NEGLECTED "RIGHTS" OF MINORS IN MARITAL BREAKDOWNS

The last decade in the United States has seen, among other significant, even staggering, social and legal changes,[1] a dramatic growth in the concept of legally protected rights of minors. The most notable growth in minors' rights has been in the area of juvenile law, the impetus being derived from *In re Gault*,[2] a case decided in 1967 by the United States Supreme Court, which, having found the informal procedures of juvenile criminal cases to be less protective of the child offender than were the formal protections mandated for the adult in criminal trials, extended adults' procedural protections to minors. Subsequent to *Gault* both courts and state legislatures have expanded the protections of the juvenile offender. For example, in North Carolina, juvenile proceedings, which are generally not deemed criminal prosecutions, are regarded as "criminal" for the purpose of applying the United States Constitution's Fifth Amendment privilege against self-incrimination.[3]

Interestingly enough, no provision of the United States Constitution specifically addresses itself to the rights of minors. Their existence is only recognized in a negative sense in the original constitution, as in Article I, section 2, which requires Representatives to be twenty-five years of age.[4] And it may be doubted whether the authors of the Fourteenth Amendment, three-quarters of a century later, thought of children as embodied in the generic term "person".[5] If children were regarded as "persons" for any purpose for Fourteenth Amendment equal protection and due process provisions, exceptions in constitutionally-acceptable classifications, as in those applied to women,[6] became entrenched constitutional doctrine. So persons below the age of twenty-one years had no right to vote in federal or state elections until those eighteen and older were given that right by the Twenty-Sixth Amendment in 1971.

The status of the minor as a party in both criminal and civil litigation has remained variable.

[1] E.g., Changes in the position of racial minorities brought about by the desegregation decisions of the Supreme Court in the 1960's by the Civil Rights legislation of the Kennedy and Johnson presidencies; and note changes in the status of women, derived in large part from the extension of civil rights holdings and principles applicable to minorities.

[2] 387 U.S. 1, 18 L. ed 2d 527, 87 S Ct 1428 (1976).

[3] *State* v. *Rush,* 13 N.C. App. 539, 186 S.E. 2d 595 (1972).

[4] Senators must be thirty years of age, Article I, section 3; the President thirty-five, Article II, section 1.

[5] "… nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[6] E.g., in spite of the Fourteenth Amendment's provision: "…nor shall any State… deny to any person within its jurisdiction the equal protection of the laws," it required the Nineteenth Amendment, some fifty-one years later, to ensure women the right to vote.

It had not been doubted that the minor, when adjudged an adult[7] for the purposes of criminal trial, was then entitled to whatever rights the adult offender possessed. The inferior procedural rights occurred, prior to *In re Gault,* in proceedings designated as "juvenile" as a result of the child's age; and because of that designation, the procedure of the Juvenile Court attached, which in its "informality" often denied the right of counsel. This denial was not uncommon, even when the child or his parents or guardians were able and willing to employ counsel.[8]

In nearly all civil litigation a child at Common Law could be represented by counsel when he was either a plaintiff or defendant.[9] Modern rules frequently require that the child sue or be sued through a guardian or next friend.[10] But there is no question that the interest being prosecuted or defended is that of the child. Counsel acts on behalf of the actual party in interest, the child.

Until fairly recent times the putative child plaintiff was prevented in most American jurisdictions from suing a parent in Tort.[11] But this is a rule now being abandoned.[12] The removal of the barrier to intra-family suits is customarily attributed to the pervasive nature of automobile insurance, that vehicle providing the cause of most intra-family actions in Torts.

The child's right to sue the parent in Contracts has not paralleled the situation in Tort because of traditional limitations on a child's capacity to enter into contracts.

The Common Law afforded a child the right to protect his interest in property against a parent, and that ancient right persists.

However, only a small number of jurisdictions have recognized the right of a child to sue, as a third party beneficiary, to enforce a separation or property settlement agreement, entered into between the parents, to provide for the support of the child.[13]

Only in comparatively recent years, and in a few jurisdictions, has a child been permitted to bring an action against his parent to enforce his statutory right to support.[14]

Even more recent, and in fewer jurisdictions, has a child been accorded a right of representation in litigation to determine his custody or matters of visitation. The failure to see these issues fully from the child's point of view stems perhaps, as in the case of similar disabilities as to him, from society's and the law's long held vision

[7] In many jurisdictions the Juvenile Court may, under certain circumstances, waive jurisdiction and certify the individual for criminal prosecution. See Texas Penal Code, Article 30.

[8] See *In re Gault,* note 2, *supra.*

[9] Occasionally, a statutory provision may have limited an infant's rights as a party.

[10] Section 1A-1, Rule 17(c), North Carolina Rules of Civil Procedure.

[11] The parent-child immunity first appeared in the United States in *Hewlette* v. *George,* 68 Miss. 703, 9 So. 885 (1891).

[12] See, e.g., *Gelbman* v. *Gelbman,* 297 N. Y. S. 2d 529; 245 N.E. 2d 192 (1969)

[13] E.g., *Walsh* v. *Walsh,* 42 Cal. App. 2d 282, 108 P 2d 760 (1940).

[14] E.g., *Green* v. *Green,* 210 N.C. 147, 185 S.W. 651 (1936).

of the child as a kind of thing, a possession of the parents. So it is not strange that the law speaks of his custody in his parents in terms not very dissimilar from the way it speaks of their custody of the personalty of the marriage or that the "right" of visitation is perceived of as something basically possessed by the parents, rather than by the child. It is, of course, true that most jurisdictions give important consideration to the desires of a child of certain maturity as to which parent he wishes to have custody.[15] But even in these jurisdictions the child is not normally represented by his own counsel. Because divorce is an equitable action, because great discretion has traditionally resided in judges dealing with matters affecting children, domestic relations courts have generally had power to appoint counsel to represent the interests of a child during at least some aspects of the marital dispute. But the appointment of counsel for the child has seldom been exercised. Even the codification of the power of the court to appoint a representative for the child in divorce actions has not resulted in much activity in this area.[16] The few states that have legislated the power of the court to appoint a representative for a child during the parents' divorce merely illustrate the extent of the serious void in children's rights in this far reaching litigation.

The prevailing, generally unstated, philosophy in the United States is that the child's interests are not inconsistent with those of at least one of his parents. While some exception is recognized in this doctrine, notably in custody proceedings in which neither parent may be found fit to have custody, full effect is still not given to important property ramifications of even a holding of double parental unfitness.

It is the thrust of this paper that the minor should be separately represented as a matter of right in family dissolution proceedings,[17] not merely to litigate matters of custody and visitation, but of support, and to present a claim to the marital property.

The interests of the child may not be compatible with the interests of either parent. It is possible, and not uncommon, that both parents should be found unfit custodians when the marriage disintegrates. Whether one or both is so found customarily depends upon whether one of the parents chooses vigorously to litigate the issue of the unfitness of the other. Thus one of the most vital decisions that can be made concerning the child's entire future life is left to persons who may be unfit to make such a decision or, if fit, may be emotionally incapable of acting in the best interests of the child. Nor are the child's property interests, even as seen as only a right of support, necessarily the same as those of either parent; and certainly if a child is recognized, as this paper argues, as having a right in the accomulated assets of the marriage, then clearly the child's interests are likely to be different from that of both parents.

[15] E.g., in Ohio the choice of a child of twelve years of age, or older, is controlling as to the parent who shall have custody, unless the court finds that parent unfit or that such custody would not be in the best interest of the child. Ohio Revised Code, Section 3109.04.

[16] See Berdon, "A Child's Right to Counsel in a Contested Custody Proceeding Resulting from a Termination of the Marriage," 50 Conn. B.J. 150, 154 (1976).

[17] For a plea for a greater recognition of children as people with legal rights see Foster and Reed, "A Bill of Rights for Children," 6 Family Law Quarterly 343 (1972).

Whatever arguments can be made for today's more casual or "liberal" attitudes in the United States towards sexual relations, conception, marriage, divorce, and one parent families, those arguments are generally concerned with the "rights" of the parents. Just as abortion is frequently argued as a right of a woman to control her own body, so divorce is most often seen as the right of the adult parties to a marriage to control their own destinies. It is not clear how much society really sees the children of divorce as the true victims of marital disintegration. The law makes no attempt to compensate these helpless victims for their emotional injury or the loss of property expectations, as it would if they were innocent victims of tortious injury, even at the hands of their parents.

No attorney can have long practiced in the field of Domestic Relations, certainly no judicial officer can have dealt with these cases, without the distressing early realization that the parties to a genuinely litigated marital break-down, consciously or subconsciously, perceive of the children as one of the most potent weapons in their marital warfare. When a child is used to punish a parent, that child's interest is not likely to be paramount in the mind of the aggressor parent, however he or she may rationalize his actions.

Although legislation has attempted to reduce the adversary nature of marital break-down through such reforms as divorce without proof of fault,[18] this legislation really only gives form to what was already a reality, i.e., often both parties do want a divorce and cooperate in procuring it. When they do, the court has no assurance that the interests of the children of the marriage are best protected and preserved by agreements reached by the parties. Many jurisdiction have some form of investigative service, often mandatory, when there are minor children.[19] A social worker, employee of the Court, or of the political division in which it operates, often makes a report in which the child's welfare is the paramount concern. But social protective investigative time and resources are limited. Where the parents are not in an adversary relationship and where the conditions of the home are not obviously deleterious, the social worker may be easily misled or deceived as to the child's best interests. No partisan legal advocate of the child examines the facts for him or speaks for him to the court.[20]

Nor is the situation better, from the child's point of view, when the parents are genuine adversaries, either in the divorce proceedings themselves or in the often traumatic custody hearings that may precede, coincide with, or follow the divorce hearing.

While the pattern is changing and the law, statutorily or by court decision, no longer prefers the mother,[21] still by force of custom or the inability, real or imagined, of the father to provide the "mothering" perceived as needed, especially for young children, the mother is most frequently awarded custody of minor children.

[18] E.g., Ohio Revised Code Section 3105.61 *et seq.*
[19] E.g., Ohio Revised Code Section 3109.04.
[20] In Ohio the ordering of the custodial investigation is at the discretion of the judge, who may feel no need of an investigation when the parents are in agreement.
[21] E.g., Ohio Revised Code, Section 3109.03.

The law makes the peculiar assumption in marital disputes, as in no other area, that where two interested parties, the parents, fight out their interests in court, the child's best interests as to matters of property and to some form of parental care will somehow emerge without benefit of a trained champion and spokesman, employed for him, as his parents' advocates are for them. Of course, the view prevails, and not without some reasonable justification, that the judicial officer will act to protect the child's best interests; and indeed he frequently does. But he must act on the evidence available. In some jurisdictions he may order extensive investigation of the family. He may even be able to compel the parties to submit to medical, psychological and psychiatric examinations.[22] But the report of an investigation cannot be expected to have the efficacy of the development of a coherent theory, the assembling of evidence and the presentation of reasoned argument by a lawyer for the child.

There are several fundamental matters that should be explored and developed by a vigorous legal advocate of the child's interests, from the time an action for divorce or separation is filed. The first is the matter of custody. Several factual variations at the time of filing for divorce are possible. In some states the parties may file for divorce and continue to live in the same house, although not in the same bed.[23] Temporary custody may not be sought by either parent in this circumstance; and the child's position is at that time not likely to be materially changed. He may then not need separate representation. More common is it for one parent to move out of the marital home, either leaving or taking the children, or some of them. In most states if the wife has the child at this juncture, she may, and often does, file for temporary custody and temporary support for the child. She often also seeks temporary alimony. At this point the child clearly needs independent representation. It may be that the parent seeking custody is unfit and the other does not want the child. In some states, no home investigation may be made by a welfare agency on behalf of the court at the time of the temporary custody hearing. Counsel for the child should be able to develop the vital facts of the unfitness of both parents and be able to offer to the court an alternative custodian, as a relative, or a state agency.[24]

A fortiori, the child needs independent representation at the permanent custody hearing.

American law has long been clear on the right of the child to a parent's support during his minority. This is so during the marriage; and the right remains after separation or divorce of the parents. Formerly, the duty was most often placed only on the father.[25] Today this duty is more often that of both parents.[26] But making the case for child support from one parent is most often the responsibility of the other. Only some states recognize the right of a child to maintain an action against a parent for support[27] and then only when a parent

[22] See Note 19, *supra.*
[23] E.g., *Randall v. Randall,* 158 Fla. 502, 29 So 2d 238.
[24] See Note 19, *supra.*
[25] See *Gulley* v. *Gulley,* 111 Tex 233, 231 S.W. 97.
[26] See [Texas] V. T.C.A., Family Code, section 4.02.
[27] *Simms* v. *Simms,* 49 Hawaii 200, 412 P 2d 638.

with custody is not seeking support for the child. In the latter situation, the courts hold the child to have no separate standing in the support litigation.[28] Most courts will not disturb a support agreement voluntarily entered into by the parent in custody, even though the sum might actually be inadequate for the needs of the child or represent an unreasonably small fraction of the other parent's income. Support does generally remain open for court modification during the minority of the child;[29] but the initiative for seeking modification is that of the parent to whom custody has been awarded; and most jurisdictions do not recognize any one not a party to the divorce, which includes the child, as having status to file a motion for modification of the support award.[30]

Where the issue of support is litigated, the court may customarily make any support award it deems just; and the court may have available testimony of independent persons, usually from a social service arm of the court, to testify to the child's support needs; but even here it would be most exceptional for the court's award to go beyond the support sought by the parent granted custody; so both the parameters of the award and the offering of testimony supporting and opposing the amount sought are controlled by the parents' attorneys, with no separate representation on behalf of the child.

A philosophical, and therefore a procedural, void generally exists in the issue of a child's rights to the accumulated property of the marriage. The matter may be quickly disposed of by noting that no such right is normally recognized to exist. What the child is entitled to is support; and support is a right to some portion of the present and future income of one or both parents. The accumulated property, real and personal, is divided between the parents, in the court's equitable judgment. The issue of support of the children is often relevant in the amount of the property awarded to the parent with custody; but title to property must be vested in one of the parents.[31] There is law which permits the property of the parents, whether separate or community, to be impressed with a trust and placed in a trustee, other than one of the parents, for the beneficial use of minor children, with title remaining in the parent to whom it would otherwise be awarded.[32] Such a course of action by a court is very rare; and depends upon adequate evidence before the court, which could not often be available to a court when the evidence is presented only by counsel for the contending parents. There would appear to be a growing tendency in the United States, deriving in part from the philosophy of community property states, as well as from the expanding concepts of sexual equality, to divide the accumulated marital assets in equal shares between the parties. But whatever formula the court uses in making the property division, the accumulated assets, and all of them, usually become, when divided, the sole property of each parent, to be managed and disposed of by that parent without regard to any interest or conflicting claim of the child.

[28] *Id.* at 644.
[29] Ohio Rules of Civil Procedure 75 (J).
[30] Note 28 *supra.*
[31] *Bond* v. *Bond,* 41 C.A. 129, 90 S.W. 1128 (Texas, 1906).
[32] *Rice* v. *Rice* 21 Tex 58 (1858).

It is not uncommon, particularly for wealthy parents, in agreement reached outside of court, to provide for the set-aside of marital *assets* for the benefit of the minor children. This is most often accomplished through the establishment of a trust and usually is meant to guarantee a corpus from which support can be made, protected from the profligacy of one or both the parents, or from a later decline in their ability to support the child. But in the absence of such a separation agreement, the agreement often being incorporated in the court's decree, the court will not normally otherwise make a property award to the child. Implicit in the court's usual property award may be the recognition of certain inchoate property rights of the child. For example, the parent with custody is often awarded the marital home in recognition of the need to have a dwelling for the child and in further recognition of the reasonableness of not forcing the child to another house or neighbourhood when the parent in custody argues the desire of maintaining the stability of location in the interests of the child. But whether the home will be awarded the parent in custody usually depends upon the existence of other offsetting assets to be awarded the other parent, or the assumption by the parent in custody of a debt to the other parent to pay his "share" of the marital assets. No award of any part of the marital assets is made to the child. A very fair question is, why not?

Why should the law not say to putative parents: when you enter into marriage you are undertaking an obligation in the event of later marital dissolution to divide the marital assets not merely between yourselves but also between you and the children of your marriage.

Under present law, after divorce either or both parents may almost always take the capital assets they have divided and utterly dissipate them. The parent with the duty of support may not have a current income, may leave the state, may disappear, may die. The parent with custody may abandon the children, may remarry and transfer affection to a new spouse and family, to the detriment of the previous children, may fall under the influence of a new spouse or lover who has no interest in the present or future of the other's children, any one of which, or other, contingencies may deprive the child of all benefit in the assets of the marriage which produced him. Why is this reasonable?

Of course, the law has not always recognized that a wife had a right in the marital assets, but rather only to alimony if she was the injured party. But the wife's right to an equitable share of the marital assets is a continually expanding concept. Only recently a trial court in Colorado found that a woman has a property right in her husband's higher education, a right quite different from alimony, which amounted to the present value of her divorced husband's future earnings assumed to arise from his university degrees, which he earned during the period of the marriage and while she was employed and contributing to the expenses of the marriage.[33] While this case is on the frontier of the wife's claim to marital property, it is illustrative of the degree to which the courts have been led to recognize property rights in the spouses.

[33] *In re the Marriage of Anne P. Graham and Dennis J. Graham.* The District Court found for the wife. The holding was reversed on appeal. Reported in The Chronicle of Higher Education, Sept. 20, 1976, p. 12 at Col. 1.

The failure of the child to be viewed as possessing a property right in the assets of the marriage may stem, in part, from the concept of fault in divorce. Fault, although declining as a rationale for divorce, remains in most of the statutory grounds for divorce. Conceptually the fault is perceived as an action or series of actions by one party against the other, not against the marriage, per se. Fault presupposes an aggressor and a victim, each one of the spouses. But I would submit that inevitable victims of divorce are the children of the marriage, even if the concept of fault is abandoned between the parents. Whatever theory justifies a sharing of the assets of the marriage by the parents would seem to justify sharing in the assets by the children. If an "innocent" spouse is entitled to a share of the assets as a victim of the other's aggression, why not the children, who are almost certainly more "innocent" of the cause of the marital breakdown than one or both the parents. If the theory of the sharing of the assets is the investment by each parent in the creation of the assets, a principle extended even to a spouse who has not worked outside the home, why can the children not also be viewed as having, in a similar way, created the assets: by tax deductions taken because of them by the parents, by their emotional investment in the marriage, as in the case of an unemployed spouse, by the rise of the principle of estoppel ?

Recognition is, in other instances, conceded as to the child's rights to assets accumulated by his parents. This is notably so in the universal provisions of a child's right to inherit through the laws of intestacy and is even more pronounced in those statutes which permit the afterborn child a share in the parent testator's estate.[34]

There are those who might concede the principle of the right of a child to share in the assets of a marriage upon its dissolution who would nevertheless balk at the procedural difficulties which recognition of such a right might be thought to entail. But of course, the creation of every new, or acknowledgment of every previously ignored, right may create procedural difficulties and new work for bench and bar. The extension of civil rights in the United States has not only spawned a vastly larger federal bureauracy but has stimulated a great deal of litigation enforcing the recently-won rights. Most people would argue that, whatever the procedural costs, the social good has more than justified these costs.

Recognition of a child's right to legal representation upon the filing of an action for divorce by one of his parents might well require the creation of a new office attached to the domestic relations court, similar to a prosecutor's or legal defender's office. But here, instead of litigating the interest of the State, as in the former, or defending an indigent defendant, as in the latter, the office would represent the interests of the child, at the expense of the State. Some alternative financing possibilities might be derived from taxing the parents from their share of the marital assets for the costs of proving the child's share.

Perhaps the most difficult, certainly the most long-ranging, problem for the court would be the continued preservation, investment and distribution, as needed, of the child's assets. The complexities

[34] G.S. N.C. Section 31-5.5.

should not be denied not the sheer volume of the work minimized, in view of the ever escalating divorce rate in the United States.[35] In principle, nothing would be required not required of a guardian or trustee of the estate of an orphaned minor; and, of course, either of the parents might well be appointed the guardian of the child's assets. But the parent guardian of the child's estate might well not be the parent with custody. One of the most frequently heard arguments from husbands who have been successful businessmen and have accumulated large estates is that the amount awarded the wife should be limited because she is naive as to financial matters or prodigal, or both. Many a husband has expressed in court the not unbelievable concern that his divorced wife will dissipate her share of the assets to the ultimate neglect of the children, of whom she seeks custody. In the absence of a separation agreement of the parties, these cries now customarily fall on deaf judicial ears, and the wife is granted her share of the marital estate, whatever their ultimate use or misuse may be thought to be. In any case, mere difficulty of administration of a right is the poorest reason for failing to acknowledge the right.

It is not clear where the institution of marriage is going in the United States. The number and percentage of divorces rise apace.[36] The birth rate declines, particularly the legitimate birth rate.[37] People cohabit openly and produce children outside marriage with little or no social stigma. But people marry and remarry. The institution of marriage will probably survive. Still the changes are profound; and through all of the changes, the children remain as innocent victims of marital discord and of marriages easily terminated, pawns in their parents' disputes. As hedonism and narcissism come more and more to characterize parents of this age, it is incumbent upon the law constantly to re-examine the position of the children of their unions. Perceptions of parental responsibility, perhaps adequate only a decade ago, appear no longer to be adequate. It may be time, if not past time, to accord the children of the marriage the fullest representation in the process of the marital dissolution and an equitable share in the accumulated assets of the marriage, at least as some guarantee of adequate support during minority.

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[35] Divorces in the U.S. are up from 2.5 per thousand population in 1965 to 4.6 per thousand in 1974. See Statistical Abstract of the United States, 1975, at p. 51.

[36] *Id.*

[37] The percentage of illegitimate births has risen from 5.3 in 1960 to 13 per cent in 1973. *Op. cit.* note 35.

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