COMMENT

A CHILD'S RIGHT TO INDEPENDENT COUNSEL IN CUSTODY PROCEEDINGS: PROVIDING EFFECTIVE "BEST INTERESTS" DETERMINATION THROUGH THE USE OF A LEGAL ADVOCATE

INTRODUCTION

This past year in New Jersey, a tragedy occurred[1] which exemplifies the inherent problems of child custody proceedings.[2] A

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[1] The Star-Ledger (Newark), June 19, 1974, at 6, col. 4.

[2] Custody proceedings arise, *inter alia,* in both original actions and rehearings for divorce, separation, or adoption. *See generally* D. HERR, MARRIAGE, DIVORCE AND SEPARATION, 11 N.J. PRACTICE § 915 (3d ed. J. Lodge 1963); *id.* §§ 821, 823 (Supp. 1974) [hereinafter cited as HERR].

In New Jersey, jurisdiction over custody matters lies in two courts: the chancery division of the superior court created by N.J. CONST. art. 6, § 1, ¶ 1, and the juvenile and domestic relations court in each county created by N.J. STAT. ANN. § 2A:4-1 *et seq.* (1952). These latter courts were created for the purpose of securing

> for each child coming under the jurisdiction of the juvenile and domestic relations court such care, guidance and control . . . as will conduce to the child's welfare and the best interests of the state . . . .
>
> It is hereby declared to be a principle governing the law of this state that children under the jurisdiction of said court are wards of the state, subject to the discipline and entitled to the protection of the state . . . .

Id. § 2A:4-2. The court's jurisdiction extends to hearing complaints:

> a. Involving the domestic relation or the welfare of children, as to which jurisdiction is vested in any court except the superior court or except with respect to the adoption of children or adults.
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> b. Involving matters of support or temporary custody of children as to which jurisdiction is vested in the superior court.
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> c. . . . [w]here the gravamen of the complaint . . . is the failure or neglect of 1 member of the family to satisfy or discharge his legal obligations to another member of the family.
>
> d. Against any person who abuses, neglects, cruelly treats or abandons a child or who contributes to the delinquency of a child.
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> e. Involving the domestic relation, where a husband or father deserts his wife or child . . . .
>
> f. Involving the domestic relation, where a husband or father forces his wife or child to leave the home because of his cruel and inhuman conduct . . . .

Id. § 2A:4-18.

The Superior Court of New Jersey has "original general jurisdiction throughout the State in all causes." N.J. CONST. art. 6, § 3, ¶ 2. As a division of the superior court, the chancery division has jurisdiction over custody disputes throughout the state. Vannucchi v. Vannucchi, 113 N.J. Super. 40, 46, 272 A.2d 560, 563 (App. Div. 1971). *See* Fantony v. Fantony, 21 N.J. 525, 535-36, 122 A.2d 593, 598 (1956).

For an excellent analysis of the difference between the jurisdictions of these two courts, and of the limitations of the domestic relations court see Lysick v. Lysick, 91 N.J. Super. 394, 399-404, 220 A.2d 702, 705-08 (App. Div. 1966) (Kolovsky, J.A.D., concurring).

two-month-old child, born a drug addict, had been removed from his parents' custody by the juvenile and domestic relations court following a complaint which alleged that the infant may have been abused.[3] Eleven months later, the child's parents, having made significant improvement toward eliminating their own drug problems, requested a custody rehearing. As a result of that rehearing, the child was returned to the parents. Within a month, the child was dead, allegedly beaten to death by his parents.[4]

In retrospect, one senses that the system failed. This failure, it seems, was due in large measure to the lack of adequate legal representation of the child's interests. The problem in custody cases seems to arise because no one involved—the court, the parties, or a state agency—is an independent representative of the child's interest. While recent New Jersey legislation[5] may partially resolve the problem in the singular area of child abuse by providing for the appointment of counsel for any child who is the subject of such an action,[6] this "right to counsel" does not attach, as it does in other states, to the many other non-abuse areas of custodial litigation. Unless New Jersey joins these other states in appointing an attorney for children in all custody proceedings, this state cannot be said to fully effectuate the best interests and rights of children.

The power of courts to determine custody matters stems from the common law doctrine of *parens patriae.*[7] This concept originated in feudal England: The King, as father of his country, "should protect all who have no other protector . . . he is the guardian above all guardians."[8] The Crown delegated this duty to courts of equity, charging them with the responsibility of implementing the "best interests" of children in custodial proceedings.[9]

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[3] The Star-Ledger (Newark), June 19, 1974, at 6, col. 5.

[4] *Id.* col. 4. Both parents were subsequently convicted of second degree murder and sentenced to prison terms. *See* The Star-Ledger (Newark), Jan. 31, 1975, at 6, col. 3-5.

[5] Law of Oct. 10, 1974, ch. 119, 3 N.J. SESS. LAW SERV. 304.

[6] *Id.* § 3, 3 N.J. SESS. LAW SERV. 305. It is unclear at present whether this right to counsel would extend to subsequent rehearings.

[7] Lippincott v. Lippincott, 97 N.J. Eq. 517, 520, 128 A. 254, 255 (Ct. Err. & App. 1925), *aff'g In re* Lippincott, 96 N.J. Eq. 260, 124 A. 532 (Ch. 1924); G. SKOLOFF, NEW JERSEY FAMILY LAW PRACTICE 197 (2d ed. 1973). *See generally* 4 J. POMEROY, EQUITY JURISPRUDENCE §§ 1303-04 & nn. 14-15 (5th ed. 1941) [hereinafter cited as POMEROY].

[8] 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 445 (2d ed. 1898). *See, e.g.,* Inker & Perretta, *A Child's Right to Counsel in Custody Cases,* 5 FAM. L.Q. 108, 109-12 (1971); Mack, *The Juvenile Court,* 23 HARV. L. REV. 104 (1909). *Cf.* Comment, *A Constitutional Right to Court Appointed Counsel for the Involuntarily Committed Mentally Ill: Beyond the Civil-Criminal Distinction,* 5 SETON HALL L. REV. 64, 67 & n.14 (1973).

[9] A court of chancery, as explained by Lord Hardwicke in 1756,

Today, courts consider various general factors in determining

has a *general right* delegated by the Crown . . . [to] interfere in particular cases, for the benefit of such who are incapable to protect themselves.

Butler v. Freeman, 27 Eng. Rep. 204, 204 (Ch. 1756) (emphasis added).

Even under the early English practice, it would appear that custody determinations were "controlled by amorphous platitudes or generalizations on the one hand and by rigid absolutes on the other." Foster & Freed, *Child Custody,* 39 N.Y.U.L. REV. 423, 423 (1964). The authors go on to say:

> In feudal England, custody was automatically an incident of guardianship of lands and only gradually came to be regarded as a trusteeship with responsibilities toward the child. The Court of Wards and Liveries, established during the reign of Henry VIII, developed some measure of protection for children. A 1660 statute transferred its jurisdiction to Chancery, which assumed the crown's prerogative of *parens patriae* to care for infants. The father was regarded as the natural guardian of his children, and it was almost impossible to make a showing of unfitness against him. In addition, since the duty of child support was a corollary of custody, it was impractical to award custody to anyone else unless the child had property of his own or a settlement was proposed by the one seeking custody. Although Chancery came to recognize the mother as a natural guardian upon the decease of the father, it was not until 1839 that the Chancellor was given power by statute to award custody of infants under seven years to her rather than to the father.

Id. at 423-24 (footnotes omitted).

Inadequate as this system may have been, it was a vast improvement over Roman law, wherein the father as head of the family had absolute power of life and death over his children:

> At the birth of a child, the father was the sole judge of its legitimacy. He could expose the new-born babe or condemn to death the full-grown son. . . . He could sell his own flesh and blood to another . . . . Everything the child under power acquired at once became the property of his father.

Couch, *Woman in Early Roman Law,* 8 HARV. L. REV. 39, 41 (1894).

For a description of turn-of-the-century attitudes in this field see Hesselman v. Haas, 71 N.J. Eq. 689, 695-96, 64 A. 165, 168 (Ch. 1906), wherein the vice-chancellor stated:

> The modern tendency of the courts in these matters of custody is so permeated with determination to do that which will best serve the interests of the infant that, notwithstanding the presence of a legal right upon one side and a lesser right of the same nature, or the entire absence of any legal right upon the other, it is necessary to determine whether the granting of custody to the one having the legal right will be prejudicial to the welfare of the infant.

Today, legislatures still adopt the historical best interest concept in their custody statutes. *See, e.g.,* N.J. STAT. ANN. § 9:2-4 (1960), which provides in pertinent part: "[T]he happiness and welfare of the children shall determine the custody or possession." This statutory language had been construed as equivalent to the more widely used phrase "best interests." Armour v. Armour, 135 N.J. Eq. 47, 51, 37 A.2d 29, 32 (Ct. Err. & App. 1944). For a collection of other state interpretations of this standard see Oster, *Custody Proceeding: A Study of Vague and Indefinite Standards,* 5 J. FAM. L. 21, 21-22 & n.7 (1965).

Today, New Jersey courts attempt to take into consideration a child's welfare. A statement by the appellate division reflects this attitude:

> Neither father nor mother has a greater right than the other to the custody of their child, and in a contest between them, the happiness and welfare of the child is the determining factor. . . . Children of tender years are not awarded to the mother because of any rule of law, but only because in fact the mother will usually take better and more expert care of a small child than can the father. But the problem in every case is the same, What will promote the happiness and welfare of the child?

Seitz v. Seitz, 1 N.J. Super. 234, 240, 64 A.2d 87, 89 (App. Div. 1949). *Accord In re* Jackson, 13 N.J. Super. 144, 147, 80 A.2d 306, 308 (App. Div. 1951).

the best interests of the child. These factors include the race,[10] age, sex, and health[11] of the child, and what the potential custodian might provide in the way of education,[12] residence,[13] and religious training.[14] Another consideration is the preference of the child.[15]

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[10] While it would appear that the race of the parties may be considered, it is nevertheless clear that a racial difference between a child and its proposed custodian would not in itself be sufficient to deny a custody award. HERR, *supra* note 2, § 834 & n.19; Annot., 57 A.L.R.2d 678 (1956).

[11] *See* Oster, *supra* note 9, at 22. *See also* HERR, *supra* note 2, § 822 & n.56; Annot., 48 A.L.R. 137 (1927) (health of child).

In State v. Stigall, 22 N.J.L. 286 (Sup. Ct. 1849), the court observed that custody would remain with the mother "if the child is of *tender years,* and especially if a *female,* or of *sickly constitution.*" *Id.* at 289 (emphasis added). This was despite the presumption of this period that the right of custody would normally attach to the father. *See* note 10 *supra. Cf.* Wojnarowicz v. Wojnarowicz, 48 N.J. Super. 349, 353, 137 A.2d 618, 620 (Ch. 1958) (child of tender years normally awarded to the mother).

[12] Rosenthal v. Rosenthal, 19 N.J. Super. 521, 88 A.2d 655 (Ch. 1952), *modified,* 26 N.J. Super. 400, 98 A.2d 338 (App. Div. 1953).

[13] When a New Jersey court has jurisdiction in a custody proceeding and only one parent is domiciled in the state, if that parent is determined fit, the custody award must be executed in favor of the resident parent. N.J. STAT. ANN. § 9:2-4 (1960). *See, e.g.,* Francisco v. Francisco, 73 N.J. Eq. 313, 67 A. 687 (Ch. 1907). *Francisco* may have been a special situation, inasmuch as the court indicated that it was, in a sense, under a statutory duty to leave the children with the mother since the father lived in New York and the children could not be relocated without their consent. *Id.* at 315, 67 A. at 687. *See* Law of April 2, 1902, ch. 92, § 7, [1902] N.J. Laws 263, *as amended,* N.J. STAT. ANN. § 9:2-2 (1960).

[14] *See* T. v. H., 102 N.J. Super. 38, 245 A.2d 221 (Ch. 1968), *aff'd,* 110 N.J. Super. 8, 264 A.2d 244 (App. Div. 1970) (per curiam). The court noted that, while religion is not usually interfered with in custody determinations,

> the religious training of the child is appropriately an element which may be considered among all the circumstances of gradational significance promoting the general welfare of the infant.

102 N.J. Super. at 40, 245 A.2d at 222. In this case the court denied custody to the parent who lived in an area where no suitable religious facilities existed. *Id.* at 39, 42, 245 A.2d at 221, 223. *See In re* De Bois, 7 N.J. Misc. 1029, 1032-33, 148 A. 10, 12 (Ch. 1929) (court considered religion a factor but deemed it not controlling). *See generally* Annot., 66 A.L.R.2d 1410 (1959).

[15] Clemens v. Clemens, 20 N.J. Super. 383, 90 A.2d 72 (App. Div. 1962). The court in *Clemens* granted a change of custody in favor of the father. *Id.* at 393-94, 90 A.2d at 77. The court considered the expressed choice of the child, but was not bound by the child's wishes. *Id.* at 392, 90 A.2d at 76. *See also* Sheehan v. Sheehan, 51 N.J. Super. 276, 291, 143 A.2d 874, 882 (App. Div. 1958) (preference of child important but not conclusive); Boerger v. Boerger, 26 N.J. Super. 90, 102-03, 97 A.2d 419, 426 (Ch. 1953). The only qualification on seeking the child's preference is that the child must be of sufficient age and have a sufficient mental capacity to aid the court in its determination. *See* Gardner v. Hall, 132 N.J. Eq. 64, 81, 26 A.2d 799, 809-10 (Ch. 1942).

The issue again arose in *In re* De Bois, 7 N.J. Misc. 1029, 148 A. 10 (Ch. 1929). There, the natural father of the seventeen-year-old girl in question sought custody from a religious society to which the girl had been committed. The father, away on an extended business trip, had received no notice when his commonlaw wife had died and his daughter subsequently was given to the society to be placed in a foster home. *Id.* at 1031, 148 A. at 11. After determining that the father was a fit parent, the court concluded that, since the child

Finally, fitness of the potential custodian often "determines the question of custody."[16]

This process of determining custody has, in recent years, engendered increased criticism, directed, in part, at the tendency of such proceedings to become a contest between the competing potential guardians in which the true best interests of the child may well go unrepresented.[17] For the parents' attorneys, the child is not

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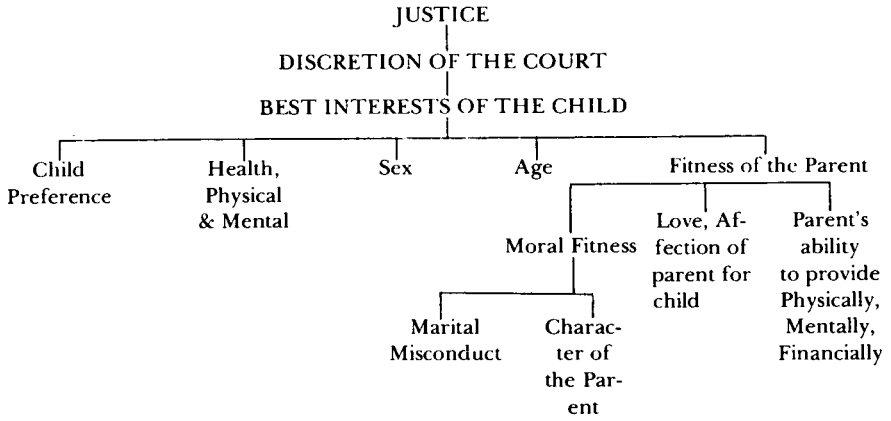
was "seventeen years of age and of normal mental development," her desire to be with her father must be strongly considered. *Id.* at 1033, 148 A. at 12.

For a general discussion on the validity of seeking out the child's preference and the procedure by which this is done in other jurisdictions see Annot., 4 A.L.R.3d 1396 (1965). For the validity of the court's interviewing of the child in private see Annot., 99 A.L.R.2d 954 (1965).

[16] *See, e.g.,* Oster, *supra* note 9, at 29. The complexities inherent in the subdivisions of the "Fitness of Parent" category illustrate its difficulty. Moreover, these subdivisions include factors which are more intangible than the relatively concrete questions of the child's expressed preference, age, sex, or health. To illustrate the categorization of these court-made factors as interpretive of the very general statutory commands, Oster sets out the following chart:



Id. at 22.

For a discussion of the historical double standard in questions of moral fitness see 4 POMEROY, *supra* note 7, § 1307 n.5.

[17] *See, e.g.,* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973) [hereinafter cited as GOLDSTEIN]; Freed, *A Bill of Rights for Children: Who Will Speak for the Child?*, N.J.S.B.J., Aug. 1972, at 35; Hansen, *The Role and Rights of Children in Divorce Actions*, 6 J. FAM. L. 1 (1966); Inker, *Expanding the Rights of Children in Custody and Adoption Cases*, 5 FAM. L.Q. 417 (1971); Inker & Perretta, *supra* note 8; Podell, *The "Why" Behind Appointing Guardians Ad Litem For Children in Divorce Proceedings*, 57 MARQ. L. REV. 103 (1973); Note, *A Case For Independent Counsel to Represent Children in Custody Proceedings*, 7 NEW ENG. L. REV. 351 (1972).

The general position taken by these commentators, as exemplified by Dr. Doris Freed, is that justice requires that children should be represented by independent counsel in any custody-determining proceeding, since "[i]t is not reasonable to assume that the court or other parties will represent the individual interests of children in such proceedings." Freed,

the client; for the judge, the primary concentration must be supervision of the proceeding. As a result, the determination of a child's future becomes

> analogous to that in an ex-parte hearing in that the child never speaks. This procedure hardly effectuates the so-called "priority" of the minor, and it is an unsatisfactory method for discharging the court's duty of determining the minor's best interest.[18]

To correct this infirmity, several jurisdictions have—by statute, court rule, or case law—adopted a procedure of appointing an attorney to represent children in custody proceedings. To date, New Jersey has not expanded the best interests concept to include such a procedure. This state's courts must recognize that, as an essential aspect of their duty to protect children who become wards of the court,[19] an independent attorney should be appointed in custodial litigation so that the child's welfare may receive paramount consideration.

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supra at 37 (footnote omitted). Dr. Freed indicates that the legal right to counsel in a custody case is analogous to the child's legal right to counsel in a delinquency proceeding. *Id.* at 35. *See In re* Gault, 387 U.S. 1, 34-42 (1967). For a more complete discussion of the *Gault* theory see note 106 *infra.*

The problem of child representation is particularly acute in states with no-fault divorce laws. Freed & Foster, *The Shuffled Child and Divorce Court,* 10 TRIAL 26 (May/June 1974). Those authors indicate that, under no-fault divorce concepts, there is "an enhanced tendency to treat custodial . . . problems in a pro forma fashion." *Id.* at 34, 41. Accordingly, this "tradition of rubberstamping" agreements previously worked out by the parents *inter sese* "jeopardizes the welfare of children." *Id.* at 41. The authors explain:

> It is not uncommon for the custodial or visitation terms to have been arrived at in a bargain and sale fashion. In addition to a review of the terms of separation agreements, independent counsel should be provided for children in contested divorce cases where custody and visitation are litigated. Children should be heard as well as seen, and within the system, this means that they are entitled to their own lawyer.

Id.

[18] Inker & Perretta, *supra* note 8, at 117.

[19] It is well recognized that any infant before any court for whatever reason becomes a ward of that court. *See, e.g.,* State *ex rel.* Stone v. Ferriss, 369 S.W.2d 244, 249 (Mo. 1963); *Ex parte* Brown, 382 S.W.2d 97, 99 (Tex. 1964). In New Jersey this principle is covered, in part, by statute. N.J. STAT. ANN. § 2A:4-34 (1952) provides:

> Children under 18 years of age who appear before the juvenile and domestic relations court in any capacity shall be deemed to be wards of the court, and protected accordingly.

See also id. § 2A:4-2.

This responsibility is said to have developed from the Crown's duty as *parens patriae* to protect those who had no other protector. Insurance Co. v. Bangs, 103 U.S. 435, 438 (1880). Responsibility for protecting the rights and property of infants was transferred early to the Court of Chancery where it could be more effectively exercised. *Id.* The effect of this duty is that the court becomes the infants' guardian during the litigation. *Id.* at 438-39. *See* Workman v. Workman, 167 Neb. 857, 868-69, 95 N.W.2d 186, 193-94 (1959).

THE WISCONSIN APPROACH

Since its 1955 supreme court decision in *Edwards v. Edwards*,[20] the state of Wisconsin, both through case law and by statute, has moved to expand the concept of best interests through the appointment of an independent counsel to represent any child who is the subject of a custody proceeding. This procedure has now developed to the point where the Milwaukee County Family Court always appoints a guardian ad litem to represent the child.[21] In Wisconsin, such a guardian must be an attorney.[22] Thus, the child is not simply to have a representative but an advocate to protect his best interests.

In *Edwards*, the court addressed itself to the custody of an eleven-year-old boy.[23] Evidence in the case indicated that at one point neither parent was fit, and in fact, the child had been placed in a foster home.[24] The mother was on one occasion allegedly "intoxicated and in the company of another man,"[25] and had allegedly tried to take the child from the father illegally.[26] The father, on the other hand, had shot at the mother with a 30/30 rifle and had served in a reformatory.[27] While the initial custody determination in *Edwards* dealt a great deal with improvements made by the father,[28] evidence also indicated that the boy had been attending school regularly and was involved in several extracurricular activities while in a foster home.[29] Despite these ac-

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[20] 270 Wis. 48, 70 N.W.2d 22 (1955).

[21] Hansen, *supra* note 17, at 8.

[22] This law had been in effect prior to the *Edwards* decision. WIS. STAT. ANN. § 256.48(1) (1971) (originally enacted as Law of April 30, 1953, ch. 107, [1953] Wis. Laws 119) provides in pertinent part:

> In all matters in which a guardian ad litem is appointed by the court, the guardian ad litem shall be an attorney admitted to practice in this state . . . .

It is important that the guardian ad litem be an attorney so that the child is adequately represented in any proceedings before the court. *See* Podell, *supra* note 17, at 103.

[23] 270 Wis. at 49, 70 N.W.2d at 23.

[24] *Id.* at 51, 70 N.W.2d at 23-24.

[25] *Id.* at 50, 70 N.W.2d at 23.

[26] *Id.* at 51, 70 N.W.2d at 23.

[27] *Id.* The mother attempted to take the child away from the father's farm. In order to stop his ex-wife, the father fired a 30/30 rifle at her car. Criminal charges were brought against the father due to the incident. Based upon his conviction for the shooting incident, the father was sentenced from one to three years in the reformatory. *Id.*

[28] *Id.* at 52-53, 70 N.W.2d at 24. Upon release from the reformatory, the father was deeded his mother's farm. He then remarried, began farming, and was attending school while the child was in the foster home. His ex-wife, who also remarried, showed little interest during this period in her son's welfare, compared to the father who made visits to his son and showed genuine concern. *Id.*

[29] *Id.* at 52, 70 N.W.2d at 24.

tivities, the child was returned to his father.[30] The respondent mother moved for a rehearing because the child's testimony had not been heard.[31] When the supreme court reconsidered the case, it "recommend[ed] to the trial court that a competent and disinterested attorney be appointed guardian *ad litem*" for the boy.[32] The court, in protecting the boy's best interests, recommended that the attorney in his representative capacity be authorized to make further investigations[33] and call additional witnesses.[34] This ruling guaranteed that in addition to examining the fitness of the parents, the boy's needs would also be considered.

Judicial interest in the appointment of counsel for children continued in *Wendland v. Wendland*,[35] wherein the court recognized the need for such an appointment in "hotly contested"[36] cases where neither the parties, nor any relevant social agency had brought out all the evidence needed to determine the child's best interests.[37] Similarly, in *Koslowsky v. Koslowsky*,[38] the court, although not having to address itself to the guardian ad litem issue,[39] again commended the practice of appointing counsel

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[30] *Id.* at 56a, 70 N.W.2d at 26. The supreme court, disagreeing with the trial court, found the father to be a fit parent. *Id.* at 54-55, 70 N.W.2d at 25. Changing custody from the foster parents to the father, the court in considering the child's best interests stated:

> [W]e deem a father's affection and guidance through his teen-age years to be highly desirable, and that the advantages of the same far outweigh any feeling of temporary insecurity that might be produced in the boy as a result of his moving from the foster home to that of his father.

Id. at 56, 70 N.W.2d at 26.

[31] *Id.* at 56a, 70 N.W.2d at 367.

[32] *Id.* at 56b, 70 N.W.2d at 367.

[33] *Id.*

[34] *Id.*

[35] 29 Wis. 2d 145, 138 N.W.2d 185 (1965).

[36] *Id.* at 156, 138 N.W.2d at 191. The court, in denying the father's request for custody, was satisfied with the completeness of the trial court's determination process. *Id.* at 155, 138 N.W.2d at 190. The supreme court recommended the appointment of a guardian ad litem "in an extraordinary situation where . . . the best interests of the children may not be brought out by the two contesting parties." *Id.* at 156, 138 N.W.2d at 191.

[37] *Id.* at 156, 138 N.W.2d at 191. The court added that the guardian would be in a better position to investigate and present evidence which would help the court make its determination. *Id.* at 157, 138 N.W.2d at 191. Showing great concern for the protection of the children, the court stated:

> This extra consideration is due the children who are not to be buffeted around as mere chattels in a divorce controversy, but rather are to be treated as interested and affected parties whose welfare should be the prime concern of the court in its custody determinations.

Id.

[38] 41 Wis. 2d 275, 163 N.W.2d 632 (1969).

[39] *Id.* at 283 n.3, 163 N.W.2d at 636. This case concerned a change of custody action brought by the divorced mother of three children. Originally, temporary custody of the

> where the evidence is either nonexistent or inadequate to determine the comparative fitness of the parents and where the best interests of the child are.[40]

Finally, in *Dees v. Dees*,[41] the supreme court indicated that a guardian ad litem should have been appointed to aid the court in determining the best interests of the child.[42] *Dees* involved an appeal by the mother for a change of custody after a divorce decree had stipulated the placement of the child in a foster home.[43] Relying on both *Wendland* and *Koslowsky*, the *Dees* court said that "the trial court should have appointed an attorney to serve as guardian *ad litem*" to protect the child's best interests.[44] The court summed up its rationale for making a guardian ad litem an integral part of the best interests standard in this case by stating: "A growing child is not a ping-pong ball to be lightly batted back and forth from one home to another."[45]

Concurrent with this case law development, the state legislature, in 1960, enacted the Wisconsin Family Code[46] with the intent of "soften[ing] the impact of the adversary approach"[47] in divorce

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children was given to the father based on the ground that the mother had abandoned the children. *Id.* at 282, 163 N.W.2d at 635. The court was content with the trial court's investigation of the fitness issue despite the lack of appointing a guardian ad litem. *Id.* at 283-84 & n.3, 163 N.W.2d at 636. The trial court stated that forcing custodial changes on minor children when their present environment is suitable, may have "detrimental effect upon [their] well-being and stability." *Id.* at 283, 163 N.W.2d at 636.

[40] *Id.* at 283 n.3, 163 N.W.2d at 636.

[41] 41 Wis. 2d 435, 164 N.W.2d 282 (1969).

[42] *Id.* at 444, 164 N.W.2d at 287.

[43] *Id.* at 438, 164 N.W.2d at 283-84.

[44] *Id.* at 444, 164 N.W.2d at 287. The court further commented on the positive aspects of appointing a guardian ad litem:

> If the appointment of such legal representative for the interests of the child were to help make clear to the plaintiff and defendant that the controlling consideration is the welfare of their child, not their wishes or desires, that would be an added plus.

Id.

[45] *Id.*

[46] Law of Nov. 3, 1959, ch. 595, [1959] WIS. LAWS 740 (codified at WIS. STAT. ANN. § 245.001 *et seq.* (Supp. 1974-75)).

[47] Hansen, *supra* note 17, at 2. The author makes it clear that the intent of the Family Code was to broaden divorce actions beyond the rights and desires of the litigants, and to provide a "legal foundation for the protection . . . of children." *Id.* at 3.

The attempt by Wisconsin to change the adversary nature of divorce proceedings is evident in its codification of the domestic relations laws. The statement of intent reveals that:

> It is the intent of [the Family Code] to promote the stability and best interests of marriage and the family. Marriage is the institution that is the foundation of the family and of society. Its stability is basic to morality and civilization, and of vital interest to society and the state. The consequences of the marriage contract are more significant to society than those of other contracts, and the public interest must be taken into account always. . . . The impairment or dissolution of the

litigation. As a result of the post-Code progeny of *Edwards*, the Code was amended in 1971 to provide that in cases affecting a marriage,

> when the court has reason for special concern as to the future welfare of the minor children, the court shall appoint a guardian ad litem to represent such children.[48]

Presently, the appointment of a guardian ad litem in Wisconsin is exemplified by the practice of the Milwaukee County Family Court, which appoints a guardian ad litem for children in every case where custody is at issue.[49] Based on this theory of appointing a guardian, as well as the ideals expressed in the Wisconsin Family Code, the Milwaukee County Family Court took the initiative and developed a ten-point Bill of Rights for Children in Divorce Actions.[50] A copy of this Bill of Rights is presented to each of the litigating parents early in the divorce procedure.[51] Predicated upon previous statements of the Wisconsin supreme court in the custody area, the Bill of Rights provides:

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marriage relation generally results in injury to the public wholly apart from the effect upon the parties immediately concerned.

WIS. STAT. ANN. § 245.001(2) (Supp. 1974-75).

This concept of downplaying the adversary nature of family proceedings has recently been judicially recognized in New Jersey. In an article in the *New Jersey Law Journal*, the Honorable Salvatore J. Ruggerio indicated that, if parties were to become "acclimatized" to a non-adversary approach in divorce proceedings then "much of the rancor [of such proceedings could] be removed, and the process of justice enhanced." Ruggerio, *Elimination of Adversary Proceedings In Divorce Cases*, 96 N.J.L.J. 649, 649 (1973). Judge Ruggerio explained his perception of the current problems:

> Under present procedures, the atmosphere surrounding divorce causes is extremely tense. The parties are often tenaciously bent upon revenge, and their attorneys charged with the obligation to attain the revenge sought. The nature of the proceedings encourages and nurtures the evil of revenge, which in turn can easily thwart the doing of justice. One of the greatest evils stemming from the revenge motive is the destruction of the emotional stability of children, often used as pawns in the battle of revenge between parents.

Id. See also Sopkin, *The Roughest Divorce Lawyers in Town*, in NEW YORK, Nov. 4, 1974, at 52. The author notes that in New York City, divorce lawyers are sometimes referred to as "bombers . . . because they'll cheerfully throw a bomb into the proceedings to win a point, set, or match." *Id.* In Judge Ruggerio's view, however, only non-adversary proceedings can adequately serve the needs of all the parties as well as the interests of justice and would indeed "achieve the civility the present procedure lacks." Ruggerio, *supra* at 671.

[48] WIS. STAT. ANN. § 247.045 (Supp. 1974-75). This appointment of a guardian ad litem is limited to actions for divorce, annulment, legal separation, or other actions involving the marriage, whenever the court feels that there is a reason that justifies special concern for children. *See id.* Comment.

[49] Hansen, *supra* note 17, at 8.

[50] *Id.* at 5-6. The bill of rights was an attempt to codify certain rights of children in divorce proceedings.

[51] *Id.* at 5.

I. The right to be treated as an interested and affected person and not as a pawn, possession or chattel of either or both parents.[52]

II. The right to grow to maturity in that home environment which will best guarantee an opportunity for the child to grow to mature and responsible citizenship.[53]

III. The right to the day by day love, care, discipline and protection of the parent having custody of the children.[54]

IV. The right to know the non-custodian parent and to have the benefit of such parent's love and guidance through adequate visitations.[55]

V. The right to a positive and constructive relationship with both parents, with neither parent to be permitted to degrade or downgrade the other in the mind of the child.[56]

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[52] Hansen, *supra* note 17, at 5 (footnote omitted). *See* Wendland v. Wendland, 29 Wis. 2d 145, 157, 138 N.W.2d 185, 191 (1965). For a more complete discussion of this case and the factual situation involved see notes 35-37 *supra*.

The case citations for footnotes 52-61 are taken directly from those supplied by Justice Hansen. *See* Hansen, *supra* note 17, at 5-6 & nn. 4-13. Justice Hansen, however, did not, in his article, deal with the factual situations upon which those decisions were based. The facts have been added in the instant decision for the purpose of clarity. It would seem that in several of the cases, the support for the particular right being analyzed is, at best, inferential. Despite this, the bill of rights stands as an important factor in the determination of custody in divorce action in Milwaukee County.

[53] Hansen, *supra* note 17, at 5 (footnote omitted). *See* Kritzik v. Kritzik, 21 Wis. 2d 442, 448, 124 N.W.2d 581, 585 (1963). In *Kritzik*, the appellant contested a modification of his support decree which mandated that he pay $1,000 toward camp expenses for his three children. *Id.* at 446, 124 N.W.2d at 584. The court viewed camp as an educational experience where children were able to grow and mature into responsible citizens. *Id.* at 448, 124 N.W.2d at 585 (by implication). In upholding the trial court's decision, the court indicated that once the children reached camp age, a change of circumstances existed which, if the husband were financially able to pay, would allow for the modification of the support award to enhance the best interests of the children. *Id.* at 447, 124 N.W.2d at 585.

[54] Hansen, *supra* note 17, at 5 (footnote omitted). *See* Whitman v. Whitman, 28 Wis. 2d 50, 57, 135 N.W.2d 835, 839 (1965). This case involved an appeal by the father from a lower court order allowing his ex-wife to move with their four children from Wisconsin to Florida. *Id.* at 55, 135 N.W.2d at 838. The father argued that no valid justification existed for permitting his children's removal from the state. Evidence existed that the defendant visited his children weekly and under the changed circumstances additional burdens would inhibit his right of visitation. *Id.* at 54, 58, 135 N.W.2d at 837, 839. Despite these objections, the court seemed to concern itself with the need of a mother's everyday care for minor children. Although the court recognized the need for love and affection by a father, it felt that increased visitation rights, despite the long distance, would be adequate. *Id.* at 57-58, 135 N.W.2d at 839. The supreme court found no abuse of discretion by the trial court and deferred to this ruling despite some questions as to its correctness. *Id.* at 58-59, 135 N.W.2d at 839.

[55] Hansen, *supra* note 17, at 6 (footnote omitted). *See* Whitman v. Whitman, 28 Wis. 2d 50, 57, 135 N.W.2d 835, 839 (1965).

[56] Hansen, *supra* note 17, at 6 (footnote omitted). *Cf.* Chandler v. Chandler, 25 Wis. 2d

VI. The right to have moral and ethical values developed by precept and practices and to have limits set for behavior so that the child early in life may develop self-discipline and self-control.[57]

VII. The right to the most adequate level of economic support that can be provided by the best efforts of both parents.[58]

VIII. The right to the same opportunities for education that the child would have had if the family unit had not been broken.[59]

IX. The right to periodic review of custodial arrangements and child support orders as the circumstances of the parents and the benefit of the child may require.[60]

X. The right to recognition that children involved in a divorce are always disadvantaged parties and that the law must take affirmative steps to protect their welfare, including, where indicated, a social investigation to determine, and the appointment of a guardian ad litem to protect their interests.[61]

The Milwaukee County Family Court procedure for appointing a guardian to represent the children's interest is instituted when children are either named as parties to the action or are mentioned in the pleadings. If not named in the proceedings, the

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587, 131 N.W.2d 336 (1964). The *Chandler* court, relying on Kritzik v. Kritzik, 21 Wis. 2d 442, 124 N.W.2d 581 (1963), upheld a modification of a support agreement ordering the father's contribution for camp costs. 25 Wis. 2d at 593, 131 N.W.2d at 339.

[57] Hansen, *supra* note 17, at 6 (footnote omitted). *See* Welker v. Welker, 24 Wis. 2d 570, 575-76, 129 N.W.2d 134, 137-38 (1964). The *Welker* court reversed the lower court's granting custody to the father on the grounds that no substantial basis existed for not awarding custody to the mother. *Id.* at 578-79, 129 N.W.2d at 139. The court in considering the questions of religion and morals indicated that the child may be exposed to unorthodox philosophies so long as such teachings are not dangerous to his health or morals. *Id.* at 575-76, 129 N.W.2d at 137-38. The court concluded that the mother's views "[fell] far short of being inimical to the welfare of her child." *Id.* at 577, 129 N.W.2d at 138.

[58] Hansen, *supra* note 17, at 6 (footnote omitted). *See* Kritzik v. Kritzik, 21 Wis. 2d 442, 447, 124 N.W.2d 581, 585 (1963) (by implication). The court required that the non-custodial party contribute payment for the cost of a summer camp for the children, even though the camp was picked by the custodian. *Id.* at 449-50, 124 N.W.2d at 586.

[59] Hansen, *supra* note 17, at 6 (footnote omitted). *See* Kritzik v. Kritzik, 21 Wis. 2d 442, 445-46, 124 N.W.2d 581,584 (by implication). *See also* WIS. STAT. ANN. § 247.25 (1957).

[60] Hansen, *supra* note 17, at 6 (footnote omitted). *See* King v. King, 25 Wis. 2d 550, 554, 131 N.W.2d 357, 359 (1964). The plaintiff in *King* appealed from a trial order granting custody of the children to the father. The court stated the doctrine of res judicata is not to be applied strictly. Thus, it retains continuing jurisdiction over appeals for custody awards based on changed circumstances. *Id.* at 553-54, 131 N.W.2d at 359.

[61] Hansen, *supra* note 17, at 6 (footnote omitted). *See* Wendland v. Wendland, 29 Wis. 2d 145, 156-57, 138 N.W.2d 185, 191 (1965).

judge can, on his own motion, implead them and appoint a guardian ad litem to provide representation.[62] The court bases the utilization of these practices on its "inherent power . . . to implement [a] 'concern for the welfare of the child.' "[63] This procedure has been defended by Justice Robert Hansen, formerly of the family court and now an associate justice of the state supreme court, who stated:

> It would be hard for me to believe that any appellate court anywhere, since the sole and only purpose of appointing a guardian *ad litem* is to make certain that the welfare of the minor children is properly represented and protected, would deny to a trial court the right to take this affirmative step to protect the children's rights.[64]

Once the court appoints the guardian ad litem, he assumes the same rights as the counsel for the litigants, as well as discretion to make his own recommendation regarding the proper custodial party.[65] The guardian is afforded these rights because they are vital to an effective representation of the children's interest. Payment of the guardian ad litem is borne by the litigating parties, unless either or both of them are indigent.[66] Thus, the use of independent counsel provides affirmative assurance that "the rights of children as interested and affected parties in divorce action [*sic*] are being identified, protected and fulfilled."[67]

THE APPROACH IN OTHER JURISDICTIONS

The Wisconsin approach toward the question of representation for children in custody actions is not unique; other state

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[62] Hansen, *Guardians Ad Litem in Divorce and Custody Cases: Protection of the Child's Interests*, 4 J. FAM. L. 181, 183 (1964).

[63] *Id.*

[64] *Id.*

[65] *Id.* at 182. Hansen stated that: "He may subpoena and present testimony of witnesses. He may cross-examine the parties or witnesses testifying on behalf of either party." *Id.* In addition, by statute, Wisconsin provides for a family court commissioner who is to make a fair and impartial investigation of the case, report on the rights and interests of the parties, and attempt to effect a reconciliation of the parties. WIS. STAT. ANN. § 247.15(1) (Supp. 1974-75). This procedure can be compared to the New Jersey court rule which provides for a county probation report. *See* N.J.R. 4:79-8. *See also* notes 147-48 *infra*.

[66] Hansen, *supra* note 62, at 183-84. WIS. STAT. ANN. § 247.045 (Supp. 1974-75) also provides for payment stating:

> If a guardian ad litem is appointed, the court shall direct either or both parties to pay the fee of the guardian ad litem, the amount of which shall be approved by the court. In the event of indigency on the part of both parties the court, in its discretion, may direct that the fee of the guardian ad litem be paid by the county of venue.

[67] Hansen, *supra* note 17, at 14.

legislatures or courts have recognized that the "best interests" standard may well require the appointment of independent counsel for children. In Nebraska, for example,[68] the state legislature has granted courts discretionary power to "appoint an attorney to protect the interests of any minor children of the parties" in custody disputes.[69] Such an attorney has investigatory powers and may call witnesses to testify as to the custodial disposition which would best serve the children's welfare.[70] In construing the nature of the court's discretion, the state supreme court held, in *Pieck v. Pieck*,[71] that where, incident to a divorce action, the issue of removal of children from the state arose, it was reversible error to deny a motion for appointment of counsel for the children.[72] While the court indicated that "limits upon the discretion must evolve case by case,"[73] in this instance, at least, that discretion had been abused. Less than a year later, a lower court's decision was again reversed in *Ford v. Ford*,[74] this time for failure of the court to appoint an attorney on its own motion.[75] The central issues in this divorce action had been the paternity and legitimacy of the children.[76] Since the resolution of this question would have momentous impact upon the children's future, and since the evidence which had been presented through the court's own investigative powers had been meager, the supreme court ruled that the added expense of appointed counsel was justified.[77] Thus, in order to ensure that sufficient evidence is presented to make a just determination, Nebraska courts have appointed an independent attorney when it ap-

[68] NEB. REV. STAT. § 42-358 (1974). Similar provisions have been enacted in other states. *See, e.g.*, Pub. L. No. 73-373, § 16, 4 CONN. LEGIS. SERV. 619-20 (1973); ORE. REV. STAT. § 107.425 (1974); TEX. FAMILY CODE ANN. § 11.10 (1973); UTAH CODE ANN. § 30-3-11.2 (Supp. 1973).

[69] NEB. REV. STAT. § 42-358 (1974).

[70] *Id.*

[71] 190 Neb. 419, 209 N.W.2d 191 (1973).

[72] *Id.* at 420, 209 N.W.2d at 192.

[73] *Id.*

[74] 191 Neb. 548, 216 N.W.2d 176 (1974).

[75] *Id.* at —, 216 N.W.2d at 177-78.

[76] *Id.* at —, 216 N.W.2d at 176.

[77] *Id.* at —, 216 N.W.2d at 177. The court found that the appointment of an attorney to represent the children was required in this case for two reasons: First, a determination of illegitimacy or legitimacy goes beyond the immediate interests of the litigating parents because of the "vital and enduring" effects of such a determination on the children. Second, there was insufficient evidence presented to warrant, under existing standards, a finding of illegitimacy. *Id.*

In addition to the problem of conflicting testimony, some of the evidentiary problems were: a failure to use blood tests, a failure to introduce medical testimony relating to the length of pregnancy, and the partial sterility of the husband, who denied paternity. *Id.* at —, 216 N.W.2d at 177-78.

peared that "[t]he children's interests [were] adverse to both parents."[78]

Similar statutory provisions have been adopted by several states,[79] following the language of section 310 of the *Uniform Marriage and Divorce Act*.[80] This section provides:

> The court may appoint an attorney to represent the interests of a minor or dependent child with respect to his custody, support, and visitation. The court shall enter an order for costs, fees, and disbursements in favor of the child's attorney. The order shall be made against either or both parents, except that, if the responsible party is indigent, the costs, fees, and disbursements shall be borne by the [appropriate agency].[81]

The attorney's role is explained in the comment to section 310 which states that:

> The attorney is not a guardian *ad litem* for the child, but an advocate whose role is to represent the child's interests. . . . It is expected that the authority given the court by this Section will be exercised primarily in contested cases, but rare or unusual circumstances may make the appointment appropriate in formally uncontested matters.[82]

There has been little opportunity for the state courts in those jurisdictions adopting statutes similar to section 310 to give judicial

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[78] *Id.* at —, 216 N.W.2d at 177.

[79] The following state statutes substantially reflect the language of section 310 of the UNIFORM MARRIAGE AND DIVORCE ACT: ARIZ. REV. STAT. ANN. § 25-321 (Supp. 1973); COLO. REV. STAT. ANN. § 46-1-16 (Supp. 1972); IOWA CODE ANN. § 598.12 (Supp. 1974-75); VT. STAT. ANN. tit. 15, § 594 (1974); WASH. REV. CODE ANN. § 26.09.110 (Supp. 1973).

[80] *See* UNIFORM MARRIAGE AND DIVORCE ACT, reprinted in 5 FAM. L.Q. 205, 235 (1971). Though approved and recommended for enactment in all the states by the National Conference of Commissioners on Uniform State Laws, the Act, at present, has not been approved by the American Bar Association. *Id.* at 204.

[81] *Id.* at 235.

[82] *Id.* Recently, the American Bar Association Family Law Section submitted a revised UNIFORM MARRIAGE AND DIVORCE ACT to the American Bar Association's House of Delegates. This proposal has not been adopted by the ABA House of Delegates nor has it been endorsed by the Uniform Commissioners on State Laws. PROPOSED REVISED UNIFORM MARRIAGE AND DIVORCE ACT, reprinted in 7 FAM. L.Q. 135 (1973).

The position of the revised proposal makes the appointment of an attorney by the court mandatory. The revised section 310 states:

> (a) *In any proceeding brought pursuant to this Act, the court shall appoint an attorney, who may be a member of the Court system personnel, to independently represent the interests of a minor, dependent or incompetent child with respect to support, custody, visitation and any other matter dealing with the children's welfare in such proceeding.*
>
> (b) *The court shall also appoint an attorney [guardian ad litem] to represent the interests of an incompetent spouse who does not have a general guardian and is not represented by his own attorney in such proceeding.*

Id. at 154 (emphasis in original).

interpretation to these enactments. As a result, it is unclear whether future statutory interpretations will differ from those of the Wisconsin and Nebraska courts.

Another jurisdiction which has confronted the problem is the District of Columbia, which authorized appointment of counsel by court rule rather than by statute. The Adoption Act of 1937[83] gave courts hearing adoption cases the power "to make such rules . . . as shall bring fully before the court for consideration the interests of the adoptee."[84] This power was construed in *Barnes v. Paanakker*[85] as requiring the appointment of a guardian ad litem "legally capable of representing [a child's] interests."[86] The court indicated that while such an appointment would not be required in all custody cases, it would be needed in those cases in which a full airing of a child's interests would not be sufficiently presented.[87] When the District of Columbia court rules were codified,[88] however, this holding was mitigated: The role of the guardian was reduced from that of an advocate to that of an investigator for the

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[83] Ch. 774, 50 Stat. 806, *as amended,* D.C. CODE ANN. § 16-301 *et seq.* (1973).

[84] Ch. 774, 50 Stat. 806, *as amended,* D.C. CODE ANN. § 16-301 (1973).

[85] 111 F.2d 193 (D.C. Cir. 1940).

[86] *Id.* at 197. *Barnes* involved an appeal by the natural mother of two boys, ages 12 and 14. *Id.* at 194, 196. She and her present husband wished to adopt her sons, but their natural father, her former husband, objected. *Id.* at 194. The appeals court noted that the two boys had not appeared at the hearing and subsequently ruled that

> where prospective adoptees have sufficient age and intelligence, as do these boys, to understand the character and consequences of adoption proceedings, they should appear for examination by the court in order that their interests be brought before it.

Id. at 196. But, the court continued, "[t]he full protection contemplated by the act . . . would not have been afforded by such an examination alone." *Id.* at 197. In addition, these children needed "a qualified person to represent them." *Id.* at 198.

[87] *Id.* at 197. This point was clarified by the same court only a year later. *See In re* Adoption of a Minor, 120 F.2d 720 (D.C. Cir. 1941). Here the court stated:

> [A]ll of the interests of the adoptee were presented by the several witnesses for adverse parties, and, in addition, the court conducted a meaningful interview with the child.

Id. at 721. From the record, it was clearly indicated that all aspects of the child's interests were presented and considered by the lower court. *Id.* at 720-21.

The court has subsequently suggested that the appointment of a representative would be particularly appropriate if

> there are no adverse parties and, despite the favorable recommendation of the Board of Public Welfare, the District Court is disposed to deny the petition for adoption.

In re Adoption of a Minor, 228 F.2d 446, 448 n.7 (D.C. Cir. 1955) (dictum). *See* Law of Aug. 25, 1937, ch. 774, 50 Stat. 806 (investigation and report by Board of Public Welfare).

[88] The rules were adopted Dec. 9, 1963 and took effect Jan. 1, 1964. 8 D.C. CODE ENCYCL. ANN. 1 (1967).

court.[89] Congress remedied this deficiency in 1970[90] by specifically authorizing the District of Columbia courts to "appoint a disinterested attorney to appear on behalf of the child and represent his best interests."[91]

Michigan has gone beyond mere discretionary authorization of court-appointed counsel for children. Since 1887, that state, by statute,[92] has required that every complaint for divorce set forth the names of all children of the marriage.[93] In addition, where children are involved, a copy of the summons and complaint must be served on the county prosecutor, who is then required to file an appearance for the state on behalf of the children.[94] If, "in his judgment, the interest of the children or the public good so requires, he"[95] must actively resist the granting of the divorce.[96] The first judicial interpretation of this statute[97] held that the prosecutor's appearance was mandatory, even in an uncontested case

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[89] D.C. GEN. SESS. (DOM. REL.) R. 5(b) (codified at 8 D.C. CODE ENCYCL. ANN. 268 (1967)). The scope of the guardian was expanded to cover any custody matter. *Id.* At least by this time, all guardians ad litem were explicitly required to be attorneys. *Id.*; D.C. GEN. SESS. (CIV.) R. 64(b) (codified at 8 D.C. CODE ENCYCL. ANN. 182 (1967)). *See* Eaton v. Karr, 251 A.2d 640, 642 (D.C. Ct. App. 1969).

[90] District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473.

[91] *Id.* § 145(e)(3)(A), 84 Stat. 557 (codified at D.C. CODE ANN. § 16-918(b) (1973)). The court rules have subsequently been amended to reflect the intent of Congress and the courts clearly have the power to appoint independent counsel where needed. *See* D.C. SUPER. CT. (DOM. REL.) R. 17(e) (codified at 8 D.C. CODE ENCYCL. ANN. 360 (Supp. 1974-75)). Guardians ad litem still must be attorneys. D.C. SUPER. CT. (CIV.) R. 304(b) (codified at 8 D.C. CODE ENCYCL. ANN. 123 (Supp. 1974-75)).

[92] Act of June 3, 1887, No. 137, [1887] Mich. Acts 152, *as amended,* MICH. COMP. LAWS ANN. § 552.45 (1967).

[93] MICH. COMP. LAWS ANN. § 552.45 (1967).

[94] The ages of the minor children to be listed has increased over the years: The original statute required the listing of all children under age 14. Act of June 3, 1887, No. 137, [1887] Mich. Acts 152. This was increased to 16 in 1919. Act of May 13, 1919, No. 397, [1919] Mich. Acts 697. The present level of 17 years was added in 1931. Law of April 24, 1931, No. 44, [1931] Mich. Acts 61.

In counties with the population of over 500,000, a "Friend of the Court" may appear in the prosecutor's stead. *Id.* For a discussion of the role of the "Friend of the Court" see notes 104-05 *infra.*

[95] MICH. COMP. LAWS ANN. § 552.45 (1967).

[96] *Id.* The concept that the state has a strong interest in the dissolution of a family is of long-standing. "[T]here are three parties to every divorce proceeding; the husband, the wife, and the state." People v. Dawell, 25 Mich. 247, 257 (1872). It is this interest of the state which the prosecutor is to represent through his appearance. *See* Wieser v. Wayne Circuit Judge, 247 Mich. 52, 54-55, 225 N.W. 542, 543 (1929). *See also* MICH. COMP. LAWS ANN. § 49.153 (1967).

[97] Willcox v. Hosmer, 83 Mich. 1, 47 N.W. 29 (1890).

where he deems his presence at trial unnecessary.[98] This rationale was recently ratified in *Young v. Young*,[99] wherein it was held that a custody complaint is fatally defective when it is not served on the prosecuting attorney.[100] The Michigan court of appeals "felt" constrained by precedent to remand, though expressing strong reservations as to the efficacy of the statutory scheme.[101] The manda-

[98] *Id.* at 4-5, 47 N.W. at 30. In this case, a prosecuting attorney who had appeared in a divorce case, but who declined to contest the divorce, sued a judge who refused to certify that the statutorily allowed fee had been earned. *Id.* at 4, 47 N.W. at 30. At that time, the statute provided:

> "For every case which the prosecuting attorney contests by and with the consent of the court he shall receive the sum of five dollars, to be paid by the county treasurer upon the certificate of the circuit judge that such services have been performed."

Id. (quoting from Act of June 3, 1887, No. 137, [1887] Mich. Acts 152). The Michigan supreme court held that since the prosecutor had not contested the granting of a divorce decree, he could not collect his fee even though he had made some investigations in the case. 83 Mich. at 6-7, 47 N.W. at 30. This holding was nullified by the state legislature in 1909 by substituting "investigates," and "in which he appears" for "contests" in the language of the statute. Act of June 2, 1909, No. 284, [1909] Mich. Acts 642.

[99] 13 Mich. App. 395, 164 N.W.2d 585 (1968).

[100] *Id.* at 401, 164 N.W.2d at 588.

[101] *Id.* at 400-01, 164 N.W.2d at 587-88. The mother in this case had divorced the father of their two children in 1965 and had married her lawyer. The original custody arrangements had been negotiated by the parties rather than decreed by the court and provided that the mother retain custody with the right of periodic visitation given to the father. *Id.* at 397-98, 164 N.W.2d at 585-86. The suit to modify the divorce decree was initiated by the mother who claimed that their two-year-old son had been returned from a visit with the father "most brutally beaten." *Id.* at 398, 164 N.W.2d at 586. The mother sought a judgment requiring further visitations to be only at her own home. The father denied any knowledge of the beating and counterclaimed for custody. The trial was "marked by unnecessary rudeness and sarcasm" by the seven witnesses whose testimony was "completely inconsistent." *Id.* The trial judge, sitting as finder of fact, was faced essentially with a question of credibility, an issue with dire consequences:

> It is clear that if the father had beaten the child, his temper was such that strict limitations should have to be placed upon his visitation to ensure against repetition; if the step-father or the mother had beaten the child, the case would then assume a most macabre aspect. It would mean that a battery had been deliberately committed in order to form a foundation to practically exclude the father from enjoying any meaningful relationship with his own children.

Id. The trial judge determined, "in a most careful and discerning manner," that the father was innocent of wrongdoing and had been falsely accused, and awarded him custody of both children, with the mother's visitations to be limited to his home. *Id.* at 398-99, 164 N.W.2d at 586. There was "ample foundation for the reasonableness of the opinion of the judge" upon the review de novo. *Id.* at 400, 164 N.W.2d at 587.

Despite these findings, the court indicated that a failure to serve the complaint for modification on the prosecuting attorney, required a remand. The court stated:

> It is truly unfortunate that the trial court must again be subjected to the grueling pressures of this explosive case, but we can see no alternative.

Id. at 401, 164 N.W.2d at 588. The court noted that it was "ironic that the plaintiff can complain, where the failure to notify the prosecuting attorney was an oversight the onus of which she herself should bear." *Id.* at 400, 164 N.W.2d at 587. As a general practice, stated the court, this requirement "is an anachronism in the law." *Id.* at 401, 164 N.W.2d at 587.

Several prior cases seem to have held that this failure of service was a fatal defect. *See*

tory nature of the appearance of the prosecutor, in the court's view, led to a lack of concentration on the interests of the individual children: "All too frequently the prosecuting attorney knows little or nothing of the case."[102] His appearance in the matter may often be "perfunctory."[103] The court suggested that a "friend of the court,"[104] whose duties are aimed at promoting the welfare of children,[105] would be better able to oversee their interests. The friend of the court, if not a substitute, could at least be an aid to the county prosecutors in protecting the welfare of children in Michigan.[106]

Mayo v. Mayo, 331 Mich. 96, 99, 49 N.W.2d 79, 80 (1951); McClellan v. McClellan, 290 Mich. 680, 682, 288 N.W. 306, 307 (1939); Sweeney v. Sweeney, 196 Mich. 240, 246-47, 162 N.W. 1015, 1017 (1917). Nevertheless, there have been cases which have held this failure of notice and appearance to be "mere irregularities" which would not require remand where the children's interests would seem to have been otherwise presented. *Cf.* Conkey v. Conkey, 237 Mich. 326, 328, 211 N.W. 740, 740 (1927); Cole v. Cole, 193 Mich. 655, 660, 160 N.W. 418, 419 (1916). Both of these cases concerned amendments to an original decree and neither were expressly overruled in *McClellan.*

[102] 13 Mich. App. at 401, 164 N.W.2d at 587.

[103] *Id.* The court explained:

> He makes a perfunctory appearance and reports that he does not intend to contest the matter, and more importantly, he files a claim and receives an order for the payment of the $5 fee which the legislature requires the county to pay.

Id. This case leads to the question: If a fee is to be paid at all, why should it not be more substantial? *Compare id. with* Willcox v. Hosmer, 83 Mich. 1, 6, 47 N.W. 29, 30 (1890).

[104] 13 Mich. App. at 401, 164 N.W.2d at 587-88. Michigan's "Friend of the Court" is defined by MICH. COMP. LAWS ANN. §§ 552.251-.253 (1967). Such an officer, appointed through the recommendations of the circuit judges in each county, must be "a duly qualified and licensed attorney," or, if not, will be assisted by an attorney where "legal assistance" is necessary. *Id.* § 552.251.

[105] The primary duty of the "friend of the court" is to enforce support and maintenance decrees in divorce cases where the children "are not properly cared for by their custodian." MICH. COMP. LAWS ANN. § 552.251 (1967). He must investigate such cases and enforce delinquent payments through the courts, or petition for modification of a decree if the support provisions are unrealistic due to changed circumstances. *Id.* §§ 552.252-.252a. He has full powers of investigation and must file a written report and recommendation with the court. *Id.* § 552.253. For a brief but complete summary of the powers and duties of the Friend of the Court see MICH. GEN. CT. R. 727.

In those counties with a population of one-half million or more, the friend of the court may serve in place of the county prosecutor in investigating and appearing at a pending divorce case. MICH. COMP. LAWS ANN. § 552.45 (1967).

[106] Two other theories can be advanced for appointing counsel to represent a child in custody proceedings. It could initially be argued that the child is the real party in interest in the custody action and thus should be named a party within the rule that "[e]very action may be prosecuted in the name of the real party in interest." N.J.R. 4:26-1. A party has been defined as a person with an interest in the action. *In re* Garey, 65 N.J. Super. 585, 588, 168 A.2d 273, 275 (Union County Ct. 1961). Despite the fact that the rule is permissive, it does appear that a court can order the joinder of the real party in interest, "whenever justice requires." De Cosmo v. Foreman, 67 N.J. Super. 548, 552, 171 A.2d 105, 107 (App. Div. 1961).

In a custody case, it would seem obvious that the child has a substantial interest in the

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To date, New Jersey has not included in its interpretation of the best interests doctrine the appointment of independent counsel for children in custody proceedings. It is not readily ascertainable why this state has not adopted the independent counsel approach; however, it would appear that the New Jersey courts rely on the effectiveness of the custody procedure to protect the welfare of the child.

Although court emphasis on a duty to protect the child's best interests[107] appears correctly placed, an examination of New Jersey case law illustrates that the concern of the court may not be fully attained in practice. *Smith v. Smith*,[108] for example, reveals such a shortcoming. In this action for modification of a support agreement, the wife had moved out of the marital home, taking with her the two children of the marriage.[109] Her justification for this re-

outcome of the action. Indeed, it can be argued that the requirement of justice theory of *De Cosmo* represents the same rationale used by the Milwaukee County Family Courts. *See* notes 62-67 *supra* and accompanying text. *Cf.* Hansen, *supra* note 17, at 13-14 (child as third-party beneficiary to contract).

The other theory under which it has been argued that counsel should attach is based on the doctrine espoused in *In re* Gault, 387 U.S. 1 (1967), which established a juvenile's right to counsel in delinquency proceedings. *Id.* at 13-14. *Gault* has been interpreted as establishing "that representation by counsel is the essence of justice, is inherent in due process and is therefore mandatory in juvenile proceedings."
Inker & Perretta, *supra* note 8, at 113. The *Gault* doctrine has not as yet, according to these commentators, been applied to custody proceedings because of the timeless civil-criminal dichotomy. *Id.* The authors note, however:

> This artificial dichotomy between civil and criminal actions cannot survive *Gault*. By discrediting this distinction, Gault paves the way for attacks against further reliance upon it.

Id. at 113-14.

The final rationale for a reliance on *Gault* in custody cases is the unity of purpose between both the juvenile proceeding and the custody determination: "the protection of society's young and the assurance that they will have a hopeful future." *Id.* at 115. For a similar view of *Gault* see Freed, *supra* note 17, at 35.

The theory of a child's right to counsel in a custody proceeding under the *Gault* doctrine was recently raised in New Jersey in Restaino v. Restaino, Appeal No. A-2379-73 (N.J. Super. Ct., App. Div., Aug. 27, 1974). In *Restaino*, the issue of counsel for the child was not raised until appeal, however, the argument for the appointment of counsel was considered by the appellate division. *Id.* at 2. On appeal, the issue was raised by the appellant Mrs. Restaino, who attempted to evince the appointment of counsel based on the idea that "[t]he protection afforded by the Fourteenth Amendment and the Bill of Rights of the United States Constitution apply to children as well as adults." Supplemental Brief on Behalf of Appellants, Restaino v. Restaino, Appeal No. A-2379-73, at 4 (N.J. Super. Ct., App. Div., Aug. 27, 1974). The appellant's attempt to extend their doctrine from a juvenile proceeding to a custody determination, however, was summarily rejected by the appellate division which found "that the argument is devoid of merit." Restaino v. Restaino, Appeal No. A-2379-73, at 2 (N.J. Super. Ct., App. Div., Aug. 27, 1974).

[107] *See* note 9 *supra*.

[108] 85 N.J. Super. 462, 205 A.2d 83 (Morris County Juv. & Dom. Rel. Ct. 1964).

[109] *Id.* at 463-64, 205 A.2d at 84. Plaintiff, Mrs. Smith, had moved out on April 3, 1964.

moval was that the husband, an habitual and excessive drinker, "bec[omes] nasty and abusive when drunk," resulting in her having "an intense fear of his violent temper."[110] At the original support hearing, the parties were ordered to consult a psychiatrist who reported that, although both parents were equally derelict in familial duties, he was "concern[ed] about the children" and concluded "that these parties should not be separated and that 'their marriage, for at least the children's sake deserves another chance.' "[111] Within a month, however, the court-appointed psychiatrist decided that reconciliation would be impossible.[112] While the *Smith* court articulated its concern for the best interests of the minor children, the focus of the decision was directed primarily toward the rights of the discordant parents.[113] In effect, a separated wife may be allowed to use her children "as weapons to inflict punishment upon the other parent for real or imagined wrongs,"[114] the only sanction incurred being a reduction of support for the children.[115]

The parties first appeared in court on May 13, at which time the case was continued while the defendant husband agreed to temporary support payments of $40.00 per week and obtained visitation rights. *Id.* A determination and order on July 9—which neither party originally attacked—required weekly support payments of $60.00 for the children but none for Mrs. Smith. Subsequently, however, Mr. Smith filed a motion for reduction due to his inability to pay. *Id.* at 465-66, 205 A.2d at 85. The reported opinion was in conjunction with the eventual order granting a reduction to $30.00. *Id.* at 463, 205 A.2d at 84.

[110] *Id.* at 464, 205 A.2d at 84. It is unclear whether his violence was directed at her or the children. Mrs. Smith also testified that he was "a generous, good husband" and "declined to attribute to defendant the characteristics of a 'drunk' or an 'alcoholic.' " *Id.* Furthermore, "she [did] not deny that he loves his children and they love him." *Id.*

[111] *Id.* at 464-65, 205 A.2d at 84. On the basis of six interviews over a two-month period, the doctor had reported to the court through the probation department. *Id.* at 464, 205 A.2d at 84. This first report favored the husband's position. *Id.* at 465, 205 A.2d at 84.

[112] *Id.* at 465, 205 A.2d at 84. The second and final report, while more well-disposed towards the mother, concluded that

> "even though I dislike seeing these people separate, I have concluded that their personalities are so incompatible that they will never make their marriage work."

Id. At this time, while Mr. Smith still wanted to see the family reunited, his wife would not even consider this. The court awarded support for the children but found that the wife, on the other hand, "had not produced evidence of 'cruel and inhuman conduct' to justify her separation from defendant and was therefore not entitled to support under N.J.S. 2A:4-18." 85 N.J. Super. at 465, 205 A.2d at 85.

[113] 85 N.J. Super. at 469, 205 A.2d at 87.

[114] *Id.* There were two reasons given for the modification of the support order: Primarily, the plaintiff mother had prevented the father from exercising his right of visitation with the children. Additionally, the amount of support had originally been based on living costs in New Jersey; since the mother had moved to Florida, circumstances had changed and the original award could be modified. *Id.* at 466, 205 A.2d at 85.

After the motion for reduction had been filed, Mrs. Smith, believing that she could obtain neither a separation nor a divorce in New Jersey, fled with the two children to Florida to obtain a divorce there. Her only notice to her husband consisted of a telephone call en route. *Id.*

[115] *Id.* at 471, 205 A.2d at 88.

In *Brown v. Parsons*,[116] the father had received a divorce decree in a Florida court which awarded him custody of the child.[117] He subsequently attempted to enforce that award in the New Jersey Court of Chancery[118] against the child's grandparents who lived in New Jersey and who had physical custody.[119] Although the court recited the principle that "[i]n a controversy over a child's possession, its welfare will be the paramount consideration in controlling the discretion of the court,"[120] the case turned, in part, on the question of who had abandoned the child.[121] While the father argued that the mother had abandoned the child, the master had found instead that the father had abandoned the child by moving to Florida.[122] Because the father and the grandfather had previously been convicts, a collateral issue developed: Which competing party was less *unfit* to have custody?[123] Thus, by focusing its opinion on the parents, the court may have failed to give adequate attention to other aspects inherent in the best interests of the child.[124]

The third New Jersey case, *C. v. T.*,[125] involved a putative

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[116] 136 N.J. Eq. 493, 42 A.2d 852 (Ct. Err. & App. 1945).

[117] *Id.* at 494-95, 42 A.2d at 852. The mother had known nothing about this divorce until six months after the decree. When the Florida statutory waiting period had expired and the decree had become absolute, the husband notified her by letter from Florida. *Id.* at 496, 42 A.2d at 853. He did not at that time seek to enforce that portion of the decree relating to his daughter's custody. In his letter, he elaborated:

> "I have no intention of trying to take her from you at any time provided that she is permitted to visit me occasionally or I can visit her whenever it is convenient."

Id. at 496-97, 42 A.2d at 853.

[118] *Id.* at 494-95, 42 A.2d at 852-53. The court of chancery was abolished and its function replaced by the superior court in the constitution of 1947. N.J. CONST. art. 11, § 4, ¶ 3; *id.* art. 6, § 3, ¶ 2. Such an action would now be brought in the superior court, chancery division. *See* N.J.R. 4:3-1(a)(1). *See also* Henderson v. Henderson, 10 N.J. 390, 395, 91 A.2d 747, 749-50 (1952).

[119] 136 N.J. Eq. at 495, 42 A.2d at 854. While the child's mother had been pregnant with her, the father had ordered her out of the house. She returned to her parents' home, where the child was born and raised. While the father visited occasionally, he paid little in the way of support. *Id.* at 495-96, 42 A.2d at 853. The mother was forced to move to Washington, D.C., to obtain employment, and left the daughter with her parents. *Id.* at 497, 42 A.2d at 854. The custody suit, to which the child's mother was not a party, arose when the father was refused entrance to the grandparents' home to visit the child. *Id.* at 498, 42 A.2d at 855.

[120] *Id.* at 503, 42 A.2d at 856.

[121] *Id.* at 504, 42 A.2d at 857.

[122] *Id.* at 499, 504, 42 A.2d at 854, 857. The grandparents had alleged generally that the father was unfit. *Id.* at 495, 42 A.2d at 853. Abandonment, as defined in N.J. STAT. ANN. § 9:6-1 (1960), is an element of unfitness. *Cf. id.* § 9:2-9.

[123] 136 N.J. Eq. at 503, 42 A.2d at 857.

[124] An interesting example of the custodial elements which a court should consider is contained in GOLDSTEIN, *supra* note 17, at 71-91, wherein the authors concentrate on the psychological rather than biological factors.

[125] Civil No. M-25896-71 (N.J. Super. Ct., Ch., May 24, 1974). This is an unreported

father seeking permanent custody of his child from the mother, who once had legal custody, and from another woman who previously had physical custody.[126] The interrogatories from this case illustrate the relative importance attributed to allegations of unfitness, as well as the indifference afforded any consideration of the best interests of the child. Of the interrogatories sent by the father, only three questions out of eleven even mentioned the child by name, and then only in a limited context.[127] The remainder, other than standard interrogatory questions,[128] were concerned with the alleged unfitness of the defendants, intimating that the mother was an alcoholic[129] and that the aunt's alleged meretricious relationship[130] made them both unfit to have custody of the child. Similarly, in those which had been sent by the mother, only four out of a total of thirty-one questions could be construed as addressing the issue of the child's best interests.[131] The vast majority attempted to establish defenses to the father's charges of unfitness[132] and to

case involving sensitive custody issues. Because of this, the author has chosen to abbreviate the names of the parties.

[126] Brief on Behalf of Plaintiff in Opposition to Motion to Dismiss Action at 2, C. v. T., Civil No. M-25896-71 (N.J. Super. Ct., Ch., May 24, 1974) [hereinafter cited as Plaintiff's Brief]. The child had been in the custody of the mother when this action was commenced in 1972, but was removed and temporarily placed with the father pending final disposition of the case. *Id.*

[127] Plaintiff's Interrogatories, C. v. T., Civil No. M-25896-71 (N.J. Super. Ct., Ch., May 24, 1974) [hereinafter cited as Plaintiff's Interrogatories]. Question 6 asks whether the defendant mother ever had physical custody of the named child, G; question 8 asks if the mother has had any children other than G; and question 10, which is the only one centering on G's welfare, inquires as to her medical history and treatment. *Id.*

[128] These questions were: state the names and addresses of all persons known by the defendant to have relevant facts regarding this inquiry; state the names and addresses of proposed expert witnesses; state the addresses of defendant over the past five years; are the defendants working?; will any affirmative defense be used? *Id.* questions 1-3, 7, 9.

[129] These relate to the mother's medical history over the previous five years. *Id.* questions 4-5. The father argued that the mother was an alcoholic who retained custody only to obtain welfare payments for the child which she could use to support her own drinking habit. Plaintiff's Brief, *supra* note 126, at 12.

[130] The interrogatories inquire as to who else lived at the aunt's address. Plaintiff's Interrogatories, *supra* note 127, question 11. It was argued that since she lived with her boyfriend, this led to an atmosphere unconducive to the "happiness and moral welfare of the child." Plaintiff's Brief, *supra* note 126, at 13.

[131] Defendant's Interrogatories, C. v. T., Civil No. M-25896-71 (N.J. Super. Ct., Ch., May 24, 1974). Question 4 asks for facts which could "support a conclusion that the best interests of [G] require that she be placed in [plaintiff's] custody." *Id.* question 4. Also queried were the father's definitions of "a 'proper and suitable home and environment' for [G]" and who should care for her when the father and his wife were at work, *id.* questions 12-13, and any facts which showed a recognition that the father would provide a better home. *Id.* question 31. Additionally, other questions were asked concerning the father's home life and employment status. *Id.* questions 13-14.

[132] *Id.* questions 5-10, 19-26, 29.

advance counter-charges of unfitness against the father.[133]

Once a custody contest turns into an adversary battle, as was the case in *Smith, Parsons,* and *C. v. T.*, there is some indication that the effect, even on a young child, can be devastating.[134] Because of their youth, immaturity, and desire to belong, children often tend to "exaggerate their own roles in causing the divorce"[135] which precipitated the custody contest. The children "feel that the departing parent is rejecting or abandoning them, perhaps, because they have not been 'good' sons or daughters."[136] These feelings can lead to deleterious results[137] whether immediate or apparent only in later life:

> [C]hildren of divorce whose welfare is neglected or not properly considered tend to become the neglected, dependent or delinquent children involved in juvenile court proceedings, later-life criminal court proceedings, or potential litigants in future divorce proceedings.[138]

It seems clear that where an adversary approach is taken in a

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[133] *Id.* questions 1-3, 27, 30. These questions relate to the father's criminal record and an allegation that he had, after G's birth, reimpregnated the mother and had her undergo an abortion. *Id.*

[134] The adverse emotional impact which hostile custody proceedings can have on the children involved has been described as "too painfully obvious to need description." J. DESPERT, CHILDREN OF DIVORCE 185 (1953). The insecurity and pressure to take sides can be very harmful to the child's well being. *Id.* Conflicts experienced by children during this process have been cited as being partially responsible for emotional disturbances in later life. Watson, *The Children Of Armageddon: Problems Of Custody Following Divorce,* 21 SYRACUSE L. REV. 55, 55 (1969).

[135] Westman & Cline, *Divorce Is A Family Affair,* 5 FAM. L.Q. 1, 6 (1971).

[136] *Id.* Additionally,

> [f]rom the point of view of the affected children, divorce requires a number of important adjustments: 1) to the anxiety, confusion and strife of the conflict-ridden marriage, 2) to the absence of an image of adults with mutual affection and respect, 3) to the compromise of routine child-rearing responsibilities accompanying the disintegrating marriage, 4) to the prospect of change in parent relationships, and 5) to the parents' preoccupation with rearranging their own emotions and lives, leading to a reduction in attention to the children, or, in some cases, to an over-reliance on the children for support. If divorce were an event that occurred quickly, these associated repercussions would be minimized.

Id. at 5.

[137] *Id.* at 7. The authors contend that the greatest hazard for a child of divorce comes from a lack of understanding of events. Stressing that "[e]very effort should be made to help the children understand the realities of the divorce experience," the authors note that

> it is difficult for many divorcing parents to admit to their children that they don't like each other, and that the divorce is a result of their being "bad" for each other. These parents prefer to say the divorce is occurring under "friendly" terms. This approach only mystifies children, who may have witnessed the opposite, or, if they haven't, may only conclude that the parents are withholding the truth, namely that they are getting divorced because of the children.

Id.

[138] Podell, *supra* note 17, at 106.

custody case, even though done in the child's "best interests," the disadvantages are acute, simply because the focus of the court tends to shift from the child to the litigants.[139]

In custody proceedings, children sometimes "have individual interests apart from . . . parental . . . interests."[140] A question is therefore raised as to the ability of an attorney to defend his parent-client's interest in the adversary arena and, at the same time, represent the child. Canon 7 of the *Code of Professional Responsibility* gives some guidelines for dealing with potential conflicts of interest by an attorney, providing that "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law."[141] One of the Ethical Considerations in Canon 7 provides that the lawyer should attempt to treat all parties involved with consideration, trying to prevent any unnecessary harm.[142] One of the disciplinary rules, however, indicates that the attorney shall not

> [g]ive advice to a person . . . if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.[143]

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[139] *See* notes 17-18 *supra* and accompanying text. With this implication, it seems that the New Jersey courts have strayed from the early decisions regarding custody. Those early decisions, in language at least, seem much more concerned with the welfare of the child rather than the unfitness of the parent. One of the earliest of these cases is Richards v. Collins, 45 N.J. Eq. 283, 17 A. 831 (Ct. Err. & App. 1889), which was a habeas corpus proceeding by the natural parent to regain custody. *Id.* at 284, 17 A. at 832. The language used by the court in *Richards* seems to recognize the necessity of a status relationship between custodian and child—a theory which is currently being advanced by at least one group of authors. *See* GOLDSTEIN, *supra* note 17, at 17-20. In making its custody determination, the *Richards* court said:

> The wishes of children of sufficient capacity to form them are given especial consideration, where the parents have for a length of time voluntarily allowed their children to live in the family of others, and thus form home associations and ties of affection for those having their care and nurture, and when it would mar the happiness of the children to sever such ties.
>
> The relation of parent and child is regarded as not fully characterized by the relative duties of service and support. Nature's provision of mutual affection commonly exists as the incentive to parental and filial duty and the bond of family union. *It is the instinct of childhood to attach itself and cling to those who perform toward it the parental office; and they become endeared to it by ministering to its dependence.* A parent, by transplanting his offspring into another family and surrendering all care of it for so long a time that its interest and affections all attach to the adopted home, may thereby seriously impair his right to have back its custody by judicial decree.

45 N.J. Eq. at 287, 17 A. at 832 (emphasis added).

[140] Freed, *supra* note 17, at 36. The author remarked that, at least in an adoption proceeding, "[t]he child, the primary party in the proceeding, should be represented by someone with no interest other than the child's welfare." *Id.* at 37 (footnote omitted).

[141] ABA CANONS OF PROFESSIONAL ETHICS No. 7.

[142] *Id.* EC 7-10 provides:

> The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.

[143] *Id.* DR 7-104(A)(2) (footnotes omitted).

In those inevitable situations, then, where the attorney is faced with the choice of either representing the child or his client, the child must proceed unrepresented.[144] Thus "the concept of the rights of children would be accepted in theory, [but] ignored in practice."[145] As a result, the child, whose best interest is theoretically at the heart of the proceeding, is abandoned by the very process which is supposed to guarantee his safety.

In a possible attempt to alleviate the conflict of interest problems and still provide some protection for the child, the New Jersey supreme court has promulgated a rule designed to aid the court in determining custodial capability.[146] The rule provides for an investigation of the litigating parties by the county probation office before any custodial determination is made by the court.[147] The report is considered confidential and "shall be received as direct

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[144] An interesting example of a possible conflict of interest arises out of the tax consequences of a divorce. If, in settling payment for alimony and support, one spouse is to receive alimony, that money serves as a deduction for the paying spouse and is reported as income by the receiving spouse. 28 U.S.C. §§ 71, 218 (1970). *See also* Commissioner v. Lester, 366 U.S. 299, 301, 303 (1961). If child support is involved, however, and is explicitly designated as such, the paying spouse would not receive any deduction. 28 U.S.C. § 71(b) (1970). If both alimony and support payments were given together—with no specific designation as to what monies were to be allocated for each purpose—then a full tax deduction would be available to the paying spouse and all monies would be taxed as income to the receiving spouse. 366 U.S. at 303. Thus, an attorney trying to work out details of a divorce settlement for the paying spouse would not want a specific amount of money designated for the children, thus enabling the preservation of a full deduction. This result would leave the receiving spouse with the discretion of how much to spend on the children. If the attorney for the paying spouse was also required to vouchsafe the rights of the children, his task would be impossible, since the true "best interests" would seem to mandate a specified amount of child support and, therefore, a greater tax burden for his client.

[145] Hansen, *supra* note 17, at 7. *See also* GOLDSTEIN, *supra* note 17, at 65-66, wherein the author notes with regard to any contest over child placement that "[i]n none of these proceedings does [any of the parties or welfare agencies involved] have a conflict-free interest in representing the child."

[146] N.J.R. 4:79-8.

[147] *Id.* The rule provides in pertinent part:

> **(a) Investigation Before Award.** In matrimonial actions where the issue of custody of children is contested the court shall, before final judgment or order, require an investigation to be made by the county probation office of the character and fitness of the parties, the economic condition of the family and the financial ability of the party to pay alimony or support or both. . . .
>
> . . . .
>
> **(d) Filing of Reports.** The written report of an investigation made pursuant to this rule shall be filed with the court, shall be furnished to the parties, and shall thereafter be filed in the office of the Chief Probation Officer. The report shall be regarded as confidential, except as otherwise provided by rule or by court order. The report shall be received as direct evidence of the facts contained therein which are within the personal knowledge of the probation officer who made the investigation and report, subject to cross-examination of him.

Id.

evidence of the facts contained therein."[148] This rule gives the court a further method "of checking on the care of children"[149] through the use of the facilities of the probation department. If then, anything is to safeguard the rights of a child under the custodial determination process, it would have to be this independent report.

A review of the type of examination conducted by the probation office in *C. v. T.*,[150] however, reveals another example of the underlying lack of substantial protection for the child. After recommending that the father be given custody, the probation officer testified as to what the investigation entailed.[151] The testimony revealed several inadequacies. The officer not only failed to interview the child's mother but also failed to ascertain whether the father's present wife would welcome the child into her home. Neither the father's nor the child's home was visited, and the officer never interviewed the child on whose behalf the investigation was instituted. Further, he stated that his recommendation was not intended to indicate unfitness on the part of any of the litigating parties.[152]

While this investigation may comport with the letter of the law, it clearly fails to comply with the spirit of the enabling court rule. If this report and the resulting recommendation that custody be given to the father were taken, as provided for in the rules, as "direct evidence of the facts contained therein,"[153] it is obvious that a custody determination in this case would have been made with few of the substantive safeguards such a report had been designed to provide.[154]

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[148] *Id.* The probation officer is, however, subject to cross-examination. *Id.*

[149] R. DEL DEO, COURT RULES ANNOTATED, 2A N.J. PRACTICE 333, Comment [to N.J.R. 4:79-8] (1973).

[150] Civil No. M-25896-71 (N.J. Super. Ct., Ch., May 24, 1974). For the fact pattern of this case see notes 125-33 *supra* and accompanying text.

[151] *See* Brief on Behalf of Defendants in Support of Motion to Dismiss Action at 3, C. v. T., Civil No. M-25896-71 (N.J. Super. Ct., Ch., May 24, 1974) [hereinafter cited as Defendants' Brief].

[152] *Id.*

[153] N.J.R. 4:79-8(d). For complete text of this rule see note 147 *supra.*

[154] The judge in *C. v. T.* indicated both that the probation officer's testimony and report were incomplete and that any conclusions which were drawn in the report were unwarranted. Defendants' Brief, *supra* note 151, at 3.

It also seems clear that the problem of inadequate probation reports is not limited to New Jersey. In his study of juvenile court judges, Kenneth Cruce Smith indicates that 26.6 percent of juvenile judges in the United States think that "[i]nsufficient probation or social service staff" is the gravest problem facing the juvenile court. Smith, *A Profile of Juvenile Court Judges in the United States,* 25 JUV. JUSTICE 27, 36 (Table 9) (Aug., 1974). This problem

In order to prevent these inherent problems, increased judicial awareness of the shortcomings of the present practice in child custody disputes is needed. Such an awareness is gradually evolving in New Jersey. In the 1966 case of *In re Adoption of Children by N.*,[155] the appellate division considered an adoption dispute between the natural father and the stepfather of a child.[156] In ordering a remand for further evidence, the court, with language strikingly similar to that used by some of the Wisconsin courts,[157] suggested:

> If it be necessary to insure that the child is treated as a person with rights and not as an object to be fought over, the court should feel free to exercise its inherent power to appoint a guardian *ad litem* to make certain that the best interests of the child are duly represented and protected throughout the proceedings.[158]

The inherent power to appoint a guardian ad litem, recognized by the court in *In re Adoption of Children by N.*, has been traditionally used to protect children in emergency situations. Where the parents have refused to consent to blood transfusions for the child due to religious beliefs, for example, the court has intervened. In *State v. Perricone*,[159] the Supreme Court of New Jersey affirmed a juvenile and domestic relations court's appointment of a special guardian for the purpose of consenting to a blood transfusion to save a child's life, where the parents, out of religious conviction, refused to allow essential medical treatment.[160] Similarly, in *Raleigh Fitkin-Paul Morgan Memorial Hospital*

ranks fourth among the fourteen greatest problems, the same rank that it occupied in a similar study in 1963. *Id.* at 34.

[155] 96 N.J. Super. 415, 233 A.2d 188 (App. Div. 1967).

[156] *Id.* at 418, 233 A.2d at 190.

[157] *Compare id.* at 427, 233 A.2d at 194 *with* Dees v. Dees, 41 Wis. 2d 435, 443-44, 164 N.W.2d 282, 286-87 (1969) *and* Koslowsky v. Koslowsky, 41 Wis. 2d 275, 282-83 n.3, 163 N.W.2d 632, 636 (1969). For a discussion of *Dees* see notes 41-44 *supra*. For a discussion of *Koslowsky* see notes 38-40 *supra*.

[158] 96 N.J. Super. at 427, 233 A.2d at 194. The court relied on several prior cases to support this statement. *Id.* at 427-28, 233 A.2d at 194-95. *See, e.g.*, Barth v. Barth, 39 Ohio Op. 2d 83, 84, 225 N.E.2d 866, 867 (C.P. Stark County 1967) (court on own motion appoints guardian ad litem to represent children in divorce action); Wendland v. Wendland, 29 Wis. 2d 145, 156, 138 N.W.2d 185, 191 (1965) (discussed in notes 35-37 *supra* and accompanying text); Edwards v. Edwards, 270 Wis. 48, 56b, 71 N.W.2d 366, 367 (1955) (discussed in notes 20-34 *supra* and accompanying text); Hansen, *supra* note 62, at 183. *Compare* Barnes v. Paanakker, 111 F.2d 193, 196-98 (D.C. Cir. 1940) *with In re* Adoption of a Minor, 120 F.2d 720, 720-21 (D.C. Cir. 1941) (for a discussion of these two cases see notes 85-87 *supra*). *See also In re* Adoption of Watson, 45 Hawaii 69, 72, 361 P.2d 1054, 1056 (1961) (lower court judge had power to appoint guardian ad litem but was correct in not doing so); *In re* Estate of Topel, 32 Wis. 2d 223, 229-30, 145 N.W.2d 162, 165 (1966).

[159] 37 N.J. 463, 181 A.2d 751, *cert. denied*, 371 U.S. 890 (1962).

[160] 37 N.J. at 466, 480, 181 A.2d at 753, 760. The child in *Perricone* was a "blue" baby,

v. Anderson,[161] the court permitted the appointment of a special guardian for the protection of an unborn child when the mother refused blood transfusions which were necessary to ensure a live birth of the child.[162] Although neither *Perricone* nor *Raleigh Fitkin* involved custody proceedings, it is clear that the underlying rationale behind the appointment of the special guardian was to protect the best interests of the child.

In an area analogous to custody, the New Jersey legislature has recently provided for the welfare of children through the appointment of a guardian at law in child abuse cases.[163] The Act's protective measures ensure that:

> Any minor who is the subject of a child abuse or neglect proceeding under this act must be represented by a law guardian to help protect his interests and to help him express his wishes to the court.[164]

In addition to the courts' *parens patriae* power to appoint guardians ad litem, the New Jersey courts have promulgated rules to remedy a conflict of interest arising between the custodian of a child and the child. For example, in a friendly proceeding[165] involving a personal injury settlement, the guardian cannot accept the settlement without first obtaining court approval.[166] Also,

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and the doctors had originally respected the parents' wishes regarding blood transfusions. *Id.* at 466-67, 181 A.2d at 753. It was only after the attending physicians deemed transfusions necessary that the hospital superintendent applied through the county counsel to have a special guardian appointed. *Id.* at 467, 181 A.2d at 753. The facts reviewed by the supreme court indicated that the mother and father knew and were willing to accept the fact that their son might die without the transfusions. Despite the eventual transfusion, the child died. *Id.* at 469, 181 A.2d at 755.

The court indicated that while both the rights of parents and the constitutional guarantees of religious freedom deserved high priority, they were not absolute, but "must be considered in light of the general public welfare." *Id.* at 472-73, 181 A.2d at 756.

In 1971, the New Jersey supreme court affirmed the appointment of a similar special guardian for a 22-year-old patient. John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971).

[161] 42 N.J. 421, 201 A.2d 537, *cert. denied,* 377 U.S. 985 (1964).

[162] 42 N.J. at 422-24, 201 A.2d at 537-38. The hospital in which the mother was confined had determined that a blood transfusion for the mother would be necessary to save the lives of both mother and child, and had petitioned for the appointment of a special guardian. *Id.* The chancery division had held that it had no power to intervene with respect to an adult's refusal to accept blood, but the supreme court on appeal, relying on *Perricone,* ordered the appointment of a guardian for the yet unborn child. *Id.* at 423-24, 201 A.2d at 538.

[163] Law of October 10, 1974, ch. 119, 3 N.J. SESS. LAW SERV. 304.

[164] *Id.* § 3a.

[165] A friendly proceeding occurs when a personal injury action is brought on behalf of a child. N.J.R. 4:44-3 provides that in all such litigation settlements were an infant is involved, a judge, sitting without a jury, must determine that the settlement is fair.

[166] *Id.*

whenever "a conflict of interest exists between guardian and ward,"[167] the court rules provide that if a child is over the age of 17, he may petition the court for the appointment of an independent guardian ad litem.[168]

Finally, there exists judicial support in New Jersey for the appointment of an attorney to represent the child through the use of the court's inherent power.[169] The Honorable Bertram Polow, formerly of the Juvenile and Domestic Relations Court, advocates the appointment of an attorney as guardian ad litem for children "in seriously contested custody cases."[170] Judge Polow, however, cautioned that "[t]he guardian **ad litem** device . . . is no panacea."[171] He noted that a guardian could do little more than the court is supposed to do in terms of ensuring that all relevant information is present for the final determination affecting the welfare of the children.[172]

Despite this statement by Judge Polow, it would appear that by giving power to an independent party, a check would be provided against the court, the parties, and the probation department. As a result, all participants in the litigation would be better able to reach "that elusive goal: a decision which will promote the child's welfare."[173] Thus, in a situation like the one earlier this year in New Jersey,[174] the child's counsel would be charged with the responsibility of having the child's doctor present at the hearing—a witness who was not heard but who could have provided relevant testimony which might have altered the tragic results.[175]

In addition to the contributions of the guardian ad litem already mentioned by Judge Polow, the counsel for the child could,

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[167] *Id.* 4:26-2(a).

[168] *Id.* 4:26-2(b)(2).

[169] *See id.* 4:26-2(b)(4). This rule states: "The court may appoint a guardian ad litem for an infant or incompetent person on its own motion." *Id.*

[170] Polow, *The Law and Changing Social Attitudes,* N.J.S.B.J., Aug. 1972, at 42.

[171] *Id.*

[172] *Id.* Judge Polow indicated that the guardian would only be able to

> order and review the probation investigation; demand further investigation and information if required; request psychological testing or psychiatric evaluation of the parties and the children where appropriate; be certain that the physical surroundings of both parties are thoroughly inspected and adequately reported to the court; be sure that all persons with relevant information and knowledge are interviewed, including teachers, physicians, friends, relatives, neighbors, and any other appropriate sources of information.

Id.

[173] Freed, *supra* note 17, at 38.

[174] *See* notes 1-4 *supra* and accompanying text.

[175] *Id.*

as he is mandated to do in Wisconsin[176] and impliedly advised to do under the *Uniform Marriage and Divorce Act*,[177] have the power to subpoena his own witnesses and cross-examine all witnesses brought by the contesting parties. This right of representation would also add "one more potential appellant to the process of review"[178] and thus further encourage a result based on best interests.

This inherent power of appointment of guardians by all courts of equity was what the Milwaukee County Family Court judges relied upon when they first proposed the appointment of an attorney.[179] This concept was also relied upon by the drafters of the *Uniform Marriage and Divorce Act* who indicated that "[t]he appointment may be made by the court . . . on its own motion."[180] The equity courts are granted this power in custody proceedings through their inherent *parens patriae* jurisdiction.[181] Additionally, there exists in New Jersey a court rule similar to the statutory provisions of Wisconsin and other states. The rule provides: "The court may appoint a guardian ad litem for an infant . . . on its own motion."[182] It is this concept of the protection of infants that induced the courts of Wisconsin as well as other jurisdictions to realize that

> children, far from sharing the adults' concerns, are frequently put in direct conflict with them: their needs may contrast with those of their biological parents, their foster parents, or the social agencies concerned with them. For this reason, once their custody is questioned, their rights cannot be represented adequately by the advocates of either the adult claimant or the adult defendant. They need party status before any court or administrative agency concerned with their fate, namely, to be represented, independently of the adults, as persons in their own right.[183]

As has been noted, this same awareness has only begun to materialize in New Jersey, which has the same concerns and jurisdictional tenets as courts in other states. The New Jersey courts already have, by court rules and common law jurisdiction, the

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[176] *See* note 65 *supra* and accompanying text.

[177] *See* notes 79-82 *supra* and accompanying text.

[178] GOLDSTEIN, *supra* note 17, at 67.

[179] *See* text accompanying notes 63-64 *supra*.

[180] *See* Comment to UNIFORM MARRIAGE AND DIVORCE ACT, *supra* note 80, at 235.

[181] *See* notes 7-9 *supra* and accompanying text.

[182] N.J.R. 4:26-2(b)(4).

[183] GOLDSTEIN, *supra* note 17, at 67.

inherent power to appoint a guardian ad litem in a custody proceeding. Too often in these cases the children tend to be barter which can be traded in settlement agreements as other property acquired during the marriage. The result, highly disadvantageous to the children, is "an enhanced tendency to treat custodial . . . problems in a pro forma fashion."[184]

CONCLUSION

In 1971, the New Jersey legislature amended the divorce laws to include a cause of action based on separation for eighteen or more consecutive months.[185] A comparison of the number of divorces filed during the year prior to the amendment with the number filed during the two succeeding years reveals the impact of this new ground for divorce. For the year prior to the effective date of the amendment, 14,326 divorce complaints were filed.[186] The next year, filings totaled 26,289,[187] an increase of over 80 percent. In the second year of the new act, 23,322 divorces were filed,[188] a decrease from the first year, but still better than 60 percent ahead of the last year of the old law.

Concomitant with this increase in the number of filed divorce actions is, of course, an increase in the number of children who will be the subject of some sort of custodial determination. And, since custody litigation involves not only parents but also putative parents, the state, foster parents, and relatives, as well as others, it would seem that these divorce figures represent only the tip of a growing custodial iceberg.

Regardless of the competing interests of the litigating parties, it must be remembered that

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[184] Freed & Foster, *supra* note 17, at 34, 41.

[185] N.J. STAT. ANN. § 2A:34-2 (Supp. 1974-75) provides in pertinent part:

> Divorce from the bond of matrimony may be adjudged for the following causes heretofore or hereafter arising.
>
> . . . .
>
> d. Separation, provided that the husband and wife have lived separate and apart in different habitations for a period of at least 18 or more consecutive months, provided further that after the 18-month period there shall be a presumption that there is no reasonable prospect of reconciliation . . . .

The new act also adds causes of action based upon drug addiction or habitual drunkenness, mental institutionalization, imprisonment, and deviant sexual conduct. *See id.* § 2A:34-2(e) to (h). For a practical guide to the practice under this new act see G. SKOLOFF, NEW JERSEY FAMILY LAW PRACTICE (1973).

[186] Tischler, *The New Divorce Act—One Year Later—Common Procedural Errors,* 95 N.J.L.J. 1241 (1972).

[187] *Id.*

[188] *Matrimonial Approvals Exceed Filings,* 96 N.J.L.J. 1129 (1973).

> a child is not a thing or an object to go as a prize to the winner of a contest. It is a precious, unique, individual human being. The whole future life of [a] child will be affected by the court's decision in the matter of custody.[189]

Based on this fundamental aspect of custodial determination, it appears that judges face greater mental anguish in attempting to make the proper custody decree than they do in any other cases they must decide.[190]

As has been seen, many jurisdictions have moved to help alleviate this agony; attempting to expand the traditional "best interests" standard by giving the child the right to his own counsel, an advocate to zealously represent his individual rights. The appointment of counsel falls within the ambit of the inherent power of courts of equity and manifests the realization that "[c]hildren have the moral right . . . and legal right to be regarded as persons."[191]

The courts of New Jersey which have been leaders in advancing many areas of the law must now recognize the importance of independent representation for children in custody cases. As it has been seen elsewhere, it must also be seen in New Jersey:

> It is unrealistic to assume that the judge or parental counsel will provide such representation and that there will be no conflict between the child's and the parents' interests.[192]

The beginning of a recognition of this concept has already started in New Jersey. If the "best interests" standard is to continue to be the bellwether of custody litigation, New Jersey must, in order to fully and completely effectuate that standard, either legislatively adopt the tenets of section 310 of the *Uniform Marriage and Divorce Act* or judicially declare that a child's right to counsel is inherent in the very underpinnings of the equitable procedure of determining custody.

James R. Devine

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[189] Hansen, *supra* note 62, at 181.

[190] Freed, *supra* note 17, at 35.

[191] *Id.* at 36.

[192] Freed & Foster, *supra* note 17, at 34.