A Child's Due Process Right to Counsel in Divorce Custody Proceedings

Maurice K. C. Wilcox

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol27/iss4/6

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.
A CHILD'S DUE PROCESS RIGHT TO COUNSEL IN DIVORCE CUSTODY PROCEEDINGS

Few states provide for separate representation of the child in divorce custody proceedings. In the majority of jurisdictions, counsel for the parents negotiate a placement decision which the judge accepts without review. If a dispute leads to trial, the child is seldom a party. The court and the adult contestants are presumed to speak for the minor's interests.

This traditional denial of equal standing for the child has received criticism, but seldom on constitutional grounds. In light of the limited

1. This note focuses on procedural, not substantive, due process. Counsel refers to a licensed attorney enjoying all the rights and obligations of lawyers for the adult parties. The specific subject matter discussed here concerns divorce custody, although some of the arguments developed below may apply to adoption, neglect, delinquency, and dependency cases. The word "proceedings" is used to refer to all aspects of a custody determination that have a bearing on the ultimate placement, including parental negotiations, counseling, court hearings, and modification orders.


3. "In practice, with over ninety percent of divorce actions ending up as default or uncontested cases, the court routinely accepts the recommendations of the parties." Hansen, The Role and Rights of Children in Divorce Actions, 6 J. Family L. 1, 2 (1966) [hereinafter cited as Hansen, Rights of Children].


5. At the time of the writing of this note, there existed only one article specifically addressed to the subject of a constitutional right. See Note, Due Process for Children: A Right to Counsel in Custody Proceedings, 4 N.Y.U. Rev. Law & Soc. Change 177 (1974).
judicial scrutiny of custody decrees, however, it is important to consider whether denial of independent counsel in divorce custody proceedings violates the due process clause of the fourteenth amendment. Discussion will focus upon the nature of the interests which children of divorcing parents have at stake, available means of protecting those interests, the elements of an argument for the constitutional right to separate representation, and suggestions for implementing such a right.

The Impact of Divorce on the Child

The Statistical Vantage

Divorce affects a significant proportion of all children under the age of eighteen. Of the nearly one million dissolutions annually, sixty-two percent involve minors. The actual number of children affected exceeds 1.2 million. This figure represents 11.9 of every one thousand persons under the age of majority each year.

Sociological and Psychological Vantage

These figures assume added weight when considered with sociological and psychological studies of divorce and child growth. Research indicates that the breakup of the family may have a detrimental affect on a child's normal maturation. For example, studies indicate a potential for reduced self-esteem and psychosomatic illnesses such as nightmares, crying spells, stammering and bed-wetting. Several analyses

12. See generally Hunt, supra note 10, at 287.
have found a tendency among males raised without fathers to exhibit increased incidence of aggressiveness, juvenile delinquency, and low school achievement. Comparable reports concerning females raised without mothers are not available. Finally, a few studies demonstrate a tendency for the child raised in a broken home to experience an unhappy marriage as an adult.

This potential for personal hardship threatens equally harmful consequences for the state. Substandard educational performance, contact with the juvenile justice system, and subsequent marital conflict can all translate into economic burdens for the taxpayer.

Summary of the Law of Divorce Custody

Considering the above, the custody award plays a significant role in a child's life. From the perspective of the court and the attorneys for the adult parties, it represents an attempt to select the environment most conducive to normal emotional development. From the child's perspective, it represents an opportunity to assert control over his or her future through expression of a preference for placement.

Unfortunately, the vast majority of custody settlements receives the rubber stamp of the court without an investigation to discover whether attorneys for the adult parties have considered the interests of the child. Such a policy is difficult to justify, because the state has a clear interest in protecting the stability of the family unit, and because an inadequately considered decision may foment the instability it is intended to avoid.

In response to the routine failure to place the impact of divorce on the minor in proper perspective, a number of commentators have advo-

14. See Kleinfeld, supra note 4, at 331.
15. See id. at 331 n.49.
17. See text accompanying notes 162-83 infra.
18. See note 3 infra.
cated the need for independent counsel to represent the interests of the child. Nevertheless, evidence of the numbers of minors affected by divorce, of the potential for psychological damage, and of the great many settlements which receive little review does not alone justify equal standing for adults and minors in the custody proceeding. The need for separate representation and for its constitutional guarantee becomes more apparent after consideration of the standards and procedures by which courts make awards of custody.

Guiding Principles for the Award of Divorce Custody

**Parens Patriae**

The standards for award of child custody derive from a quasi-legal doctrine of Roman private law called *patria potestas*, literally paternal power, under which the father had an absolute right to control of his children. The doctrine became a part of the English law but declined in significance by the fourteenth century. In feudal England, custody was an incident to the guardianship of lands. The state had an interest in the uninterrupted passage of title to property, and custody was simply a matter of placement with the parent having land to convey or bequeath. A sense of responsibility for the child was a secondary development. Late in the seventeenth century, the chancery courts assumed jurisdiction over custody matters and exercised their powers of parens patriae to protect the welfare of the child. In practice, the father received the award as natural guardian of his children; the process was tantamount to a re-emergence of *patris potestas*.

The doctrine of *parens patriae* was absorbed into American practice, though a strict preference for the father has never developed. Today, the principle is invoked to justify the denial of full procedural due process to the child, as it is claimed that the youth needs protection from the rigors of adversary proceedings. Consistent with this concept is the notion that the judge is to act as an “affectionate parent” who represents the child and is cognizant of his needs. Consequently, the

---

20. See text accompanying notes 74-88 infra.


24. Literally, the father of his country; or more generally, the sovereign power of guardianship over persons under a disability.


judge is to enjoy wide discretion in making the custody award.27

Use of the parens patriae rationale was critically assessed by the Supreme Court in *In re Gault.*28 Moreover, the original grounds for its existence, protection of tenurial rights and exercise of the prerogatives of the Crown, have obviously ceased to have any current relevance. Nonetheless, one court recently invoked the doctrine to rationalize denial of separate representation for a child in a divorce custody proceeding.29

**The Best Interest of the Child**

Another guide for the assessment of custody alternatives is the "best interest" rule, to which most courts profess adherence.30 The rule is designed to lead the judge to a determination which best satisfies the needs of the child. In theory, the interests of the state and the adult parties assume lesser status. Nonetheless, the "best interest" rule has not adequately ensured the primacy of the child's welfare in two respects.

One problem is the potential for conflict with the doctrine of parens patriae.31 While the two principles overlap, the parens patriae concept affords the court greater discretion. It authorizes the judge to speak for the child as an incident of the court's historical duty to protect those who have no other protector.32 The judge is assumed to have complete discretion. The "best interest" rule attempts to narrow the latitude of that discretion and shifts a great deal of responsibility to the attorneys for the opposing parties. The court must theoretically play a more passive role as arbiter of the settlement proposals offered by the contestants. The "best interest" doctrine thus seeks to proscribe opportunities for determinations based upon the judge's subjective preferences.

---

28. 387 U.S. 1 (1967). "The Latin phrase [parens patriae] proved to be of great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance." *Id.* at 16.
31. See Inker & Perretta, *supra* note 21, at 111.
32. See Shepherd, *supra* note 19, at 159.
Yet the courts may justify their holdings by appeal to either doctrine. To the extent that the judge has an interest in summary proceedings, or denies the adversary character of the contested custody, or believes that he or she may fairly represent the interests of the child, the parens patriae rationale may be invoked and the “best interest” rule relegated to a secondary role.

The “best interest” test has not adequately protected the welfare of the child in another respect. It has spawned a panoply of vague and conflicting standards designed to restrain the discretionary character of the custody award. Each, moreover, is administered ex parte and fails as a substitute for the individualized attention afforded by independent counsel.

For example, many states provide for consideration of the child’s wishes when he or she is of sufficient maturity to express a reasoned preference for one parent. Some commentators, however, have questioned whether the young person, caught in the midst of a battle for possession, has the ability to make an objective selection. The judge, in any event, is not bound by the child’s preference.

In addition, courts frequently award custody by comparing the relative fitness of each parent. This procedure tends to subvert the value of the “best interest” rule by shifting attention from the emotional needs of the child to the comparative abilities of the adult parties to assume the obligations of exclusive parent. The custody decision becomes little more than an election by process of elimination.

As a final example, some courts make the award on the basis of simplistic rules of thumb. Illustrations include the presumptions that natural parents will care for the child more adequately than non-natural parents and that mothers are better suited than fathers to raise a younger child. Whatever the merits of these contentions, neither provides a


34. See generally Annot., 4 A.L.R.3d 1396 (1965). California statute requires the court to give due weight to the child’s wishes if the child “is of sufficient age and capacity to reason so as to form an intelligent preference as to custody.” CAL. CIV. CODE § 4600 (West Supp. 1974).


36. See, e.g., Freed & Foster, The Shuffled Child, supra note 7, at 28; Oster, supra note 33, at 29-37; Shepherd, supra note 19, at 162.

37. California has expressly repudiated the fitness rule and substituted the “best interest” test for all custody determinations. CAL. CIV. CODE § 4600 (West Supp. 1975). See also In re B.G., 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974).

38. See Inker & Perretta, supra note 21, at 111.

39. See Drinan, The Rights of Children in Modern American Family Law, 2 J.
focus on the needs of the particular minor which the “best interest” rule requires. Most jurisdictions have recognized the impersonality of formulistic decision making and have repealed the statutes which conferred rights to custody. The rules have survived in practice, however, and a few courts still apply them without modification.

A few states have attempted to improve the standards for award of custody by enacting legislation which defines best interest in terms of the child’s psychological well-being. The court must weigh alternative placements according to a checklist of considerations. Each element of the statutes speaks to a particular need of the child. The result is a link between judicial practice and that line of sociological theory which has found a negative correlation between divorce and normal child growth. The so-called “psychological best interest” test is a guideline which has received limited application despite widespread acclaim. Perhaps, as a consequence of dissatisfaction with present standards and increased familiarity with sociological research, more states will redefine best interest in psychological terms. As yet, experience with the test is limited, and fair evaluation is not possible.

In sum, each of the present standards for award of divorce custody endows the judge with broad discretionary powers. When time,

FAMILY L. 101, 102 (1962); Freed & Foster, The Shuffled Child, supra note 7, at 28; Lefco, supra note 35, at 577.

40. See Shepherd, supra note 19, at 159.


42. See, e.g., MICH. COMP. LAWS ANN. § 722.23 (Supp. 1975-76).

43. See generally Watson, supra note 10.

44. The first mention of the “psychological best interest” test is found in an article prepared with the aid of interviews with Anna Freud. See Note, Alternatives to Parental Right in Child Custody Disputes Involving Third Parties, 73 YALE L.J. 151, 157 n.29 (1963). The idea received expanded consideration six years later in an article by Watson. See Watson, supra note 10. The best known work on the topic, published four years after Watson’s study, failed to credit the pioneering discussion by the Yale student. See Goldstein, FREUD & SOLNIT, supra note 10.

45. “The absence of definite rules for custody cases gives the courts very broad discretion. The standards applied in practice can only be discovered by studying the individual decisions. Such a study reveals that, in reaching conclusions as to the best interests of a child and as to parental fitness, courts consider criteria which, although useful, are inadequate, in that they fail to force courts to consider essential factual, social, medical, and psychological information. Consequently, a judge may have nothing but his common sense to guide him to a wise solution of a complex problem.” Foster
knowledge, and resources are adequate to the caseload, the child receives the attention to detail that his interests merit. When, as is more common, dockets are crowded, training insufficient, and resources limited, the child's predicament does not receive the scrutiny which an independent advocate could provide.

Despite the shortcomings common to present standards for award of custody, the "best interest" doctrine would appear to be the most valuable guiding principle for placement determinations. It requires the greatest concentration on the welfare of the child and demands appraisal of custody alternatives from the minor's perspective.

Current Procedures for the Award of Divorce Custody

Representation by Counsel for the Adult Parties

Many of the current procedures which courts employ to settle custody disputes likewise fail to place in proper perspective the impact of divorce on the child. Chief among these is advocacy of the child's best interest by counsel for the parents. Commentators have discredited any presumption that the minor may be fairly represented by an adult party or by counsel for such a party. A child, they urge, has interests at stake which differ from those of a parent. Examples include the interests in an environment suited to normal psychological growth and in custody by a party capable of assuming the obligations of child rearing. Furthermore, adherence to the "best interest" rule requires counsel for the parents to analyze prejudicial and conflicting evidence from the perspective of the minor. On the other hand, counsel have a duty under the Code of Professional Responsibility to interpret that same evidence in the light most favorable to their clients. When testimony impugns fitness, counsel is obligated to provide a refutation, even though he may not believe that his client is a suitable custodian. Clearly, this dual role for counsel involves conflicting interests which work against full advocacy of the child's needs.

Representation by Guardian Ad Litem

A few states have attempted to resolve the problems of representation by the parents' counsel through appointment of guardians ad litem

& Freed, Child Custody, supra note 23, at 438 (footnote omitted). See also Oster, supra note 33, at 23-25; Shepherd, supra note 19, at 161; Note, Measuring the Child's Best Interests—A Study of Incomplete Considerations, 44 Denver L.J. 132 (1967).

46. See, e.g., Goldstein, Freud & Solnit, supra note 10, at 67; Foster & Freed, A Bill of Rights for Children, 6 Family L.Q. 343, 356 (1972); Freed & Foster, The Shuffled Child, supra note 7, at 34; Hansen, Rights of Children, supra note 3, at 8; Inker & Perretta, supra note 21; Lefco, supra note 35, at 580-81.

47. ABA Code of Professional Responsibility EC 5-1, 7-1.
to speak for the interests of the child. Typically, the laws provide for appointment in cases of contested custody or at the discretion of the judge. In jurisdictions which lack statutory authority for the appointment, the court may rely on its inherent rule making power.

The provision for a guardian is a significant, partial advancement toward protection of the child's welfare. In Kentucky and Wisconsin, the appointee has rights of examination and cross-examination equivalent to those of full counsel. Some states require the guardian to be a licensed attorney. Nevertheless, the guardian does not enjoy all the rights of counsel for the adult parties. For example, he may not participate in the negotiations for alimony and property distribution, and he does not always have independent powers of discovery. As a consequence, the appointed guardian cannot adequately represent the child, since he has neither equal access to information nor an equal right to participate in crucial aspects of the divorce proceedings. He plays a more passive role than would an independent attorney. The guardian system, therefore, cannot ensure that a decree will satisfy the "best interest" rule.

Investigation by a Social Services Department

Many judges now seek the advice of local social service or analogous court departments regarding custody alternatives. The desired goal is an analysis of alternative awards in terms of the "psychological best interest" test discussed above. Court and counsel can thereby tap the expertise of those outside their field of competence. The assumption is that a mix of legal and sociological opinions will produce greater likelihood of a decision which meets the concerns of the child, the parents, and the state.

The reports, however, cannot remedy the absence of independent representation for the child. The social worker who reviews the placement alternatives is not an advocate. He neither hears the parents'
arguments nor rebuts testimony. Several observers have warned that social service investigations are subjective by nature and merely add to the conflicting testimony which the court, counsel, and guardian must interpret. At least one psychologist has noted the high costs involved and recommends that a court forego the investigation altogether when resources are insufficient for an exhaustive inquiry.

**Notice to a Public Official**

Finally, about half the states require that a public official receive notice of any divorce which involves children below a specified age. The provision ensures an opportunity for a representative of the state to appear and to certify that a custody award satisfies the public interest. In Wisconsin, the official of the state in the uncontested case is the Family Court Commissioner, who enjoys the "same rights and opportunities as counsel for the parties." He may, for instance, take depositions and compel the attendance of witnesses. Nevertheless, the procedure suffers from drawbacks similar to those of the guardian system. The representative need not be a lawyer and may lack the ability to skillfully attack the arguments of counsel for the parents. His or her essential function is to review the arrangements for custody from the perspective of the public interest, not that of the child.

**The Consequences of Inadequate Procedures**

Thus, except in the few states which require participation of a guardian ad litem or attorney for the child, the court acts alone to determine whether a custody award satisfies the "best interest" rule. The potential shortcomings of this procedure are numerous. First, the judge assumes conflicting functions as advocate and impartial arbiter. The Supreme Court of Wisconsin has recognized the inefficiency of representation by a judge alone. In a recent decision, it held that failure to appoint a guardian to aid in the determination of an award responsive to

---

53. See, e.g., Lefco, supra note 35, at 579-80.
54. Watson, supra note 10, at 76.
55. See CLARK, supra note 30, at 380-81; Foster & Freed, A Bill of Rights for Children, 6 FAMILY L.Q. 343 (1972).
56. Hansen, Guardians Ad Litem, supra note 48, at 182.
58. See note 2 supra.
59. Id.
60. "Where the rights of children of the divorcing parties are involved, it is not enough to assign the responsibility for speaking up for the children to the parents; their perspective is often clouded by the hostility existing between them, or to the judge, harassed by the pressures of time and serving as the umpire not as an advocate." Hansen, Rights of Children, supra note 3, at 7-8 (footnote omitted).
the child's welfare was a partial ground for reversal. Similarly, the Oregon Court of Appeals has found that potential conflicts exist among the interests of children, parents, and the state in all termination proceedings and has held that the judge must appoint independent counsel to represent the needs of the minor. Second, crowded calendars and limited time for reflection foster a rubber stamp approach to agreements reached by counsel for the adult parties. Third, the majority of judges do not understand the dynamics of child development. They frame decrees in moralistic terms which demonstrate an ignorance of social science research that could be of value in weighing custody alternatives. The objective appraisal of the child's welfare which the "best interest" rule theoretically requires has become no more than an abstract goal for most courts.

To the extent that standards and procedures are inadequate, the child becomes a pawn in a dispute which may affect his financial and psychological well-being. No judge would admit to treatment of the minor as a chattel. Yet when the court accepts the settlement of the parties as binding on the child or withholds from him the safeguards afforded parents, the child enjoys all the rights of the family car.

Proposed Changes in the Guiding Principles and Procedures for Award of Divorce Custody

Overview

To remedy the deficiencies of existing law, observers have proposed numerous new standards and procedures. These proposals include many suggestions short of separate counsel: better representation by the attorneys for the adult parties; minimal modification of custody

---

63. See note 3 & accompanying text supra.
64. See Watson, supra note 10, at 61-62.
65. See MacDonald, A Case for Independent Counsel to Represent Children in Custody Proceedings, 7 New Eng. L. Rev. 351, 358 (1971); Shepherd, supra note 19, at 178.
decrees;\(^{68}\) greater resort to expert advice;\(^{69}\) parental counseling to avoid
unnecessary divorce;\(^{70}\) appointment of committees of doctors, educators,
and clergymen to review decrees;\(^{71}\) holding argument in chambers
rather than in open court;\(^{72}\) and creation of a system of family courts to
integrate delinquency, neglect, dependency, adoption, and divorce
custody cases into one judicial setting.\(^{73}\)

Each of these suggestions would effect a more exacting considera-
tion of the child's welfare. Nevertheless, none of the changes would
guarantee forceful representation of the child's interests. Counsel for
the adult parties would remain obligated to advocate their clients' needs
over those of the child in the event of a conflict. The judge would still
have to compromise his role as spokesman for the child under the "best
interest" rule in order to render an impartial decision. Each proposal
would, therefore, perpetuate the major deficiencies of existing schemes.

\textit{Proposals for Separate Counsel—On Grounds Other than the Due Process Clause}

Advocates of separate counsel have proposed at least three argu-
ments based on grounds which make no appeal to constitutional guaran-
tees.

The first relies on the language of joinder and intervention statutes
to claim that the child has interests at stake which cannot be protected
unless he participates in the proceeding.\(^{74}\) For example, under the
Federal Rules of Civil Procedure, the court may declare a person
indispensable to an action if he claims an interest relating to the subject
of the action and may lose the ability to protect that interest unless
granted party status.\(^{75}\) If the absence will prejudice the interest in a

\(^{68}\) The advocates of a limited right to modification argue that a child requires
a stable home environment for normal psychological development. They contend that
statutes which facilitate changes in placement weaken a custodian's commitment to a
child and threaten the desired stability of the family unit. \textit{See, e.g., Goldstein, Freud
& Solnit, supra note 10, at 35; Bodenheimer, supra note 13, at 728-29; Kay & Philips,
cited as Kay & Philips]; Watson, supra note 10, at 63-64.}

\(^{69}\) \textit{See, e.g., Clark, supra note 30, at 398-99; Bodenheimer, supra note 13, at 722;
Foster & Freed, Child Custody, supra note 23, at 615-20; Kay & Philips, supra note 68,
at 724-25, 740; Watson, supra note 10, at 74-75.}

\(^{70}\) \textit{See, e.g., Bodenheimer, supra note 13, at 722; Kay & Philips, supra note 68,
at 740; Watson, supra note 10, at 74-75.}

\(^{71}\) \textit{See, e.g., Kubie, Provision for the Care of Children of Divorced Parents:
A New Legal Instrument, 73 Yale L.J. 1197 (1964); Watson, supra note 10 at 67, 79.}

\(^{72}\) \textit{See, e.g., Watson, supra note 10, at 78.}

\(^{73}\) \textit{See, e.g., Bodenheimer, supra note 13, at 729; Shepherd, supra note 19, at 171
& n.85.}

\(^{74}\) \textit{See Kleinfeld, supra note 4, at 324-27.}

\(^{75}\) \textit{Fed. R. Civ. P. 19(a)(2).}
manner which cannot be corrected by shaping the relief among the parties, the case may be dismissed for nonjoinder.\textsuperscript{76} In those instances in which a person is not a necessary and indispensable party, he may still have a right to intervene if his absence will impair his ability to protect an interest relating to the subject of the action, unless that interest is adequately represented by existing parties.\textsuperscript{77} The language of these statutes does not bar their applicability to minors. Nonetheless, opponents of the joinder and intervention arguments may cite ample authority for the proposition that children need not receive the same procedural protections afforded adults.\textsuperscript{78} Moreover, in divorce custody actions specifically, joinder and intervention arguments have simply not persuaded courts to offer party status to minors.\textsuperscript{79}

The second argument avoids discussion of the procedural means for representation of the minor and contends solely that the child's interests in an environment conducive to normal psychological development are so important that their protection should not be entrusted to the court and adult parties alone.\textsuperscript{80} The success of this approach, however, requires a judge to recognize the inviolability of human needs which cannot be measured. Not surprisingly, the "normal growth" approach has been accepted by few courts.\textsuperscript{81} One explanation lies in the courts' lack of familiarity with the contributions of the social sciences concerning the mechanics of divorce and child growth. Another may rest solely on tradition, which sanctions awards based on parental fitness and token reference to the "best interest" rule.\textsuperscript{82}

\textsuperscript{76} \textit{Fed. R. Civ. P. 19(b)}.  
\textsuperscript{77} \textit{Fed. R. Civ. P. 24(a)(2)}. "The right to intervene belongs to anyone who 'would be substantially affected in a practical sense by the determination made in the action,' not merely those with rights in a fund to be distributed or those whom the proceeding might bind as a matter of \textit{res judicata}, and representation is inadequate under the rule even though a party has a legal duty to represent the would-be intervenor where it probably will be inadequate as a practical matter." Kleinfeld, \textit{supra} note 4, at 326 (footnote omitted).


\textsuperscript{79} Kleinfeld, \textit{supra} note 4, at 327.

\textsuperscript{80} See \textit{Goldstein, Freud & Solnit, supra} note 10, at 65-66.

\textsuperscript{81} Only a few cases have cited the Goldstein analysis with approval. \textit{See}, e.g., DeForest v. DeForest, 228 N.W.2d 919 (N.D. 1975).

\textsuperscript{82} "Despite strong reasons to the contrary, most jurisdictions award custody without any representation of the child. Only a little authority can be found for the proposition that a child is not a necessary party, or even a permissible intervenor, but nearly all jurisdictions conduct custody proceedings as if that were so. This practice may be not so much a reasoned decision as an historical survival from the period where custody decisions were made upon the basis of parental right rather than best interests of the child, so that the child had no recognized interest to be represented." Kleinfeld, \textit{supra} note 4, at 336-37 (footnotes omitted).
A third argument for separate counsel draws upon analogies between the custody proceeding and actions in which minors presently enjoy independent standing to justify the use of identical procedural safeguards in the custody context. For example, some courts have extended the right to seek medical treatment without parental consent to children below the age of majority. Counsel is often provided the minor in neglect, probate, and personal injury actions. For the juvenile delinquent, the right to independent representation is constitutionally guaranteed.

The similarities between the divorce custody proceeding and the situations above appear close at first glance. A probate decision, for example, has an impact on the financial well-being of the child similar to that of an alimony or property settlement. Each affects purchasing power for food, clothing, housing, and schooling. Likewise, juvenile court dispositions and divorce custody awards serve a common goal, the normal socialization of the child.

Nonetheless, some similarity of consequence and purpose by itself seldom justifies similarity of procedure. The logic of the arguments by analogy fails to consider that the rights which minors exert in the analogous proceedings have distinct legal histories. The right to counsel in juvenile court derives from similarities between juvenile court and criminal proceedings. It is because of this similarity that "essentials of due process and fair treatment" have been said to require that counsel be provided in juvenile court proceedings. The provision for representation in the probate action has deep roots in the common law. A delinquent is a defendant in an action brought by the state in response to an accomplished harm. An heir is the recipient of a direct interest in land or chattels. The child of divorce, by contrast, has neither committed a wrong nor acquired a legal claim to the assets of his parents.

The Constitutional Argument

Introduction

The most persuasive argument for the child's right to counsel in divorce custody proceedings is based on notions of constitutional law. This section presents the idea that the protections afforded by the due

83. See id. at 326-27.
86. See Kleinfeld, supra note 4, at 340-41.
87. See id.
88. See, e.g., In re Gault, 387 U.S. 1 (1967).
89. Id. at 30, quoting Kent v. United States, 383 U.S. 541, 562 (1966).
90. See Kleinfeld, supra note 4, at 340-41.
process clause of the fourteenth amendment should be held to include
an unqualified right to independent counsel for the child of divorcing
parents. The discussion will outline the tests for applicability and
scope of due process guarantees and then develop the rationale for
separate representation.

At the outset, two potential objections to the constitutional argu-
ment require mention. The first is that the word “person,” as used in
the fourteenth amendment, does not include minors. The answer is
certain. Under a line of cases which is numerically short but unmistak-
ably clear, the Supreme Court has established the minor as a “person”
under both the fifth and the fourteenth amendments.

The second objection is that there is insufficient conflict among the
interests of the child, adult and the state to claim the existence of a case
or controversy arising under the constitution or federal law. Natural-
ly, if the welfare of the minor were construed to be adequately protected
by the court or the parents, the argument for separate counsel would be
considered superfluous. The Supreme Court has not stated explicitly
the degree of conflict of interest necessary to constitute a case or
controversy, but the possibility of dismissal for absence of a dispute is
not remote. Justice Powell objected to the recent extension of due
process protections to public school students subject to disciplinary
non-due process arguments discussed earlier. The constitutional argument draws
analogies between the divorce custody situation and cases in which children enjoy proce-
dural protections greater than in divorce custody cases but in which the deprivations of
liberty or property are similar. It stresses the child’s need to grow in a stable environ-
ment and the importance of equal standing with the adult parties. To some extent,
therefore, this newest of approaches must share the weaknesses of logic not based
upon notions of procedural due process. A constitutional argument, however, has
a distinct advantage over all others. It may draw from an increasingly large body of
Supreme Court decisions regarding the legal status of minors under the fourteenth
amendment, and it may appeal to a long line of cases establishing elaborate protections
against invasions of fundamental interests.

91. This argument for separate counsel views denial of independent representation
as an infringement of rights guaranteed by the due process clause of the fourteenth
amendment. See note 5 supra. Some of the reasoning involved, however, draws upon
the non-due process arguments discussed earlier. The constitutional argument draws
analogies between the divorce custody situation and cases in which children enjoy proce-
dural protections greater than in divorce custody cases but in which the deprivations of
liberty or property are similar. It stresses the child’s need to grow in a stable environ-
ment and the importance of equal standing with the adult parties. To some extent,
therefore, this newest of approaches must share the weaknesses of logic not based
upon notions of procedural due process. A constitutional argument, however, has
a distinct advantage over all others. It may draw from an increasingly large body of
Supreme Court decisions regarding the legal status of minors under the fourteenth
amendment, and it may appeal to a long line of cases establishing elaborate protections
against invasions of fundamental interests.

92. See, e.g., Goss v. Lopez, 419 U.S. 565 (1975); McKeiver v. Pennsylvania, 403
U.S. 528 (1971); In re Winship, 397 U.S. 358 (1970); Tinker v. Des Moines Inde-
pendent Community, 393 U.S. 503, 511 (1969); Levy v. Louisiana, 391 U.S. 68 (1968);
In re Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966); Gallegos
v. Colorado, 370 U.S. 49 (1962); Haley v. Ohio, 332 U.S. 596, 601 (1948); West Vir-
are included here because analysis of due process safeguards is identical under the two
amendments.

The Supreme Court has recently held that “the word ‘person,’ as used in the Four-
teenth Amendment, does not include the unborn.” Roe v. Wade, 410 U.S. 113, 158
(1972) (footnote omitted).

action partially on the ground that the interests of pupil and administrator are not at odds. Furthermore, argument for the separability of the interests of the child in divorce proceedings is a recent phenomenon and not widely respected.

On the other hand, the list of disputes which have been found cognizable under the due process clause does not preclude the addition of safeguards for the children of divorce. Moreover, Justice Black noted in dictum in a 1962 opinion that determination of custody is not necessarily a question which parents can objectively resolve. Nonetheless, until the literature which has stressed the separate interests of the child gains greater respect, opponents of independent representation will continue to deny the existence of a justiciable conflict.

The Tests for Applicability of Due Process

The Nature of the Interest

The test for applicability of the due process clause consists of two parts. The first concerns the nature of the interest at stake, while the second considers the gravity of its deprivation.

Despite authority to the contrary discussed below, the most recent decisions of the Supreme Court have afforded protection for only the interests denominated in the fourteenth amendment—liberty and property. For example, Justice Stewart, writing for the majority in Board

95. See note 82 & accompanying text supra.
97. "Unfortunately, experience has shown that the question of custody, so vital to a child's happiness and well-being, frequently cannot be left to the discretion of parents. This is particularly true where, as here, the estrangement of husband and wife beclouds parental judgment with emotion and prejudice." Ford v. Ford, 371 U.S. 187, 193 (1962).
of Regents v. Roth,\textsuperscript{100} specified that "while the Court has eschewed rigid or formulistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words 'liberty' and 'property' . . . must be given some meaning."\textsuperscript{101} The Court in Roth upheld nonretention, without an explanation or a hearing, of a nontenured teacher at a state university. The apparent restriction is flexible, however, since the Court neither overruled nor distinguished earlier holdings which placed broader interpretations on the scope of due process guarantees.\textsuperscript{102}

Rather than addressing these prior decisions directly, the Court in Roth proposed definitions for "liberty" and "property." The bounds of liberty were outlined by reference to the language of several previous decisions. The result was a collage of generalizations describing liberty as extending beyond freedom from bodily restraint\textsuperscript{103} and from "the sort of formal constraints imposed by the criminal process"\textsuperscript{104} to matters of reputation, honor, and integrity\textsuperscript{105} and to "those privileges long recognized . . . as essential to the orderly pursuit of happiness by freemen."\textsuperscript{106} One might argue that as a result of so broad a declaration, the bounds of liberty remain illusory.

The interest in property, however, received a more exacting consideration. The Court specified that it would be willing to extend procedural protections only to "safeguard . . . the security of interests that a person has already acquired in specific benefits."\textsuperscript{107} It held that the dimensions of such interests were to be derived not from the language of the Constitution but from "existing rules or understandings that stem from an independent source such as state law . . . ."\textsuperscript{108} Finally, the Court held that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."\textsuperscript{109}

While Roth treated property interests as creatures of state law or of other sources independent of the Constitution, it placed no similar restrictions on the interest in liberty. The distinction, of course, does not prevent a court from borrowing statutory definitions of liberty. In

\textsuperscript{100} 408 U.S. 564 (1972).
\textsuperscript{101} Id. at 572.
\textsuperscript{102} See notes 113-23 & accompanying text infra.
\textsuperscript{103} 408 U.S. at 572.
\textsuperscript{104} Id. at 572 (footnote omitted).
\textsuperscript{105} Id. at 573, quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).
\textsuperscript{106} Id. at 572, quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
\textsuperscript{107} 408 U.S. at 576.
\textsuperscript{108} Id. at 577.
\textsuperscript{109} Id.
Wolff v. McDonnell, for example, the Court reviewed a Nebraska policy of revoking prisoners' good-time benefits without prior hearing. The Court recognized that the Constitution does not guarantee credit for satisfactory behavior but added that nonetheless,

the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures . . . required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.

While the Court thus invoked the due process clause to affirm the statutory right, it by no means indicated that protection would be extended only to "liberty" as defined by statute.

Furthermore, as mentioned above, the Supreme Court has not always determined the applicability of the due process clause by restricting itself to the precise language of the fourteenth amendment. In Goldberg v. Kelly, the Court held that termination of public assistance payments without an opportunity for a prior evidentiary hearing denied procedural due process. The Court required no showing of a controversy involving a denominated interest. A single reference to welfare as a modern form of property was placed in a footnote. The opinion simply concluded that "[s]uch benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights."

In Bell v. Burson, the Court considered whether failure to afford a hearing on the question of fault or liability before suspension of a motor vehicle driver's license constituted a denial of due process. Finding in the affirmative, it held that "[o]nce licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees."

Two months before the decision in Roth, the Court again displayed no inclination to hold to the specific language of the due process clause,

---

111. Id. at 557.
112. See text accompanying note 102 supra.
114. Id. at 262 n.8. The Roth opinion construed Goldberg as involving the infringement of property rights. 408 U.S. at 576. The Supreme Court, however, did not squarely set the Goldberg decision on the ground of a property deprivation. See text accompanying note 113 supra.
115. 397 U.S. at 262 (emphasis added).
117. Id. at 539 (emphasis added).
as it found, in *Stanley v. Illinois*,\(^\text{118}\) that a state may not presume that unmarried fathers are unsuited as parents and neglectful of their children. An Illinois statute required the state, upon the death of the mother, to take custody of all illegitimate children, without a hearing on the father's fitness. The interest at issue was described variously as "that of a man in the children he has sired and raised"\(^\text{119}\) and that "in retaining custody."\(^\text{120}\)

These decisions and others caused one observer to write that [the frequent practice of ... referring to a denial of due process, without any reference to anything else that a person has been deprived of in terms of the language of the Fourteenth Amendment, prompts the question whether the Court now reads the language of the Amendment as if it said, \"* * * nor shall any state deprive any person of due process of law.\"\(^\text{121}\) *Roth* and subsequent decisions have provided an answer to the contrary, but they have left unclear the bounds of the interests protected by the due process clause.\(^\text{122}\) Whether or not the Court would currently reject an argument based solely on the deprivation of an important right or important interest remains moot, however, since there is nothing in the recent opinions to indicate a repudiation of the earlier line of reasoning.\(^\text{123}\)

### The Gravity of the Deprivation

The second part of the test for applicability of procedural due process measures the gravity of the deprivation of the protected interest. Supreme Court opinions demonstrate a split of authority regarding this prong of the test comparable to that concerning the range of protected rights.

The older view, announced by Justice Frankfurter in a concurring opinion in *Joint Anti-Fascist Committee v. McGrath*,\(^\text{124}\) requires a demonstration of "grievous loss"\(^\text{125}\) to invoke due process guarantees. In

\(^{118}\) 405 U.S. 645 (1972).
\(^{119}\) Id. at 651.
\(^{120}\) Id. at 652.
\(^{122}\) In a number of decisions due process protections have been limited to the interests denominated in the fourteenth amendment. See, e.g., *Goss v. Lopez*, 419 U.S. 565, 572-76 (1975).
\(^{123}\) Under either line, however, the requirement that the right or interest be state-created would still apply.
\(^{124}\) 341 U.S. 123 (1951).
\(^{125}\) "This Court is not alone in recognizing that the rights to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardship of a criminal conviction, is a principle basic to our society." Id. at 168 (Frankfurter, J., concurring).
McGrath, the Court heard a challenge to an executive order which had required the attorney general to prepare a list of communist organizations for use in identifying disloyal government employees for discipline. The list named the Anti-Fascist Committee, which argued, in part, that its inclusion without notice or hearing violated the due process clause of the fifth amendment. The organization's allegations of loss of operating revenue and harm to reputation persuaded the majority that the petitioner had stated a claim for which relief could be granted. The Court has applied the "grievous loss" standard on many subsequent occasions to analyze deprivations of liberty\(^\text{126}\) and "important\(^\text{127}\) interests.

An opposing view has emerged, however, which requires no more than a de minimis deprivation of a protected interest to invoke the due process clause. Justice Harlan formulated the test in a concurring opinion in Sniadach v. Family Finance Corp.,\(^\text{128}\) in which the Court invalidated a Wisconsin prejudgment garnishment statute for failure to provide adequate notice and hearing for the garnishee.\(^\text{129}\) Justice Harlan's opinion offered no elaboration of the rule, stating only that "[s]ince this deprivation cannot be characterized as de minimis, [petitioner] must be accorded the usual requisites of procedural due process . . . ."\(^\text{130}\) Three years later, a majority cited the test with approval in a footnote to Fuentes v. Shevin,\(^\text{131}\) in which the Court invalidated a Florida prejudgment replevin statute on grounds similar to those in Sniadach. Not until Goss v. Lopez,\(^\text{132}\) however, did the rule assume prominence in the analysis of the applicability of the due process clause. Justice White declared in Goss that "as long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause."\(^\text{133}\)

Although no opinion has repudiated the "grievous loss" rule, the Court appears to have chosen the "de minimis" test as the more appropriate standard. The "de minimis" test accords with a modern shift toward focus on the nature of the interest at stake, not on its weight, when determining whether or not due process safeguards should apply. For instance, in Fuentes, the Court held that while the "severity of a deprivation may be another factor to weigh in determining the appropri-

\(^{127}\) See, e.g., Goldberg v. Kelly, 397 U.S. 254, 263 (1970). See also note 114 supra. The opinion in Goldberg misconstrued the test inasmuch as the Court applied it to an analysis of how much due process to afford, not whether to extend due process at all.
\(^{129}\) Id. at 342.
\(^{130}\) Id.
\(^{131}\) 407 U.S. 67, 90 n.21 (1972).
\(^{132}\) 419 U.S. 565 (1975).
\(^{133}\) Id. at 576 (citations omitted).
ate form of hearing, it is not decisive of the basic right to a prior hearing of some kind.” The majority in Roth echoed this language, stating that "to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake." The Court in Goss employed identical logic. In short, although the test for applicability of due process includes considerations of both the nature of the interest infringed and the extent of its deprivation, the Court will safeguard all rights which it holds to be included within the due process clause on a showing of some damage. The weight of the loss will figure more prominently in the determination of which particular protections to afford.

Although the "de minimis" rule emerged from a line of property cases, the Court has used the standard for measuring deprivations of liberty, as well. For example, Goss involved not only the property interest in continued public education but also the liberty interest in a reputation free from the stigma of expulsion from school. The Court specifically applied the "de minimis" rule to each.

The Test for the Scope of Due Process Protection

Once the applicability of the due process clause is established, analysis must turn to the degree of protection to which an individual is entitled. In this determination, the Supreme Court has long emphasized procedural flexibility. The protections due in a given situation derive from a balance of the competing interests.

The foundational requisites of procedural due process are some form of notice and opportunity to be heard. These rights apply

134. 407 U.S. at 86.
135. 408 U.S. at 570-71 (citations omitted).
136. 419 U.S. at 575-76.
137. Id. at 576.

Federal court decisions and law review articles which have attempted to isolate fixed ingredients of the balancing process would therefore appear to contravene the clear intent of Supreme Court opinions. See, e.g., Geneva Towers Tenants Organization v. Federated Mortgage Investors, 504 F.2d 483, 491 (9th Cir. 1974); Thompson v. Washington, 497 F.2d 626, 634 (D.C. Cir. 1973); Note, Procedural Due Process in Government-Subsidized Housing, 86 Harv. L. Rev. 880, 891 (1973).

irrespective of the cost\textsuperscript{142} or efficiency\textsuperscript{143} of implementation and regardless of the type of interest allegedly infringed.\textsuperscript{144} The timing and substance of each, however, depends upon the nature of the case.\textsuperscript{145} When the Supreme Court has found that the interests of the individual outweigh those of the state, it has provided a hearing prior to or contemporaneous with the deprivation of a protected right.\textsuperscript{146} When the interests of the state have predominated, the hearing has followed the deprivation.\textsuperscript{147}

Representation is not a foundational requisite of due process;\textsuperscript{148} the Court has chosen to analyze the question of the right to counsel on a case-by-case basis.\textsuperscript{149} Therefore, the type of interest allegedly infringed,\textsuperscript{150} cost,\textsuperscript{151} efficiency,\textsuperscript{152} and whether the attorney would be appointed or retained\textsuperscript{153} are material factors in determining whether to provide counsel at all.

For instance, in *Goldberg v. Kelly*,\textsuperscript{104} the Court held that a welfare recipient faced with revocation of assistance benefits may retain an attorney if representation is desired.\textsuperscript{155} The state’s interest in an inexpensive, summary proceeding, however, outweighed a right to appointed

\begin{itemize}
\item \textsuperscript{142} See, e.g., Bell v. Burson, 402 U.S. 535, 540-41 (1971).
\item \textsuperscript{143} See, e.g., Stanley v. Illinois, 405 U.S. 645, 656 (1972).
\item \textsuperscript{145} Goss v. Lopez, 419, U.S. 565, 579 (1975).
\item \textsuperscript{147} See, e.g., Mitchell v. W.T. Grant, 416 U.S. 600 (1974).
\item \textsuperscript{148} There may be an argument to the contrary supported by cases which require representation at least when a party is illiterate or does not understand the nature of the proceeding. In *Wolff v. McDonnell*, for example, the Court stated: "Where an illiterate inmate is involved, however, or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case, he should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff." Wolff v. McDonnell, 418 U.S. 539, 570 (1974). \textit{See also} Powell v. Alabama, 287 U.S. 45, 68-69 (1932).
\item \textsuperscript{149} See, e.g., Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).
\item \textsuperscript{150} See, e.g., Arnett v. Kennedy, 416 U.S. 134, 178 n.6 (1974) (White, J., concurring in part and dissenting in part).
\item \textsuperscript{152} See, e.g., Wolff v. McDonnell, 418 U.S. 539, 570 (1974).
\item \textsuperscript{153} "We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires." Goldberg v. Kelly, 397 U.S. 254, 270 (1970).
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{155} \textit{Id.} at 270.
\end{itemize}
representation. In *Goss v. Lopez*, the Court denied that a student subject to short suspension from public school has a right to retain counsel. The denial was based on the notion that creation of a trial atmosphere might "overwhelm administrative facilities" and destroy the effectiveness of suspension as part of the teaching process.

Nonetheless, consistent with the flexibility of a balancing process, the Court did not categorically deny representation for all suspensions. It acknowledged, for example, that public school administrators may permit counsel in cases involving longer suspensions or more difficult fact situations than those analyzed in *Goss*.

**The Proposed Constitutional Argument for Separate Representation of the Child**

The preceding analysis of the applicability and scope of procedural due process provides a framework for argument supporting a child's right to separate counsel in divorce custody proceedings. Discussion will identify the interests of the minor which may be infringed, measure the gravity of their deprivation, and balance their weight against the opposing interests of the state.

**The Child's Separate Interests in Divorce Custody Proceedings**

**Liberty Interests**

As stated earlier, the child of divorce has an interest in an award conducive to healthy emotional development. Proponents of change in divorce custody procedure have resorted to two principal sources of authority to indicate that the child has separate interests in divorce custody proceedings. First, by reference to sociological literature, they have emphasized the need to consider psychological variables when evaluating placement alternatives. In addition, they have cited Supreme Court cases acknowledging a clear public policy in favor of protecting

---

156. *Id.*
158. *Id.* at 583.
159. *Id.*
160. *Id.*
161. 419 U.S. at 584. For parole and probation revocation hearings, the court has established a limited right to counsel. It has explained that "[a]lthough the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees." *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).
162. See note 80 & accompanying text *supra*.
163. See notes 42-44 & accompanying text *supra*.
the stability of the family unit. The Court has established both that this interest in a stable family unit applies to the child and that it is part of the concept of "liberty." For example, it has stated that "[i]t is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."

The liberty protected by the fourteenth amendment clearly includes the child's interest in normal growth as well as his interest in a stable family unit. In the Roth opinion, which remains the most ambitious recent attempt to define the scope of due process liberty, the Court stressed the importance of a flexible definition. It described the concept as "purposely left to gather meaning from experience . . ." and as "relat[ing] to the whole domain of social and economic fact . . . ."

Furthermore, protection of the child's interests in the divorce proceeding does not require an attenuated definition or analysis. The need for family stability is already a recognized ingredient of fourteenth amendment liberty. The interest in normal growth is simply a logical corollary of that need. Obviously, if the state sanctions custody procedures which fail to consider the emotional well-being of the children involved, it also sanctions a disregard of family unity.

"Important" Interests

These interests in fourteenth amendment liberty also qualify as "important" interests under the authority of the pre-Roth cases which extended due process safeguards to rights not specifically denominated "liberty" or "property." For instance, in Stanley v. Illinois, the Court recognized a right to the management of one's children and, therefore, invalidated a statutory presumption that unmarried fathers were unsuited to assume the obligations of custody upon the death of the mother. The opinion, however, did not analyze the parent's rights alone; it also acknowledged that the fitness of an adult for parenthood has a significant bearing upon the growth and development of a child.

164. See note 19 & accompanying text supra.
166. 408 U.S. at 572-75.
168. Id.
169. See notes 19, 164 & accompanying text supra.
170. See note 19 & accompanying text supra.
171. See notes 113-23 & accompanying text supra.
172. 405 U.S. 645 (1972).
173. See notes 119-20 & accompanying text supra.
174. 405 U.S. at 657-58.
175. Id. at 652-53.
The Court therefore understood the placement award to affect separate concerns of minor and adult. The opinion stated that when “the procedure forecloses the determinative issues of competence and care . . . it needlessly risks running roughshod over the important interests of both parent and child.” Since the Court has not discredited the logic of cases which applied due process protections to non-denominated interests, Stanley remains valuable support for a distinction between the needs of children and those of parents in divorce custody proceedings.

Property Interests

By comparison to the liberty interests and other “important” interests discussed above, the property rights of the child in divorce custody proceedings have little substance. Roth requires proof of entitlement to a benefit before due process will apply. In the absence of a clear statutory or de facto state policy which allows direct participation of the child in the distribution of marital assets, the alleged property claim constitutes merely a “unilateral expectation” or “abstract need.” Therefore, argument that divorce infringes a minor’s economic well-being will not of itself invoke the protections of the fourteenth amendment.

176. Justice Douglas emphasized the need to weigh the interests of the minor in litigation concerning the parental right to control the religious freedom of a child. Wisconsin v. Yoder, 406 U.S. 205 (1972) (dissenting opinion). “If the parents . . . are allowed a religious exemption, the inevitable effect is to impose the parents’ notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child’s rights to permit such an imposition without canvassing his views.” Id. at 242.

177. Id. at 657 (emphasis added).

178. 408 U.S. at 577.

179. Id.


181. 408 U.S. at 577.

182. Id.

183. A few recent Supreme Court decisions have greatly expanded the scope of protections afforded by the fourteenth amendment. These cases have found “zones of privacy” emanating from the specific guarantees of the Bill of Rights which encompass a married couple’s right to use contraceptives and a pregnant woman’s qualified right to seek abortion free of state interference. See Roe v. Wade, 410 U.S. 113 (1973) (abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraceptives). Whether the logic of these opinions will support a broad interest in personal autonomy remains an open question. Several lower courts, however, have already construed Roe as resting the abortion decision with the pregnant woman and her physician alone. Statutes requiring parental consent for abortions performed on pregnant minors have therefore been invalidated. See Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975); Planned Parenthood Ass’n v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975); Baird v. Bellotti, 393 F. Supp. 847 (D. Mass. 1975).

Further mention of these emergent interests would require discussion of the special
The Gravity of Deprivation of the Child's Separate Interests

The "De Minimis" Standard

The gravity of the deprivation of the child's protected interests in divorce custody is not de minimis. Cases which have defined the standard have at the same time emphasized a shift from measuring the weight of the loss toward scrutinizing the nature of the right allegedly infringed. For example, in Goss, the Court held that once a de minimis infringement is found, the gravity of deprivation is irrelevant to the question of whether due process may apply in a given situation. There, a ten-day suspension from public school was sufficient to infringe due process liberty on grounds of potential damage to reputation.

By comparison to the public school suspension, the custody decision threatens harm which clearly satisfies the "de minimis" rule. The placement award is permanent, not temporary. It ruptures the stability of the family unit and poses a threat to the child's normal growth and development. The stigma which may attach to a ten-day school absence is minor by comparison to the long-term hardships which may result from an ill-considered placement.

The "Grievous Loss" Standard

If the Supreme Court were to return to a measure of deprivation based upon the grievous loss standard, the interests of the child would qualify for protection nonetheless. Divorce, as mentioned above, may tend to disrupt the normal socialization of the child. An earlier section of this note, for example, outlined the potential consequences of a failure to consider the psychological best interest of a child: psychosomatic illness, low school achievement, reduced self-esteem, and juvenile delinquency. Obviously, these threatened hardships are

---

184. See notes 134-36 & accompanying text supra.
185. 419 U.S. at 576.
186. Id. at 574-75.
187. See notes 19, 164-65 & accompanying text supra.
188. See notes 11-16 & accompanying text supra.
189. See notes 11-16, 19, 80-81, 162 & accompanying text supra.
190. See note 12 & accompanying text supra.
191. See note 14 & accompanying text supra.
192. See note 11 & accompanying text supra.
193. See note 13 & accompanying text supra.
grievous in terms of both their damage to normal growth and their potential economic impact upon the state.

The Scope of Due Process Protection—The Child’s Right to Separate Counsel

As stated previously, analysis of the scope of due process protection makes no use of general rules or standards. The safeguards which are appropriate to a given circumstance derive from a balancing of the competing interests. The right to independent representation is no exception; the Supreme Court has expressly decided to resolve the issue on a case-by-case basis. The balancing process, however, is neither purely subjective nor wholly unpredictable. The instances in which the Court has confronted the question serve as benchmarks for discussion of the right to counsel in other contexts.

In Goldberg v. Kelly, the Court held that notice and hearing, the foundational requisites of due process, were inadequate by themselves to protect a person from an unjustified deprivation of public assistance payments. Quoting from Powell v. Alabama, a criminal case, the Court explained that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." The Court noted that the severe financial burden which would befall the welfare recipient upon erroneous termination of benefits greatly outweighed the state’s interests in summary adjudication and protection of the public treasury. The opinion reasoned that counsel could help to "delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient." Although the Court declined to extend its analysis beyond the right to retain an attorney when representation was desired, nothing in the opinion foreclosed an argument for appointed counsel under different, deserving circumstances.

In Goss v. Lopez, as already mentioned, the Court denied that students subject to short suspension from public school have a right to retained counsel. Nevertheless, the opinion left open the question of

194. See notes 139-53 & accompanying text supra.
195. See note 140 & accompanying text supra.
196. See note 149 & accompanying text supra.
198. Id. at 268-71.
199. 287 U.S. 45 (1932).
200. 397 U.S. at 270 (citation omitted).
201. Id. at 265-66.
202. Id. at 270-71.
203. Id. at 270.
204. 419 U.S. 565 (1975).
205. 419 U.S. at 583.
independent representation for suspensions exceeding ten days or for "unusual situations." \textsuperscript{206} Examples of the circumstances which would justify the services of counsel were not provided.

The variables which the Court stressed in permitting or denying separate representation in \textit{Goldberg} and \textit{Goss} provide a framework for discussion of the child’s right to independent representation in the divorce custody proceeding. The opinion in \textit{Goss} intimated that time may play a role in the determination. A deprivation of liberty beyond ten days was a factor which might have tipped the scales in favor of a right to counsel. \textsuperscript{207} The custody decree, by comparison, is often permanent; it is seldom modified except on a showing of change in circumstances. \textsuperscript{208} The Court in \textit{Goss} further indicated that the difficulty of the proceedings in which protected rights are litigated may be an ingredient in the balance. It found that the typical public school disciplinary process did not qualify in this regard. \textsuperscript{209} By contrast, the divorce custody proceeding litigates the significant interests of the child in an atmosphere which is adversarial and often rife with conflicting and bitter testimony.

The Court in \textit{Goldberg} emphasized that when stakes are high, \textsuperscript{210} the right to be heard has little substance unless it includes the right to be heard by counsel. \textsuperscript{211} The minor’s stakes in a divorce custody proceeding are obviously high. The child depends upon the adult parties and the court to advocate his interests in an environment conducive to normal psychological development and in the stability of the family unit. Yet because the parents and the judge have additional interests to protect, \textsuperscript{212} the advocacy includes no guarantee of forcefulness. The child needs the guiding hand of counsel to help delineate the issues, present the factual contentions in an orderly manner, and generally safeguard his special concerns. \textsuperscript{213}

The holding in \textit{Goldberg} was limited to the right to \textit{retain} counsel. Extension of a similar privilege to the child of divorce would serve little purpose. Few minors have the sophistication or the financial resources to secure the services of an attorney without assistance. The child requires an unqualified right to demand appointed counsel in those custody proceedings which threaten deprivation of his separate interests.

\textsuperscript{206} \textit{Id.} at 584.
\textsuperscript{207} \textit{Id.}
\textsuperscript{208} \textit{See, e.g.,} Stephens v. Stephens, 47 Ala. App. 396, 255 So. 2d 338 (1971).
\textsuperscript{209} \textit{419} U.S. at 583-84.
\textsuperscript{210} \textit{397} U.S. at 266.
\textsuperscript{211} \textit{Id.} at 270.
\textsuperscript{212} \textit{See} notes 46, 60 \& accompanying text supra.
\textsuperscript{213} \textit{Powell} v. \textit{Alabama}, 287 U.S. 45, 69 (1932).
Applying the Constitutional Right to Counsel

Recent Decisions

Assertion of the constitutional argument for the right to counsel has already met strong resistance. Three recent decisions provide sufficient illustration. In Salaices v. Sabraw, three minor children, aged ten, eleven, and thirteen, sued in federal district court to enjoin the enforcement of a visitation order against their mother, claiming a due process right to participate in the decision through separate counsel or guardian ad litem. Mrs. Salaices, the natural mother, and Mr. Hidalgo, the natural father, had divorced in 1970. The final decree awarded custody to the mother and reasonable visitation rights to the father. Neither parent attempted to compel regular visits until November of 1974, when Mr. Hidalgo brought a contempt proceeding against Mrs. Salaices to enforce the original order.

During the superior court trial, the children attempted to intervene on the ground that neither parent could adequately convey their opposition to visits with Mr. Hidalgo. The record indicates that the mother had no interest in the outcome. She simply denied that she had interfered with the visitation order. The affidavits of two of the three children disclosed a clear wish to avoid association with their father. Each indicated that he had received physical abuse from Mr. Hidalgo during previous visits.

The superior court judge attempted to evaluate the controversy by appointing a social worker to prepare a report of the plaintiffs' needs and interests, by speaking with the oldest of the three children in chambers, and by hearing the argument of proposed counsel on two occasions. The plaintiffs argued that the judge had denied the motion to intervene before receiving the report from the social worker.

Thus, the plaintiffs presented a strong case for their asserted due process rights: disputed visitation, a disinterested mother, a hostile father, adversary proceedings, limited hearing of their wishes, affidavits

215. Id. at 368.
218. 400 F. Supp. at 369.
219. Id.
220. Id.
attesting to the unsatisfactory nature of the visits, and failure to consider the social worker's report. Nonetheless, the federal court ruled that the superior court judge and the attorneys for the parents had adequately considered the interests of the children\(^2\) and rejected the constitutional argument as unsupported by the evidence.\(^2\)

In *Goldsmith v. Jekanowski*,\(^2\) by contrast, a federal district court enjoined the enforcement of a custody decree and ordered a hearing on the minor plaintiff's asserted right under the due process clause of the fourteenth amendment to participate in the placement decision through retained counsel.\(^2\) The plaintiff, Kyneret Goldsmith, was eleven years old at the time of suit. Her parents had separated in November 1972 and divorced in September 1974. She had lived with her mother in Massachusetts for the entire period. During custody proceedings in February 1975, the probate court awarded custody to the father, a resident of Illinois. Within three days of forcible removal,\(^2\) Kyneret fled her father's home and returned to her mother, who secured a stay of execution of the custody decision by a single justice of the Supreme Judicial Court of Massachusetts. After argument, however, the full court affirmed the placement and dismissed a motion by Kyneret to intervene in the proceedings through retained counsel.\(^2\) The plaintiff appealed to the federal district court, which granted an injunction against enforcement of the custody award on grounds of potential psychological harm to Kyneret, interruption of schooling, absence of harm in maintaining the status quo, and likelihood of success on the constitutional argument.\(^2\)

Although *Goldsmith* received a more favorable review in federal court than *Salaices*, each illustrates the unyielding opposition of state courts to the assertion of a child's due process right to counsel in custody or visitation proceedings. Furthermore, the federal court in *Goldsmith* chose not to settle the constitutional claim, merely noting instead the likelihood of its success on rehearing. To date, therefore, no federal court has favorably analyzed the due process argument.

In *Leigh v. Aiken*,\(^2\) the divorced mother of a twelve-year-old boy

---

222. 400 F. Supp. at 369.
223. Id. at 368.
228. Id. at 2-3.
argued that the trial court had erroneously deprived her son of representation by a guardian ad litem in her suit against the father for modification of custody and visitation rights. The claim, raised for the first time on appeal, asserted the child’s right to separate representation under the due process clause. The Alabama Court of Civil Appeals dismissed the argument and stated flatly that custody proceedings have no bearing on the due process rights of the children involved. It held the practice of investing the judge with complete discretion to secure an award in the best interest of the child sufficient to satisfy principles of fundamental fairness.

These decisions have a common characteristic. Each fails to specify the precise deficiencies of the due process logic. The explanation for the dismissals of the constitutional argument may lie not in the weakness of the claim, but rather in the courts’ reluctance to authorize sweeping modifications of existing procedures. For example, the court in Leigh asked,

If counsel is appointed, whose view does he represent, his own or that of the child? Is the child to be a witness and subject to cross-examination? Is the child to have the right of appeal? How is the cost of counsel and his expense of investigation to be assessed?

Problems of Implementation

When To Appoint Counsel

The constitutional argument discussed above does not qualify the child’s right to counsel. The balance of interests at stake in divorce proceedings, however, may not convince every analyst that separate representation is required in all cases. In any event, the right to counsel should apply at the very least in circumstances involving disputed custody or upon the recommendation of a designated family counselor.

The term “disputed custody” refers to all cases which require the intervention of a third party, generally a judge or referee, to effect a settlement. An earlier section of this note outlined the difficulties of securing an award in the child’s best interest within the context of an adversary proceeding. The attorney for each adult must try to prove the fitness of his or her client for parenthood, no matter how equivocal the evidence. Furthermore, the judge must fill two mutually exclu-

230. Id. at 446.
231. Id. at 450.
232. Id. at 448 (footnote omitted).
233. Other factors which the court might consider are the child’s wishes, the parents’ wishes, and the opinion of the local social services department.
234. See note 46 & accompanying text supra.
235. Id.
sive roles, as he or she is to function as both arbiter and advocate. Unless there is a means to press the child’s wishes at all times, the disputed custody proceeding may litigate the claims of the adults alone.

In addition, it is suggested that courts be required to consider the opinion of a family counselor on the need for separate representation and to grant the right to counsel in all cases in which such representation is advised. Several factors recommend the additional input. The vast majority of custody decrees receive limited judicial scrutiny. Courts seldom have the time or resources to evaluate each award adequately. They are therefore forced to provide rubber stamp approval for the settlements reached by counsel for the adult parties.

A counselor could help to resolve these problems by locating those undisputed cases which show signs of casual or incomplete consideration of the child’s welfare. The practical application of this suggestion would involve little added expense or delay. The parties who reached a settlement through their attorneys would meet briefly with a trained counselor to discuss the factors which contributed to the agreement. The counselor would deliver his findings to the court accompanied by a recommendation favoring or opposing a renegotiation in which a lawyer for the child would participate. Naturally, this process would give tremendous discretion to the counselor. Nevertheless, considering the abuse of the child’s interest which an ill-considered decision may involve, the suggested procedure is a small price to pay.

A court should appoint counsel in a case of disputed custody or upon the recommendation of a counselor without regard to the age of the child. Maturity would create an arbitrary classification. An infant and an adolescent may react to divorce in psychologically distinguishable ways. Nonetheless, the potential for disruption of normal emotional development exists for each. Age may have a bearing upon the tactics selected by an attorney to represent a minor client but should not determine the need for counsel.

The Role of Counsel

Analysis of the role of counsel provokes several questions: Should the child’s attorney have legal powers similar to those of the parents’ attorneys? Would the court retain its authority to act as *parens patriae* for the “best interest” of the child? How would the age of the client affect the manner of representation?

236. See note 60 & accompanying text *supra*.
237. The counselor would be a court-affiliated or court-designated trained professional.
238. See note 3 & accompanying text *supra*.
239. See, e.g., Goldstein, Freud & Solnit, *supra* note 10, at 32-34.
240. Id.
First, counsel for the child should have the same powers as the attorneys for the adults with respect to discovery, presentation of evidence, cross-examination, and appeal. A less active role would prejudice a forceful advocacy of the child's views. The guardian ad litem concept, for instance, fails as a comprehensive safeguard of the minor's welfare precisely because the guardian lacks the authority to confront the parents' counsel on equal legal footing.\textsuperscript{241}

The court would naturally retain some right to modify the normal rules of evidence and procedure to protect the child's welfare. For example, the judge could decide not to allow the child to take the stand. Nevertheless, counsel for the child should have the right to appeal any order believed to have prejudiced his client's interests.

Second, the addition of representation for the child would clearly diminish the court's discretionary power under the\textit{ parens patriae} doctrine. The judge would have an obligation to consider the views of the child's attorney regarding the most suitable decree. The court would have the ultimate power of decision, but the possibility of appeal would reduce the chances of an award based solely on subjective grounds.

Third, the obligations of the child's lawyer should not increase or decrease with the age of the client. The Code of Professional Responsibility of the American Bar Association recognizes the difficulties of advocating the interests of a minor\textsuperscript{242} and provides several guides for the attorney. If the child is "acting through a guardian or other legal representative, [the] lawyer must look to such representative for those decisions which are normally the prerogative of the client to make."\textsuperscript{243} If the child "has no legal representative, [the] lawyer may be compelled . . . to make decisions on behalf of the client."\textsuperscript{244} In this instance, "the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client."\textsuperscript{245} In short, nothing in the code permits the lawyer to dilute his loyalty to the child\textsuperscript{246} or to provide less than a zealous representation\textsuperscript{247} at all times.

\textbf{The Cost of Counsel}

The cost of added counsel should be paid by the adult parties, if they are financially able to pay, or absorbed by the court. Opponents

\begin{footnotes}
\item 241. See notes 48-50 & accompanying text supra.
\item 242. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-11.
\item 243. Id. EC 7-12.
\item 244. Id. At least one court has recognized the incongruity of acting as both client and attorney and has appointed a guardian\textit{ ad litem} for the child unable to make decisions on his own behalf. See \textit{In re Dobson}, 125 Vt. 165, 212 A.2d 620 (1965).
\item 245. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12.
\item 246. Id. EC 5-1.
\item 247. Id. EC 7-1.
\end{footnotes}
of the due process claim will raise vigorous objection to the increased expense involved. Moreover, courts have the right to consider cost when appraising the need for appointed representation. Nonetheless, the economic argument should not outweigh the need for counsel, at least in the two instances of greatest threat to the child's interests, disputed custody and casually considered settlements.

Conclusion

Ideally, the divorce custody decision should reflect a considered analysis of placement alternatives from the perspective of the child's best interest. In practice, the assessment represents little more than the court's opinion of parental fitness. Social service reports, recommendations by parents' counsel, and evaluation of the child's wishes may increase the likelihood of a determination which serves the child's needs. The majority of custody settlements, however, receive limited court review. Contested cases pose additional obstacles to careful analysis in the form of acrimonious debate and sharply conflicting testimony. Nonetheless, the child has a clear interest in the accurate finding of fact and the informed use of discretion.

The argument for a due process right to counsel attempts to resolve the deficiencies of existing procedure. As courts and attorneys become more familiar with studies of the psychological damage which may accompany the ill-considered placement decision, due process claims should become more prevalent. Until the means to effective representation of the child's welfare are improved, custody determinations based upon the minor's best interest will remain an abstraction.

*Maurice K. C. Wilcox*

* Member, Second Year Class.

The author wishes to thank Suzanne Martinez and Robert Walker of the Youth Law Center, San Francisco, for their assistance in the preparation of this note.