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The Child's Right to be Heard and Represented in Judicial Proceedings

Howard A. Davidson*

I. INTRODUCTION

On November 20, 1989, the United Nations General Assembly unanimously adopted the "Convention on the Rights of the Child." The Convention was the result of a decade-long drafting process. It emerged as a comprehensive compilation of rights—civil-political, economic-social-cultural, and humanitarian—that all nations of the world could agree were the minimum rights governments should guarantee to children.¹ The Convention went into force as an international treaty on September 2, 1990, after ratification by the requisite twenty nations. As of February 1, 1991, seventy nations had ratified the Convention. However, the United States is not yet among them.²

Article 12 of the United Nations Convention on the Rights of the Child addresses the right of children to have their voices heard, with the assistance of effective legal counsel, in all judicial or administrative hearings affecting them. The text of the article reads as follows:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in *all matters* affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in *any* judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a man-

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1. *Convention on the Rights of the Child*, G.A. Res. 44/25 Annex, U.N. Doc. A/44/736 (1989), reprinted in 28 INT'L LEGAL MATERIALS 1456 (1985).

2. Information provided through telephone communication with staff of Defense for Children International-USA.

ner consistent with the procedural rules of national law.³

This article explores the laws and practices in the United States that relate to the *representation in judicial proceedings* aspect of this important provision of the Convention. The right of *all* children affected by judicial proceedings to independent representation will be examined, not merely the rights of those older children considered capable of forming their own views.⁴

There are a wide variety of legal matters affecting children that commonly result in a court taking actions that could have a significant impact on them. The most frequent legal proceedings affecting children will be analyzed herein. These include:

- (a) Proceedings brought against a juvenile for the alleged commission of an offense, or because the child is allegedly un-governable by a parent and thus requires court supervision;
- (b) Proceedings affecting a child's custodial or parental visitation status (including parental divorce or separation, child abuse and neglect, and termination of parental rights legal actions);
- (c) Proceedings to establish a child's paternity or to establish or modify a parent's support obligation;
- (d) Proceedings to have a child adopted;
- (e) Proceedings related to the commitment of a minor child to a psychiatric facility; and
- (f) Proceedings related to public school actions affecting a child, such as expulsion or suspension and the entitlement of a disabled child to certain special education programs and services.

There are, of course, other types of court cases related to the status of children. These include, for example, judicial proceedings based on emancipation petitions⁵ and immigration/deportation actions affecting unaccompanied minors from another country. In these and other miscellaneous legal matters, there is much less precedent established related to the child's right to counsel than in (a)-(f) above.

The right of a child to be adequately represented in a judicial action, brought on his or her behalf for the general enforcement of federal and state constitutional rights or statutory entitlements, will be

3. *Convention on the Rights of the Child*, *supra* note 1; 28 INT'L LEGAL MATERIALS at 1461 (emphasis added).

4. There has long been debate among advocates for children as to whether very young children (i.e., those too young to give direction and control to their attorneys) should be represented by legal counsel at all. *See, e.g., Guggenheim, The Right to be Represented but Not Heard: Reflections on Legal Representation of Children*, 59 N.Y.U. L. REV. 76 (1984); Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126 (1978).

5. *See, e.g., CAL. CIV. CODE* §§ 61-70 (West 1982 & Supp. 1991) (Emancipation of Minors Act provides for judicial declaration of a child's emancipation but is silent about the appointment of counsel for children seeking to be emancipated).

discussed at the outset of this article. The problems in assuring that a child has access to competent representation for the judicial enforcement of rights are pervasive to all the categories listed above.

II. REPRESENTATION OF THE CHILD IN GENERAL LITIGATION

A. *When the Child is a Party*

The most significant procedural difference between the child and adult litigant in American courts involves the issue of representation. Because of their legal incapacity, minor children cannot initiate or defend lawsuits without adult assistance.⁶ Traditionally, the minor plaintiff has been required to bring a lawsuit through a "next friend," while a minor who is sued must be represented by a "guardian ad litem." Today, these terms are used interchangeably (guardian ad litem will be used herein).⁷

Most states now model their rules related to the representation of children in litigation on Rule 17(c) of the Federal Rules of Civil Procedure which states:

Whenever an infant [minor child] has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant An infant . . . who does not have a duly appointed representative may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant . . . not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant⁸

Normally, of course, a minor child affected by civil litigation will not initially come before the court with a "duly appointed representative," and thus the court will have to address at the outset the question of who should perform that function. Usually, parents of the child will serve in this capacity, and they generally can do so without formal appointment by the court.⁹ But what about where the interests of the parents may conflict with those of the child? Some examples of such actions include:

6. See FED. R. CIV. P. 17(c), which addresses the capacity of parties, treats minor children and incompetent persons identically.

7. See 42 AM. JUR. 2d *Infants* § 158 (1969).

8. FED. R. CIV. P. 17(c). See also *Gardner v. Parsons*, 874 F.2d 131 (3d Cir. 1989)(guardian ad litem should have been appointed for mentally retarded minor in federal civil rights action challenging the quality of state-provided care); *Shearer v. Coates*, 434 N.W.2d 596 (S.D. 1989)(defendant minor in state court action may not have default judgment entered against him unless court-appointed guardian ad litem represents him and appears in the case).

9. See Annotation, *Necessity for and Degree of Relationship to Infant as Affecting Representation as Next Friend or Guardian Ad Litem*, 118 A.L.R. 401, 402 (1939).

- (a) When a child sues his parents, which is becoming more common as the traditional legal doctrine of parental immunity has eroded;¹⁰
- (b) When a child seeks an order from the court under laws related to judicially authorized abortions without parental notification or consent;¹¹
- (c) When parents seek a court order to have their mentally retarded child sterilized;¹² and
- (d) When a child seeks to challenge some administrative action (e.g., a school suspension) against the parent's wishes.

In such situations, any person with an interest in the welfare of the child may generally serve as the "next friend" or guardian ad litem. Some states will permit the child to nominate his or her own representative. In addition, some courts will even permit litigation affecting the child to proceed without such an appointment where the child is an older, "mature" minor who is able to participate in the legal action, and where the child is represented by legal counsel.

Guardians ad litem for minor children in civil actions affecting children are usually considered "officers of the court." Although such a guardian ad litem is not a party to the action, he or she is responsible for representing and protecting the best interests of the child until the litigation is concluded, or until the child reaches the age of majority. The powers of guardians ad litem include the authority to engage legal counsel on behalf of the child and to facilitate settlement or other methods of speedy resolution of the case. Their conduct is subject to the scrutiny of the court, and if their actions adversely affect the child, they can be removed.¹³

B. When the Child is Not a Party, But Has an Interest in the Outcome of the Litigation

In cases where the child may be affected by some form of on-going civil lawsuit, American courts have clear authority to appoint a guardian ad litem to protect the interests of the child. The judge in such cases may even add the child as a party to the litigation. Some examples of where the child may need to be represented and heard in litigation affecting his or her rights include:

10. See Horowitz & Goodman, *The Child Litigant*, in LEGAL RIGHTS OF CHILDREN § 3.08 (Horowitz & Davidson, eds. 1984).

11. See Dodson, *Legal Rights of Adolescents*, in LEGAL RIGHTS OF CHILDREN § 4.16 (Horowitz & Davidson, eds. 1984).

12. See, e.g., *In re A.W.*, 637 P.2d 366 (Colo. 1981); *In re Grady*, 85 N.J. 235, 426 A.2d 467 (1981).

13. See, e.g., *In re B.B.B.*, 393 N.W.2d 436 (Minn. Ct. App. 1986)(court may not remove guardian ad litem without specific finding that he failed to act in best interests of child).

- (a) Actions involving insurance policy claims where the child has a potential monetary interest in such policy;
- (b) Probate/inheritance proceedings in which the child may have a financial stake in the outcome;
- (c) Claims for certain benefits to which an adult, and his or her child, may be entitled, such as workers' compensation, social security, public assistance, etc.; and
- (d) Suits to determine ownership of certain assets, the resolution of which may affect children as the later beneficiaries of such property.

Although the above examples suggest that the child's interest in existing litigation must be a monetary one in order that the child be added as a party, a monetary interest is not required. Courts have been given increasingly wide discretion to add children as parties and provide them with the assistance of guardian ad litem representation when critical to the protection of their interests.¹⁴ For example, the authority of judges to appoint a guardian ad litem for a child victim or witness in criminal proceedings at which the child may appear has recently been the subject of judicial and legislative attention.¹⁵

III. SOURCES OF, AND STANDARDS FOR, LAWYERS FOR CHILDREN

A. *Resources for Child Representation*

Given the broad authority of American courts to protect the rights and interests of children through the appointment of a guardian ad litem, it is disconcerting that the ranks of specially qualified *attorneys for children* are so thin. Unlike jurisdictions such as Canada's Ontario Province, which maintains an "Official Guardian" child representation program, there are no federal or state agencies in this

14. Indeed, some federal courts have reversed a trial court for failing to determine whether a guardian ad litem is necessary. *See, e.g.,* Noe v. True, 507 F.2d 9, 11-12 (6th Cir. 1974).

15. *See, e.g.,* State v. Freeman, 203 N.J. Super. 351, 496 A.2d 1140 (Ct. Law Div. 1985) (children appointed a guardian ad litem in order to assess whether their best interests would be harmed through their participation in prosecution of father charged with murdering their mother); Stewart v. Superior Court, 163 Ariz. 227, 787 P.2d 126 (Ct. App. 1989) (inherent authority to appoint guardian ad litem for child witness where the parents' interests are shown to be in conflict with the best interests of the child); IOWA CODE ANN. § 910A.15 (West Supp. 1990) (prosecuting witnesses who are children are entitled to have their interests represented by guardians ad litem in certain criminal proceedings including incest, sexual abuse, etc.); OKLA. STAT. ANN. tit. 21, § 846(B) (West Supp. 1990) (guardians ad litem shall be appointed for child victims in certain criminal child abuse cases). *See also* Hardin, *Guardians Ad Litem for Child Victims in Criminal Proceedings*, 25 J. FAM. L. 687 (1986-87).

country established specifically to protect children's interests in all forms of civil litigation.

There is a small (under 2000 members), but important, National Association of Counsel for Children in the United States.¹⁶ For over a decade the Association has been a vehicle for training and information dissemination for attorneys who specialize in what its founder, Donald Bross, has dubbed "pediatric law." In 1978 the American Bar Association, through its Young Lawyers Division, founded the ABA Center on Children and the Law.¹⁷ This has become the primary ABA vehicle for addressing the legal needs of the nation's children.

There is a minuscule number of small law offices in America that specialize in representation of children (e.g., San Francisco's Legal Services for Children; Charlotte, North Carolina's Children's Legal Center; and the Massachusetts Children's Law Center). Many public defender agencies and legal services or legal aid offices, as well as a few special county-administered guardian ad litem programs, are involved in providing representation to children. However, their assistance is generally obtainable only in the special proceedings described below (and typically only in one or two types of these).

The most common source of representation for children is the private bar, whose members are regularly appointed by judges (typically from "sign-up" lists or panels) in cases involving indigent parties or minors. However, these attorneys are usually appointed without any prerequisite education in the special knowledge and skills needed by those who represent children. Most states lack *any* statewide effort to support, or upgrade the competency of, court-appointed attorneys for children.

A few states *have* addressed the needs of such lawyers by developing special education, training, and standards-setting programs and projects. For example, for over a decade the District of Columbia Superior Court has sponsored a "Counsel for Child Abuse and Neglect" program that provides expert legal and social worker support to panel attorneys, as well as mandatory basic legal education programs and continuing skills-building seminars.

In New York State, to aid court-appointed counsel for children (statutorily referred to as "law guardians"), there are four regional law guardian programs and program directors, local law guardian advisory committees, a series of training programs offered throughout the state, and a periodical, *Law Guardian Reporter*. The latter contains feature articles, updated bibliographies, digests of relevant fed-

16. The National Association of Counsel for Children can be contacted at 1205 Oneida Street, Denver, CO. 80220.

17. The ABA Center on Children and the Law can be contacted at 1800 M Street, N.W., Suite S-200, Washington, DC 20036.

eral and state cases, and descriptions of new state legislation. In addition, a set of standards for law guardian practice has been published by the New York State Bar.¹⁸

The Massachusetts Committee for Public Counsel Services has a Family Law Advocacy Project. This project has developed a state-wide certification requirement (two days of "basic training") for lawyers accepting court appointments in child abuse and neglect-related cases. It also sponsors a host of training programs, publishes a newsletter and other special materials, and continues to set standards for court-appointed attorneys for children.

Lawyers for children, however, are not necessarily considered indispensable. There are two factors that have caused many courts to implement a far simpler, and less expensive, alternative approach to independent advocacy for children in court. The first factor is the *escalating public expense* involved in compensating court-appointed attorneys for children in cases in which legal counsel is, or is not, constitutionally or statutorily mandated. The second factor is the often *poor performance* of court-appointed legal counsel for children.

In a few states (*e.g.*, Florida and North Carolina), there are state-wide guardian ad litem programs that use unpaid *lay citizen volunteers* to represent children in court. These appointments are limited to civil child protection-related cases and, in rare instances, to abuse-related child custody disputes.¹⁹ In recent years, a nationwide movement to utilize such lay volunteers, in place of court-appointed lawyers for children or attorneys serving as guardians ad litem, has become widespread. Such volunteers are now commonly called Court-Appointed Special Advocates (C.A.S.A.).²⁰

There are reported to be over 400 local C.A.S.A. or volunteer lay guardian ad litem programs throughout the country. Several legislatures have embraced the volunteer C.A.S.A./guardian ad litem model by amending laws to permit lay volunteer representation of children

18. LAW GUARDIAN REPRESENTATION STANDARDS, (NEW YORK STATE BAR ASS'N COMM. ON JUVENILE JUSTICE AND CHILD WELFARE 1988).

19. Both the Florida and North Carolina programs are part of the office of state court administration, receive targeted legislative appropriations, have state guardian ad litem program directors, and promulgate uniform statewide standards and training programs.

20. The National Court Appointed Special Advocate Association can be contacted at 2722 Eastlake Avenue E., Suite 220, Seattle, WA. 98102. The Association has endorsed a set of standards for local C.A.S.A. programs and has participated in the development of the Comprehensive Training Program for the C.A.S.A./G.A.L. (New York City: Edna McConnell Clark Foundation 1989).

as a substitute for court-appointed counsel or attorneys serving as guardians ad litem.²¹ However, the majority of states still require, by law or policy, that court-appointed guardians ad litem for children in abuse and neglect cases be attorneys — or that children in these cases have appointed legal counsel.²² In August of 1989, the American Bar Association adopted a policy stating that, in child abuse and neglect-related judicial proceedings, all children should be represented by both a lay guardian ad litem (C.A.S.A.) and an attorney acting as the child's legal counsel.

B. Improving the Quality of Child Representation

In 1979, the American Bar Association's House of Delegates approved a set of Juvenile Justice Standards developed by a joint commission established by the ABA and the Institute of Judicial Administration. One of the volumes, Standards Relating to Counsel for Private Parties, more than a decade after its approval by the ABA, remains one of the few comprehensive sets of guidelines available to court-appointed lawyers for children.²³ Another set of guidelines is available from the National Association of Counsel for Children). The ABA Standards address such subjects as the lawyer's:

- (a) time of entry into a case and duration of representation;
- (b) relationship with social workers involved with the child;
- (c) need to have available adequate investigative and case planning support services;
- (d) means of determining what is in the child client's interests;
- (e) ability to maintain the confidentiality of the child's communications to the attorney;
- (f) role in advising and counseling the child; and
- (g) protection of the child's right to treatment.

These Standards reject the use of attorneys as merely guardians ad litem entrusted with protecting the child's "best interests." Rather, they suggest the preference that lawyers exercise their professional responsibility as they would in representing an adult. The Standards are, therefore, oriented toward assuring that the child's own views concerning the case will be effectively heard in court through a lawyer-advocate.

21. See, e.g., ME. REV. STAT. ANN. tit. 22, § 4005(1) (Supp. 1988) ("The term guardian ad litem is inclusive of lay court appointed special advocates . . .").

22. Davidson, *Collaborative Advocacy on Behalf of Children: Effective Partnerships Between CASA and the Child's Attorney*, in ABA CENTER ON CHILDREN AND THE LAW, LAWYERS FOR CHILDREN 17, 22 (1990).

23. See STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES (1980). See also LAW GUARDIAN REPRESENTATION STANDARDS, *supra* note 18; D. DUQUETTE, ADVOCATING FOR THE CHILD IN PROTECTION PROCEEDINGS (1990).

C. Difficulties in Defining the Role and Accountability of the Child's Court-Appointed Representative

In 1983 the American Bar Association adopted a set of new Model Rules of Professional Conduct. These rules require that lawyers, as far as is reasonably possible, maintain a normal lawyer-client relationship with clients whose decision-making capacities are in some way impaired.²⁴ However, in child abuse/neglect, custody/visitation, and termination of parental rights cases, attorneys are often appointed not as "legal counsel" but rather as guardians ad litem for children. In such cases, the attorney's perception of his or her role may vary. Factors affecting such role perceptions, and the carrying out of guardian ad litem responsibilities, include:

- a) how the role is described, if at all, in state law;
- b) any instruction given by, or expectations of, the appointing judge;
- c) the training that has been received, if any, in the scope of the guardian ad litem's role; and
- d) the age of the child and the guardian ad litem's understanding of child development, bonding and attachment, and permanency planning issues.

Even in delinquency cases, a lawyer for a child faces potential conflict over whether he or she should function as a traditional legal advocate. Judges may place pressure on such attorneys to propose case outcomes that, strictly speaking, are not favored by their child clients.²⁵ In child abuse/neglect and child custody related cases, where the attorney is appointed as the child's guardian ad litem, role conflict is even more likely. A lawyer for the child or guardian ad litem will frequently be expected to present all available evidence that he or she believes is related to the child's best interests.²⁶

24. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(a)(1983).

25. See, e.g., *In re K.M.B.*, 123 Ill. App. 3d 645, 462 N.E.2d 1271 (1984) (defense attorneys at disposition hearings in delinquency cases must propose dispositions that are in their clients' best interests, not merely advocate what the child wishes).

26. See, e.g., *In re Marriage of Barenthouse*, 765 P.2d 610 (Colo. Ct. App. 1988), cert. denied, 490 U.S. 1021 (1989) (attorney appointed for the child should present all evidence available regarding child's best interests, not merely repeat child's expressed wishes); *In re Marriage of Rolfe*, 216 Mont. 39, 699 P.2d 79 (1985) (where child's attorney has perception that the child's interests clash with the child's wishes, the attorney is obligated to advocate the child's best interest); *contra In re Baby Girl Baxter*, 17 Ohio St. 3d 229, 479 N.E.2d 257 (1985) (where lawyer/guardian ad litem has a role conflict, he should petition court to permit him to withdraw as guardian ad litem, and court should grant such a request); Arizona State Bar Comm. on Rules of Professional Conduct, Op. No. 86-13 (1986) (if conflict arises between wishes of the child and best

In addition to the confusion over the role of attorneys appointed as either legal counsel or guardians ad litem for children, there is a question as to whether children's communications to their attorneys are privileged. As more states use C.A.S.A. or nonattorney guardians ad litem, there is a greater risk that children will not be able to rely upon the confidentiality of communications with their court-appointed advocates. If a child's disclosures are made to a nonattorney advocate, the lawyer-client privilege will not apply. Where an attorney is appointed as the child's legal counsel, the communications should remain privileged.²⁷ But if the attorney is appointed as the child's guardian ad litem, the privilege may not apply.²⁸

The scope of the duties of court-appointed attorneys for children or guardians ad litem is increasingly being addressed through state legislation and court decisions. Although no single law has mandated all of the following duties, in civil child abuse/neglect cases legislatures have required court-appointed advocates for the child to:

- a) introduce/examine witnesses and present evidence to the court;
- b) accompany the child to, and be present at, all court proceedings;
- c) speak regularly with the child and observe the child in his/her placement situation;
- d) conduct an independent investigation of the case, including interviews with the child's parents, caretakers, etc.;
- e) review all relevant records and reports;
- f) file a report and recommendations with the court related to the child's welfare; and
- g) monitor to assure that the court's orders and child welfare agency's responsibilities are being carried out.

Regardless of whether the role of the child's attorney or guardian ad litem is statutorily defined, the courts can be expected to help further delineate that role.²⁹ Other issues related to independent repre-

interests of the child as perceived by the lawyer, lawyer must follow the wishes of the child as much as possible, and he should move for appointment of a new guardian ad litem).

27. See, e.g., *In re Order Compelling Production of Records of Maraziti*, 233 N.J. Super. 488, 559 A.2d 447 (Ct. App. Div. 1989) (communications between minor children and their attorney in civil child protective proceeding held to be subject to attorney-client privilege).

28. See, e.g., *Ross v. Gadwah*, 131 N.H. 391, 554 A.2d 1284 (1989) (attorney-client privilege does not apply to guardians ad litem, even if they are attorneys); Alaska Bar Ass'n Ethics Op. No. 85-4 (1985) (the attorney-client privilege does not apply when an attorney is appointed to be the child's guardian ad litem).

29. See, e.g., *In re N.C.L.*, 89 N.C. App. 79, 365 S.E.2d 213 (guardian ad litem appointed in a termination of parental rights case had the right to intervene in a later adoption action and to have access to information on the prospective adoptive parents), *review denied*, 322 N.C. 481, 370 S.E.2d 226 (1988). *Stanley v. Fairfax County Dep't of*

sentation of the child, such as liability and compensation, are also likely to be the continuing focus of judicial attention.³⁰

IV. THE CHILD'S RIGHT TO COUNSEL IN SPECIFIC PROCEEDINGS

A. *Juvenile Delinquency and Status Offender Cases*

Two important United States Supreme Court cases of the 1960's, *United States v. Kent*³¹ and *In re Gault*,³² are generally credited with establishing the right of minor children to be represented by counsel at all critical stages of delinquency proceedings where they are subject to a deprivation of liberty.³³ The importance of such counsel was reaffirmed by the Court in the case of *Fare v. Michael C.*,³⁴ where the Court noted that:

the lawyer occupies a critical position in our legal system. . . . Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts.³⁵

The "critical" stages of proceedings involving juveniles in which effective assistance of counsel is, in my view, an essential right include:

- (a) pre-adjudication interrogations;
- (b) identifications and line-ups;³⁶

Social Services, 10 Va. App. 596, 395 S.E.2d 199 (1990) (guardian ad litem in an abuse/neglect case had the authority to file a termination of parental rights petition); South Carolina Bar Ethics Advisory Comm., Op. No. 87-8 (undated)(guardian ad litem in abuse/neglect case could later represent the child in a tort action against the Department of Social Services for negligent supervision of the child's abusive parents).

30. See, e.g., *Tindell v. Rogosheske*, 428 N.W.2d 386 (Minn. 1988)(guardian ad litem for child is absolutely immune from liability for acts within the scope of his or her statutory responsibilities); *Cabinet for Human Resources v. Howard*, 705 S.W.2d 935 (Ky. Ct. App. 1986) (juvenile court has the authority to award attorney's and guardian ad litem's fees against state child welfare agency in abuse/neglect cases); *In re M.P.*, 453 So. 2d 85 (Fla. Dist. Ct. App. 1984), *review denied*, 472 So.2d 732 (1985) (court can require public welfare agency to pay reasonable fees of guardians ad litem in abuse/neglect cases, but on a scale below what attorneys would generally receive from paying clients); *Div. of Youth and Family Services v. D.C.*, 118 N.J. 388, 571 A.2d 1295 (1990) (court-appointed attorneys for children in termination of parental rights cases have no statutory right to payment for their services, and state's refusal to pay these fees did not violate attorneys' constitutional rights).

31. 383 U.S. 541 (1966).

32. 387 U.S. 1 (1967).

33. It should be noted that *Gault* only indicated that a child is entitled to counsel in "proceedings to determine delinquency which may result in commitment to an institution" *Id.* at 41.

34. 442 U.S. 707 (1979).

35. *Id.* at 719.

36. See, e.g., *Commonwealth v. Minnis*, 312 Pa. Super. 53, 458 A.2d 231 (1983) (counsel must be present at line-up unless identification occurred at the scene of the crime).

- (c) responses to charges in the court petition;
- (d) detention hearings;³⁷
- (e) adjudication and disposition hearings;
- (f) hearings on the issue of whether a juvenile court will transfer jurisdiction of the case so that a child may be tried as an adult (also known as waiver hearings);³⁸ and
- (g) probation and parole revocation hearings.

Many laws fail to state precisely those stages of delinquency cases, or pre-judicial situations, in which there is a right to counsel. Some use the term "at all critical stages of" the proceeding,³⁹ others merely use the term "right to counsel" without designating the stages of a case to which the right does or does not apply,⁴⁰ while still others simply extend the right to "every stage of all [juvenile] proceedings."⁴¹

The right to counsel during court proceedings is generally waivable by the juvenile after a hearing that determines that the waiver of counsel was knowing, intelligent, and voluntary.⁴² There have been some laws and court decisions, however, that have placed limits on the court's ability to approve waivers of counsel by juveniles.⁴³ In some instances, if a child did not adequately waive counsel in earlier juvenile delinquency proceedings, later court actions may not be able to rely upon these prior adjudications.⁴⁴

37. See, e.g., *State ex rel. M.C.H. & S.A.H. v. Kinder*, 317 S.E.2d 150 (W. Va. 1984)(right to counsel exists at detention hearings).

38. *But see State v. McCoy*, 285 S.C. 115, 328 S.E.2d 620 (1985) (transfer hearing is not a trial; therefore, counsel's failure to reveal exculpatory evidence was not error).

39. See, e.g., D.C. CODE ANN. § 16-2304(a)(1981); and N.J. STAT. ANN. § 2A:4A-39 (West 1982)

40. See, e.g., MINN. STAT. ANN. § 260.155(2) (West 1982).

41. See, e.g., TEX. FAM. CODE ANN. § 51.10 (Vernon 1986).

42. See *Faretta v. California*, 422 U.S. 806, 835 (1975). See also *In re Juvenile Appeal*, 39 Conn. Supp. 400, 465 A.2d 1107 (1983) (child cannot waive counsel by mere silence after his attorney has withdrawn from the case).

43. See, e.g., *In re Manuel R.*, 207 Conn. 725, 543 A.2d 719 (1988) (the child's age, the mother's conflicting interest in waiving counsel, and the child's own participation in waiver-related discussions are relevant factors for courts assessing the appropriateness of a waiver of counsel); *In re B.M.H.*, 177 Ga. App. 478, 339 S.E.2d 757 (1986) (court must inform juvenile and parents of the risks of going forward without counsel, including the disposition that could be made following an adjudication); *State ex rel. Juvenile Dept. v. Cheney*, 96 Or. App. 680, 773 P.2d 1351 (1989) (court is required to assure that prior to waiver the child understood the nature of the charges, possible penalties that the court could impose, and the overall impact of the waiver decision); *State ex rel. J.M. v. Taylor*, 276 S.E.2d 199 (W. Va. 1981) (right to counsel during adjudicatory stage cannot be waived except on the advice of the child's attorney); N.Y. JUD. LAW § 249-a (McKinney 1983) ("the court shall not permit the [juvenile] to waive his right to be represented by counsel"); TEX. FAM. CODE ANN. §§ 51.09(a), 51.10(b) (Vernon 1986) (right can generally be waived only with advice of counsel, and representation during adjudicatory and disposition hearings may not be waived). See also, Ferguson & Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39 (1970); Comment, *Waiver of Counsel by Minor Defendants*, 3 TULSA L.J. 193 (1966).

44. See, e.g., *State ex rel. Alton v. Conkling*, 421 So. 2d 1108 (Fla. Dist. Ct. App.

As we approach the twenty-fifth anniversary of the historic *Gault* decision, several commentators on the juvenile justice system have described how courts are still failing to assure the appearance of lawyers on behalf of children in delinquency proceedings, sometimes in large numbers of cases.⁴⁵ The waiver of counsel by the juvenile is the most common explanation that judges give in cases where the child does not have representation.⁴⁶

Neither *Kent*, *Gault*, nor any other Supreme Court decision, has addressed the issue of the child's right to representation in cases brought by parents or others alleging the child's incorrigibility, runaway behavior, or school truancy ("status offender" cases). Even when a child is locked up in a secure correctional or treatment institution, or otherwise punitively sanctioned as a result of a status offender proceeding, a child may not have the right to legal counsel under state law. Although many states, by legislation, have provided such a right,⁴⁷ appellate courts have differed their views as to whether counsel should be required in such cases.⁴⁸ There is also controversy over the role and function of court-appointed advocates for children in juvenile status offender cases.⁴⁹

When an allegedly recalcitrant youth has defied a juvenile court's

1982) (juvenile court adjudications that occurred without a proper waiver of counsel cannot be used as the basis for later proceedings to transfer the juvenile to adult court).

45. See, e.g., B. FELD, *THE RIGHT TO COUNSEL IN JUVENILE COURT: FULFILLING GAULT'S PROMISE* (1989); Aday, *Court Structure, Defense Attorney Use, and Juvenile Court Decisions*, 27 SOC. Q. 107-19 (1986); Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY, 1185 (1989); Feld, *In re Gault Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 CRIME & DELINQ. 393 (1988).

46. B. FELD, *THE RIGHT TO COUNSEL IN JUVENILE COURT: FULFILLING GAULT'S PROMISE*, *supra* note 45, at 8.

47. See, e.g., N.M. STAT. ANN. § 32-1-27(H)(1981).

48. Compare *In re Spalding*, 273 Md. 690, 332 A.2d 246 (1975) (due process right to counsel where child's alleged acts would be criminal violations if committed by an adult and child faces commitment to juvenile institution) with *State ex rel. Juvenile Dep't of Multnomah County v. K.*, 26 Or. App. 451, 554 P.2d 180 (1976) (when child not subject to incarceration due process may require less than the "entire spectrum of rights" constitutionally guaranteed in criminal proceedings — i.e., notice, right to counsel, right to confront witnesses, and privilege against self-incrimination).

49. Compare *In re Lisa G.*, 127 N.H. 585, 504 A.2d 1 (1986) (role of defense counsel in status offender proceedings is to advocate the juvenile's position and protect the child's constitutional rights, but court retains discretion to appoint guardian ad litem to protect the child's best interests even in the absence of a statute requiring such appointment). But see Massachusetts Bar Ass'n Comm. on Ethics, Op. No. 76-1 (1976) (when children are unable to make "informed judgments" regarding their own interests, counsel are obligated to advocate their belief as to child clients' best interests, even when contrary to the childrens' expressed wishes).

order in a status offender proceeding, the federal Juvenile Justice and Delinquency Prevention Act allows exceptions to the Act's general prohibition of secure detention for status offenders. In 1980 and 1984, Congress granted states participating in federal financial assistance under the Act the authority to order children who had defied "valid court orders" related to prior treatment and placement into secure residential settings.⁵⁰ The federal agency administering the Act has, however, issued regulations requiring that the child have a judicial hearing, with representation by counsel, before the youth may be securely incarcerated.⁵¹

B. Child Abuse/Neglect and Custody/Visitation Related Cases

By statute in almost every state, children in civil child protective proceedings initiated by the state or county (child abuse and neglect cases) have a right to have a representative appointed by the court to independently protect their interests in the litigation.⁵² A primary impetus for such laws was not a Supreme Court decision, but rather the 1974 federal Child Abuse Prevention and Treatment Act.⁵³ This Act requires that states receiving certain federal assistance for child protective services assure that every child involved in a civil child protective proceeding has a court-appointed guardian ad litem. Although the federal law did not specify whether the guardian ad litem must be an attorney, statutes in about half of the states require the appointment of either legal counsel or an attorney who serves as

50. 42 U.S.C. §§ 5603(16), 5633(a)(12)(A) (1988) (originally enacted as Juvenile Justice and Delinquency Act of 1974, 88 Stat. 1109, 1111). Section 5603(16) was added in 1984 by Pub. L. No. 98-473 § 613(6). The amendment provides:

The term "valid court order" means a court order given by a juvenile court judge to a juvenile who has been brought before the court and made subject to a court order. The use of the word "valid" permits the incarceration of juveniles for violation of a valid court order *only if they received their full due process rights as guaranteed by the Constitution of the United States*

Section 5633(a)(12)(A) was amended in 1980 by Pub. L. No. 96-509 § 11(a)(13). The statute provides in pertinent part:

In order to receive formula grants under this part, a State shall submit a plan for carrying out its purposes applicable to a 3-year period

In accordance with regulations which the Administrator shall prescribe, such shall

(12)(A) provide . . . that juveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult or offenses which do not constitute violations of valid court orders, or such nonoffenders as dependent or neglected children, *shall not be placed in secure detention facilities or secure correctional facilities*

51. 28 C.F.R. § 31.303(f)(iii)(3)(v)(1990). Prior to the amendment of the federal law, in *In re Hutchins*, 345 So. 2d 703, 707 (Fla. 1977), the Florida Supreme Court held that where, because of a prior status offense or "ungovernability" proceeding, the child faces a subsequent similar hearing, the child may not be incarcerated unless the child was represented by counsel at the earlier proceeding.

52. See, e.g., VA. CODE ANN. § 16.1-266(A)(1982).

53. 42 U.S.C. §§ 5101-5107 (1988).

the child's guardian ad litem.⁵⁴

Today, in most civil child protective proceedings, a legal counsel, a lawyer serving as guardian ad litem, a C.A.S.A., or a combination of these, is required by law at some point during the court's hearing of the case. However, these advocates often are not appointed at the earliest possible stage of each proceeding. These representatives are typically involved with the case through its formal adjudication and disposition stages. In post dispositional case review hearings, and especially in separate termination of parental rights proceedings,⁵⁵ state statutes and appellate courts rarely require — and thus children are much less likely to have — court-appointed representation.⁵⁶ In particular, it seems odd and unfortunate that all states do not clearly mandate appointment of counsel for the child in termination of parental rights hearings, since the long-term consequences are greatest in these cases.⁵⁷

In intra-family custody or visitation disputes related to parental separation or divorce, the child's right to independent legal representation is even less established. Only a few states require a court to appoint counsel or a guardian ad litem for the child in a custody or visitation case, even when one parent accuses the other of child

54. Davidson, *supra* note 22 at 22.

55. See, e.g., *In re Kapsos*, 468 Pa. 50, 360 A.2d 174 (1976) (no right to counsel for child in termination of parental rights action, despite statutory right to counsel in prior dependency proceeding); *In re D.*, 24 Or. App. 607, 547 P.2d 175 (1976) (in termination of parental rights proceeding, child does not have right to independent counsel), *cert. denied sub nom. C. v. F.*, 429 U.S. 907 (1976); *but see Leonard v. Leonard*, 783 S.W.2d 514 (Mo. Ct. App. 1990) (where basis for seeking termination of parental rights is sexual abuse, failure to appoint guardian ad litem is error); *In re J.C., Jr.*, 781 S.W.2d 226 (Mo. Ct. App. 1989) (termination decree reversed where children were not provided with effective assistance of counsel).

56. See, e.g., *Ivy v. Edna Gladney Home*, 783 S.W.2d 829 (Tex. Ct. App. 1990) (because adoption agency adequately represents child's best interests in termination of parental rights action, failure to appoint guardian ad litem is neither improper nor violative of statutory requirements); *but see In re Child X*, 617 P.2d 1078 (Wyo. 1980) (in termination of parental rights proceeding, statute requiring appointed counsel to also serve as guardian ad litem mandates appointment of counsel to protect child's welfare); *In re T.M.H.*, 613 P.2d 468, 470 (Okla. 1980) (in all termination cases potential conflicts of interest between the child, parents, and state, court must appoint counsel for child).

57. The United States Supreme Court has never ruled on the issue of mandatory appointment of counsel for the child in termination of parental rights proceedings; however, the Court suggested in *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816 (1977), that a child facing removal from a long-term foster home may have asserted some liberty interest, but at least in the foster family setting, the diminished due process interest does not support the right to independent counsel for the child where the state's preremoval procedures adequately protect the interests of all parties.

abuse.⁵⁸ It is clear, however, that judges always have discretion, even if rarely exercised, to appoint legal counsel or a guardian ad litem for the child.⁵⁹ However, appellate courts may still find that the trial court abused its discretion by failing to appoint separate representation for the child.⁶⁰

Although courts do not routinely appoint legal representatives for children in intra-family conflict cases, they have given varying degrees of consideration to children's stated custodial preferences. As children approach the age of majority, courts increase the weight given to the views of children. Approximately half the states have statutes listing the child's custodial wishes as one factor the court must consider, or give special weight to, when making a custodial determination.⁶¹ Only a few states make the child's custodial wishes generally binding, and only so long as the parent is fit.⁶²

Even in the absence of statutes mandating consideration of the child's wishes, judges who fail to elicit or who totally ignore children's custodial preferences are increasingly likely to have their custody orders reversed on appeal.⁶³ The views of the affected children are also increasingly important in custodial disputes, such as contested changes from sole to joint custody, or when a custodial parent seeks the court's permission to move to another state.

58. The most prominent state laws to require appointment of a guardian ad litem for a child in all contested custody cases are WIS. STAT. ANN. § 767.045 (West 1981 & Supp. 1990) (formerly § 247.045), *construed in de Montigny v. de Montigny*, 75 Wis. 2d 131, 233 N.W.2d 463 (1975); N.H. REV. STAT. ANN. § 458:17-a (1983).

59. *See, e.g.*, *Levitt v. Levitt*, 79 Md. App. 394, 556 A.2d 1162 (lawyer appointed for five-year-old child subjected to a protracted custody dispute), *cert. denied*, 316 Md. 549, 560 A.2d 1118 (1989); *McDonald v. McGowan*, 163 Ill. App. 3d 697, 516 N.E.2d 934 (1987) (guardian ad litem appointed in visitation dispute); *Van Houten v. Van Houten*, 156 A.D.2d 694, 549 N.Y.S.2d 452 (1989) (appointment of guardian ad litem required during custody proceedings after father kidnapped daughter during visitation and concealed her whereabouts for eight years); *but see Smith v. Smith*, 724 S.W.2d 541 (Mo. Ct. App. 1986) (despite allegations of child abuse, court did not abuse its discretion in custody proceeding by ruling without appointing guardian ad litem); *Sucher v. Sucher*, 416 N.W.2d 182 (Minn. Ct. App. 1987) (appointment of guardian ad litem not required where evidence from other sources is sufficient for decision based on child's best interests); *Cotton v. Cotton*, 11 Conn. App. 189, 526 A.2d 547 (1987) (court not required to appoint counsel to represent minor children in custody dispute).

60. *See, e.g.*, *G.S. v. T.S.*, 23 Conn. App. 509, 582 A.2d 467 (1990) (custody award reversed for failure to appoint counsel for child).

61. *See, e.g.*, MONT. CODE ANN. 40-4-219(1)(d) (1989). N.M. STAT. ANN. § 40-4-9 (1989); TENN. CODE ANN. § 36-102 (Supp. 1990).

62. These states include West Virginia and Georgia (children age 14 and over). *See, e.g.*, *S.H. v. R.L.H.*, 169 W. Va. 550, 289 S.E.2d 186 (1982) (rule created by court); GA. CODE ANN. §§ 19-9-1(a), 19-9-3(a) (Supp. 1990).

63. *See, e.g.*, *Flaherty v. Smith*, 87 Mich. App. 561, 274 N.W.2d 72 (1978) (reversing for failure to adequately determine and consider child's custodial preference); *In re Marriage of Kramer*, 177 Mont. 61, 580 P.2d 439 (1978) (trial court abused its discretion by failing to make specific finding of child's custodial preference and by failing to state reasons for not following this preference).

C. Paternity and Support Cases

It is generally accepted that a child, acting through either the mother, a guardian, or the state may bring a paternity action. Under the Uniform Parentage Act (UPA), which has been adopted in only a few states, a child must be made a party to any paternity action.⁶⁴ The UPA also requires that if the child is a minor, he or she must be represented by a guardian or guardian ad litem. Neither the child's mother nor father may serve in either of those capacities due to the potential conflict of interest. In states that have not adopted the UPA, however, the prevailing view is that a guardian ad litem is not required when the mother and child's interests are sufficiently similar.⁶⁵

If paternity is contested, some states, regardless of whether they have adopted the UPA, will appoint a guardian ad litem for the child. By making the child a party and providing a guardian ad litem, the court may avoid subsequent re-litigation by the child.⁶⁶ Courts have also spoken clearly about the child's interests in these cases. For example, in *Ford v. Ford*⁶⁷ the Supreme Court of Nebraska stated that:

a decision as to legitimacy is one in which the two children, independent of the dispute between the parents, have a vital and enduring interest affecting their own life, which requires that it be independently protected by the court and the representation of counsel. The children's interests may be adverse to both parents in the case.⁶⁸

That view, however, applies only in a minority of states when statutes or case law require appointment of counsel or guardians ad litem

64. Uniform Parentage Act, 9B U.L.A. 287 (1973) (approved by the National Conference of Commissioners on Uniform State Laws in 1973).

65. See, e.g., *T.R. v. A.W. ex rel. Pearson*, 470 N.E.2d 95 (Ind. Ct. App. 1984), *reh'g denied*, Jan. 24, 1985, *transfer denied* May 1, 1985 (no appointed counsel for child needed where mother's interests not sufficiently different from child's); *Mistretta v. Mistretta*, 566 So. 2d 836 (Fla. Dist. Ct. App. 1990) (no appointment for child needed when nonparty parent's interests are not adverse to child's); but see *Johannessen v. Johannessen*, 148 A.D.2d 894, 539 N.Y.S.2d 155 (1989) (appointment of special guardian necessary because children not adequately protected in divorce action where paternity and child support were at issue).

66. See, e.g., *Commonwealth ex rel. Gray v. Johnson*, 7 Va. App. 614, 376 S.E.2d 787 (1989) (because mother acts only as conduit for child's support, and her interests may be adverse, mother and child will not be considered in privity unless child was formally named as party, was represented by guardian ad litem, and was given an adequate opportunity to litigate paternity issue); *Department of Revenue v. Jarvenpaa*, 404 Mass. 177, 534 N.E.2d 286 (1989) (child is not barred by a putative father's acquittal in criminal paternity prosecution from filing subsequent civil action to establish paternity); *Arsenault v. Carrier*, 390 A.2d 1048 (Me. 1978) (child was not bound by agreement between mother and putative father in prior paternity action).

67. 191 Neb. 548, 216 N.W.2d 176 (1974).

68. *Id.* at 549-50, 216 N.W.2d at 177.

for children in paternity cases.⁶⁹

In *Mills v. Habluetzel*,⁷⁰ Justice O'Connor identified a rationale for making the child a party to paternity actions and providing the child with independent representation. She noted that a mother may decide to bring a paternity action because of motives unrelated to the child's best interests, such as the mother's desire to maintain a cordial relationship with the father.⁷¹

When the issue is child support, rather than paternity, the duty of support is clearly owed to the child, not to the custodial parent. Typically, however, custodial mothers or state/county welfare agencies initiate child support actions. Rarely does a court consider appointing counsel or a guardian ad litem for the child, essential in such actions.⁷² Only when a child reaches the age of majority, or is otherwise emancipated, have courts permitted enforcement actions on the child's own behalf.

D. Adoption Cases

State laws generally designate a minimum age above which children who are the subject of adoption actions must give consent, often in open court, before the adoption can become effective. This designated age typically ranges from ten to fourteen.⁷³ If a child of sufficient age opposes a stepparent adoption, however, courts may have authority to waive or dispense with the consent requirement.⁷⁴ The preferences of younger children may also be considered, but are not binding.

In uncontested stepparent adoptions, or adoptions arranged through licensed adoption agencies, courts seldom appoint an independent representative for the child.⁷⁵ Even in privately arranged

69. See, e.g., *In re S.G.P.*, 400 Mass. 12, 507 N.E.2d 736 (1987) (child should have guardian ad litem in paternity action brought by father); *LeHew v. Mellyn*, 131 Ill. App. 3d 314, 475 N.E.2d 913 (1985) (where putative father seeks to prove paternity and establish visitation rights, a guardian ad litem should be appointed); *In re Burley*, 33 Wash. App. 629, 658 P.2d 8 (1983). ILL. ANN. STAT. ch. 40 para. 2507(c) (Smith-Hurd Supp. 1990).

70. 456 U.S. 91 (1982).

71. *Id.* at 105 (O'Connor, J., concurring).

72. See, e.g., *Robin v. Robin*, 45 Ill. App. 3d 365, 359 N.E.2d 809 (1977) (appointment of guardian ad litem and award of fees reversed when primary issue was child support).

73. See, e.g., ARIZ. REV. STAT. ANN. § 8-106B (West 1989) (consent of child age 12 and above required); MICH. COMP. LAWS ANN. § 710.43(2) (West Supp. 1990) (consent of child over age 14 required).

74. See, e.g., FLA. STAT. ANN. § 63.062(1)(c) (West 1985) (court may dispense with requirement of child's consent to adoption if in child's best interest); N.Y. DOM. REL. LAW § 111.1(a) (McKinney 1988) (judge has discretion to dispense with consent requirement).

75. See, e.g., *In re Appeal in Pima County*, 138 Ariz. 291, 674 P.2d 845 (1983) (counsel for children appointed when step-father sought to vacate earlier adoption).

(independent) adoptions, few states require the appointment of counsel or a guardian ad litem to protect the interests of the child.⁷⁶ Discretionary appointments are occasionally made when an adoption proceeding is contested. These include cases where fraud, duress, or coercion in connection with the adoption is alleged by the biological parent; when such parent seeks to revoke his other prior consent; when the necessity for a non-custodial parent's consent is disputed; or when the suitability of the adoptive placement is questioned. A child may also be represented in an adoption proceeding by a person previously appointed in an earlier proceeding involving the child.⁷⁷

There are currently two proposed "model" state laws on adoption in various stages of development. The more complete product is the American Bar Association Model State Adoption Act.⁷⁸ Although this Act has been approved by the A.B.A. Family Law Section, it has not been approved by the Association's House of Delegates and thus does not yet constitute official A.B.A. policy. Section 21 of that Act provides only for discretionary appointment of independent representation for children subject to adoption proceedings.⁷⁹ Similarly, section 60 of a recent draft of a proposed Uniform Adoption Act makes appointment of an attorney or guardian ad litem for the child merely discretionary, both in agency placement adoptions as well as in independent adoptions.⁸⁰

E. Psychiatric Commitment Cases

Historically, almost all states have permitted parents to commit their minor children to mental institutions without any form of due

76. See, e.g., MO. ANN. STAT. § 453.025 (1986) (court shall appoint guardian ad litem for child in all adoption proceedings); N.M. STAT. ANN. § 40-7-48 (1989) (independent counsel must be appointed for child in all contested adoption proceedings); S.C. CODE ANN. § 20-7-1732 (Law. Co-op Supp. 1989) (court must appoint guardian ad litem for child in all adoption proceedings). The majority of state codes are silent on this issue, while approximately 15 states provide for discretionary appointment of a guardian ad litem for children in adoption proceedings.

77. See, e.g., *In re Christina D.*, 525 A.2d 1306 (R.I. 1987) (error for trial judge in an adoption case to deny standing to guardian ad litem appointed in earlier termination of parental rights proceeding); *People ex rel. M.C.P.*, 768 P.2d 1253 (Colo. Ct. App. 1988) (because guardian ad litem's responsibilities continue until placement is finalized, court should have allowed access to information on child's pre-adoptive home to guardian ad litem who represented child in previous dependency proceeding).

78. *Draft A.B.A. Model State Adoption Act*, 19 FAM. L.Q. 103 (1985).

79. *Id.* at 120.

80. This draft was submitted at the July 13-20, 1990 meeting of the National Conference of Commissioners on Uniform State Laws. It does not necessarily reflect the views of the drafting committee, reporter, or Commissioners.

process or judicial hearing. The first major challenges to the "voluntary" juvenile commitment process were the parallel United States Supreme Court cases of *Institutionalized Juveniles v. Secretary of Public Welfare*⁸¹ and *Parham v. J.R.*⁸² In both of these cases, federal courts had previously nullified state civil commitment laws that failed to adequately protect the due process rights of minors.

In *Parham*, the Supreme Court reversed a federal ruling that had granted a right to prompt hearings and appointed counsel to children facing psychiatric hospitalization. The Supreme Court instead required that children subject to mental commitments merely be afforded an independent inquiry by an informal, non-judicial "neutral factfinder" who would evaluate only whether the legal psychiatric admission standards were met.

One major implication of this decision was that minor children subject to psychiatric commitment actions initiated by their parents do not have a constitutional "right to be heard" through the appointment of legal representatives. The Court extended the ruling to include children in the custody of the state or county, rather than their parents, at the time of the proceedings.

Few Supreme Court decisions have been so criticized by child advocates and those who deal with rights of the mentally disabled as *Parham*.⁸³ In spite of this criticism, the majority of states continue to permit parents to commit their child to a mental health facility, against the child's wishes, without a judicial or administrative hearing, or appointment of legal representation for the child. Even when states have given children the right to be heard in cases involving *public* psychiatric facilities, these safeguards might not be extended to minors committed by their parents to *private* psychiatric hospitals. The latter actions have in recent years become more prevalent, in part because state laws have reduced or eliminated the use of secure institutionalization for juvenile "status offenders." Critics have charged that parents are substituting such private psychiatric facilities as restrictive placements for troublesome or rebellious children, particularly where status offender laws no longer afford easy "incarcerations" of rebellious or troubled young people.⁸⁴

81. 442 U.S. 640 (1979).

82. 442 U.S. 584 (1979).

83. See, e.g., Schoenberger, "Voluntary" Commitment of Mentally Ill or Retarded Children: Child Abuse by the Supreme Court, 7 U. DAYTON L. REV. 1, 30-31 (1981); Mabbutt, *Juveniles, Mental Hospital Commitment and Civil Rights: The Case of Parham v. J.R.*, 19 J. FAM. L. 27, 64 (1980-81); Note, *Children's Rights Under the Burger Court: Concern for the Child but Deference to Authority*, 60 NOTRE DAME L. REV. 1214, 1231 (1985).

84. See, Lambert, *Growing Numbers of Youth Committed to Psychiatric Hospitals*, YOUTH L. NEWS, Mar.-Apr. 1990, at 12.

F. Administrative and Judicial Actions Related to Public Education

A number of United States Supreme Court cases have clearly vested children and their parents with certain due process rights concerning children's education, including school attendance, the educational program, and disciplinary sanctions imposed by the school. Under *Goss v. Lopez*⁸⁵ children suspended from school for ten days or less are not entitled to a full panoply of due process protections; however, longer, major sanctions such as suspensions, expulsions, or disciplinary transfers to other schools warrant full due process rights.⁸⁶ It is by no means clear, however, that in according children's due process rights states will require that children subject to major sanctions be afforded full hearings with the right to counsel.

In *Ingraham v. Wright*,⁸⁷ the leading case on the use of corporal punishment by schools, the Court not only held that such discipline was not "cruel and unusual," but also that it could be administered without any prior hearing whatever.⁸⁸ Although a rapidly growing number of states have legislated against the use of corporal punishment in schools, the large number of states still permitting its use do not provide the child with a right to be heard as to whether the misbehavior justifies such sanctions.

Special education services for disabled children have generated the most specific policies concerning the child's right to hearings and representation. Under the retitled federal Education of Individuals with Disabilities Act,⁸⁹ parents have the right to challenge the school's educational placement or the services provided to their child in both administrative and judicial hearings. Parents may initially request an administrative "impartial due process hearing" to resolve differences with school administrators.

Federal regulations governing such hearings assure parents the right to be represented by counsel and require that parents be given notice of any available free or low-cost legal services to help secure an appropriate educational program for the child.⁹⁰ In 1986, the Act was amended to authorize courts to award attorney fees to the par-

85. 419 U.S. 565 (1975).

86. *Id.* at 581-584.

87. 430 U.S. 651 (1977).

88. *Id.* at 669-671, 682.

89. The Education of the Handicapped Act, 20 U.S.C. §§ 1400-1485 (1988), was re-titled by Pub. L. No. 101-476 104 Stat. 1103 (1990).

90. 34 C.F.R. §§ 300.506(c), 508(a)(1)(1986).

ents of disabled children for successful legal work in administrative or judicial hearings related to securing legally-required special education services.⁹¹ Since the 1986 amendments, a flood of cases have interpreted the law's attorney fees provisions.⁹² These decisions clarify the parameters of compensable attorney work under the federal law.

V. CONCLUSION

Over the past twenty-five years, a child's right to be heard and represented in court proceedings has received much legislative, judicial, bar association, and scholarly attention. Today's American courts are much more likely than past courts were to focus on hearing from the child and securing for that child competent and effective, independent advocacy. Special efforts are being made to elevate the level of attorney advocacy in children's cases and at the same time, a movement toward lay "court-appointed special advocate" volunteers is gaining acceptance.

Although children are benefitting by these changes, there are some lingering concerns. Studies of juvenile delinquency proceedings show that children are often unrepresented.⁹³ A recent study indicates that children in civil abuse/neglect proceedings, despite almost universal statutory mandates, are frequently not provided representation.⁹⁴

In certain types of judicial proceedings, such as adoption, children in most states still do not have a statutory entitlement to independent representation. Children may lack representation even when the adoption is contested by the affected adults or when a licensed child welfare agency is not actively involved.

The aforementioned American Bar Association Standards Relating to Counsel for Private Parties⁹⁵ volume sets forth the official ABA policy on the types of legal proceedings in which children should be represented. It states:

Counsel should be provided for any juvenile subject to delinquency or in need

91. The Handicapped Children's Protection Act, Pub. L. No. 99-372, 20 U.S.C. § 1415(b)(2) (1988); 34 C.F.R. §§ 300.506-.508 (1990).

92. See, e.g., *McSomebodies v. Burlingame Elementary School Dist.*, 886 F.2d 1558 (9th Cir. 1989) (attorney's fees recoverable for administrative hearing); *E.P. v. Union County Regional High School Dist. No. 1*, 741 F. Supp. 1144 (D.N.J. 1989) (attorneys fees recoverable for administrative proceedings); *Burr v. Sobol*, 748 F. Supp. 97 (S.D.N.Y. 1990) (time spent by law students may be reimbursable); *Arons v. New Jersey State Bd. of Educ.*, 842 F.2d 58 (3d Cir. 1988) (no fees awarded to lay advocate), *cert. denied*, 488 U.S. 942 (1988).

93. B. FELD, *THE RIGHT TO COUNSEL IN JUVENILE COURT*, *supra* note 45, at 6-8.

94. See, e.g., CSR INC., *NATIONAL STUDY OF GUARDIAN AD LITEM REPRESENTATION*, U.S. DEPT OF HEALTH AND HUMAN SERVICES 41 (1990) ("Despite statutory requirements for representation, less than 100 percent of all children receive it in 26 States. In six of these States, less than 70 percent of children are represented.").

95. *STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES* (1980).

of supervision proceedings Legal representation should also be provided the juvenile in all proceedings arising from or related to a delinquency or in need of supervision action, including mental competency, transfer, probation revocation, and classification, institutional transfer, disciplinary or other administrative proceedings related to the treatment process which may substantially affect the juvenile's custody, status or course of treatment Independent counsel should also be provided for the juvenile who is the subject of proceedings affecting his or her status or custody.⁹⁶

These standards remain generally unfulfilled. Moreover, American government, at the federal, state, and local levels, lacks any organized program that focuses comprehensively on the needs of children for independent advocacy in all types of proceedings where their interests may be affected. Until government addresses this issue more carefully and completely, our nation's legal system will not be in a position to assure — as Article 12 of the new United Nations Convention⁹⁷ reads — that children's views will be freely heard and fairly considered throughout our judicial system.

96. *Id.* at § 2.3.

97. *Convention on the Rights of the Child*, *supra* note 1, at 1461.

