THE LEGAL REPRESENTATION OF CHILDREN IN CUSTODY AND PROTECTION PROCEEDINGS: A COMPARATIVE VIEW

Chief Judge H.T.G. Andrews
Pasquale Gelsomino

1: INTRODUCTION

Legal representation of children in custody and child protection proceedings is now a reality in many legal systems with a common law tradition. It is a recognition that children have interests, perhaps even rights, that need to be considered distinctly and separately from those of the adults, and particularly their parents, interested in the litigation.

The purpose of this paper is to examine the extent of recognition of these interests and rights in selected jurisdictions, with special attention to the effect of these legislative provisions on the role of the child's lawyer.

No effort is made to review the development of the law in the United States generally. The present position in New York and Wisconsin is particularly highlighted. These states have a long standing tradition of separate legal representation for children. Other states have fashioned their legislative on their model.

Australia has very recently enacted provisions for the legal representation of children. The judicial divergence of view on the role of the lawyer is examined.

The position in Canada generally, and in individual provinces, is, naturally, treated more extensively.

2: THE NEED FOR INDEPENDENT REPRESENTATION

2.1:Children's Rights and Interests

Any discussion regarding the nature of legal representation for children must concern itself with the need that counsel is to fill. Lawyers advance before a court the legally recognised rights and interests of their clients. What sort of rights and interests of a child should a lawyer be representing? Shall he represent the child's interests? Rights? Or best interests? These terms are not synonymous. Each one refers to a distinct sort of "concerns" that the child has in the legal proceedings. Each requires a unique representational stance.

(a) Interests

Interest, in legal parlance, is a term that denotes a relationship to or concern in a legal proceeding or its outcome, where a benefit or prejudice might accrue to a person or group as a result of it and which would incline that person or group to favour one side or the other or a third position. It can be tangible, such as one affecting economic matters, or it can be less concrete but just as significant, such as one affecting the welfare and happiness of the person or group asserting it.[1]

Some interests can be enforced through the Courts; others cannot. Interests that are not legally enforceable cannot be regarded as rights. Parties to a legal proceeding are before the Court only because they purport to be asserting a "right". The primary duty of a Court is to determine the conflicting rights of the litigants. Other persons may wish to intervene in an action or other proceeding, with the permission of the Court, to protect their interests. The role of counsel representing these other persons is not to call evidence to dispute facts. Although he may urge a particular outcome favourable to his clients' interests, he purports to assist the Court in its deliberations, by impressing upon it the wider concerns which go beyond the immediate rights of the litigants.[2]

That children have interests in custody as well as in child protection hearings is indisputable. Whether they have enforceable interests or "rights", is a question that will be discussed later. Decisions of utterly fundamental importance concerning their well-being are made by the Courts in custody and protection proceedings.[3]

Traditionally, the Courts have been satisfied that children's interests were adequately represented by the adult parties. In recent years, however, children have been increasingly recognised as individual persons, with views, preferences,

and interests distinct from those of their parents, guardians and child protection agencies. Some statutes contain provisions allowing the Judge to hear any person on behalf of the child [4] (presumably the child is included) or to declare the right of the child to be heard.[5] Courts, at times have resorted to the practice of interviewing children.[6] Occasionally, a Judge has ordered separate legal representation for a child so that his interests could be fully brought to the attention of the Court.[7]

"Interests" refers to the concerns of a child as to the outcome of the legal proceedings. A lawyer representing the "interests" of a child would, to a greater or lesser extent, act in a partisan capacity.

(b) Rights

While an interest may confer the privilege of being heard before a decision is taken, a right is a legally enforceable claim on its own merits. It entitles one to initiate an action and enjoy full party status in the proceedings.

Recently there has been judicial as well as legislative recognition that certain interests of a child may amount to rights. Some jurisdictions allow the child to make an application for his own custody, access,[8] possibly even to initiate a protection hearing[9] on his own behalf. Several cases have established a

precedent that "access" is a right of a child rather than of the parent.[10] In some Canadian provinces, the child is specifically granted a statutory right to participate through legal counsel in a protection hearing.[11] Such innovations are highly suggestive of the real possibility that a child actually has a "party" status before a Court. This is a startling conclusion because a child has been ordinarily perceived more as the res or object of the litigation than as a party. Yet the legal meaning of "party" is sufficiently broad to include, without difficulty, a child in custody and protection proceedings should anyone care to raise the issue.[12]

A similar situation prevails in the United States and Australia. Some of these jurisdictions have legislation providing for a general right to counsel. Others leave it at the discretion of the Court.[13] Whether the enforcement of this right confers party status upon the child is not known. The only clear pronouncement on the matter was made in a Wisconsin case where it was held that children are "indispensable parties to the proceedings".[14]

If the child is a party to the proceedings, he would have the right to retain counsel and be represented in a fully adversarial role. Similarly, the right to initiate certain proceedings would entitle the child to a partisan stance.

The protection of these rights would, therefore, be best assured by an advocate vigourously advancing his client's rights urging that they deserve greater protection than those of other parties.

(c) Best Interests

"Best interests" must be distinguished from "interests". Strictly speaking, "best interests" is not a legal term. It is borrowed from the behavioural sciences and refers to the non-legal appraisal of what constitutes the "welfare" of a child in a particular social setting, assessed from the perspective of someone other than the child himself or a spokesman for the child's preferences. It is not the same as the child's subjectiv view of "his interests", although the two may occasionally coinci

"Best interests" must also be distinguished from "rights In a legal context, the former refers to the standard or criterion applied in deciding whether a right deserves enforcement in particular circumstances. For example, a child has the right to visit with or be visited by his hopelessly violent and alcoholic father. A Court, however, may refuse to give effect to this righ as it would be against the child's "best interests". In this case, the child's "best interests" may outweigh his rights.

in a juvenile delinquency prosecution, rights invariably outweigh best interests. For example, a child charged with delinquency has the right to have the charge against him dismissed on the grounds that the evidence against him is inadmissible, even though such a dismissal would not serve his best interests. (In a criminal or quasi-criminal proceeding, the fact that a child needs help is not proof that he has committed an offence).

The practical determination of this concept is fraught with uncertainty.[15] Even in what appear to be relatively simple facts, different schools of thought in the behavioural professions can lead to different conclusions. Like many concepts in the sciences, and particularly the behavioural sciences, "best interests" is subject to fads and fashions. For instance, the idea of "joint custody" has currently captured the fascination of many in the field of custody conciliation, but it is within the living memory of most when the "magic mother" or "tender years" philosophy urged that children are always better off in their mother's custody.

Some recent reforms[16] have made attempts to define "best interest" in statutory language. Naturally, these do not purport to be exhaustive, nor do they shed any greater light on the concept for Judges and lawyers.

In a legal proceeding, "best interests" is, ultimately, what a Judge decides it to be. A lawyer, untrained in the behavioural sciences, is ill equipped to advocate his young client's "best interests" and perhaps it is unrealistic, even unfair to him and to the child, to champion "his" view of what constitutes his client's best interests. Indeed, an attempt to do so may violate his profession's code of ethics.[17]

The legal complications into which a lawyer attempting to play the social worker role can put himself are many. In one Australian case, a dedicated young lawyer for the child interviewed the parties, the child and the witnesses, reached a conclusion and submitted a report to the court with her recommendations. Her conduct was strongly criticised by the Court:[18]

> It was purely fortuitous that Counsel for both the husband and the interveners agreed to adopt her report. The question which must however be asked is, what would have happened if anyone had wished to challenge it? Natural justice would demand that the maker of the report be cross-examined; and it is plainly undesirable that an advocate in a case should be a witness in that same case. Furthermore the Family Court is specially equipped with trained Counsellors to perform just the function that was here performed by the child's representative.

> Had the representative been cross-examined she would have been placed in such an embarrassing position that it would almost certainly have required a further representative to take over the role of Counsel while she became relegated to the position of witness.

The role that this lawyer had assumed has been traditionally filled by a behavioural expert whom one side or the other intends to call as a witness, but never by a lawyer. The lawyer is simply not an expert in child psychology. Even if he were, his would only be the opinion of an expert.

That is not to say that a lawyer cannot attempt to represent "best interests", but if he is at all realistic, he will realise that he is championing someone's view of what those "best interests" are —— usually the views of some behavioural expert or group of experts whom he intends to call as witnesses. Consciously or unconsciously, he has elected to side with one school of thought on the issue which may, on occasion, coincide with the school of thought being advocated by one of the parties (such as a child protection agency). An intrinsically objective assessment of "best interests" will therefore remain as elusive as ever and there is even the risk in such a case that the Judge will still lack all the information that may be needed, especially the child's own views.

2.2: Nature of the Judicial Process

In child custody and protection hearings, the Courts are called upon to perform two different and sometimes contradictory functions: private dispute settlement and child protection.[19] The adversarial system is well suited for the proper discharge of the first, while the second is more consonant with an inquiry.

The adversary system does not provide for a scientific investigation for the discovery of the truth, but it determines only the basis for a settlement between litigants. It is a system designed to reach the relative solution as to who has the "stronger" right, not as to who has the "best" right. The parties are, thus engaged not only in the positive advancement of their case, but also in detracting that of the opponent. This is what happens often in child custody proceedings where the child is not separately represented by counsel. The parents compete for the award of custody. Subject only to the rules of "fair play", the process is essentially accusatory in nature, directed at proving the unfitness of a parent, the better to assert one's own rights to the child. Similarly, in child protection proceedings, a parent has a vested interest in defending his reputation. Social welfare agencies, on the other hand,

often become engaged in a vigorous prosecution of their case. They are likely to defend their concept of the best interests of the child against the attack of the parent's lawyer directed at discrediting their evidence.

The purpose of these hearings, however, goes beyond the settlement of parental rights. In fact, their preservation is warranted only when it is conducive to the welfare of the child. A Judge must also determine what conditions best protect the child's future welfare in the circumstances. This task may require an assessment of the child's needs, a formulation of plans for the future, and a decision how those needs should be filled. It is a task in the nature of an inquiry that the adversarial system often cannot accomplish.[20]

In an inquiry, the inquisitor is not limited by the evidence of those interested in the issue, since the proceedings are not directed at determining the relative merits of the participants' positions but at solving a problem. Thus, the investigative process of an inquest would be more effective in marshalling the necessary data to determine the issue. Recognising this need, the Judge is empowered by some statutes to seek additional evidence, even in the context of what is otherwise an adversarial trial.[21]

It is doubtful and unrealistic, however, to expect a total rejection of the adversarial system. It is equally clear that in some cases it is not possible to identify the child's best interests unless additional information about the child is forthcoming. On the theory that the Courts need all the assistance and guidance available in resolving custody disputes, and, with a view to providing a fact finding process consistent with the adversarial system, separate legal representation for children may offer that needed input.

2.3 : Protecting Judicial Integrity and Impartiality

The "best interest of the child" is the sole or, if in combination with other statutory factors, the paramount criterion in custody disputes.

In a fully adversarial setting, a Judge must reach a decision solely on the basis of the evidence that the parties choose to put before the Court. In custody proceedings, the reliability of such evidence may sometimes be questionable since the parties' motives may be more to discredit their opponent than to advance the welfare of the child. The Judge is thus left without any independent objective evidence by which to assess the child's best interests.

An Ontario case will illustrate the problem.[22] A trial Judge had found both mother and father equally qualified to rear the children, but decided to award custody to the mother. There was evidence that she was living with a paramour, but neither side chose to call this man as his or her witness. The appellate Court quashed this decision and ordered a new trial. The suitability of the wife's paramour to act as surrogate father to the children was held to be a vital element in the determination of the best interests of the children. The failure of the trial Judge to ascertain this man's capacity to "parent" was an appealable error.

For a trial conducted on an adversarial model, however, the problem becomes: Who will introduce evidence about the child's best interests when it is in the interests of none of the parties to adduce it? The Judge, as an impartial adjudicator, should not descend into the "arena" of the litigation, nor can he call his own witnesses. And yet some Judges have felt forced to do precisely that. Such a descent regrettably forces the Court to assume two conflicting roles —— an advocate and an arbiter —— to the ultimate detriment of both.

This conflict can be avoided and the Court can revert to its impartial role provided that it is given a source of evidence that is wholly independent of the other claimants. In recent years, there has been a growing judicial and legislative movement to provide that source through the use of independent legal counsel for the child. This is exactly what was done in this Ontario case.

3: POSSIBLE ROLES FOR CHILDREN'S LAWYERS

It has been suggested that the role of the lawyer is a function of the child's capacity to "instruct" counsel.[23] Implementation of this proposal would require a prior determination of the child's capacity, a time consuming mechanism that may subject the child to adverse exposure to the judicial process.[24] In addition, neither legislation, nor judicial pronouncements have addressed the issue.[25]

Perhaps, the appropriate role for counsel may be defined as a function of the nature of interests that he is to advocate. Three possible roles are open to him.

3.1: Guardian ad Litem

Historically, the child has been perceived as being under a legal disability. Being unable to determine his interests rationally and competently or to assert his rights in a civil legal proceeding, the child could only act through an adult who made decisions on his behalf. The law refers to this person as the guardian and to the child as his ward — concepts that date to feudal England.

Traditionally, the principal and historic responsibility of the guardian was to protect his ward's property interests until the ward reached the age of majority.[26] Naturally, that meant that only children who were blessed with worldly goods ever had guardians — a small minority indeed. The guardian was appointed invariably by the father through a deed, during the father's lifetime or by the father's last will and testament; or he could be appointed by an order of a Court. Usually, a kinsman or a close family friend was chosen. In more modern times, Courts have come to rely on public law officers, such as the Official Guardian, the Official Solicitor or the Public Trustee.

Through slow evolution, the guardian began to assume other functions in respect of his ward. For example, legislation in Manitoba[27] offers fairly accurate catalogue of a modern guardian's duties:

(a) to the custody, control of and responsibility for the care, maintenance and education of the child;

(b) to the possession and control of real property of the child and the receipt of rents and profits therefrom;

(c) to the management of the personal property of the child;

(d) to act for and on behalf of the child; and

(e) to appear in any court and prosecute or defend any action or proceedings in which the child is or may be affected.

It is in this last capacity that the guardian would participate in legal proceedings before the Courts on behalf of his ward.

Where a child had no full-time guardian —— and historically, most children had none —— a child could acquire or a Court would appoint a temporary guardian for the limited purpose of prosecuting or defending any legal action involving the child's interests.[28] This limited guardian was called a guardian ad litem (that is, a guardian for the purpose of the lis or the litigation). Historically, he was not a lawyer, but a kinsman, close friend or concerned individual —— a lay person who could and often did hire a lawyer whom he "instructed" on his ward's behalf. As the mature alter ego of the child, the guardian ad litem determined the interests of the child

in the circumstances as seen from his responsible adult perspective; then he proceeded, through the lawyer, to take the best course of action to protect them. Thus, it was the guardian's views and not necessarily the child's wishes that were placed before the Court.

The concept of a guardian ad litem, then, is not a novel one to the lawyer. He is comfortable with it, so long as he acts as the lawyer and someone else acts as the guardian. The confusion begins, however, when the lawyer is invited to assume both roles —— the role of the instructor and the "instructee". By training and by ethical temperament, a lawyer is loathe to act on self-instruction, possibly against the wishes of his client who now happens also to be his temporary ward.

The trouble is, however, that some statutes have specifically called upon the lawyer to function as a guardian ad litem for the child. Even in the absence of statutory authority, Judges of superior Courts, purporting to exercise the Courts' inherent powers, have appointed lawyers for the child, again specifically clothing them with the responsibilities of a guardian ad litem.

For a lawyer to be advocate and guardian ad litem at the same time is to be in an uncomfortable and contradictory

role. As guardian, he would first determine what, in "his" view, promotes the future well-being of the child; as lawyer, he would then instruct himself and advocate that position. Thus "his" view is placed before the Court which may or may not coincide with that of the child. To a barrister, this constitutes a paternalistic and unprofessional role, especially when he is not bound to represent even a competent child's view. A child may not be willing to confide in his own lawyer, as he would inevitably perceive that "he" is not being represented. Thus his trust in the judicial process and his belief that adults actually care for children may be seriously eroded.

3.2: Amicus Curiae

The role of amicus curiae also has historical roots and is well known to the legal profession. The term means "friend of the Court" and it refers to a lawyer who was appointed by a Court of equity to assist the Court in an impartial exposition of certain facts, the state of the law or of the interests of those who are not parties before the Court (such as the general public interest). In more recent times, self-styled and self-appointed amici curiae have been allowed to appear in other Courts, but only by permission of the Judge. Whether directly appointed by the Court or given leave to appear, the amicus curiae has only such duties as conferred or allowed by the Court.

Ideally, then, the allegiance of the amicus curiae is to the Court and not to any of the litigants before the Court. His role should be neutral in respect of the outcome of the litigation and should be directed at assisting the Court in the administration of justice. Nevertheless, Courts have occasionally instructed or allowed the amicus curiae to speak on behalf of interested persons whose concerns would otherwise receive no audience before the Court and would not be weighed in any final judgment.[29] To avoid the making of a judgment in such ignorance, a Court may find the submissions of an amicus curiae invaluable.

In child custody and protection proceedings, the amicus curiae helps the Court in maintaining an impartial position. He relieves the Judge from the dangerous praactice of interviewing children or of descending into the "arena" of the litigation in search of the missing vital evidence. Thus, he ensures that the Court has before it complete facts, including expert evidence, to counterbalance the distorting partisan contentions and, thus, lead to the best resolution of issues.

The amicus curiae has been, historically, a familiar and comfortable role for the lawyer. It involves a pure exercise of legal skills. All that is sometimes missing from his normal responsibility in private practice is the advocacy of partisan interests.

Since the amicus curiae acts upon a Court's instruction or leave, it cannot always be maintained that the child's interests are being represented by counsel —— at least not unless those instructions or that leave include representation of the child's interests. Thus, when a child has the capacity to formulate and does in fact formulate an opinion, the amicus curiae would ordinarily submit for the Judge's consideration the child's position merely as another piece of evidence, but would not necessarily marshal his legal skills to argue in favour of the child's position. Thus, while clearly valuable to the judicial process, representation by the amicus curiae is not always (perhaps not even often) separate legal representation of the child, since the Court and not the child is the centre of allegiance for the amicus.

3.3: Advocate

This is the traditional and natural role of a lawyer. As an advocate, he is free to advance the client's desired results zealously, although within the established ethical bounds. He represents the "legal rights and interests" of his client in the dispute. His goal is to convince the Judge that the law accords them better protection, in the circumstances, than to those of the other parties. He passes no judgment either on the nature of those rights and interests or on whether they promote the client's happiness or future economic well being.

In the context of child representation, this role may create a serious ethical dilemma for some lawyers particularly when the child's wishes differ profoundly from the lawyer's own view of the child's best interests. Certainly, the lawyer may assist his young client to re-evaluate his position by presenting to him his conclusions and recommendations —— just as he would with a somewhat reckless adult client. But should the child persist in his views, then the lawyer proceeds on the principle that any client has the right to have the Court hear, and have advocated before it, a position that the client wants, even if it should prejudice the client's own "best interests".

Social workers and other professionals in the field of child care have raised strong objections to the advocate role in civil proceedings that involve the welfare of a child. Their antagonism seems to be rooted in the fear that the advocacy of the child's interests and rights may discredit and weaken their case promoting the "best interests".

That fear is without foundation. All custody and protection statutes require that the Judge base his decision on the child's "best interests", either as the sole or the paramount criterion. The child's rights or "interests" constitute but one factor in the Judge's calculations that will not be allowed to prevail unless they coincide with the

child's "best interests". In short, no Judge would give effect to the child's rights if it would violate a statutory direction to render a judgment only on the basis of the child's "best interests".

Second, a vigorous challenge of expert evidence may actually crystallise the vague concept of "best interests" and, thus, enable the Judge to make a more informed decision in the "best interests" of the child.

Naturally, this role is not met with universal acclaim. Even some groups of lawyers assert that it is their responsibility and duty to represent the child's "best interests" when these, in their opinion, conflict with the child's "interests". Some legal writers, in fact, maintain that[30]

> ... the juvenile attorney may feel permitted — indeed obligated — to act on a conviction that ... paternal guidance is the best thing for the child he is representing.

This is an ill-founded position. By training, a lawyer is not a Judge; he is not called to pass judgment on his client, or allow his judgment to prevail over the child's view of his interests:[31]

> The pleasing but puerile notion that the attorney must act as the guardian of the objectives of the juvenile justice system should be put to rest. The court is the guardian of the values of the system. The defense attorney's role must be to represent his client vigorously and wholeheartedly.

The position of the Law Society of Upper Canada is clear:[32]

> ... the child's voice should not be watered down by someone else's opinion of what is good for him, least of all by counsel appointed to represent him.

The same position is advanced by the Children's Services Division of the Ontario Ministry of Community and Social Services.[33]

Even some Judges remain hostile to the role of advocate. A substantial number of cases have held that if potential danger to the child may result by the advocacy of his interests, then the lawyer must advise the Court of this development.[34] This, however, raises the problem of confidentiality of information between a solicitor and his client. It is a privilege that belongs to the client and a lawyer may not ethically violate it without his client's full consent. The Law Society of Upper Canada is adamant in maintaining that the statutory phrase "legal representation":[35]

> ... in itself confers the meaning that it is advice with respect to the legal rights of the child which is being provided, and that advice is being provided to the child, not to the parents, not to the court, and not to the society, but only to the child.

This disclosure of information given in trust by the child to his lawyer could seriously undermine the child's view of the judicial system. He may come to feel that adults are imposing a decision on him and his point of view is not only unrepresented, but being subverted. Thus, his stable development as a responsible citizen in a free society could be hampered by a sense of distrust toward society's institutions and professions.

4: LEGAL REPRESENTATION IN THE UNITED STATES

4.1: Retainer of Counsel in Custody Litigation

New York was the first of the United States to enact a law for the appointment of counsel to represent children in Family Court proceedings. The legislation is based on the conclusion that:[36]

> ... counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determination of fact and proper order of disposition.

The same motivation pervades similar legislation in other American states.[37] Wisconsin is a leader in this regard. Its statute provides for the appointment of a guardian ad litem to represent a child in contested custody disputes. Similar laws have been enacted in Massachussetts,[39] Minnesota[40] and Texas.[41] In Ohio[42] and Rhode Island,[43] the Courts have explicitly held that they have "inherent" power to appoint legal counsel for children.

The counsel appointed must be an attorney admitted to practise in the state.[44] In New York State, the office of Court administration or the Appellate Division of the Supreme Court has either entered into an agreement with the legal aid society and designated a panel of law guardians or appointed a qualified attorney on an ad hoc basis.

The statutes do not purport to limit the child's right to request or retain his own counsel. Parents, next friends or other persons may provide the child with counsel. Judicial intervention seems to be limited only to cases where the child is unrepresented or is unable to afford or obtain "independent" counsel.[45]

4.2: The Court's Discretion to Appoint Independent Counsel for a Child

When a child is unrepresented, appointment of separate counsel is at the discretion of the Court. The obvious issue is how and when this power is exercised.

Most Courts adopt the view that a child's best interests are usually better protected by the parents and that strangers should not interfere with parental rights to the custody of their children. Intervention of separate legal counsel is justified only when there is "reason for special concern"[46] or where it is in the "best interests of the minor children".[47] Thus, the discretion will not be exercised unless the interests of the child are found to be in conflict with those of the parents. For example, where the issue was merely the propriety of joint custody, rather than the fitness of either parent, one Court saw no merit in a lawyer for the children, since the parents, although locked in a vigorous contest, showed a genuine concern for their children's welfare.[48] In another case, where the welfare of the children would not be adversely affected by permanent placement with either parent, failure to appoint separate counsel was held not to amount to an abuse of the Court's discretion.[49]

Where, however, it is apparent that the dispute centres on the interests of parents rather than the best interests of

the child, American Courts have ruled that separate counsel must be appointed.[50] In such cases, it is likely that the contesting parties would not fully disclose factors that would best preserve the child's present and future well-being and thus deprive the Court of vital evidence. In addition, the child's own view of his interests may go completely unrecognised.

Wisconsin seems to have ventured the farthest in appointing independent counsel for children. An examination of the Court rulings shows a gradual clarification of judicial discretion which culminated in a 1975 decision that a determination of custody, by definition, raises "special concern" for the children's welfare.[51] Thus, in proceedings to vary existing custodial arrangements, the appointment of a guardian ad litem was held to be required.[52] In such a case, the welfare of the child is the central issue. The variation sought, unless clearly inconsequential, raised a question of "special concern" for the future stable growth of the child.

In some cases, even the interests of siblings may be incompatible with each other. Where there are children of former marriages, for example, there is a clear danger of conflicting interests between the parents and some of the children and among the children themselves, a situation warranting independent representation for all.[53]

4.3: Retainer of Counsel in Child Protection Proceedings

There do not seem to be any legal barriers preventing a child, or other person on his behalf, from retaining his own counsel in child abuse and neglect proceedings. Most legislation provides for the appointment of counsel when the child cannot afford one or when independent legal representation is not otherwise available to him.

The right to counsel may be absolute or discretionary. The discretionary statutes[54] empower Courts to appoint counsel when it would be in the child's interests or when it would be necessary to the proper determination of the case. A few states have strictly mandatory provisions. New York's is the oldest.[55] In others, the statutes are mandatory in nature but only for certain special cases. In California, for example, the statute requires appointment in dependency proceedings culminating in temporary severance of the child-parent relationship when neglect, cruelty, depravity or physical abuse are alleged or when a conflict of interests exists between the child and the parent.[56]

Where the power to appoint is discretionary, basically the same considerations discussed in custody proceedings guide the Court's exercise of that discretion.[57] Considering that inherent in the proceeding is the potential conflict of interest between the child and the parents, the Courts have more readily

exercised their discretion in favour of appointment. Thus, in the absence of an affirmative showing that the minor's interests would otherwise be protected, the Court must appoint separate counsel.[58]

4.4: Role of Child's Counsel

Legislation providing for the appointment of separate counsel for children has been enacted in most states only very recently. Consequently, in many, such as California, the case law regarding the role of the child's counsel is minimal or non-existent. Moreover, little guidance is provided in the legislation itself. Even where there is some statutory direction, it is veiled in vague and imprecise language.

Two states, New York and Wi consin have at this date generated an adequate body of case law —— sufficient enough to draw some conclusions about counsel's role. Their approaches represent the two sides of the controversy surrounding the role.

New York's system of law guardians assigns to its lawyers a two-fold responsibility: "to help protect their interests and to help them express their wishes to the court".[59] The former sounds more like the role of a guardian ad litem while the latter more like an amicus curiae. It is an ambivalent role reflecting the drafters' hope that law guardians would not create a fully adversarial system in the Family Court while meeting the

need for a third voice, presenting, but not necessarily advancing, the view of the child. The title itself — law guardian — declares this ambivalence.

The leading judicial decisions mirror this duality. In one case, for example, the law guardian was required to

a) conduct a thorough investigation,
b) file a complete report with the Court,
c) file objections, if such were in the child's "best interest", and
d) act as an advocate for the child.[60]

This is a highly hybrid role containing characteristics of the three possible roles previously discussed.

In another case, the role of amicus curiae was emphasised. The law guardian was instructed to be neutral, like a Judge, since, in addition to his role as counsel, advocate and guardian, he was said also to serve in a quasi-judicial capacity, having some responsibility to aid the Judge in arriving at a proper disposition.[61]

Essentially the guardian, consonant with the legislative mandate "to be helpful in making reasoned determinations of fact and proper order of dispostion", acts as an amicus curiae.

In so far as he acts as an advocate, the protective aspect of his role is nevertheless given priority. While he is certainly to present before the Court the wishes —— that is, the interests and concerns —— of the child, yet as guardian he is to protect the child's interests —— that is, best interests —— should they conflict with his wishes. The concept of "guardianship", in fact would seem to require that the general welfare of the child be evaluated by counsel in fashioning his course of action. The role of the protective and wise parent has, in effect, been transferred to the law guardian.

In Wisconsin, the legislation, if read literally, presents the same ambiguities of role as that of New York State. The statute refers to an attorney who, as a "guardian ad litem", is supposed to "represent the interests" of children but at the same time somehow to manage to "advocate their best interests".[62] It offers, however, no resolution to those situations in which the child's "interests" should conflict with his "best interests".

The conflict has been resolved by the Wisconsin Courts, but in a way that raises questions about judicial interpretation or statutes. Judges have ignored the literal meaning of the words "guardian ad litem" —— indeed, have ignored the legislation itself —— and have substituted their own ideals. In one far-reaching decision, the state's Court of Appeal ruled that the law had made minor children:[63]

> .. necessary and indeed indispensible parties to the proceedings and must be represented in their own capacities as parties.

Clearly, if a child is a party to the litigation, then the lawyer for the child is accountable to the child and no one else. The decision reflected unequivocally:[64]

> ... a conviction that the children are best represented by the presence of a vigorous advocate free to investigate, consult with them at length, marshall evidence and to subpoena and cross-examine witnesses. The Judge cannot play this role. Properly understood, therefore, the Guardian ad litem does not usurp the Judge's function, he aids it.

Consonant with party status is the necessary establishment of a true solicitor-client relationship between the child and this so-called "guardian ad litem". In fact, the Court seemed to lean toward this conclusion when it said:[65]

> The guardian ad litem is more than an adjunct to the Court. He is the attorney for the children and their interests. He must perform his duties in accordance with the standards of professional responsibility adopted by this Court. Code of Professional Responsibility, 43 Wisc. 2d, December 16, 1969. Nominal representation that fails to assure that children are treated as parties to the action is insufficient and constitutes a breach of the duties of professional responsibility.

Recently, an isolated decision of the same Court seemed to retreat from this traditional view to one more in

tune with the literal meaning of "guardian ad litem", by emphasising the lawyer's duty to "protect" and advance the "best interests" of the children.[66] On the whole, however, this case seems to be an aberration; the general tendency of Wisconsin's Courts is to favour an advocate's role for children's lawyers.

Not all children's lawyers are appointed by the Courts. Both in New York State and Wisconsin, children can retain their own lawyers or some interested person (such as a parent) may retain one for them. Clearly, these lawyers fall outside of the scope of this special legislative system for judicial appointments and, of course, are not bound by judicial interpretations of their role under that legislation. The only thing that regulates their role under these circumstances is the code of professional ethics of the state Bar association, which will invariably impose the advocate's role.

5: LEGAL REPRESENTATION IN AUSTRALIA

5.1: Retainer of Counsel in Custody Litigation

The enactment of the federal Family Law Act 1975[67] by the Australian Parliament introduced a new element in the process of child custody adjudication. It gives the federal Family Court discretionary powers to order separate

child representation, either of its own motion or upon the application of a child, a welfare officer or a child care organisation or any other person. No statutory criteria are provided. It can only be assumed that the child's welfare will be the overriding consideration.

Any Court request for separate representation is arranged through the Australian Legal Aid Office. As a matter of practice, that agency always accepts such a request.

As in other jurisdictions, the practice of separate representation of children was not unheard of prior to 1975. When the need was pressing, Australian Courts took steps to provide independent counsel for children.[68]

The lack of case law makes it difficult to determine how and when Courts exercise their discretion under the Act. Certainly no reported cases have been located where requests for separate representation were refused. It is expected that a separate representative may not be appointed as a matter of course in every contested custody dispute. Thus, if it appears that the parties properly address the issue of the child's welfare and provide the Court with a full range of viable alternatives, there is little contribution that a child's representative can make, especially since a separate Court official already prepares what purports to be an independent report.

If the parties are engaged in bitter, acrimonious litigation likely to overshadow the evidence as to the welfare of the child, however, a separate counsel for the child may play an important role. As a matter of general principle, it appears appropriate that separate representation will be ordered
interests of the child do not appear to coincide with those of either parent.

5.2: Role of Counsel

The role of the separate representative has not yet been settled. In a recent appeal, a full bench of the Family Court expressed tentative views on child advocacy in the Court, emphasising, however, the importance of retaining flexibility of approach.[69] Two Judges laid down the following functions of the separate representative:[70]

a) To cross-examine the parties and their witnesses.

b) To present direct evidence to the Court about the child and matters relevant to the child's welfare.

c) To present, in appropriate cases, evidence of the child's wishes.

In concluding, they added that the lawyer's:[71]

> ... submissions should be in accordance with those wishes [of the child] unless he considers that this would not be in the child's best interests.

Thus the counsel is given a two-fold role: to help the Court in the fact finding process and to advocate the best interests of the child. The former sounds like the role of an amicus curiae, the latter sounds more like a guardian ad litem.

Again, however, it appears that the Court had not looked at the strict words of the statute. The language of the Act does not in fact empower a Court to appoint anything like a "guardian ad litem; nor does it suggest that the Court can exploit an assistant (an amicus curiae) in its desire to ascertain the child's best interests. The Australian statute merely refers to an order that the child be "separately represented".

Even more recently, a trial Judge of the Family Court of Australia has enunciated a more traditional role for the representative, disagreeing with these earlier tentative views:[72]

> It is my respectful view that to suggest that the advocate, whether counsel or solicitor, has a duty to express his personal opinion as to the child's interest or welfare misunderstands the role of an advocate. Advocacy, as understood and practised in this country, demands that the advocate conduct his client's case objectively and without necessarily holding, and certainly

> not expressing, any personal opinion or view as to the case or any aspect of it. To permit otherwise would be to fly in the face of Australian and English understanding of the role of an advocate.
>
> So far as counsel are concerned, the law is that a barrister shall refrain from expressing his personal view or opinion of the case in court, or from becoming personally involved in any way; see Ryves v. The Attorney-General (1886) Annual Register 265 and Lord Hershell, The Rights and Duties of an Advocate, at p. 10.
>
> There is no logical reason why a solicitor acting as a separate representative should be permitted to take any different stance or role.

Yet, he too drew no strength from the actual language of the Act and seemed to draw conclusions quite independent of that Act.[72a]

Australia still awaits a definitive ruling on the issue.

Nothing in the federal Act appears to bar a child or his parent from retaining counsel privately. For such lawyers, outside the Australian Legal Aid Office, there appear to be no role guidelines save the codes of ethics of the state Bars.

5.3: Child Protection Proceedings

Child protection in Australia is a matter coming within the legislative competence of the state legislatures. These legislatures seem not to have made any statutory provision for separate legal representation of children in such proceedings, but this has apparently not deterred the Courts from invoking their "inherent" powers to appoint counsel when they deemed it necessary to protect the welfare of the child. Naturally, the invocation of this power is discretionary.

In one reported case, counsel's function was:

(a) to have an independent approach to the facts which seems to be a request for an amicus curiae;

and

(b) to put before the Court the child's "reasonably" based wishes, which seems to be urging for something between the role of a guardian ad litem and an advocate.[73]

Any evaluation of the child's wishes presumes, of course, that the child is able to articulate his wishes. The trouble is that the lawyer is asked to judge whether those wishes are reasonable —— a dangerous criterion since reasonableness may be measured by the fidelity with which the child's wishes

coincide with the views of the lawyer. What a reasonable lawyer may choose may not necessarily be the choice of a reasonable child.

6: LEGAL REPRESENTATION IN CANADA

6.1: Retainer of Counsel in Custody Proceedings

There is no statutory prohibition in Canada on the child's own retainer of counsel. To the contrary, in several jurisdictions of the Dominion,[74] the child has a statutory right to bring an application in respect of his own custody and access —— he might even be able to launch protection proceedings[75] —— a circumstance that makes him an applicant and therefore a party to the proceedings. These acts could presumably be executed through "his own" lawyer.

Parents, guardians, or other interested persons may retain also counsel on behalf of a child. Although the practice was discouraged in one Ontario case,[76] it appears to have been an isolated precedent that has not been followed in the years since it was handed down.

Legislation in New Brunswick and British Columbia[77] gives certain Crown law officers the administrative discretion to appoint legal representatives for children in custody matters.

Aside from these indirect references, neither provincial nor federal statutes recognise the need of children to separate legal representation in custody disputes. This void, however, has not deterred Judges of the Superior Courts of record from occasionally appointing counsel for children in appropriate instances.[78] They appear to have justified their actions on one of two grounds. One authority invoked is their parens patriae jurisdiction which they enjoy as Courts of equity.[79] The other is the broad language of statutes that call for the appointment of certain public law officers (such as the Public Trustee or the Official Guardian) whose normal work involves their intervention to protect the proprietary (and not personal) interests of infants, lunatics and mental incompetents.[80] Neither of these justifications is generally available to inferior Courts of summary family jurisdiction where the majority of custody disputes are tried.

6.2: Role of Counsel in Custody Proceedings

Privately retained counsel is expected and will assume the traditional adversary role.[81]

The duties of judicially appointed counsel have been prescribed by the Superior Court Judge according to the need of each specific case. Substantially, these duties require the lawyer to ensure that the Court has before it accurate and complete evidence and to assist the Court with an independent view of the case.[82] Clearly, these are duties consonant with those usually discharged by an amicus curiae.

When an officer such as the Official Guardian is directed to make a "full, complete, and independent" representation "as though [the children] were parties to these proceedings",[83] presumably he is to act independently of the adult parties but not necessarily of the Court.

This is the practice followed in Alberta, where, at present, the Alberta Court of Queen's Bench may appoint counsel in custody proceedings to serve as amicus curiae. A 1976 study prepared for the Alberta Institute of Law Research and Reform recommended that an office of Amicus Curiae be formally established and that representation by this officer be made mandatory in all cases of alleged abuse and neglect and in custody disputes.[84] It was not apparent, however, how his neutral role might accommodate advocacy of any of the children's "interests".

While Superior Courts in Canada appear to favour the amicus curiae role, the case law on the issue is not particularly voluminous and the whole question of child representation in custody disputes has not been explored with any great fervour. That no Court has urged an advocate's role may, therefore, not be particularly meaningful.

6.3: Retainer of Counsel in Child Protection Proceedings

In the last few years, responding to the increasing awareness of children's rights and interests voiced by Judges, legal critics and concerned groups, some provincial legislatures have reformed their child protection laws to include provisions for the legal representation of children's "interests" in certain appropriate cases. All of these reforms centre about the appointment of counsel for the child either by the Court or by some other official.

Some of the reforming provinces, however, have specifically stated that a child has a right to retain counsel —— presumably on a private basis.[84a] Even in the absence of such a provision, it is probabl that a child could retain his own counsel or have some responsible adult retain counsel for him.

While each provincial reform has unique features, certain general groupings are possible. One group of provinces, consisting of Alberta, British Columbia and New Brunswick, has embarked on a system that has imposed administrative control over appointments of representatives for children.[85] Their legislation does not proclaim any general right to counsel and whether a child receives a lawyer is a purely administrative decision at the discretion of either elected or appointed officials. Only in New Brunswick does a Court play a minor role in "advising" a ministerial official that the child should be represented by counsel or other responsible spokesman. It is expected that the "advice" of the Court will be followed.

There are no criteria how this administrative discretion should be exercised. The Alberta legislation merely points out that counsel may be retained if it is in the "public interest", a phrase whose current limits are not known. Presumably, it includes the child's interests as well as those of the parents, the state, and, perhaps, the community at large. The impact of these legislative provisions, therefore, will largely depend on the effectiveness of the administrative process devised to implement them.

Another group of provinces, comprising Manitoba, Ontario and Quebec, recognises the right of children to legal counsel.[86] Should they not retain a private lawyer, however,

one may be appointed under certain circumstances by the trial Judge. Only the Ontario provision imposes on the Judge the positive duty to determine the desirability of a separate legal representative for the child.[87] In all three provinces, the legislation sets out certain criteria, in addition to all other relevant considerations, to guide the discretion of the Judge in ordering legal representation for a child.[88] Basically, these guidelines focus on the existence of any possible conflict of interests between the child and his parent and between the child and the child protection agency, and on the capacity of the child to express his views. In Quebec, these criteria are far less comprehensive but equally subjective.

Once the Judge exercises his discretion, he may direct that counsel be appointed. To whom the direction is addressed is not known. In practice, in Ontario at least, the Official Guardian's Office retains a lawyer from private practice under the Ontario Legal Aid Plan.

6.4: Role of Counsel in Child Protection Proceedings

Two quite distinct and opposite positions seem to have emerged from the few cases that have dealt with the role of counsel in protection hearings.

One judicial view supports the traditional solicitor-client relationship. Counsel is to represent the child's interests and to carry out the child's instructions. Where the child's wishes are ambivalent, counsel's role is to explore and attempt to explain this conflict to the Court by strictly evidentiary methods. The ultimate responsibility to determine what is in a given child's best interests, however, rests with the Judge alone. Counsel acts unprofessionally and improperly if he advances his personal view of the child's welfare, should it conflict with the child's "own interests".[89] In addition, counsel, even though judicially appointed, may be dismissed by the child, at least where counsel insists on representing his own subjective view of the child's "best interests" rather than the child's legal interests.[90]

The other position is more in tune with the social worker's view that Family Courts and their officers have an obligation to strengthen the family unit and to protect children. One Judge asserted that:[91]

> ... an adversarial posture by counsel would be detrimental and undermining to the family court in attempting to achieve its social and community objectives.

All counsel, the Judge continued[92]

> ... have the duty ... to give an honest and professional statement of what they feel is in the best interest of the child and the reason for that position.

In a later case, the same Judge reaffirmed his position and held that representing a child's "best interests" involves the assumption of a discretion by counsel to decide how he will fulfil his role.[93] If the child's wishes are in conflict with his "best interests", then counsel is to advocate the latter. This imports deciding what is "best" and, thus, passing judgment on the position of the client. Moreover, it strains the meaning of the legislation where the word "best" is conspicuously absent; it only provides for "legal representation to protect the interests of the child".

The two positions seem to stem from two different premises. The first seems to indicate that a Family Court, even in a protection hearing, is, first and foremost, a Court of law that must hear the submissions and views of the parties and adjudicate according to the legal standards set by the legislature and the traditions of jurisprudence. The second, on the other hand, emphasises the social policies behind the creation of the Family Courts. Now it is certainly true that it is the duty of every Judge presiding over any Court of law to promote and to enfore social policies, but what this latter position ignores is that social policies are decided by elected, law-making bodies —— the legislatures and not Judges —— and set out in the statutes, ordinances and regulations that they promulgate. Every enactment purports to affect social relationships to promote some desirable goal or policy. A Judge's conduct is questionable, however, when

he acts on alleged policies that are not set out in or readily implied from a written law.

It is true that a Family Court is a forum in which families in crisis can seek help. But that help invariably comes from the social services that are affiliated with the Court. The Courtroom itself, however, is not a thereapeutic institution and neither the Judge nor the lawyers are social workers when they become engaged in the judicial process. And it is an unfortunate day for citizens when a lawyer will advance a client's wishes in Court only if he is convinced of the inherent goodness of the client's position; the client can be tried, judged and be found wanting even before he arrives at the Courtroom door.

Child representation in protection proceedings is still in an embryonic stage in Canada. So far, only Ontario has generated any reported case law, none of which has ever gone to appeal. Much time is needed, therefore, before a consensus can emerge.

CONCLUSION

There is a great fear in many quarters that advocacy of the child's views, where they conflict with his best interests, may be productive of certain harm to the child. It is a sentiment that sees children's "rights" only in terms of etherial propositions, such as the "right" to health care, to personal

development, to a loving environment and to play and recreation —— worthy goals indeed, but difficult to enforce in a Court of law. After all, how does any Court compel a parent to love his child? But when it comes to concrete "rights" that are ordinarily exercised by adults, however, there is a sudden reluctance to give any meaningful effect to them. Many of those who would oppose advocacy of children's "rights" probably do so without any insight into or appreciation of the professional ethics within which a lawyer is bound to operate. Too often, they equate the zeal of advocacy with irresponsible and purposeless obstructionism.

This paper has already discussed some of the reasons why true child advocacy should be encouraged. What has not been mentioned is perhaps the most important: that the child should not only be represented but that the child perceive that he is being represented.

FOOTNOTES

1. A husband, for example, has "that indirect interest which every man has in the happiness and welfare of his wife.": Smith v. Hancock, [1894] 2 Ch. 377 at 386, 63 L.J. Ch. 477 at 481, 70 L.T. 578 at 580, 10 T.L.R. 435 at 437, 42 W.R. 465 at 467 (C.A.), per Lindley, L.J.

   "Interests" have been defined with some precision as:

   > Those claims, wants, desires, or demands which persons individually or in groups seek to satisfy and protect, and of which the ordering of human society must take account. The legal system of a country does not create interests; these are created or extinguished by the social, moral, religious, political, economic, and other views of individuals, groups, and whole communities. The legal system recognises or declines to recognise particular interests as worthy of legal protection, and jurists classify those recognised and argue about whether certain others should be recognised.

   See David M. Walker (ed.): The Oxford Companion to Law (Oxford: Clarendon Press, 1980), at 629.

2. Recently, outside persons claiming to have an interest in the outcome of the appeal were allowed to make submissions to the Supreme Court of Canada. See Attorney General for Canada v. Lavell, [1974] S.C.R. 1349, 38 D.L.R. (3d) 481, 11 R.F.L. 333, 23 C.R.N.S. 197; and Morgentaler v. The Queen, [1976] 1 S.C.R. 716, 4 N.R. 277, 53 D.L.R. (3d) 161, 20 C.C.C. (2d) 449, 30 C.R.N.S. 209.

3. On occasion, they can affect the very life of the child. See, for instance, the circumstances surrounding the death of Maria Colwell described by Olive M. Stone: "The Welfare of the Child" in The Child and the Courts, edited by Ian F.G. Baxter and Mary A. Eberts (Toronto: Carswell, 1978), at 237-238. See also the account of the death of a one-year-old congenital drug addict within a month of his Court-ordered return to his parents, by James R. Devine: "A Child's Right to Independent Counsel in Custody Proceedings" (1975), 6 Seaton Hall L. Rev. 303.

4. See subsection 38(3) of the Child Welfare Act, R.S.O. 1980, c. 66.

5. See subsection 6(4) of the Child and Family Services and Family Relations Act, S.N.B. 1980, c. C-2.1 [in force on 1 September 1981].

6. See Voghell v. Voghell and Pratt (1962), 38 W.W.R. 368, 35 D.L.R. (2d) 592 (Man. Q.B.); Saxon v. Saxon, [1974] 6 W.W.R. 731, 17 R.F.L. 257 (B.C.S.C.); Guy v. Guy (1975), 22 R.F.L. 294 (Ont. H.C.); Stein v. Stein (1976), 14 N.B.R. (2d) 627, 15 A.P.R. 627 (N.B.Q.B.).

7. McKercher v. McKercher, [1974] 2 W.W.R. 268, 41 D.L.R. (3d) 760, 15 R.F.L. 39 (Sask. Q.B.); Re Reid and Reid (1975), 11 O.R. (2d) 622, 67 D.L.R. (3d) 46, 25 R.F.L. 209 (Ont. Div. Ct).

8. Alberta: clause 32(2)(b) of The Provincial Court Act, 1978, c. 70; and clause 46(1)(b) of The Domestic Relations Act, R.S.A. 1970, c. 113;
Northwest Territories: paragraph 34(1)(b) of the Domestic Relations Ordinance, R.O.N.W.T. 1974, c. D-9.

In other Canadian jurisdictions, the custody and access legislation is worded so generally (for example, "On application, the Court may ...", without specifying who may bring the application), that it is possible for any interested person — including presumably the child — to launch the proceeding. See:

British Columbia: subsection 35(1) of the Family Relations Act, R.S.B.C. 1979, c. 121;
Manitoba: section 116 of The Child Welfare Act, 1974, c. 30 as amended by 1980, c. 41;
New Brunswick: supra fn. 5, subsections 129(2) and 129(3);
Ontario: subsection 35(1) of the Family Law Reform Act, R.S.O. 1980, c. 152;
Prince Edward Island: subsection 35(1) of the Family Law Reform Act, 1978, c. 6;
Saskatchewan: subsection 3(1) of The Infants Act, R.S.S. 1978, c. I-9.

9. Ontario seems to be the only Canadian jurisdiction that permits private citizens to compel child protection authorities to act. Presumably, a child could qualify as such a citizen. See subsections 22(2) and 25(13) of the Child Welfare Act, supra fn. 4.

10. See M. v. M. (Child: Access), [1973] 2 All E.R. 8] at 85 (Fam. Div.) per Wrangham, J.; Currie v. Currie (]975), 18 R.F.L. 47 at 51-52 (Alta Tr. Div.), per McDonald, J.; Knudslien v. Rivard (1978), 5 R.F.L. (2d) 264 at 269 (Alta Fam. Ct) per White, Asst Ch. Prov. J.

11. Manitoba: subsection 25(7) of The Child Welfare Act, 1974, c. 30, as added by 1979, c. 22;
Ontario: section 20 of the Child Welfare Act, R.S.O. 1980, c. 66;
Quebec: sections 78 and 80 of the Youth Protection Act, 1977, c. 20.

12. In Ontario, for instance, clause 1(o) of the Judicature Act, R.S.O. 1980, c. 223, defines "party" as follows (Emphasis added):

> "party" includes a person served with notice of or attending a proceeding, although not named on the record; ...

By virtue of section 31 of the Interpretation Act, R.S.O. 1980, c. 219, this definition extends to all legal matters. Unfortunately, it is not exhaustive, nor does it purport to be so.

Perhaps a more practical definition of "party" would be as follows: It is a person, either individual or corporate, who has an interest, whether favourable or adverse, in a legal proceeding; whose presence, whether on the record or otherwise, is either necessary or proper; and who will be bound by the judgment of the Court, even though he, she or it has chosen not to participate formally in the proceeding.

By that standard, even an infant in a custody-related proceeding could be said to be a "party".

13. See this text, infra.

14. de Montigny v. de Montigny (1975), 70 Wisc. 2d 131, 233 N.W. 2d 463 (Wisc. S.C.).

15. See Robert Mnookin: "Child Custody Adjudication — Judicial Functions in the Face of Indeterminacy" (1975), 39(3) Law & Contemp. Prob. 226.

16. See, for example:
British Columbia: subsection 24(1) of the Family Relations Act, R.S.B.C. 1979, c. 121;
Manitoba: paragraph 1(a.2) of The Child Welfare Act, 1974, c. 30, as added by 1979, c. 22;
New Brunswick: section 1 of the Child and Family Services and Family Relations Act, supra fn. 5;
Ontario: clause 1(b) of the Child Welfare Act, R.S.O. 1980, c. 66.

17. Rules 3 and 8 of the Rules of Professional Conduct set out in the Professional Conduct Handbook (Toronto: Law Society of Upper Canada, 1978), at 5 and 20 respectively, provide:

> The lawyer must be both candid and honest when advising his client.
>
> ...
>
> When acting as an advocate, the lawyer must, while treating the tribunal with courtesy and respect, represent his client resolutely, honourably and within the limits of the law.

See also the Code of Professional Conduct (Ottawa: Canadian Bar Association, 1975).

18. Re E. and E. (1979), 26 A.L.R. 376 at 383, 36 F.L.R. 12 at 20-21, F.L.C. 90-645 at 78,373-78,374 (Aust. Fam. Ct, F.C.), per Asche, S.J.

19. See Mnookin, supra fn. 15, at 229.

20. See Edward D. Bayda: "Procedure in Child Custody Adjudication — A Study in the Importance of Adjective Law" (1980), 3 Can. J. Fam. L. 57 at 65-66.

21. See section 29 of the Child Welfare Act, R.S.O. 1980, c. 66.

22. Re Reid and Reid, supra fn. 7.

23. See Jeffrey S. Leon: "Recent Developments in Legal Representation of Children — A Growing Concern with the Concept of Capacity" (1978), 1 Can. J. Fam. L. 374.

See also the Children's Services Division of the (Ontario) Ministry of Community and Social Services: The Role of the Lawyer in Legal Representation of Children, an unpublished submission to the Subcommittee of the Law Society of Upper Canada Committee on Professional Conduct in the Legal Representation of Children (Toronto: 23 January 1981).

24. It may involve an unnecessary and detrimental inquiry into the voluntariness of the instructions if undue parental influence is suspected. Pshychiatric or other clinical assessments may be required to determine the child's mental capacity.

25. The sole comment on the matter in the reported jurisprudence (to the authors' best knowledge) was made in an Ontario case where a Judge stated that the legislation imposes no duty on a Court to conduct any inquest over the child's capacity to instruct; see Re J.C. and S.C. (1980), 31 O.R. (2d) 53 at 56 (Ont. Prov. Ct, Fam. Div.), per Karswick, Prov. J.

26. For a historical outline of the guardian's role and duties, see Walder G.W. White: "A Comparison of Some Parental and Guardian Rights" (1980), 3 Can. J. Fam. L. 218.

27. Section 114 of The Child Welfare Act, S.M. 1974, c. 30 as amended by 1978, c. 49.

28. In some jurisdictions, the guardian who represents an infant plaintiff (that is, the proponent of a legal proceeding) is called a "next friend". Any distinction, however, is a matter of semantics.

29. See the cases cited at fn. 2, supra.

30. Richard Kay and Daniel Segal: "The Role of the Attorney in Juvenile Court Proceedings — A Non-Polar Approach" (1973), 61 Georgetown L.J. 1401 at 1411.

31. Douglas J. Besharov: Juvenile Justice Advocacy — Practice in a Unique Court (New York, 1974) at 50.

32. Report of the Subcommittee on the Legal Representation of Children (Toronto: unpublished, May 1981), at 4.

33. Supra fn. 23.

34. Supra fn. 32, at 10 (emphasis added).

35. Section 241 of The Family Law Act, N.Y.L. 1962, c. 686, as amended by L. 1970, c. 962.

36. The majority of American states have legislation providing for legal representation of children in custody disputes and protection proceedings. See, for example:

California: section 237.5 of the California Civil Code, as added by Stats. 1965, c. 1530, and as amended by Stats. 1969, c. 489 and Stats. 1974, c. 246; section 4606 of the California Civil Code, as added by The Family Law Act, Stats. 1969, c. 1608, and as amended by Stats. 1976, c. 508; and section 317 and 318 of the Welfare and Institutions Code, Stats. 1937, c. 369, as added by Stats. 1979, c. 1068, and amended by Stats. 1980, c. 1254;
New York: section 249 of The Family Court Act, N.Y.L. 1962, c. 686, as amended by L. 1976, c. 656; L. 1977, c. 859; L. 1978, c. 481; and L. 1979, c. 531;
Wisconsin: section 767.045 of the Wisconsin Statutes, as amended by L. 1979, cc. 196 and 352; subclause 48.23(1)(b)(1) and subsections 48.23(3) and 48.23(3m), as amended by L. 1979, c. 300.

37. Section 767.045 of the Wisconsin Statutes, supra fn. 36.

38. Section 56A of the Massachusetts General Laws, c. 215, as amended by Stats. 1975, c. 400 and Stats. 1978, c. 478.

39. Section 518.165 of the Minnesota Statutes, as added by L. 1974, c. 33, and as amended by L. 1978, c. 772, and L. 1979, c. 259.

40. Section 11.10 of the Family Code, Texas Acts 1969, c. 888, as added by Acts 1975, c. 543, and as amended by Acts 1975, c. 476, and Acts 1979, c. 643.

41. Barth v. Barth (1967), 12 Ohio Misc. 141, 225 N.E. 2d 866 (Ohio Comm. Pl., Dom. Rel. Div.).

42. Zinni v. Zinni (1968), 103 R.I. 417, 238 A. 2d 373 (S.C. Rh. Is.).

43. Section 4606 of the California Civil Code, supra fn. 36, refers to "private counsel".

Section 242 of The Family Court Act of New York, supra fn. 35, as amended by L. 1970, c. 962, merely requires counsel to be an attorney admitted to practice in the state.

Section 767.045 of the Wisconsin Statutes, supra fn. 36, has a provision similar to that of New York.

44. Section 243 of The Family Court Act of New York, supra fn. 35 as amended by L. 1974, c. 833.

45. See, for example, subsection 48.23(4) of the Wisconsin Statutes, as amended by L. 1979, c. 356.

See also section 249 of The Family Court Act of New York, supra fn. 36.

46. See, for example, section 56A of the Massachussetts General Laws, supra fn. 38.

47. See, for example, section 4606 of the California Civil Code, supra fn. 36.

48. Mayer v. Mayer (1977), 150 N.J. Super. 556, 326 A 2d 214 (N.J. Ch. Div.).

49. Pfeifer v. Pfeifer (1974), 62 Wisc. 2d 417, 215 N.W. 2d 419 (Wisc. S.C.).

50. Dees v. Dees (1969), 41 Wisc. 2d 435, 164 N.W. 2d 282 (Wisc. S.C.); de Montigny v. de Montigny, supra fn. 14.

51. de Montigny v. de Montigny, supra fn. 14.

52. Id.

53. Borkowski v. Borkowski (1977), 90 Misc. 2d 957, 396 N.Y.S. 2d 962 (N.Y.S.C.); Reimer v. Reimer (1978), 85 Wisc. 2d 375, 270 N.W. 2d 93 (Wisc. C.A.).

54. See subsection 48.23(1) of the Wisconsin Statutes, supra fn. 36.

55. Section 249 of The Family Court Act of New York, supra fn. 36.

56. Section 317 of California's Welfare and Institutions Code, supra fn. 36.

57. Re Dunlap (1976), 62 Cal. App. 3d 428, 133 Cal. Rptr 310 (Cal. Dist. C.A.); Re Richard E. (1978), 146 Cal. Rptr 604, 579 P. 2d 495 (Cal. S.C., in bank).

58. Id.

59. Supra fn. 36

60. Re Mark V. (1975), 80 Misc. 2d 968, 365 N.Y.S. 2d 463 (N.Y. Surr. Ct).

61. Re Apel (1978), 90 Misc. 2d 839, 409 N.Y.S. 2d 928 (N.Y. Fam. Ct).

62. Supra fn. 37

63. de Montigny v. de Montigny, supra fn. 14, at 468 (N.W.), per Heffernan, J., emphasis added.

64. Bahr v. Galonski (1977), 80 Wisc. 2d 72, 257 N.W. 2d 869 at 874 (Wisc. S.C.), per Hansen, J.

65 de Montigny v. de Montigny, supra fn. 14, at 468 (N.W.); emphasis added.

66. Allen v. Allen (1977), 78 Wisc. 2d 263, 254 N.W. 2d 244 (Wisc. S.C.).

67. Section 65 of the Family Law Act 1975, No. 53 (Cth), provides:

> Where, in proceedings with respect to the custody, guardianship or maintenance of, or access to, a child of a marriage, it appears to the court that the child ought to be separately represented, the court may, of its own motion, or on the application of the child or of an organisation concerned with the welfare of children or of any other person, order that the child be separately represented, and the court may make such other orders as it thinks necessary for the purpose of securing such separate representation.

68. Dewis v. Dewis, unreported decision of Selby, C.J., 12 June 1973, Family Law Division of the Supreme Court of New South Wales, digested at 47 Aust. L.J. 548.

See also Rosen v. Rosen, unreported decision of Allen, J., 1975, Family Law Division of the Supreme Court of New South Wales, digested at 50 Aust. L.J. 145

In both cases, broad statutory provisions were used to appoint the president of an organisation promoting legal representation of children as the guardian ad litem of the children who were the subjects of the proceedings.

69. In the Marriage of Bosely and Lyons (1977), 32 Fed. L.R. 386, F.L.C. 90-423 (Aust. Fam. Ct, F.C.).

70. Id., at 391 (Fed. L.R.), 77,136 (F.L.C.), per Evatt, C.J., and Pawley, S.J.

71. Id., at 393 (Fed. L.R.), 77,137 (F.L.C.).

72. Waghorne v. Dempster (1979), 5 Fam. L.R. 503, F.L.C. 90-700 at 78,735 (Aust. Fam. Ct), per Treyvaud, J.; (emphasis added).

72a. In its critical analysis of the cases, the legal literature also pays scant regard to the precise wording of the legislation. It seems to be more pre-occupied with clarification of the roles of the various participants than in offering a statutory construction. See, for example:

(a) Sybille Kobienia: "Separate Representation in Custody Cases" (1978), 6 Adelaide L. Rev. 466;

(b) Domenica Whelan: "The Wishes of the Children and the Role of the Separate Representative" (1979), 5 Monash U.L. Rev. 287; and

(c) John Wade: "Separate Representation of Children" [1980] Aust. Curr. L. AT-42.

73. Poole v. Hunt (1979), 22 S.A.S.R. 293 (So. Aust. S.C., in banco).

74. Supra fn. 8.

75. Supra fn. 9.

76. Rowe v. Rowe (1976), 26 R.F.L. 91 (Ont. H.C.).

77. British Columbia: section 2 of the Family Relations Act, supra fn. 8;
New Brunswick: section 7 and subsection 39(8) of the Child and Family Services and Family Relations Act, supra fn. 5.

Is is not clear whether these provincial statutes can be invoked by a Court hearing a divorce petition under the federal Divorce Act, R.S.C. 1970, c. D-8. No one seems to have raised it as a legal issue, but the practice appears to be that Courts do indeed take advantage of these provincial provisions, whether in the form of express provincial legislation (infra fn. 78) or in the form of parens patriae (infra fn. 79). (Parens patriae is a body of equity jurisdiction that constitutionally falls within provincial legislative competence.)

78. McKercher v. McKercher, supra fn. 7; Re Reid and Reid, supra fn. 7.

79. Id. (Re Reid and Reid).

80. Id., where the Court relied on what is now subsection 107(2) of the Judicature Act, R.S.O. 1980, c. 223.

In McKercher v. McKercher, supra fn. 7, the Court invoked what is now section 31 of The Infants Act, R.S.S. 1978, c. I-9.

Other jurisdictions in Canada have similarly broad provisions that have not yet (to the best knowledge of the authors) been employed for purposes of child representation in custody-related proceedings. See:

Alberta: clause 5(g) of The Public Trustee Act, R.S.A. 1970, c. 301;

British Columbia: subsection 5(1) of the Official Guardian Act, R.S.B.C. 1979, c. 348;

Manitoba: subsection 27(3) of The Queen's Bench Act, R.S.M. 1970, c. C280;

Newfoundland: subparagraph 8(1)(h)(ii) of The Public Trustee Act, R.S.N. 1970, c. 321 [not yet in force] ;

Northwest Territories: subparagraph 4(i)(ii) of the Public Trustee Ordinance, R.O.N.W.T. 1974, c. P-16;

Nova Scotia: subclause 4(3)(g)(ii) of the Public Trustee Act, 1973, c. 12.

81. Rowe v. Rowe, supra fn. 76

82. McKercher v. McKercher, supra fn. 7; Re Reid and Reid, supra fn. 7.

83. Id. (Re Reid and Reid).

84. Susan McKeown: Representation of the Infant in Legal Proceedings — Who Speaks for the Child? (Edmonton: Alberta Institute of Law Research and Reform, 1976), at 36-37.

84a. Supra fn. 11.

85. Alberta: subsection 18(4) of The Child Welfare Act, R.S.A. 1970, c.45;

British Columbia: section 2 of the Family Relations Act, supra fn. 8;

New Brunswick: section 7 and subsection 39(8) of the Child and Family Services and Family Relations Act, supra fn. 5.

86. Supra fn. 11.

87. Subsection 20(2) of the Child Welfare Act, supra fn. 4.

88. With reference to the statutes cited at fn. 11, supra, see:

Manitoba: subsection 25(7.1);

Ontario: subsection 20(3);

Quebec: section 80

89. Re Debra N., unreported decision of Felstiner, Prov. J., 10 September 1979, Ont. Prov. Ct (Fam. Div.) of the Jud. Dist. of York; Re W. (1980), 27 O.R. (2d) 314, 13 R.F.L. (2d) 381 (Ont. Prov. Ct, Fam. Div.); Re Honey C., unreported decision of Felstiner, Prov. J., 7 August 1980, Ont. Prov. Ct (Fam. Div.) of the Jud. Dist. of York.

90. Hare v. Hare, unreported decision of Wilkins, Prov. J., 11 March 1981, Ont. Prov. Ct (Fam. Div.) of the Jud. Dist. of York.

91. Re C. (1980), 14 R.F.L. (2d) 21 at 26-27 (Ont. Prov. Ct, Fam. Div.), per Karswick, Prov. J.
See also Re J.C. and S.C., supra fn. 25.

92. Id. (Re. C.), at 27.

93. Re J.C. and S.C., supra fn. 25.