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GUARDIAN AD LITEM IN A FAMILY COURT

HON. MARSHALL A. LEVIN*

Initially, the thrust of this article was confined to a consideration of the feasibility of the employment of a guardian ad litem\(^1\) for the protection of children in custody disputes. However, an analysis of the need for this device exposes the larger problem of the general lack of adequate judicial consideration of the interests of the child in domestic matters. The question of how best to protect the child in such troubulous circumstances has become critical, particularly with the advent of the Maryland “no fault” divorce which may well tend to further submerge or neglect the interest of the child. It, therefore, became evident that the utilization of a guardian ad litem in custody matters was only part of a larger solution which might well encompass the establishment of a Family Court to provide a unified and logical approach to the multiple ills that sometimes beset a family. The guardian ad litem would be the principle mechanism within the Family Court for the protection of the interests of the child. Additionally, the Family Court would offer voluntary counselling and conciliation services to provide guidance for the parents and, thereby, safeguard the interests of children.

NATURE OF THE PROBLEM AND PROPOSED SOLUTION

Traditionally, disputed matters of custody, visitation, and child support (and sometimes adoption) are determined by Mary-

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1. The phrase “guardian ad litem” is used in this article to mean the legal representative of children who are the subject of dispute in matters of custody, visitation, child support and sometimes adoption. It may no longer be the most appropriate description since the provision for appointment of a guardian has been deleted from the Maryland Rules. See Md. R. P. 205e, Committee Note; Md. ANN. CODE, Cts. & Jud. Proc. Art., § 3-201(c) (1974) (definition of “guardian”). However, the phrase has achieved widespread use in both the law and legal literature dealing with custody problems, and therefore, it shall be used in this article.
land equity courts\(^2\) in a setting where the attorneys\(^3\) for the opposing parents\(^4\) project the antagonistic positions of their respective clients. In a custody case, the parties and their witnesses will testify in an effort to convince the Chancellor that one parent is more "fit" than the other to care for the child. The child\(^5\) becomes the ultimate "prize" of the contest. Thus, one parent will, in testimony, venomously attack the other parent, many times in front of the children,\(^6\) in order to establish the other’s "bad points." In the process, the ultimate "winner" will have done irreparable harm to the "loser" and, even worse, to the children.\(^7\) The situation becomes further exacerbated because the "loser" may often find his or her visitation opportunities diminished in direct relation to the "success" of such a court attack.

The Maryland Court of Appeals has consistently instructed the Chancellor that: "The legal standard to be applied in custody cases is quite clear, the best interest of the child being the determinative factor in making the award."\(^8\) However, neither attorney specifically represents the child. In fact, the success of each attorney rests upon the dispute being resolved in favor of his particular client, rather than upon obtaining a disposition most in accordance with the "best interest" of the child. It is, therefore, suggested that without meaningful representation of the interests of the child, the adversary system cannot properly effectuate the

\(^2\) MD. ANN. CODE, Cts. & Jud. Proc. Art., § 3-602(a) (1974); cf., Stern v. Horner, 22 Md. App. 421, 324 A.2d 134 (1974). In Baltimore City, these matters are decided in Circuit Court Number Two which is the Domestic Relations Court. In the Maryland counties, domestic matters are decided in the Circuit Court and are sometimes designated "in equity" or "domestic" to distinguish them from other matters also determined in these courts. See Jones v. Jones, 259 Md. 336, 343-44, 270 A.2d 126, 130 (1970).

\(^3\) Church, Counsellor-at-Law, A Game of Chess?, TRIAL, Sept./Oct. 1972, at 27. Attorneys, schooled in the "special skills" of psychological and family law, can "trounce success-hardened big-trial lawyers in domestic courts." Id.

\(^4\) The contest may also involve parties other than the parents, such as relatives, welfare and social agencies, and foster parents.

\(^5\) A person over the age of eighteen is an adult in Maryland. MD. ANN. CODE art. 1, § 24 (Supp. 1973); see Monticello v. Monticello, 271 Md. 168, 315 A.2d 520 (1974).

\(^6\) The Chancellor may, at his discretion, exclude the children from the courtroom. Interestingly, it is generally the Chancellor, rather than the parents, who perceives the necessity for such exclusion.

\(^7\) It is painful for a judge to hear one parent brand the other as a "whore" or a "rotten drunk," and, thus, one can imagine the effect on impressionable youngsters sitting in a courtroom.

legal test of what is in the "best interest" of the child.⁹

In many states,¹⁰ additional resources in the form of agencies are available to aid the court in deciding controversies pertaining to custody. These agencies will perform the functions of investigation, evaluation and recommendation. In Baltimore City, the Adoption and Custody Unit of the Department of Juvenile Services will, at the request (or order) of the court, undertake investigations and make written¹¹ recommendations to the court.¹² The

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9. The following letters, actually received by the author, painfully demonstrate the inadequacy of the adversary system in considering the best interest of the child:

**Wednesday, 33 May 1974**

Judge Levin -

My parents case, vs.

is currently being heard in your court. As these are my parents and my family I am directly involved with all rulings handed down by you, therefore I would like to have an appointment to see you and discuss the situation.

Sincerely,

Tommy

"Judge Levin:

Tommy doesn't want either of his parents to know he wishes to meet with you, hence his reason for corresponding through me.

I have offered to help him pursue a course of action designed to get the legal system to recognize the lack of representation to children in these cases. Tommy feels his first step should be to obtain a personal interview with you if you can fit it into your schedule."


11. In Cornwell v. Cornwell, 244 Md. 674, 678, 224 A.2d 870, 872 (1966), the Maryland Court of Appeals stated that the agency report should be in writing and made available to both counsel prior to the Chancellor's decision.

12. *See Md. 8th Jud. Cir. R.* [hereinafter cited as *Supreme Bench R.*] D75; Md. R.
final decision may, of course, be made only by the Chancellor. Although there may be independent appellate review of the Chancellor's decisions by the Maryland Court of Special Appeals, in practice, the Chancellor is generally upheld.

The agency reports contain much hearsay and if challenged for this reason, it would seem that the actual investigator (social worker) must testify and be subjected to cross-examination. Even then, the investigator may not testify as to what she was told by neighbors, friends, teachers and doctors, because that too would be objectionable as hearsay. Thus, while the personal observations of the investigator are clearly admissible, ninety

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P. D75. The Supreme Bench Rule relates to adoption and requires the judge to order an investigation before a final determination. The Maryland Rule, also dealing with adoption, provides for the court appointment of an attorney for a parent whose child is to be adopted if such parent is under a disability (i.e., a minor). Previously, the Maryland Rule had called for the appointment of a "guardian ad litem" rather than an "attorney." Curiously, there is no rule dealing with the power or duty of the Domestic Relations Court to refer custody matter for investigation. Nevertheless, such investigations are routinely performed in Baltimore City, and there have been numerous cases recognizing the custody reports submitted by the Adoption and Custody Unit. See, e.g., Jester v. Jester, 246 Md. 162, 228 A.2d 829 (1966); Brendoff v. Titus, 22 Md. App. 412, 323 A.2d 612 (1974).

The Adoption and Custody Unit was reassigned to the Department of Juvenile Services in the late 1940's. The Department was reluctant to assume responsibility for this Unit; however, Thomas P. McCarthy, Administrative Master of the Supreme Bench, prevailed upon the Department by referring to the predecessor of Md. Ann. Code art. 52A, § 5(b) (1972) which indicated that the Department should provide services requested by the Juvenile Court "and Judges sitting in other equity Courts, who are dealing with persons under the age of eighteen years." Since then, the Adoption and Custody Unit has been a part of the Department of Juvenile Services. The law should be clarified to define the legal status of this Unit and to spell out its duties, responsibilities and powers. In addition, such a law should define and regulate the matter of legal admissibility of the Unit's reports.


17. The feminine pronoun is used to refer to the masculine gender as well.


19. The health, attitudes, preferences and discipline of the children, evaluation of relevant factors with regard to the parents or those in loco parentis, and the physical condition of the home and neighborhood are typical personal observations.
per centum of the substance of such written reports is inadmissible. The use of the hearsay rule in this context is utterly absurd if carried to an extreme; and yet, if the struggle is conducted along traditional adversary lines, the absurdity becomes practice.\textsuperscript{20}

In addition to the Department of Juvenile Services, the court may refer selected problems to the Medical Service of the Supreme Bench of Baltimore City\textsuperscript{21} for investigation, evaluation, recommendation and report. For example, if the emotional stability of one or both of the parents is an issue or if certain delicate and sensitive matters with regard to a child must be explored, the court may find need for expert opinion and may refer cases accordingly.\textsuperscript{22} Of course, the report of Medical Service is not admissible per se but is subject to the same hearsay objection as other agency reports. If there is such an objection, the psychiatrist, psychologist or psychiatric social worker must testify and be available for cross-examination.\textsuperscript{23}

These reports, along with the mental, emotional and intellectual makeup of the Chancellor himself,\textsuperscript{24} are the tools used to make these decisions of such crucial importance to our society. Having presided over both the Criminal and the Domestic Relations Courts of Baltimore City,\textsuperscript{25} the author is acutely aware of the future significance of custody decisions. The personal agonies

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\item The attitudes of the various judges who have presided in the Domestic Relations Court differ. Some have admitted these reports into evidence on the theory that the court itself has requested such reports which are, therefore, admissible per se. Other judges have admitted them on the basis that the social worker is an “expert”. However, still other judges have refused to admit the reports if there is an objection.
\item Medical Service is presently headed by the distinguished Jonas R. Rappeport, M.D., a psychiatrist. The staff includes both full-time and part-time medical doctors, psychologists, and social workers. Medical students from University Hospital also participate in the Service. There is a separate juvenile division within the Service.
\item Mo. R. P. 420; see also Rappeport, \textit{Psychiatrist as an Amicus Curiae} \textit{(pts. 1 & 2)}, 18 \textit{MED. TRIAL TECH. Q.} 183, 297 (1971-1972) [hereinafter cited as Rappeport].
\item The Maryland Court of Special Appeals has stated that a psychologist may testify as to the results of psychological testing administered by him, but he cannot give an opinion or diagnosis as to sanity or criminal responsibility. Sherrill v. State, 14 Md. App. 146, 158-59, 286 A.2d 528, 534-35 (1972).
\item J. Goldstein, A. Freud & A. Solnit, \textit{Beyond the Best Interests of the Child} 49-52 (1973) [hereinafter cited as Goldstein, Freud & Solnit]. The thesis of this book is that the psychological rather than the biological relationship is of paramount importance. Joseph Goldstein is a Professor of Law, Science and Social Policy at Yale University Law School; Anna Freud, daughter of Sigmund Freud, is Director of the Hampstead Child Therapy Clinic and is one of the foremost authorities on the emotional lives of children; and Dr. Albert Solnit is the Sterling Professor of Pediatrics and Psychiatry at Yale University School of Medicine and Director of the Yale University Child Study Center.
\item The judges in Baltimore City rotate, pursuant to \textit{SUPREME BENCH R. 31}, for a period of one year in the various courts.
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involved in sentencing adult defendants in criminal cases have naturally led to questions pertaining to the origin of criminal or deviant behavior.\textsuperscript{26} Often the answer may be found in the Domestic Relations Court where the unrepresented interests of the child have been ignored.\textsuperscript{27} Society, in the long run, must be concerned with whether custodial problems have been properly resolved or merely glossed over by the adversary system to bear bitter criminal fruit in the future.\textsuperscript{28}

There is, therefore, growing discussion in the nation,\textsuperscript{29} in

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\item 26. David L. Bazelon, Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, in an address entitled "Juvenile Justice: A Love Hate Story," focused upon the crisis in juvenile justice. Judge Bazelon stated:

> "My own experience with delinquents and criminals is that their lives on the street have destroyed their ability to empathize with other human beings.

> "We must take the first step toward breaking the cycle of poverty which leads so many of our youths into juvenile courts — a step toward preventing trouble rather than waiting to cure it. . . ."

Trial, July/Aug. 1973, at 58.

Judge Dembitz of the New York Family Court has further elaborated upon the relationship between juvenile delinquency and adult crime by writing that:

While we have no statistics on how many children brought to court as uncontrollable are therefore proved guilty of juvenile delinquencies or of adult crimes, statistics do establish the tie between juvenile delinquency and adult crime. Practically all adults apprehended for robberies, rapes, assaults, and other street crimes that most alarm the public . . . were juvenile delinquents who generally committed less serious crimes as juveniles than as adults.


\item 27. Goldstein, Freud and Solnit cite Carter v. United States, 252 F.2d 608 (D.C. Cir. 1957), as an example of the consequences of judicial or administrative neglect of the child's needs. Goldstein, Freud & Solnit, supra note 24, at 34 n.2. In Carter, the consequences of transferring a child from one foster home to another without recognition of the child's emotional difficulties was first degree murder. "In any case, multiple placement at these ages puts many children beyond the reach of educational influence, and becomes the direct cause of behavior which the schools experience as disrupting and the courts label as dissocial, delinquent, or even criminal." Goldstein, Freud & Solnit 34. See also S. Glueck & E. Glueck, Delinquents and Nondelinquents in Perspective (1968).


\item 29. Henry H. Foster, Jr., Professor of Law, New York University, a Council member of the Family Law Section of the American Bar Association and co-chairman of the Research Council, has written "With reference to the policy of safeguarding the interests of the children of divorce, probably the most practical device is a mandatory requirement that there be independent counsel to represent the interests of the child." Foster, Current Thought, A.B.A. News, Aug. 1973, at 5.

Similarly, in their review of Goldstein, Freud & Solnit, supra note 24, R. Brant and J. Brant mentioned that:

The Anglo-American legal system has traditionally given children few legal rights. . . . In the area of child custody law, where the interests of several adults
Maryland and in Baltimore City, as to whether the present system can adequately cope with the distressing problems of child custody. The question is now being asked whether children should not be represented by a guardian *ad litem* in custody actions. Many scholars, judges and legal commentators have voiced great doubt as to the practicability of the present, two-sided, adversary system in solving problems of this nature.

While a judge may attempt to use common sense (and not all judges possess this admirable quality) in custody decisions, he is not trained in the behavioral or social sciences. A child's real needs may remain undetected by a judge who, although well meaning, may disregard what is actually best for a child by adopting a "common sense" approach. Several decades ago, Roscoe Pound observed that:

> The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts and courts of domestic relations. . . . It is well known that too often the placing of a child in a home or even in an institution is done casually or perfunctorily, or even arbitrarily. . . . Even with the

and of a child often collide, the law, despite professing to act in the best interests of the child, has reflected the same 'adultocentric' view that is apparent in other areas of law as well.

*TRIAL*, July/Aug. 1974, at 35.

30. The Governor's Commission on Law Enforcement and the Administration of Justice recently recommended the following plan for Maryland:

One division of the Trial Court would be a Family Court that would include domestic relations, juvenile delinquency cases, paternity proceedings, and other family problems and would operate on a unified basis throughout the State. Specially trained prosecutors, judges and defenders would handle juvenile cases.


31. *See Report of Special Family Law Comm. of the Bar Ass'n of Baltimore City* (Feb. 6, 1973), where, among the "Areas of Concern", the following question is posited: "Are the rights of children adequately protected under our present divorce practice, should there be guardians appointed in all cases where the rights of children are contested or in the discretion of the court . . . ?" *Id.* at 4.

32. Dembitz, *supra* note 26, at 588.


34. One commentator has stated: "The psychological calculus in child custody determinations compels the question of whether judges are the ablest individuals to factor these equations. . . . Perhaps custody decisions . . . should not be made by a legally trained judge alone." Dembitz, *Book Review*, 83 YALE L.J. 1304, 1311 (1974) (review of Goldstein, *Freud & Solnit*). *See Goldstein, Freud & Solnit, supra* note 24, at 67.
most superior personnel, these tribunals call for legal checks.  

Sometimes the Chancellor may talk with the child out of the presence of attorneys and parents (except that the Court Reporter must be present) to gain insight into certain problem areas. However, a relatively brief, one-time communication between a judge and a small child is inherently limited in its effectiveness. 

Another problem in relying upon the Chancellor to give effect to the "best interest" test is found in the situation where the parties have reached their own "agreement" and thus, in effect, precluded judicial inquiry into the welfare of their children. In one case, the attorneys told me that the wife would "take" two of the three children and the husband would "take" the third. Upon my inquiry as to whether such arrangement was the most beneficial to the three children, the attorneys for the litigants replied that if the parents had made this decision, then why should I question it? A domestic relations judge with a heavy caseload may tend to sanction such arrangements blindly without proper inquiry or, indeed, without any inquiry.

35. Pound, Foreward to P. Young, Social Treatment in Probation and Delinquency at XV (1952).
37. The chambers conference may be valuable in determining the attitudes and preferences of a child. However, while such factors may be considered, they are not controlling. Fanning v. Warfield, 252 Md. 18, 248 A.2d 890 (1969); Ross v. Pick 199 Md. 341, 86 A.2d 463 (1952).
38. Professor Foster notes that over ninety per centum of divorce cases are uncontested and frequently involve separation agreements which establish the custody of the children. Foster, supra note 33, at 46. However, in Nutwell v. Department of Social Servs., 21 Md. App. 100, 318 A.2d 563 (1974), the Maryland Court of Special Appeals, reversing an award of guardianship of two children with the right to consent to adoption to the Department of Social Services over the "vigorous" objections of the natural mother, noted that the "decreed . . . contemporaneously reft the children's common bond with their brother and sister who were not the subject of the petition." Id. at 101, 318 A.2d at 564; cf. Brendoff v. Titus, 22 Md. App. 412, 323 A.2d 612 (1974).
39. It, generally, is not the policy of the law to separate young children from each other. The Maryland Court of Appeals has ruled that: "Other things being equal, a divided control of children is to be avoided." Roussey v. Roussey, 210 Md. 261, 264, 123 A.2d 354, 355 (1956); Casey v. Casey, 210 Md. 464, 474, 124 A.2d 254, 258 (1956).
41. M. Rheinstein, Marriage, Stability, Divorce and the Law 255 (1972) [hereinafter cited as Rheinstein]. Max Rheinstein, Professor of Law at the University of Chicago Law School and Director of the University of Chicago Comparative Law Research Center, has long been a leader in the field of family law.

Suppose a father had been previously convicted of carnal knowledge of his fourteen year old daughter, or had been indicted, tried and found not guilty, or had not been
The very real interest of the child may, then, be submerged in the bitter battle, conducted under the traditional rules of the adversary system, between his parents. Although the adversary system is admirably suited to ascertaining truth in a two-sided controversy where credibility may be the main issue, the question remains whether this system is the most appropriate for solving a three-sided problem where one of the three sides involves a fundamentally interested and vulnerable minor child. A child has physical, material, emotional, moral and educational needs which the courts must recognize and meaningfully protect. The guardian ad litem presents the courts with a workable mechanism for achieving such a result. Therefore, should not a guardian ad litem be appointed mandatorily by the court to represent the interests of children in custody, visitation and adoption disputes when issues are raised as to their welfare or where the court itself has grave concern as to their welfare?

The thesis under consideration is that since the parent (or criminally accused but the daughter had complained to her mother to no avail. The parents might agree, through counsel, that the father shall have custody of the daughter. Should not someone then, at least, have the right of inquiry? See generally 1 L. MARSHALL & G. MAY, THE DIVORCE COURT — MARYLAND (1932).


43. Goldstein, Freud and Solnit refer to the child as an "indispensable party to the [custody] proceeding." GOLDSTEIN, FREUD & SOLNIT supra note 24, at 65. This conclusion is supported by citation to the statement of Mr. Justice Curtis in Shields v. Barrow, 58 U.S. 130, 139 (1854), on party status:

The court here points out three classes of parties to a bill of equity. They are:
1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

GOLDSTEIN, FREUD & SOLNIT, supra note 24, at 65 n.1.


See 1 J. BENTHAM, THEORY OF LEGISLATION 248 (1840):

The feebleness of infancy demands a continual protection. Everything must be done for an imperfect being, which as yet does nothing for itself. The complete development of its physical powers takes many years; that of its intellectual faculties is still slower. At a certain age, it has already strength and passions, without experience enough to regulate them. Too sensitive to present impulses, too negligent of the future, such a being must be kept under an authority more immediate than that of the laws . . . .
person *in loco parentis*) may not necessarily be the one who will most adequately espouse and protect the best interest of a child, the child is then entitled to his own representative to insure that his legitimate interests will be properly safeguarded. The guardian *ad litem* would not be responsible to either parent (or current custodian). This neutrality would better insure that the Chancellor is furnished with reliable and unprejudiced information. Further, the guardian could investigate and perhaps find certain situations in which obvious relief could be afforded to mutually unaware parents. He might also uncover certain detrimental conditions as regards the child or debilitating home conditions, and the guardian could bring such facts to the attention of the Chancellor for appropriate disposition.

The guardian may be in a better position than the adversaries to present the court with the proper criteria for actually satisfying the best interest test. The parties may, for example, be so busy hammering upon the adultery or other "fault" of each other that neither presents the Chancellor with an insight into the real needs of the child. The parties are invariably so emotionally charged that the case degenerates into an unproductive battle as far as the Chancellor is concerned. Even the attorneys may become extremely emotional and lose their professional "cool." It seems that in the area of domestic relations this is a common phenomenon. Perhaps this is true because the litigants are prone to insist that they want a "fighter" for an attorney (or one who will not "sell out to the other side"), and these pressures inevitably generate more heat than light. As a neutral party, the guardian would not be as vulnerable as the respective attorneys to the antagonism between the parents. Hopefully then, the guardian would be in a position to work between the parties to achieve a note of consonance rather than dissonance. As such, the guardian could strive to bring about evidentiary stipulations (which could greatly expedite the trial) or to conduct a pre-trial conference which might actually bring about a resolution of the custody problem. It sometimes happens that one spouse will ask for custody simply because the other spouse seeks a divorce, and if such

45. See note 93 *infra* for a discussion of parental child abuse. Clearly, when such circumstances exist, the parent will not adequately espouse and protect the best interest of the child.

46. For example, newcomers to the city from rural areas might be ignorant of the panoply of available municipal services.

47. The most common problem areas which a guardian *ad litem* might investigate relate to health, neglect and school truancy.

48. "Removal of the time-honored, soundly approved right to 'refuse' a divorce to
a pre-trial conference is skillfully conducted under the impartial auspices of a guardian ad litem, the custody demand may well be dropped. Also, through a pre-trial conference, the guardian might ascertain that the matter of visitation is the real problem and an equitable suggestion in this often troublesome area may well resolve the custody problem. It is possible that certain fears may be allayed by disclosures supplied at such a conference—fears that cannot be as readily dealt with by attorneys who must otherwise proceed along adversary lines.

The use of a guardian, as a means to protect the interests of a minor, is not new to Maryland law. The device of a guardian, custodian or trustee is routinely utilized to protect minors in matters involving decedent estates and in the regulation of gifts to minors. This technique is also employed in the settlement of actions brought on behalf of a child in a court of law, and a child's money judgment is protected by the appointment of a "trustee" when he so recovers. If the "best interest of the child" is said to be paramount and if the child is furnished with, and protected by, a guardian as concerns his money and property, then is there not a much more obvious need for a guardian when a child's future life is concerned? Could it be that when financial matters are at stake, legal representation is more adequate?

Developing Juvenile Rights

Let no one minimize the importance of a custody decision. It determines with whom a child will live; where he will live; what kind of clothes he will wear; where he will go to school; what religion he will follow; what type of food he will eat; with whom he will associate; what books he will read; and what values

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53. See cases cited note 8, supra and accompanying text.
he will learn. In sum, a custody decision affects the very essence of what determines a child’s future life.58

Is this type of determination to be made only on the basis of the material produced by two litigating warriors and an agency report that can be rendered nugatory by a skillful attorney? Should we not consider the possibility of having the legitimate interest of a child espoused and protected by his own attorney: one not controlled by either of the combatants but guided only by the very real interest of the child. Would this not breathe real meaning into the phrase “best interest” of the child?

It will undoubtedly be argued that we do not need a guardian and that there is no need for a change in the law because the “best interest” test adequately supplies the answers to custody problems. Such an argument fails to appreciate the difficulty of defining the “best interest” test. While all agree that the “best interest” or the “best welfare” of a child is the paramount consideration, the legal significance of these phrases has undergone (and is still undergoing) change of fundamental nature.

An analysis of the evolving rights of the putative father of an illegitimate child reflects the increased judicial concern with the “best welfare” of the child. Until recently, it was universally held that the putative father had no right to notice or to a hearing when the custody of his child was being determined because he could not legally affect the custodial welfare of the child.59 However, in 1972, the Supreme Court held in Stanley v. Illinois60 that the putative (and biological) father was constitutionally entitled to notice and opportunity to be heard when custody of his children was being transferred to neighbors (by a state agency) after the death of the natural unwed mother. The theory upon which the Supreme Court premised its decision was that the putative father might be the most qualified person to satisfy the “best interest” test.61

60. 405 U.S. 645 (1972).
61. The father had lived intermittently with the children and their natural mother for 18 years. Id. at 645.
The full impact of Stanley has not yet been determined. In 1973, Maryland, apparently, adhering to the mandate of Stanley, modified its prior law (that a putative father was not entitled to custody) and now relies upon the "best interest" test even if the father is putative and the children are illegitimate. However, there still remained the question of whether Stanley required that notice be given the putative father in an adoption case. Significantly, the Maryland Rules of Procedure were recently amended to read: "If the person to be adopted is a minor, the show cause order shall be served on the putative father of a child born out of wedlock in the manner provided by Rule 104 or Rule 105." The Supreme Court's opinion in In re Gault further serves to illustrate judicial expansion of the "best interest" test. In holding that due process required that children (juveniles) be represented by an attorney in juvenile court delinquency proceedings, the Court rejected the traditional doctrine that the child's interest would be protected by the doctrine of parens patriae.

62. The question has been posed as to whether sex is now a "suspect classification." If so, a state giving notice and opportunity to be heard to the mother in custody matters would be required to provide the same for the putative father. Compare Reed v. Reed, 404 U.S. 71 (1971) with Fronterio v. Richardson, 411 U.S. 677 (1974).
63. Ramsay v. Thompson, 71 Md. 315, 18 A. 191 (1889); Butler v. Perry, 210 Md. 332, 123 A.2d 453 (1956).
66. MD. R.P. D74cl (effective July 1, 1974).
68. The confrontation clause of the sixth amendment, as interpreted in Bruton v. United States, 391 U.S. 123 (1968) (admission of co-defendant's confession implicating defendant reversible error where co-defendant does not testify), applies to juvenile delinquency adjudicatory hearings. In re Appeal No. 977, 22 Md. App. 511, 323 A.2d 663 (1974). However, the Supreme Court has held that there is no right to a jury trial in Juvenile Court. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).
69. The doctrine originated in England where the Crown would take the place of the parents to protect those subjects who were unable to protect themselves. Note, A Case for Independent Counsel to Represent Children in Custody Proceedings, 7 NEW ENGLAND L. REV. 351, 352 (1972). Parens Patriae (parent of the country) was a "diluted" form of
The theory that a benevolent judge representing the state would furnish the best protection for juveniles was found to be inadequate to secure a child's constitutional rights. Implicit in *Gault* is the conclusion that the legal rights of a child in a delinquency hearing are not necessarily safeguarded by a "Big Brother" Judge. Yet, in a matter of equal or perhaps greater importance —custody—the interests of the child still remain entrusted to the care of a judge. While all states, including Maryland, subscribe to *parens patriae*, the doctrine is not a "blank check" to be used to deny children the protection now mandated by the United States Supreme Court.

In yet another area, the "best interest" test is undergoing a critical metamorphosis. With the advent of the Equal Rights Amendment in Maryland, a father may now assert custodial rights equivalent to those of a mother. If it be contended that he always had such "equal rights," it did seem that the mother's rights were, in practice, more "equal" than those of the father. Withal, it is possible that the welfare of a child may be served best by awarding custody to the father rather than the mother;

*patria potestas* (a quasi-legal-religious part of Roman private law whereby the father was regarded as high priest of family worship with lifelong authority over all members of his household). Inker & Perretta, *A Child's Right to Counsel in Custody Cases*, 55 Mass. L.Q. 229, 230 (1970). In the United States, a state, as the sovereign, has the power of guardianship over persons under disability such as minors, insane and incompetent persons. Townsend v. Townsend, 205 Md. 591, 596, 109 A.2d 765, 767 (1954); *Ex parte Cromwell*, 232 Md. 305, 192 A.2d 775 (1963).

72. Md. Const., Decl. of Rights, art. 46.
73. The "maternal preference" has also been removed by statute. Md. Ann. Code art. 72A, § 1 (Supp. 1973) (neither spouse shall be given preference in a court custody proceeding because of sex).
75. E.g., Hild v. Hild, 221 Md. 349, 157 A.2d 442 (1960), which states that because the mother is the natural guardian of the young and immature, custody is ordinarily awarded to her, at least temporarily in legal contests between parents when other things are equal, even when the father is without fault, provided the mother is a fit and proper person to have custody. Id. at 357, 157 A.2d at 446; accord, Stern v. Horner, 22 Md. App. 421, 324 A.2d 134 (1974); see also Clark, supra note 58, at 585; Drinan, *The Rights of Children in Modern American Family Law*, 2 J. Family L. 101 (1962). The mother wins four-fifths of all custody cases.
76. While the function of mothering is crucial in a child's first year of life, it is felt that a child between the ages of three and six years should have both male and female parent figures and that if both are not present, "it may be essential to place the child with his father because he can provide a substitute mother, or with his mother because she can
and the Amendment will undoubtedly have the effect of generating more even-handed treatment.\textsuperscript{77}

Stanley teaches that labels (illegitimacy) are not sufficient to furnish the best answers to questions of custody; Gault demonstrates that the rights of children in juvenile delinquency hearings must be protected by the expertise and training of lawyers; and the Equal Rights Amendment mandates that the sex of a person shall no longer be the exclusive consideration in custody cases. The instant postulate, therefore, is that in matters of custody, the need is to provide realistic protection for children, and this protection will be afforded most effectively by a specialized attorney whose expertise and loyalty will be devoted purely to his clients, the children. Acceptance of this postulate can be seen in the emerging recognition that children are “persons”\textsuperscript{78} under the law with certain rights—\textit{qua} children—just as clearly, it is contended,\textsuperscript{79} as other groups of persons, i.e., blacks, mentally retarded,\textsuperscript{80} women,\textsuperscript{81} inmates\textsuperscript{82} and poor people.\textsuperscript{83}

\textit{Theoretical Basis for the Proposed Solution}

The concept of the guardian \textit{ad litem}, as a device for furthering the interests of the child, first emerged in the writings of the legal commentators. The device is now generally accepted among


\textsuperscript{78} The Supreme Court in Jiminez v. Weinberger, --- U.S. ---, 94 S. Ct. 2496 (1974), has ruled that under the Social Security Act, insurance benefits due an illegitimate child (born after the disability of his father) may not be denied even though the Act proscribed such a sub-class of illegitimate children. The Court viewed a child as a dependent by virtue of his status as a child with no showing of dependency or paternity necessary to qualify him.

\textsuperscript{79} Foster, supra note 33.

\textsuperscript{80} Haggerty, Kane & Udall, \textit{An Essay on the Legal Rights of the Mentally Retarded}, 6 \textit{Family L.Q.} 59 (1972).


\textsuperscript{83} Shapiro v. Thompson, 394 U.S. 618 (1969).
the commentators, but has received only limited judicial approval.

In 1956, Professor Bradway mounted a devastating attack upon the use of the adversary system in custody proceedings. He was especially critical of the secondary role assigned to the child by this system. Professor Bradway reasoned that despite the historical basis for precluding children from litigating against their parents, children should be made parties to divorce proceedings. He postulated that as a matter of "public relations" children should have a representative to protect them from the "beneficent" interest of the court.

Robert F. Drinan, S.J., formerly dean of the Boston College Law School, rather than relying on "public relations," provided a legal basis for the adoption of the guardian ad litem. He viewed the rationale for the device as a function of the third party beneficiary theory of contracts. Dean Drinan's thesis was that children were third party beneficiaries of the marriage contract and, as such, should be represented in divorce actions. He, therefore, asserted that the State, by means of a guardian ad litem, should represent children of divorce.

Subsequently, Judge Robert W. Hansen of the Wisconsin Supreme Court set forth, in a "Bill of Rights for Children," subsequent

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87. Judge Hansen formerly presided over the Milwaukee Family Court.
88. Hansen, supra note 33, at 5-6. A printed copy of this Bill (derived from Wisconsin appellate decisions) is given to divorce-seeking parents at the commencement of any court hearing. The Bill accords to children:
I. The right to be treated as an interested and affected person and not as a pawn, possession or chattel of either or both parents;
II. The right to grow to maturity in that home environment which will best guarantee an opportunity for the child to grow to mature and responsible citizenship;
III. The right to the day by day love, care, discipline and protection of the parent having custody of the children;
IV. The right to know the non-custodian parent and to have the benefit of such parent's love and guidance through adequate visitations;
V. The right to a positive and constructive relationship with both parents, with neither parent to be permitted to degrade or downgrade the other in the mind of the child;
VI. The right to have moral and ethical values developed by precept and practices and to have limits set for behavior so that the child early in life may develop self-discipline and self-control;
VII. The right to the most adequate level of economic support that can be provided by the best efforts of both parents;
certain rights to be accorded children affected by divorce actions. This Bill was subsequently expanded upon by Professors Foster and Freed in their "Bill of Rights for Children." Professor Foster, perhaps the leading advocate of the guardian *ad litem* theory, in conjunction with Professor Freed, has asserted that a child should have certain moral and legal rights, including the right:

1. To receive parental love and affection, discipline and guidance, and to grow to maturity in a home environment which enables him to develop into a mature and responsible adult;
2. To be supported, maintained, and educated to the best of parental ability, in return for which he has the moral duty to honor his father and mother;
3. To be regarded as a person, within the family, at school, and before the law;
4. To receive fair treatment from all in authority;
5. To be heard and listened to;
6. To earn and keep his own earnings;
7. To seek and obtain medical care and treatment and counseling;
8. To emancipation from the parent-child relationship when that relationship has broken down and the child has left home due to abuse, neglect, serious family conflict, or other sufficient cause, and his best interest would be served by the termination of parental authority;
9. To be free of legal disabilities or incapacities save where such are convincingly shown to be necessary and protective of the actual best interests of the child; and
10. To receive special care, consideration, and protection in the administration of law or justice so that his best interests always are a paramount factor.89

From the fifth right, there has developed the "right to have standing in legal proceedings to assert one's claim of interest";90 and, thus, the conceptual right to be represented by a guardian *ad 
The theory is that children should not be treated as appendages in a divorce case but should be recognized as persons with rights peculiar to their minority status.\textsuperscript{91} Clearly children are "real parties in interest where their placement is at stake."\textsuperscript{92} It will, thus, not suffice to leave matters of custody and visitation entirely to benevolent parents—or even to the courts—because in too many instances, parents are not truly benevolent\textsuperscript{93} and judges may not have the time or training to produce proper custody decisions in the mass of divorce cases that now flood the courts.\textsuperscript{94}

**EMERGING DEVELOPMENT OF THE DEVICE OF GUARDIAN AD LITEM**

In 1960, Wisconsin modified the adversary system in its law of domestic relations by slowing up and "softening"\textsuperscript{95} the divorce process. A divorce action in Wisconsin may only be commenced by the filing of a summons which is then served upon the other spouse. The summons is merely a formal notification and does not provide any legal or factual details. Thereafter, if a spouse still wishes to pursue the divorce, he must, after sixty days, file a complaint setting forth only the statutory ground for divorce. Again, the complaint may not provide any specific charges.\textsuperscript{96} Thus, the Wisconsin procedure "softens" the divorce process by precluding reference to injurious details which might prompt the target to respond in kind.\textsuperscript{97}

\textsuperscript{91} Foster & Freed, \textit{supra} note 71, at 347.
\textsuperscript{92} Foster, \textit{supra} note 33, at 43.
\textsuperscript{93} Child abuse is a crime in Maryland, MD. \textit{ANN. CODE art. 27, § 35A (Supp. 1973)}, and is a growing problem in the United States. The United States Children's Bureau estimates that there are presently between 50,000 and 75,000 cases annually. It has been further estimated that 1.5 million annual cases will occur within the next ten years if the present pattern continues unabated. Pauley, \textit{Battered Children: A National Disgrace}, The Daily Record, Aug. 15, 1974, at 1, col. 5. Most child battering is done by apparently "normal people" who "strike out in rage, resentment or sheer ignorance." IRWIN, \textit{TO COMBAT CHILD ABUSE AND NEGLECT} (published by Public Affairs Committee). See also McCord, \textit{Battered Child}, 50 \textit{MINN. L. REV.} 1 (1965); Paulsen, Parker & Adelman, \textit{Child Abuse Reporting Laws—Some Legislative History}, 34 \textit{GEO. WASH. L. REV.} 482 (1966); Foster & Freed, \textit{The Battered Child}, TRIAL, Dec./Jan. 1966-1967, at 33. And, as pointed out by Goldstein, Freud, and Solnit, the "battered child" may, when he becomes a parent, be a "battering parent." GOLDSTEIN, FREUD, & SOLNIT, \textit{supra} note 24, at 5, 17, 127. See generally, Note, \textit{The Battered Child: Logic In Search of Law}, 8 \textit{SAN DIEGO L. REV.} 364 (1971).

\textsuperscript{94} Rheinstein, \textit{supra} note 41, at 255.
\textsuperscript{95} Hansen, \textit{Wisconsin Family Code—After Five Years}, 18 \textit{OKLA. L. REV.} 68, 69 (1965).
\textsuperscript{96} WISC. \textit{STAT. ANN. § 247.061 (Supp. 1974)}.
\textsuperscript{97} I have heard testimony of how a child has discovered a Bill of Complaint filed against his mother, charging the mother with adultery in damaging language. In most
A second time period must elapse before trial so that there may be a statutory "effort to reconcile." This procedure provides for approximately a four month period between commencement of the action for divorce and the actual trial. Additionally, the decree entered upon the conclusion of the trial is interlocutory in that it does not end the status of husband and wife until one year after its rendition. 98

Because it was felt that the marriage contract was of more significance to society than other contracts, that marriage was the foundation of the family and, therefore, of society, and that the stability of the family was basic to morality and civilization, the State of Wisconsin made a further important and fundamental change in its domestic relations law. Specifically, a full-time Family Court Conciliation Department was created to provide the machinery for mandatory efforts to effect a reconciliation between the spouses. 99

Marriage counselors (from the Department) 100 interview the parties and attempt to aid in the solution of any existing problems. However, if there can be no reconciliation, the counselors are entrusted to so report. Nevertheless, Judge Hansen states that many marriages have been saved by this required counseling procedure. 101

A full-time Family Court Commissioner was also established (in the larger counties) 102 to make a "full and impartial investigation of the case" and to "fully advise the court as to the merits of the case and the rights and interests of the parties and the public" and "to appear in the action," 103 particularly when the defendant fails to answer. The Commissioner participates in the trial with the same right as counsel for the parties to interrogate witnesses, to subpoena additional witnesses, and to argue against the granting of a divorce. 104

The concept of protecting the marriage was then judicially

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101. Id.
102. A part-time court officer is appointed for each of the smaller counties.
103. Hansen, supra note 33, at 3.
104. Id.
broadened to include the matter of representing children in divorce actions. In *Kritzik v. Kritzik*, the Wisconsin Supreme Court expounded upon the duty of the trial court to safeguard the welfare of any children affected by divorce proceedings. Recognizing that children involved in a divorce are disadvantaged parties and that the law must take affirmative steps to protect their welfare, the court stated:

In making his determinations as to what conditions of a divorce judgment would best serve the interests of the children involved, the trial court does not function solely as an arbitrator between two private parties. Rather, in his role as a family court, the trial court represents the interests of society in promoting the stability and best interests of the family. It is his task to determine what provisions and terms would best guarantee an opportunity for the children involved to grow to mature and responsible citizens, regardless of the desires of the respective parties.

Among the "affirmative steps" available to a court for ensuring the welfare of children is the power to order a preliminary investigation of the particular needs of the children. The court's custody decision would then be deferred until such evaluation had been made available to both the parties and the court.

The judges of the Milwaukee Family Court also caused to be printed the "Bill of Rights for Children" in which each Right was based upon the holding of a Wisconsin appellate court. A copy of the Bill is presented to parties in a divorce action at preliminary hearings on *pendente lite* motions.

Finally, in *Wendland v. Wendland* the Wisconsin Supreme Court recommended the appointment of a guardian *ad litem* to represent the interests of children involved in divorce proceedings. The court stated: "[w]here there is a hotly contested custody dispute, and the court is satisfied that the procedure of relying on the two parties and the investigation of a welfare agency may not produce all the important evidence that the court

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105. 21 Wis.2d 442, 124 N.W.2d 581 (1963).
106. *Id.* at 448, 124 N.W.2d at 585.
107. In Baltimore City, the preliminary investigation is done on the basis of custom by the Adoption and Custody Unit of the Department of Juvenile Services, *supra* note 12, and in the counties, such work is done by either the Department of Social Services or probation officers. In Wisconsin, the recommendation of the Family Conciliation Department Worker is made from the witness stand and the Worker is qualified as an expert in the field of child welfare.
108. See note 88, *supra*.
109. 29 Wis.2d 145, 138 N.W.2d 185 (1965).
should consider in looking after the best interest of the children, a guardian ad litem should be appointed." Underlying this recommendation was the court's opinion that: "children . . . are not to be buffeted around as mere chattels in a divorce controversy, but rather are to be treated as interested and affected parties whose welfare should be the prime concern of the court in its custody determinations." Wendland thus ruled that the court was primarily responsible for protecting the welfare of children in divorce proceedings. However, the Wisconsin Supreme Court recommended that the trial court, in furtherance of this responsibility, appoint a guardian ad litem in matters where custody is "hotly contested" or where the court has special reason for concern.

Other states have, in varying degrees, followed the reform course of Wisconsin. The legislatures of Connecticut and Missouri have provided their courts with the statutory authority to appoint a guardian ad litem to represent the interests of the children in matters of custody. The courts of Rhode Island and

110. Id. at 156, 138 N.W.2d at 191 (emphasis added).
111. Id.
112. The guardian ad litem's duties were said not to be inconsistent with those of the Conciliation Department because the guardian could make further investigation and call additional witnesses to testify. Id. at 156, 138 N.W.2d at 191.
113. Pub. L. No. 73-373 (Jan. Session, 1973) which will be CONN. GEN. STAT. REV. §§ 46-15(N), 46-16. This new divorce reform law provides that if at any time during the pendency of any action for divorce it appears that the rights of any child of the marriage are not being adequately protected, the court may appoint an attorney to represent the interest of the child. Further, after the filing of a complaint for dissolution, either party or a child of sufficient age and intelligence may request the court to appoint counsel for the child. The court is required to make such an appointment when a custody agreement is submitted by the parents. The court may also appoint counsel for a child where custody, care, education, visitation or child support is in controversy or where the court deems such representation to be in the best interest of the child. Moreover, before the court allows third persons to intervene in custody controversies, the law says that the court shall appoint counsel for the child. Counsel's fee is paid by either or both of the parties or by the child's estate.
114. Mo. Rev. Stat. § 453.020 (Supp. 1974). The statute requires the appointment of a guardian ad litem in an adoption case by providing that the Juvenile Court is without jurisdiction to proceed in the adoption of a person under the age of twenty-one years until a guardian ad litem has been appointed for such child. See generally Speca & Wehrman, Protecting the Rights of Children in Divorce Cases in Missouri, 38 U.M.K.C. L. REV. 1 (1969).
115. The Supreme Court of Rhode Island has accorded the Family Court Justices the inherent power to appoint a guardian ad litem to represent the interest of minor children and to assist the court in hearings before it. In Zinni v. Zinni, 103 R.I. 417, 238 A.2d 373 (1968), the court stated that:
It is well settled that whenever in any judicial proceeding it shall be made to appear that there are interests of a minor to be protected, the judicial officer presiding has the inherent power to appoint a guardian ad litem for the protection of the minor's interests.
Id. at 421, 238 A.2d at 376 (emphasis added).
Ohio have achieved similar results by relying on the inherent judicial power to safeguard the interests of minors. Finally, several states have, at least, acknowledged the public interest in custody proceedings by requiring that notification be given the District Attorney or some other public official when parties seeking divorce have children under a certain age. New York had statutorily established a system of guardians ad litem (called "Special Guardians") but subsequently repealed the statute.

Function, Status and Payment of the Guardian Ad Litem

The function of the guardian ad litem would be to assist the trial judge in any proceedings which may affect children. Judicial protection of the welfare of the child requires that judges be provided with the fullest and most professional insights into these difficult and delicate problems. Without competent assistance, judges may be forced to rely on their personal notions of what is "decent," "moral" or "right" in determining what satisfies the "best interest" of the child. Thus, the primary responsibility of the guardian ad litem would be to accurately present the true needs of the child and, thereby, establish the "best interest" test as a suitable formulation for ensuring a child's welfare. "A judge needs all of the real friends he can find."

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116. Relying upon a generic guardian ad litem type statute and inherent judicial power, the judge in Barth v. Barth, 12 Ohio Misc. 141, 225 N.E.2d 866 (1967), made the children of divorcing parents actual parties (defendants) to the action and appointed a guardian ad litem to appear on their behalf.

117. In Delaware, the District of Columbia, Georgia, Hawaii, Indiana, Kentucky, Massachusetts, Michigan, Nebraska, Washington, West Virginia, Wisconsin, and Wyoming, the District Attorney or some other public official is required to be notified when parties seeking divorce have children under a certain age. Foster & Freed, supra note 71, at 356 n.42. In Michigan the prosecuting attorney is directed by statute to appear at the hearing and to introduce evidence opposing the divorce if the interests of the children and the public good so require. MICH. Comp. Laws § 552.45 (1967).

118. In 1967, New York statutorily established Conciliation Bureaus which were headed by Supreme Court Justices. The Supervisory Justice of each Bureau had the power to appoint as many Conciliation Commissioners, Special Guardians and Counselors as deemed necessary: the law stating that if "there are minor . . . children of the marriage, the commissioner may request the supervising justice to appoint a special guardian for the minor . . . children. Upon such appointment, the special guardian shall be deemed to be a party to the proceeding." Law of April 26, 1966, ch. 254, § 8, [1966] N.Y. Laws (repealed 1973). There were few, if any, Special Guardians appointed under this law. As a result of the New York experience, Professor Foster advocates "mandatory rather than discretionary authority to appoint independent counsel to represent children." Letter from Henry H. Foster, Jr. to the author, Oct. 22, 1973.


120. See Rappeport, supra note 22, at 309.
As part of his function, the guardian would obtain information from the usual administrative sources but he would not be restricted to them. The guardian should have full right of legal discovery. He should be able to augment the agency reports by more intensive scrutiny of possible “trouble” areas contained in such reports. In so doing, he might be led to situations which the parents might prefer to leave unnoticed. Perhaps a neglect case might be uncovered in the files of the Department of Social Services, or the guardian might perceive the need for Medical Service to enter the picture even if such action is opposed by the parents. He would report such matters to the judge so that these issues could be fully considered.

Once the pre-trial or hearing phase of the matter (custody, visitation or adoption) is concluded, the guardian would also be called upon to fulfill his responsibility in court. He should be able to present evidence as to the child’s viewpoint and the child’s needs so that the judge can make an intelligent and unhurried decision. Procedurally, the function of the guardian would depend upon the status accorded to the children in domestic proceedings. To fully ensure the guardian’s right to represent the children affected by domestic relations litigation, the children should be made actual parties to any litigation involving custody, child support, visitation or adoption. The guardian ad litem should be free to summon witnesses; avail himself of pre-trial discovery; cross-examine; offer evidence; present oral and written argument to the court; and even to appeal decisions of the court if such decisions were felt to be adverse to the best interest of the children.

It may well be that such guardians ad litem will develop into a new breed of lawyer: “lawyers trained in psychoanalytic child development and specializing in child-custody cases.” While some may view this as impractical and costly, such specialization may be the best method of determining what has been called the “least detrimental alternative” for his child client. The guard-

121. See text accompanying notes 10-23 supra.
122. The guardian could supplement the reports by interviewing school teachers and social workers in either the Department of Social Services or private agencies (such as Family and Childrens Bureau, Associated Catholic Charities and Jewish Family and Childrens Service) if it appears that the child is “known” to these agencies.
124. GOLDSTEIN, FREUD & SOLNIT, supra note 24, at 53-64.
ian would also exercise all of the legal rights now afforded children as enunciated in Gault. After all, if children involved in delinquency proceedings are accorded the right to adequate notice, right of confrontation, right to cross examine, and privilege against self-incrimination, then logic should certainly dictate the same rights in custody (and adoption) matters. In fact, as Professor Foster points out, the need for these rights may be greater in placement matters because in cases where juveniles are adjudicated delinquent, only about twenty per centum are institutionalized; whereas a placement decision involves the whole future life of a child.

As to payment, there are a number of approaches. Under the Uniform Marriage and Divorce Act, the trial judge, except in cases of indigency, may order one or both of the parties to pay the guardian ad litem. Or, perhaps, Legal Aid (now the Legal Services Corporation) would undertake such representation. These attorneys (and interns from law schools) could furnish dedicated and competent advocacy. Possibly, the State, through the Department of Juvenile Services or the Office of the Public Defender, should provide for and pay such an attorney. Also, there might be funding through the Law Enforcement and Assistance Administration as a result of the recent enactment of the Juvenile Justice and Delinquency Prevention Act of 1974 which is designed to supplement juvenile delinquency prevention and control efforts at the state and federal level. The matter of such representation is also one to which the organized Bar must address itself, and it is felt that there must be an adequate response pro bono publico.

Source of Authority

There is considerable authority to the effect that the device of a guardian ad litem may be judicially established. The argument is that either equity courts have the inherent power to ap-

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125. See text accompanying note 67 supra.
126. Popkin, Lippert and Keiter, Another Look at the Role of Due Process in Juvenile Court, 6 FAMILY L.Q. 233 (1972); see in re Appeal No. 977, 22 Md. App. 511, 323 A.2d 663 (1974). However, it should be noted that there is no double jeopardy when the State appeals from a Master's dismissal of a delinquency petition, and the Juvenile Court conducts a trial de novo. In re Anderson, 272 Md. 85, 92-106, 321 A.2d 516, 520-27 (1974).
127. Foster, supra note 33, at 44.
128. Id. at 44-45.
129. The Act was approved by the National Conference of Commissioners on Uniform State Laws in 1970.
point a guardian or the rule-making power of an appellate court is broad enough to permit the promulgation of rules authorizing guardians. However, statutory authority is preferred. Logically, the device should be instituted in the context of a Family Court.

The legislature should require mandatory appointment of a guardian ad litem in divorce proceedings affecting children. Professor Foster asserts that when "marriage breakdown" is made a ground for divorce, counsel for the children should be appointed mandatorily. Maryland presently requires even less than "marriage breakdown" for a divorce, and, consequently, caution would dictate the security of a statute. While the Uniform Marriage and Divorce Act provides that the court may appoint an attorney to represent the interests of a minor child with respect to his support, custody and visitation, the Family Law Section of the American Bar Association favors making provisions of such counsel mandatory. It substitutes "shall" for "may" because experience has shown that courts rarely if ever appoint such counsel unless the provision is mandatory.

In this context, the provisions of Maryland's new Courts and Judicial Proceedings Article should be noted. Section 2-102, entitled "Special Officers," provides:

If advisable in a specific proceeding, a court may appoint an auditor, surveyor, court reporter, assistant counsel for the state, counsel for a party if authorized by law or rule, accountant, master, examiner, or other officer, and may require his presence in court.

However, since children are not actual parties to Maryland divorce and custody proceedings and since the new Article makes only "stylistic" revisions of the prior codification, it would seem

133. See text accompanying notes 199-235 infra.
135. See text accompanying notes 166-69 infra.
136. UNIFORM MARRIAGE AND DIVORCE ACT § 310.
138. See generally 5 HARV. J. LEGIS. 563 (1968) (providing a Model Divorce Act which favors mandatory appointment).
140. See In re Trader, 20 Md. App. 1, 3 n.1, 315 A.2d 528, 530 n.1, rev'd on other
that the quoted statute does not provide any authority for the appointment of a guardian *ad litem*.

**USE OF THE GUARDIAN *AD LITEM* WITHIN THE FRAMEWORK OF CONCILIATION AND COUNSELING**

It is submitted that the guardian *ad litem* device must be thought of as but one facet of a more fundamental approach to the entire realm of domestic relations and family problems. In some respects Maryland already utilizes certain sensible procedures; in others the laws are in an embryonic stage; and in still others new ground must be broken. As already indicated, one of the more serious defects in the Maryland divorce procedure is the lack of any effective means of preserving the rights of an inherently interested child. The use of a guardian *ad litem* is one method of safeguarding the child, but the guardian's role is somewhat limited. He does not become involved in domestic problems until after the parents have determined to seek judicial dissolution of their marriage. The guardian is, therefore, only able to champion the interests of the child in those instances in which the marriage may be dissolved. While we obviously need the services presently provided by the Adoption and Custody Unit (of the Department of Juvenile Services) in matters previously discussed, a guardian *ad litem* "may well be in a position to conduct a further investigation and present evidence to the court that will help it reach its custody determination." Nevertheless such recommendation is made in the context of litigation, and the guardian is not otherwise involved in preserving the family. May we not, then, consider conciliation and counseling as additional devices for the preservation of the family? Before exploring the merits of such a proposal, it is necessary to briefly examine the effect of the present Maryland divorce law upon the family unit.

The State of Maryland now permits absolute divorce, regardless of fault, upon the mere passage of a three year time span. While this statutory approach is sensible in some respects, it also contains a basic flaw which tends to subvert the maintenance of the family unit. Let us first note, however, the advantages of this new law. It *is* salutary to abolish "fault" in divorce situations...
because the traditional fault concept has the effect of producing hypocrisy in, at least, two instances. First, a marriage may reach a point of total deterioration without either party being "at fault" in the conventional legal sense. Yet, if the parties live under the same roof, albeit in separate bedrooms with no sexual relations, they still may not obtain a divorce. The result is that if the parties really want a divorce, they must manufacture a way to obtain one. The simplest "way" is for one party to present untested testimony as to the abandonment or adultery of the other spouse (with the other party being present only through his or her attorney). Both parties are fully aware that such testimony may be rank perjury.

Professor Rheinstein labels this type of falsely obtained divorce a "consent divorce." He takes the position that this concept developed as a result of a compromise between "conservatives" and "liberals." The conservatives insist that fault or culpability laws must remain on the statute books even though such laws are not obeyed. The liberals, although disapproving of the concept of fault in divorce proceedings, will tolerate these laws as long as the harsh effects can be avoided by the consent or "migratory" divorce. Professor Rheinstein feels that a tacit truce evolved until the "crucial breakthrough" of the "no fault" divorce concept. The breakthrough has taken many forms. As will be later seen, it has taken a sharp and perhaps unusual form in Maryland.

Perjured testimony also occurs because a "fault" divorce has


146. For example, when one spouse has abandoned the other, the abandoned spouse may obdurately refuse to bring suit for an absolute divorce until he (or she) receives a property settlement to his (or her) liking. Once such an agreement is reached, there is no further obstacle, and a quick divorce is usually desired. If the parties begin the twelve month statutory time period from the date of mutual agreement, no legal or ethical problem is presented. Md. Ann. Code art. 16, § 24 (Supp. 1973). However, since a quick divorce is desired, the parties almost inevitably date the "voluntary" separation from the date of actual separation even though the initial separation was not "voluntary." Thus, in order to obtain the desired divorce, the parties resort to perjury in testifying as to the date of the mutual agreement to separate.

147. Rheinstein, supra note 41, at 247.

148. A migratory divorce is one where the "divorce seeker living in a place in which divorce cannot be obtained at all, or only under difficulty, resorts to the court of another place in which a divorce can be obtained more easily or, perhaps, just more discreetly." Id. at 63.

149. See text accompanying notes 166-69 infra.
been historically considered a punishment for the party guilty of matrimonial misconduct and a privilege for the spouse innocent of "wrongdoing." Yet, in those instances when the question of fault was not well-defined, the concept produced results that were perceived to be unfair. Efforts to ameliorate the harsh application of the fault rule led to the establishment of a system of defenses available to the "wrongdoer." The thought was that if such a defense prevailed, the "wrongdoer" was felt not to deserve the "punishment" of a divorce. Thus, if the innocent party condescended \(^1\) or connived \(^2\) or the other's misconduct or if one connived \(^3\) at the other spouse's adultery or if there was collusion \(^4\) or recrimination, \(^5\) there could be no divorce. To avoid this system of defenses and obtain a fault divorce, the parties resorted to perjury.

Even in those cases where there existed a clear situation of fault with no valid defense, the parties might still find a way to attenuate \(^6\) or disregard \(^7\) the rigors of the fault predicament. \(^8\) Given these deficiencies in the system of fault, the public grew cynical, and the need for what Professor Bradway called "better public relations" grew apace with such cynicism. \(^9\) The disrespect thus bred for the law of divorce was a symptom of a deeper malaise—the concept of culpability itself. From this disenchantment with the concept of culpability developed the idea that divorces should be granted when there is a breakdown of the marriage itself; or, as California has legislatively put it, when there are "irreconcilable differences, which have caused the irreparable breakdown of the marriage." To the extent that divorce is to be allowed regardless of fault, there is provided a procedure that will do much to obviate the charades and the perjury. This new legislation, therefore, provides a welcome relief from some of the more flagrant abuses of the "consent divorce." \(^10\)

\(^3\) Harne v. Harne, 141 Md. 123, 118 A. 122 (1922); Fisher v. Fisher, 95 Md. 314, 52 A. 898 (1902).
\(^6\) Rheinstein, supra note 41, at 59.
\(^8\) Bradway, supra note 84, at 666-80.
\(^10\) The removal of fault from divorce may be part of a general trend away from...
The no-fault approach also sensibly resolves another irritant in the law of divorce which arises from the concept of fault: the situation where the spouse at fault is held in a perpetual state of marriage by the other, who, acting out of spite and malice, refuses to ever seek or permit a divorce. It sometimes happens that one spouse, badgered beyond description by the other, leaves the marital abode under circumstances which may not constitute constructive desertion\textsuperscript{160} and then stays away permanently. The conduct of the party who has been abandoned may be the actual cause of the separation; and, yet, instead of seeking a divorce, such party may bring an action only for permanent alimony.\textsuperscript{161} This will then leave the abandoning spouse in a situation where he or she can never obtain a divorce\textsuperscript{162} because of legal fault.

There are many more examples of the defects inherent in the fault system but, apart from hypocrisy, the most telling criticism is that legal fault may not be the actual cause of marital failure.\textsuperscript{163} Thus, if the law requires fault to be proved in an adversary context, it may well intensify conflict between the parties and exacerbate the situation with respect to their children.\textsuperscript{164} The persistent adherence to the concept of fault in the framework of the adversary system without reference to softening devices such as counseling and conciliation hastens the break-up of the family unit. Such a result may operate to the detriment of any children: "The child's psychopathology is often intensified by the parents' legal wrangles with resulting depression, withdrawal, phobic fears or acting out behavior."\textsuperscript{165}

Apparently, the Maryland General Assembly has come to the

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161. See Moran v. Moran, 219 Md. 399, 149 A.2d 399 (1959) (husband guilty of desertion despite wife's nagging and jealousy, and wife, therefore, entitled to permanent alimony); Binder v. Binder, 16 Md. App. 404, 297 A.2d 293 (1972) (wife's excessive use of alcohol did not justify husband's desertion, and wife, therefore, entitled to permanent alimony).

162. See note 161 supra.


165. Id. at 67.
realization that divorce ought to be allowed without regard to fault or culpability. However, the General Assembly did a rather anomalous thing by engrafting a no-fault ground onto the existing grounds for absolute divorce—grounds which include all of the traditional guilt (or culpatory) grounds. The typical statutory solution has been to remove culpability as a ground for divorce and to replace it with the theory of "irremediable breakdown." An "irremediable breakdown" statute is based on "irreconcilable differences" and requires a conflict which must be judicially determined to constitute "substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved." However, Maryland presently has either the best or the worst of both worlds—a mixture of "fault" and "no-fault" divorce. Under this hybrid system, one may procure a divorce by judicially establishing either fault or a three year separation. The problem with Maryland's approach is that there is no need for any judicial finding that the marriage should be dissolved. While words such as "irremediable" and "irreconcilable" may mean different things to different trial judges, Maryland seems to have solved the problem by not using any standard in its new no-fault approach other than a mere passage of time.

Although it would seem that there is an obvious inconsistency between an admixture of culpatory and non-culpatory divorce, there is an opposite view which contends that a party should be allowed to choose the ground that suits him best. For example, if one spouse flagrantly commits adultery, it may be argued that the other should be able to obtain an "adultery" divorce without allowing for the three years required by the no-fault statute. But here again, divorce is used as a punishing weapon without any attempt to ascertain the reason for the adulterous conduct. To permit such a divorce too quickly might dissolve a long and productive marriage (with children) that might otherwise be saved by counseling and conciliation techniques. Does not society have a legitimate right to demand that before absolute divorce is allowed, there must be a determination that the marriage is actually untenable and should be dissolved? I submit that Maryland should remove all grounds for divorce ex-

166. See note 144 supra.
168. CAL. CIV. CODE § 4507 (West 1969).
cept one, namely, that of separation after a certain period; but I also submit that Maryland should create and implement a system for voluntary conciliation and counseling.

Admittedly, some distinguished scholars have voiced a different theoretical viewpoint. Professor Rheinstein, for example, feels that the evil is not divorce but what he calls "factual marriage breakdown" and, therefore, the parties should have unfettered "freedom to remarry" (Rheinstein's euphemism for divorce). In other words, if we are interested in family stability, we should look at the causes of actual marital breakdown rather than simply equate marriage breakdown with divorce. It is hard to dispute the logic of his position. On the other hand, Rheinstein concedes that the "therapeutic" approach of conciliation and the use of a Family Court may have proved to be effective in one instance. This concession is tempered by his statement that he "did not know" if such success was due to the plan or to the unique effectiveness of the presiding officer, Judge Paul Alexander. Further, Rheinstein is criticized by Professor Bodenheimer who states that Rheinstein seems to feel that divorce is a blessing. Perhaps it is a blessing to the divorcing spouses but it may not be to the children. While divorce may be a solution to marital miseries, there may be other, more satisfactory, solutions to the problems encountered by those swept into the domestic vortex. Professor Rheinstein's "freedom" may turn into a curse—what Kierkegaard called the "despair of possibility."

If the cornerstone of our society is felt to be the family unit,

171. Rheinstein, supra note 41 at 266.


175. S. Kierkegaard, The Sickness Unto Death, in Fear and Trembling & The Sickness Unto Death 168-70 (1968 ed. W. Lowrie transl.). Although written in a different context, the following words of Kierkegaard aptly describe the freedom of divorce: "At last it is as if everything were possible—but this is precisely when the abyss has swallowed up the self." Id. at 169.

176. Because more families are breaking up than ever before, the family may seem more dispensable than it was in the past. The contrary is probably true. Until another institution can provide a role for children—and none, including the kibbutz, is in sight—the family continues to be indispensable. Although other institutions, such as the schools, may augment the family, none can effectively replace
then society has a profound stake in actively seeking to preserve the married family entity. While the extended family may no longer predominate, the family nucleus still remains, and it should not be split without every effort being made to preserve the unit.\textsuperscript{177} As Karl Llewellyn stated, the "pair-marriage" is the best type of (sexual) relationship to provide a foundation for society.\textsuperscript{178} If the home is thus recognized as the basic unit in our civilization, can we not say that anything that destroys this unit is contrary to public policy? Should we not therefore consider the therapeutic approach of conciliation and counseling both as to parents and their children?\textsuperscript{179}

Undoubtedly certain marriages can be saved by expert counseling services.\textsuperscript{180} To sanction automatic divorce after three years is to permit irreparable harm to the parties and, perhaps, more importantly, to their children by dissolving marriages and families which might possibly be saved.\textsuperscript{181} Those who view the marriage contract as merely another part of the law of contracts would do well to note the words of Justice Traynor:

The deceptive analogy to contract law ignores the basic fact that marriage is a great deal more than a contract. It can be terminated only with the consent of the state. In a divorce proceeding the court must consider not merely the rights and wrongs of the parties as in contract litigation, but the public interest in the institution of marriage. The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives

\textsuperscript{177} W. Glasser, The Identity Society 133 (1972).

\textsuperscript{178} H. Becker & R. Hill, Family, Marriage and Parenthood ch. 5, at 131 (2d ed. 1955); J. Kuhn, American Families Today: Development and Differentiation of Families ( ); J. Lichtenberger, Divorce, A Study in Social Causation 247 (1931).

\textsuperscript{179} Llewellyn, Behind the Law of Divorce, 32 Colum. L. Rev. 1281, 1284 (1932).

\textsuperscript{180} See, Note, Counseling the Counselors: Legal Implications of Counseling Minors Without Parental Consent, 31 Md. L. Rev. 332 (1971).

\textsuperscript{181} Obviously, those marriages without children may also benefit from counseling.
that might otherwise become socially destructive; it insures the care and education in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people. Since the family is the core of our society, the law seeks to foster and preserve marriage. But when a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted. ['P]ublic policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed.'\textsuperscript{182}

The techniques of conciliation and counseling are being increasingly utilized in the United States,\textsuperscript{183} both in judicial\textsuperscript{184} and private\textsuperscript{185} settings. While phrases such as "marriage counseling" and "conciliation" are relatively new, the ideas they embody are ancient. Marriage counseling means:

Those activities which are aimed at helping parties to troubled marriages to understand their difficulties and the sources of them, and thus to deal with them in a rational way. Where marital difficulties have source in neurotic traits, the marriage counsellor may have to resort to \textit{therapy}, ordinarily by advising the client to seek the service of a psychotherapist.\textsuperscript{186}

Conciliation is different. It is the process of attempting to induce separated parties of a troubled marriage to resume living together in an untroubled way.

While there are ardent advocates of \textit{mandatory} conciliation

\textsuperscript{182} DeBurgh v. DeBurgh, 39 Cal.2d 858, 863-64, 250 P.2d 598, 601 (1952).

\textsuperscript{183} Conciliation and counseling techniques are already in widespread use in other countries. \textit{See Rheinstein, supra} note 33, at 437 (France); 301, 438 (Federal Republic of Germany, certain areas of permissiveness), 190 (Italy), 439 (certain cantons of Switzerland), 140, 147 (Sweden), 110 (Japan).

\textsuperscript{184} The use of conciliation services is statutorily encouraged in England. The solicitor for a divorce petitioner must state whether he has informed his client of the desirability of conciliation and indicated to the client where and how such service is available. Matrimonial Causes Act 1965, c. 72, § 3(1). In Canada, the lawyer must discuss the possibility of reconciliation with the client and direct him to marriage counseling facilities for assistance. The Divorce Act, \textit{Can. Rev. Stat. c. D-8 et seq.} (1970); \textit{see} Bodenheimer, \textit{The New Canadian Divorce Law}, 2 Family L.Q. 213 (1968).

\textsuperscript{185} CLARK, \textit{supra} note 59, § 11.1, at 284; FOSTER, \textit{supra} note 33, at 3-7; Henderson, \textit{supra} note 180, at 6.

and counseling, the more persuasive reasoning supports the voluntary use of these devices. As Professor Clark notes, the question of reconciliation is ultimately a matter to be decided by the parties themselves and not by state officials, "no matter how well intentioned." Further, mandatory procedures, requiring one to submit to involuntary psychotherapy in order to obtain a divorce, may be an impermissible exercise of state power. The state should not be allowed to establish conciliation and counseling as prerequisites for a divorce. However, many persons may not even know about psychotherapy, or they may have a distorted view about modern psychiatric techniques. Certainly, there should be a requirement that the availability of such help be made known to persons who wend their unhappy ways through the state monopoly of a divorce court. Should we not require parties seeking divorce to at least submit to a screening process for the purpose of educating and informing them as to the possible benefits of counseling and conciliation? This screening process should be conducted by persons professionally trained in the social and behavioral sciences. Such a professional staff, which is felt to be a necessity, should not become a dumping ground for incompetents and misfits.

As Dean Pound observed in his discussion of the use of conciliation and counseling in the context of a Family Court, there is always criticism. One possible argument against adopting the techniques of conciliation and counseling is that government (executive and legislative) will neither adequately fund the professional staff nor provide for "job recruiting, and opportunities for research and professional advancement offered by competing private agencies." There may be additional criticism that even assuming such a professional staff, there is insufficient knowledge about human psychology to effect a cure of the marriage break-

188. CLARK, supra note 59, § 11.1, at 285.
191. See THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT ON JUVENILE DELINQUENCY AND YOUTH CRIME 7 (1967).
The difficulty with such criticism is that, if considered seriously, we would have to wait until some indeterminable time in the future to ascertain the magic moment when such truth becomes evident; and in the interim, we must sit idly by while marriage breakdown and divorce increase almost geometrically.

Finally, the fact remains that if one seeks priorities in the allocation of tax dollars and human resources, the top priority should be our children with all other considerations yielding accordingly. If it is possible to preserve marriages by virtue of a professional staff trained in conciliation and counseling and, thus, to achieve the stability so desperately needed by children, then a way must be found to have and to use these techniques appropriately and effectively. Of course, if a marriage is totally beyond repair, then certainly let it be dissolved. However, should not society have the right to ascertain that a marriage has irretrievably broken down before rubber-stamping a divorce decree, especially one involving an award of custody? At least, the parties might be made to understand the existence of their psychological problems and have pointed out the nature and location of help which could reduce marital tensions. If, on the other hand, the professional counseling and conciliation staff ascertains that the marriage is "over," it would so certify, and society could then have the security of knowing that everything possible had been done before permitting dissolution.

Perhaps, the time has come to consider the desirability of establishing a Family Court in Baltimore City and each of the metropolitan counties. Presently, in Baltimore City there are three separate courts which handle family related problems. This diffusion of authority causes domestic questions to be considered in a vacuum and tends to minimize the totality of the family. The establishment of a Family Court would accentuate the family

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194. Id.
196. In the 1970 and 1972 Sessions of the Maryland General Assembly, Senator John J. Bishop, Jr. introduced legislation seeking to create "Courts of Conciliation," which failed of passage. It is understood that he plans to introduce similar legislation in later sessions.
197. See Bodenheimer, supra note 73.
198. In 1973, the Board of Governors of the Maryland State Bar Association authorized its Family and Juvenile Council to conduct a study of the advisability of a Family Court in Maryland. No report has yet been issued.
structure by placing all of the separate but related courts and services under one umbrella. Such a unified court would afford a more complete procedure for treating the interrelated and complex problems associated with the family unit.

A brief examination of the existing “family” system in Baltimore City exposes the closely associated functions of the separate courts. There are three courts in the Eighth Judicial Circuit (the Supreme Bench of Baltimore City) that deal with family related problems: Circuit Court Number Two, Criminal Court Part Eight, and the Division for Juvenile Causes of the Circuit Court (Juvenile Court). Pursuant to local court rule, the judges of the Supreme Bench, except for the judge assigned to the Juvenile Division, are assigned to the various courts by a system of annual rotation. The jurisdiction of the Circuit Court Number Two (the Domestic Relations Court) extends to matters of divorce, annulment, alimony, child custody, visitation, child support, guardianship, adoption, contempt, counsel fees; and related matters incidental to the foregoing. For example, modification proceedings, such as modification of alimony and child support by way of increase or decrease and modification of custody and visitation would come within the jurisdic-

199. Recent events suggest the rotational system may be extended to this division.
202. Id.
203. Id.
tion of the Domestic Relations Court. The judge who presides in the Criminal Court Number Eight has jurisdiction over "civil paternity" cases, criminal non-support cases and matters of "defective delinquency." The Division for Juvenile Causes has exclusive original jurisdiction over cases of children who are alleged to be delinquent, dependent, neglected, in need of supervision or mentally handicapped, and proceedings arising under the Interstate Pact on Juveniles. This court also has exclusive original jurisdiction over an adult charged with committing an act "causing a child to be adjudicated neglected, delinquent, or in need of supervision." Additionally, under special circumstances the Division for Juvenile Causes may have jurisdiction to hear custody, guardianship and paternity proceedings. Should we not consider the idea of a Family Court which would combine the function of dealing with children who are in trouble with the function of dealing with marital trouble and all of its related problems?

First, it is necessary to determine what is meant by a Family Court. There are a number of courts in the United States which style themselves as "Family Courts," but, in actuality, they are not. These courts may be simply "juvenile courts enlarged to apply social service principles to other family members and matters." A Family Court is a unified court having jurisdiction to hear and determine all justiciable controversies and disputes regarding problems that involve members of a family. Such a court is referred to as an "integrated" Family Court. Further, this type of court is a centralized one with all of its parts located in

214. Md. Ann. Code, Cts. & Jud. Proc. Art., § 3-602(a) (1974). Although the statute provides that paternity proceedings are equitable in nature, the practice continues in Baltimore City of holding such proceedings in Criminal Court Number Eight. At the commencement of a paternity proceeding, the bailiff for the Criminal Court announces that the court is sitting in equity.

one place. As a consequence of this consolidation, the Family Court must be staffed by experienced personnel who are able to make appropriate referrals to the particular units under the aegis of the court.

An integrated Family Court in Baltimore City should have jurisdiction over all family related matters. The new court's jurisdiction would thus encompass those matters currently heard in the Division for Juvenile Causes of the Circuit Court, the Domestic Relations Court and the Criminal Court Part Eight. Furthermore, the Family Court would be the appropriate forum for any crimes of an intrafamilial nature such as child abuse and assault and battery. Cases arising under the Uniform Reciprocal Enforcement of Support Act would also come within the jurisdiction of the Family Court. Additionally, such a court would assume control over all related agencies. Thus, the Adoption and Custody Unit would no longer be under the dual control of the Department of Juvenile Services and the Domestic Relations Court, but would be placed within the authority of the Family Court.

In addition to integrated jurisdiction, another trademark of a Family Court is its expertise. This type of court is presided over by judges who are specialists in the field of family relations. The rotational system of the Supreme Bench, as concerns this particular type of problem, is unsatisfactory per se because, while judges rotate, problems remain. The matter of divorce, for example, is but a temporary stop of the train: the subsequent modification problems keep rolling. Remaining to be dealt with are questions pertaining to subsequent increase or decrease of alimony, child support, visitation and custody. Disposition of such modification proceedings may well involve testimony given in the original proceeding—testimony taken long before the current judge attempts to solve the latest manifestation of the fundamental problem. The current judge must either take testimony anew, which is time consuming and duplicative, or ask the former presiding judge to

226. Even though wife beating, for example, may technically constitute the crime of assault and battery, a civil remedy may be more appropriate. The District of Columbia has recognized this preference by providing for a civil protection order and required participation in a psychiatric treatment and counseling program. D.C. Code Ann. § 16-1006 (Supp. 1970).


228. Different attorneys may also be involved in the subsequent problems which occur after the divorce. See Md. R. P. 125e (automatically terminating the appearance of counsel upon final decree of divorce).
hear and determine the existing problem. The former judge may be loath to redetermine such matters since he will, in all probability, then be assigned to a different court with different substantive problems.\textsuperscript{229} The structure of the Family Court eliminates this problem by abolishing the rotational system. The permanent assignment of judges to the Family Court would foster both the development of expertise and familiarity with specific family-related issues. It may also produce a permanent tyrant, but care in appointment\textsuperscript{230} plus existing removal procedures\textsuperscript{231} should minimize this possibility.

A successful Family Court requires the permanent and scrupulous keeping of adequate records and the prompt and systematic exchange of information among the various divisions of the

\textsuperscript{229} Even if the former judge is gracious enough to interrupt his present docket and hear the current unrelated domestic problems, such problems may involve former situations which are naturally hazy in his memory, and, therefore, unsatisfactory decisions may ensue.

\textsuperscript{230} Maryland recently adopted the "Missouri Plan" for the selection of its judges. Exec. Order of July 17, 1970, [1973] Md. Laws 1973 (trial court judicial selection). Under this plan, each of Maryland's eight judicial circuits now has a "Governor's Commission on Trial Court Judicial Selection," composed of eleven members: five are attorneys elected by the appropriate local Bar Association and six are appointed by the Governor from the general public. The Commission submits a list of attorneys suitable for judicial appointment to the Governor whenever a vacancy occurs in the circuit. The plan is believed to best "assist the Governor in carrying out his desire and intent to appoint to judicial offices on the trial court only those members of the Bar who are, by virtue of their learning, experience, character and temperament best fitted therefor." Id. Under the prior system, the appropriate Bar Association would submit a list of names, sometimes as many as twenty or more, to the Governor who would generally appoint from this list. It was felt that the old system left too much to "judicial politics" and did not give the general public any say in judicial selection.

\textsuperscript{231} Judges in Maryland may now be removed through the Commission on Judicial Disabilities. This Commission, appointed by the Governor, may receive and investigate complaints against Judges, conduct formal hearings, and recommend to the Court of Appeals removal or retirement of a judge. Md. Const. art. IV, §§ 4A, 4B; Md. Ann. Code, Cts. & Jud. Proc. Art., §§ 13-401 et seq. (1974). The Maryland Court of Appeals, after a hearing and upon a finding of misconduct while in office, or of persistent failure to perform the duties of his office, or of conduct prejudicial to the proper administration of justice, may remove the judge from office or may censure him, or the Court of Appeals, after hearing and upon a finding of disability which is or is likely to become permanent and which seriously interferes with the performance of his duties, may retire the judge from office. Md. Const. art. IV, § 4B(b). This procedure is "alternative to, and cumulative with, the methods of retirement and removal provided in Sections 3 and 4 of this Article [Art. IV], and in Section 26 of Article III of this Constitution." Md. Const. art. IV, § 4B(c). Section 4 permits removal "on conviction . . . of incompetency, of wilful neglect of duty, misbehavior in office, or any other crime, or on impeachment . . . or on the address of the General Assembly. . . ." Md. Const. art. IV, § 4. Section 3 allows a judge to be retired by the General Assembly with approval of the Governor for "inability . . . to discharge his duties with efficiency, by reason of continued sickness, or of physical or mental infirmity." Md. Const. art. IV, § 3.
This procedure eliminates duplication and enables each interested unit of the Family Court to maintain a current and informed position on any particular problem. Thus, if there is juvenile trouble that comes to the attention of the Juvenile Division of the Family Court, that information would automatically be brought to the attention of all other Divisions. It may also be that the Domestic Relations Division has had or might, in the future, have contact with the family of the particular juvenile, and the need for counseling might be determined earlier than it would under a non-integrated system. Further, where divorce actions are instituted in the Domestic Relations Division, detailed data should be taken and correlated immediately with the Juvenile and other Divisions. In this way, all Divisions might be made aware of pertinent information that could benefit the children of the divorce action, and an informed investigation could be made.

The procedures involved in a Family Court must be carefully analyzed. The court should function "in cooperation with private and community facilities."233 Counseling and conciliation would not be mandatory but would be available through the Family Court.234 The divorce action should be instituted with the title In Re the marriage of Mary and John Jones instead of Mary Jones v. John Jones. There would be an initial mandatory interview to ascertain the situation of the parties and to explain to them the facilities of the Family Court.

There may be criticism that courts really cannot settle family problems, and, therefore, the concept of the Family Court is without merit. However, there are certain family areas, such as divorce, which require judges to determine both property rights and support obligations and to enforce legal rights. In addition, judges are controlled by the appellate corrective process (to say nothing of legislative correction) which provides safeguards against judicial excess in regard to familial situations. Thus, the Family Court is a desirable innovation; for, as Professor Kay writes, it "appears more appropriate to provide courts with nonlegal techniques and personnel than to supply legal authority to nonjudicial agencies even if they are better equipped to deal with the primarily emotional problems of family dissolution."235

232. The records should be centrally located and not dispersed to the various agencies and units. The cost of such a system of record-keeping and its effectiveness is readily ascertainable. See O. Glaser, Routinizing Evaluation: Getting Feedback on Effectiveness of Crime and Delinquency Programs (HEW Pub. No. 73-9123, 1973).

233. Kay, supra note 194, at 1225.

234. Id. at 1226-27.

235. Id. at 1208.
CONCLUSION

The emerging recognition of the rights of children warrants full consideration of appropriate methods to implement such rights.

One method is the use of a guardian *ad litem* within the framework of a Family Court. It is submitted that even without a Family Court, there should be mandatory use of such guardians in hotly contested custody cases or in any other situations where the judge feels that one is necessary. Certainly this is true as long as Maryland retains fault and the adversary system in its divorce machinery. If Maryland were to rid itself of the fault concept, then the drive for a guardian *ad litem* might lose some of its urgency. However, the removal of fault will produce a dangerous gap which, it is submitted, should be filled with a fully integrated Family Court: a court with specialized nonrotating judges, a professional staff and jurisdiction to determine all justiciable controversies relating to members of a family.

The basic thrust of the Family Court concept is that it will provide an individual with the ability to more deeply understand himself and an opportunity to see better how he "presents himself to others."\(^{235}\) It is felt that this approach will be constructive to the marriage and to the children of the marriage. If so, the value of the Family Court would be established because the family and its continued existence are of fundamental concern to society.\(^{237}\)

However, the flywheel ought to have another thrust, a recognition that if a marriage is truly "dead," it should be decently interred\(^{238}\) regardless of whether there are children.\(^{239}\) If this is so determined by the professional staff and the judge after due consideration, then let the divorce ensue. We then will know that we have done our best.\(^{240}\)


\(^{240}\) Kay, *supra* note 194, at 1248.