REPRESENTATION OF THE INFANT

IN LEGAL PROCEEDINGS - WHO SPEAKS FOR THE CHILD?

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I.

INTRODUCTION

A. Purpose of the Paper

The purpose of this paper is to set out the existing practice in the Province of Alberta relating to the representation and the protection of the rights of the child in legal proceedings affecting his interests. Part II considers the situation in which the child is a party to the proceedings and surveys the law relating to the "next friend" and the "guardian ad litem" with a separate study of the protection given a child's property interest. Part III is a limited study of the situation in which the child is not a party to the proceedings; the common law, existing legislation and the practice of appointing an amicus curiae are examined. As well, the practice in other jurisdictions is outlined for the purpose of comparison. Part IV sets out the conclusions arising from this study and the writer's recommendations.

B. Areas Beyond the Scope of the Paper

This study is limited in Part III largely to an examination of the position of the child in proceedings relating to his custody, access and guardianship. However, the problem of his representation cannot be viewed in isolation and for this reason there follows some brief comments in selected areas that, due to limitations of time and resources, were beyond the scope of the study.

1. Juvenile Delinquency Proceedings

The feeling that just because an offender is a juvenile he should not therefore be deprived of the fundamental right of all adults to proper legal representation has led Legal Aid in Alberta to propose that all juveniles have

legal advice made available to them before they first appear in court. Legal Aid has set up a pilot project in Calgary which has been in operation since October of 1975 and in which juveniles in the juvenile courts are provided with a system of duty counsel--lawyers assigned to the project for a certain time period. A procedure is followed in which the lawyer interviews the juvenile at a detention centre before his first court appearance; he speaks to bail if necessary, makes any required recommendations to the court and has the juvenile complete an application for legal aid if he feels he needs a defence. Legal Aid is strongly behind the province-wide implementation of this proposal but at the moment it appears that the provincial government is waiting for some concrete data on the progress of the pilot project.

2. Abuse-Neglect-Wardship Proceedings

The only legislative provision for legal representation of a neglected or abused child subject to these proceedings is found in section 18(4) of the Child Welfare Act, R.S.A. 1970, c. 45; the Director of Child Welfare, if he considers it to be in the public interest to do so, may retain counsel to represent the interests of the child. Under section 31 of the Act the Director is made guardian of the person of any infant who is a temporary ward of the Crown and sole legal guardian of the person and estate of an infant who is a permanent ward of the Crown. If the parent involved in these proceedings is a minor, section 37 gives the judge a discretion to appoint the Public Trustee or other person to safeguard his interests before the court.

One question that calls for close examination in this area is the adequacy of the section 18 protection; not only is it discretionary and based on the public, rather than the child's interests, the discretion itself is vested not in

the court but in the Director of Child Welfare with the resulting possible problem of conflict of interest for the counsel who is retained by the Director but responsible for representing the child.

In isolated cases, the court has appointed an amicus curiae to represent the child but this practice is rare and more often limited to cases involving contested custody issues. Perhaps this is an area into which this practice should be extended and perhaps even made mandatory. Mr. Alexander Hogan, formerly with the office of the Public Trustee, proposes in his paper "Child Advocacy and the Law" presented to the Child Welfare League of America Conference, that every child the subject of abuse, neglect or contested custody proceedings be automatically represented by independent counsel who would have the right to adduce evidence, cross-examine and have investigative authority and resources.

3. Adoption Proceedings

Section 50 of the Child Welfare Act requires that an application to adopt a child must first be submitted to the Director of Child Welfare who, in the interests of the child, must investigate the application and present a report of it to the judge. Where the child is not a ward of the Crown, section 57 requires that the judge be satisfied with the propriety of the adoption having regard to the welfare and interests of the child. These provisions appear to be the only protection given to the interests of a child who is the subject of adoption proceedings in Alberta.

Section 70(4) of Ontario's Child Welfare Act, R.S.O. 1970, c. 64 (as amended by C.S.O. 1970, c. 96, s. 18(1)) makes the appointment of a guardian ad litem mandatory in applications for adoption orders. The Ontario Law Reform Commission in its Report on Family Law (Part III, Children, 1973) recommends the

setting up of a new office of Law Guardian , part of whose function would be to take over the role of guardian ad litem in adoption proceedings. In England also, a guardian ad litem is appointed for the child who is the subject of adoption proceedings (the adoption (High Court) Rules 1971, S.I. 1971, No. 1520/L.34, Rules 6, 7 and 15). Should not Alberta have some such similar provisions giving the child representation independent of the Department of Child Welfare, particularly in cases where his material welfare may not coincide with his emotional welfare?

Mr. Alexander Hogan, in the paper cited above, describes adoption proceedings in Alberta as "rubber stamp" cases--cases in which the court acts like a rubber stamp to an administrative decision made by the Department of Child Welfare. He proposes the setting up of an independent "Committee of Review" financed through Legal Aid and whose function would be to screen all applications relating to issues of adoption, guardianship, wardship, maintenance, affiliation, annulment and noncontested divorce and custody, to investigate cases where necessary and to advise the court whether the interests of the child require that he should or should not have counsel.

II.

REPRESENTATION AND PROTECTION OF THE INFANT'S INTERESTS WHERE HE IS A PARTY TO THE PROCEEDINGS

A. In General - The Next Friend and Guardian Ad Litem

Under the Alberta Rules of Court an infant may sue or counterclaim by his next friend and may defend by his guardian or his guardian ad litem.[1] The next friend is not appointed as "guardian" by the court, while the guardian ad litem is so appointed. The court may appoint a guardian ad litem whenever it appears to be in the interests of the infant.[2] An example of such a situation could be where the infant has no guardian to conduct his defence or where the interests of the guardian conflict with those of the infant.

The language used in the Alberta Rules of Court, for example, "may" sue by next friend and "may" defend by guardian ad litem does not mean that their presence is not mandatory where an infant is a party to the suit. In the case of Arnott v. Arnott [1937] O.W.N. 531, Mr. Justice Hogg of the Ontario High Court stated:

> "It would appear that the rule is that, although the lack of the appointment of a guardian is not a ground to invalidate a judgment, nevertheless an action should not be proceeded with or continued up to judgment where an infant is a defendant unless a guardian has been appointed."

The same court in a later case commented:[3]

> "It could never be successfully contended that an infant could sue without a next friend. It follows that an infant can only defend by the guardian

> appointed for that purpose. The word "may" as used in this rule does not give a discretion to the court. Furthermore, it cannot give a discretion to an infant. It is a rule setting out the practice to be followed where an infant is a plaintiff or a defendant in an action, and must be complied with before such an action is properly constituted."

The courts will insist on compliance with the rule where it is known that the plaintiff or defendant is an infant, and especially if he is an infant of "tender years". They appear, however, to be loathe to use the rule to invalidate a judgment where the infant is almost of full age. In such a situation, the Saskatchewan Court of Queen's Bench took the view that "...Rules of Court, like laws generally, must be interpreted in the light of existing conditions and with a sense of reasonableness...." and held that noncompliance with the rule requiring the appointment of guardian was merely an irregularity and did not nullify the proceedings.[4] If the court finds that there was no reason to suspect that the interests of the infant were not carefully considered and protected[5] and that, therefore, his infancy placed him under no disability,[6] it will probably refuse to invalidate proceedings taken in the absence of a guardian or next friend.

Neither the next friend nor the guardian ad litem is a party to the proceedings. They are officers of the court whose function is to represent and protect the interests of the infant and both are accountable to the court for the conduct of the proceedings.[7]

Generally anyone who is not himself under a legal disability and who has no interest in the proceedings adverse to that of the infant may act as next friend or guardian ad litem, although preference is given to his parents, guardian or relative.[8]

Traditionally, a married woman was not allowed to act as next friend or guardian ad litem of an infant. The basis for this practice was commented upon by Chitty J. in the case of Thynne v. St. Maur (1887) 56 L.J.Ch. 733:

> "The rule appears to have been founded generally on the incompetency of a married woman; amongst other things, her incompetency to sue, her incompetency to be answerable in regard to the costs of the action where the infant was plaintiff and she was his next friend, and also to answer for any costs of any proceedings where she was acting as guardian ad litem for an infant defendant. The rule was most general and founded on the incapacity of a married woman. Now, The Married Women's Property Act of 1882 has not made a married woman for all purposes a feme sole. What it has done by the section in question is to render her capable of suing and being sued in regard to certain matters, which, for shortness, I will say are matters relating to herself personally; and that is the extent to which, to put it in general terms, her incapacity has been removed....There are many reasons I can see why it would not be to the advantage of infants to be represented by a married woman. I need not go into them. I base my judgment upon the circumstance that her incapacity is not removed; but I can conceive, by reason of her being a married woman and liable to influence of her husband, who is not the next friend, there may be many cases ...in which a married woman should not be appointed. Seeing, then, that the

> matter is dealt with without there being any application for judicial discretion, I think it would be a a dangerous innovation to alter the practice. Amongst other reasons, I might add that a married woman would not be responsible, as far as I can see, for the costs of an improper action, nor liable to pay the costs of an improper defence or vexatious proceeding. The result is that she could only be made responsible at the utmost for those costs in respect of her separate estate; and then there would be the inquiry whether she had separate estate or not, with all the inconveniences attending the inquiry."

This reasoning was applied in England until 1926 when the Judges of the Chancery Division stated that a married woman could institute and defend proceedings in the name of a person of unsound mind and that a mother could act as next friend of an infant child upon an application under The Guardianship of Infants Act 1925.[9] Section 2 of that Act states:

> The mother of an infant shall have the like powers to apply to the court in respect of any matter affecting the infant as are possessed by the father.

In 1947 Rule 17A was added to Order 16 of the Rules of the Supreme Court of England. Rules 16 and 17 dealt with infancy and lunancy and Rule 17A stated: "Nothing in Rule 16 or 17 of this Order shall prevent a married woman acting as next friend or guardian." This Rule was deleted in the 1962 Revision of the Rules when the whole of Order 16 was completely revamped but the practice of allowing married women to act as next friends or guardians

ad litem has continued.[10]

Alberta has no provisions similar to section 2 of the English Guardianship of Infants Act 1925. However, sections 60 and 73(2) of the Domestic Relations Act, R.S.A. 1942, chapter 300,[11] have been read together as having the same effect. Section 60(1) states that the father and mother of an infant shall be joint guardians of the infant. Section 73(2) states that every guardian during the continuance of his guardianship shall have authority to act for and on behalf of the infant and may appear in court and prosecute or defend any action or proceedings in the infant's name. Mr. Justice Parlee of the Appellate Division of the Alberta Supreme Court held in the case of Read v. Allan [1948] 2 W.W.R. 1018 that the combined effect of these sections removed the incapacity of a married woman to act as next friend for an infant child. A recent Ontario case[12] appears to disagree with the reasoning used in Read v. Allan because, although the Ontario Infants Act[13] contains provisions similar to those mentioned above in the Alberta Domestic Relations Act, the court did not refer to those sections at all. Instead it cited the case of Thynne v. St. Maur and several Ontario cases that had followed it and concluded that a married woman could not act as next friend for her infant daughter. It is difficult to justify the conclusion reached by the Ontario court if the court in Read v. Allan properly interpreted the effect of The Domestic Relations Act unless one assumes that Mr. Justice Parlee based his decision specifically on sub-paragraph (b) of section 73(2) which gives the guardian authority to appear in court and prosecute or defend in the infant's name. Only subsections (a) giving the guardian authority to act for and on behalf of the infant and (c)

giving the guardian charge of the infant's estate, are duplicated in the Ontario Act. Whatever the position in Ontario, it seems clear that in Alberta a married woman may act as next friend for her infant child.

The purpose of acquiring of this "adult" intervention is three-fold: (1) to protect the defendant in the matter of costs in an action by an infant plaintiff,[14] (2) to protect the infant by giving him the benefit of adult guidance,[15] and (3) to have before the court someone to answer for the propriety of the action, and through whom the court may compel obedience to its orders.[16] These interests are worthy of the law's protection. There has been criticism of the rule requiring adult intervention, especially in the case of the "technical" infant. One critic goes so far as to state that no necessary function is performed by a next friend for an infant who is sixteen years of age or more and that the guardian ad litem is as useful to this "technical" infant as a bump on a log.[17] While such criticism may be valid in some instances, it would be dangerous to generalize from this that all minors over fifteen are capable of recognizing and protecting their best interests and of instructing counsel. The fact that this requirement may, in some cases, impose a burden on infants in terms of extra time and expense does not justify a blanket removal of the protection afforded both to the infant and to the opposite party by the rule. If on the other hand, this problem is considered to be a serious one, the proper solution would be to make provision in the Rules of Court for application to dispense with the requirement of suing by next friend or defending by guardian ad litem, such applications to be made only in cases where the infant involved is over fifteen years of age and where the court is satisfied that such an

order would not be prejudicial to either party's interests.

B. The Property Interest

The extent to which the property rights of infants are protected by the law is so considerable that it has been described as "pathetic"[18] when viewed in light of the comparatively meagre protection afforded the infant's physical and emotional welfare. A brief survey of the some of the law relating to an infant's property rights shows just how much importance is placed upon protection of these rights.

In any action involving property in which an infant is interested, he is served by serving the guardian ad litem or the guardian of his estate and if neither of these exists then the Public Trustee must be served and will be the guardian ad litem.[19] In fact, the Public Trustee must be served with notice of any application made to a court in respect of the property or estate of an infant.[20] No sale of real propery in which an infant is interested will be valid without the approval of the Public Trustee unless there is an order of the court[21] and no sale, mortgage, lease or other disposition of an infant's estate will be ordered by the court unless the disposition will substantially promote the infant's interest.[22] Furthermore, the infant must give his consent to the disposition if he is fourteen years or older.[23] No order confirming the settlement of an action maintainable on behalf of an infant in respect of an injury to the infant will be made without ten days notice having been given to the Public Trustee[24] who must satisfy himself that the settlement is adequate and in the infant's best interests. If he concludes that the settlement is not

adequate he can so inform the court, which will then come to its own decision as to whether the settlement is in the best interests of the infant. If applications are made under The Family Relief Act[25] of under The Administration of Estates Act[26] in respect of an estate in which an infant is interested, notice of such applications must be served upon the Public Trustee. Rule 343 of the Alberta Rules of Court states that no payment made to a guardian or next friend of money due to an infant is a valid discharge as against the infant. Section 7 of The Public Trustee Act states:

> Notwithstanding anything contained in other Act, any money other than wages or salary and any property to which an infant is entitled under an intestacy or under a will, settlement, trust deed, or in any other manner whatsoever, and for whose estate no person has been appointed guardian by the issue of letters of guardianship, shall be paid or transferred to the Public Trustee.

It can be seen from the above survey that in any legal proceedings affecting his property rights, an infant's interests enjoy "double" protection, through his guardian or next friend and also through the Public Trustee. If the Office of the Public Trustee is performing the function envisaged for it by these various legislative provisions, and apparently it is,[27] there would appear to be no problem in the area of representation and protection of an infant's"property" interests.

C. Conclusion

It is clear that where an infant is a party to legal proceedings the law has provided means for his interests to be represented before the court. His case is conducted by his next friend, guardian or guardian ad litem through the lawyers hired by them. If the infant's property interest is involved, the Public Trustee's investigation provides an additional safeguard. Here is an example of the adversary system working as it should: the court is able to act out its traditional role as impartial arbiter; there is no need for the court to step into the adversary arena itself in an effort to discover the infant's case as there is a spokesman for the child.

III.

REPRESENTATION AND PROTECTION OF THE INFANT'S INTERESTS WHERE HE IS NOT A PARTY TO THE PROCEEDINGS

The relevance of the issue of representation of the infant becomes clear when one considers the various legal proceedings to which he is not a party but which involve determinations vitally important to his physical and emotional welfare. This part of the paper will focus attention on three main areas in this regard; that is, proceedings relating to the custody, access and the guardianship of the infant, including a brief survey of the position of the infant in the isolated issue of his maintenance.

A. The Alberta Position

1. The Parens Patriae Power

The courts have always had jurisdiction to interfere in cases of infancy, this jurisdiction being based on the prerogative of the Crown as parens patriae. In the case Shaftsbury v. Shaftsbury (1725) Gilb. Rep. 172, the court explains this jurisdiction at 173-74:

> But the Crown has another Jurisdiction, and that is as Pater Patriae, as a Father over his Children. The King has a Right to take Care of Infants, Luneticks, and Ideots, that cannot take Care of themselves; and this Care cannot be exercised otherwise than by appointing them proper Curators or Committees....Now as the King has the Protection of Infants, I don't see any other Protection can be, than by assigning them their Guardians; and where should that Protection be exercised, but in that Court where Care is taken of all Persons under natural Disabilities?

The nature of this jurisdiction was also commented upon by Lord Esher, M.R. in the case of The Queen v. Gingelle [1893] 2 Q.B. 232 at 239:

> But there was another and absolutely different and distinguishable jurisdiction which has been exercised by the Court of Chancery from time immemorial. That was not a jurisdiction to determine rights as between a parent and a stranger, or between a parent and a child. It was a paternal jurisdiction, a judicially administrative jurisdiction, in virtue of which the Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superceding the natural guardianship of the parent.

Lord Esher, M. R. continues at page 241:

> "How is such jurisdiction to be exercised? The court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of children, and must exercise that jurisdiction in the manner in which a wise, affectionate and careful parent would act for the welfare of the child."

This parens patriae power has been vested in the Supreme Court of Alberta through The Judicature Act[1] which declares that: "...the Court has the like jurisdiction and powers that by the laws of England, were, on the 15th day of July in the year 1870, possessed and exercised by the Court of Chancery in England in respect of...all matters relating to...infants, idiots and lunatics and to the estate of infants, idiots or lunatics,....".

The report of the Ontario Law Reform Commission on Family Law, Part III, Children (1973) discusses the ambit of the parens patriae power and points out the increasing use made of it in resolving custody issues.[2] This writer agrees with the conclusion reached by the Commission at page 113 of the report:

> ...the recent vigorous resurrection of the power convinces us that it is a useful vehicle for judicial innovation and worth preserving. It does, of course, introduce an element of uncertainty in the law, but we believe that the concurrent advantage of flexibility overrides the disadvantage of uncertainty. It does not appear to us, in surveying the recent cases, that the courts have abused the power and we are not prepared to recommend either its abolition or a more careful definition.

2. Existing Legislation

(a) Maintenance Orders and Affiliation Proceedings

Section 9(1)(e) of The Divorce Act[3] creates a duty in the court to refuse a decree sought on the ground of permanent breakdown of marriage where the granting of this decree would..."prejudicially affect the making of reasonable arrangements" for the maintenance of children of the marriage. The interests of the child are therefore protected to a limited extent in that the court, to discharge its duty, must address its mind to the possible effects of the decree on the maintenance situation.

If a person legally responsible for providing maintenance for a child neglects to do so an application may be made in District Court under section 5 of The

Maintenance Order Act, R.S.A. 1970, chapter 222, for a maintenance order against the person liable. The application may be made by the parent or guardian, the Director of Child Welfare, or by the infant by his next friend. There is no provision for the retention of counsel for an applicant. The Act does not apply to illegitimate children.

The right of illegitimate children to maintenance is governed by The Maintenance and Recovery Act, R.S.A. 1970, chapter 223. The proceedings are initiated by way of making a complaint against the putative father, the end result of the process being an order that may require him to pay a monthly sum of money toward the maintenance and education of the child. Section 13 of the Act provides that a complaint may be made by the mother, the next friend or guardian of a child born out of wedlock or by the Director of Maintenance and Recovery and gives the Director a discretionary power to retain counsel, if he considers it to be in the public interest to do so, to represent any person who has made a complaint. The Act has been amended[4] through the repeal of section 31 and the addition of section 2(1) which gives the judge a discretion to appoint the Public Trustee or other person to safeguard the minor's interests before the court. Section 2(1) is broader than section 31, in which the discretion was limited to appointing a representative for a minor mother or minor putative or declared father. Section 2(1) is broader also than section 13 which limits the Director's discretion to appointing counsel for a complainant; section 2(1) would seem to include the possibility of representation for the infant whether or not he is the complainant.

In summary then, the basic legislation in the area of maintenance for children makes no provision for legal representation for a legitimate child but does appear to allow for such representation for an illegitimate child.

(b) Custody, Access and Guardianship

Other than inherent jurisdiction in custody, access and guardianship matters provided by the parens patriae power, the court also has a statutory jurisdiction founded in both provincial and federal legislation. Section 11 of the Divorce Act gives the court the power, upon the granting of a decree nisi for divorce, to grant corollary relief in the form of an order providing for the custody, care and upbringing of the children of the marriage. Prior to the passage of the Divorce Act in 1968, custody problems were governed solely by provincial legislation. The concurrent existence of both federal and provincial legislation in this area gives rise to the possibility of conflict but this has largely been avoided as the courts tend to apply provincial law in making custody awards under the Divorce Act.[5]

The important provincial legislation in this area is found in Part 7 of the Domestic Relations Act, R.S.A. 1970, c. 113. Section 42 allows an infant, or anyone on his behalf, to apply to the court for the appointment of a guardian where the infant has no parent or guardian or where the parent or guardian "is not a fit and proper person" to have the guardianship of the infant. No guidelines for the appointment of a guardian are set out other than the vague and implicit condition that the guardian be a fit and proper person to have the guardianship of the infant.

While no mention is made of the infant's welfare, one would assume this to be the paramount consideration by virtue of the parens patriae jurisdiction. By contrast, section 46 does set out guidelines to be applied on an application for the custody of or right of access to the infant. Applications may be made by the father or mother or by an infant, who may apply without a next friend, and the court, in making the order, must have regard to three factors: (1) the welfare of the infant, (2) the conduct of the parent, and (3) the wishes of both the father and the mother. It is interesting to note that the wishes of the infant are not mentioned as a relevant consideration. It is only in section 50, relating to a court order to ensure that the infant is brought up in the proper religion, that mention is made of the infant's wishes and even then it is not a required consideration.[6] Where the parents are living apart and there is a dispute as to custody of or access to the infant, they, or the infant, may apply to a Family Court judge for an order which must be based on the "best interests" of the child.[7]

In all of these situations the infant may himself apply, without anyone interested on his behalf, to the court for the order. This rarely occurs and if it does, the infant involved is probably an "older minor" since he is aware of this right, and therefore should be capable of representing and protecting his own interests before the court. It is in the case of someone other than the infant applying for an order concerning his custody, guardianship or access that the issue of representation of the child's interests comes into focus. The court is faced with a situation which it must make a disposition based to a large extent on the "welfare-best interests" of the child. The child is not

a party to the proceedings and he has no statutory right to have someone represent his interests to the court. Upon what is the court to base its decision as to the "welfare-best interests" of the child?

3. The Practice of Appointing an Amicus Curiae[8]

Prior to 1966 the Alberta court's main method of obtaining information and recommendations as to what disposition would be in the best interest of the child who was the subject of a custody or access dispute was through not infrequent requests for investigation and reports by social workers. This is still the practice in the Family Courts where an investigation is done in every disputed custody or access case on the consent of the parties. Rule 218 of the Alberta Rules of Court has also been utilized to allow the court to have a social workers "expert" evidence on the matter. It is questionable whether this is a proper case for the use of Rule 218. In the absence of these procedures, the court was left with only the disputing parties' evidence and argument upon which to bas its decision as to what disposition would be in the best interest of the child. The feeling that this was not in many cases an adequate method of ensuring that the child's welfare would be given paramount consideration has led to the increasing use of the "amicus curiae" procedure which was adopted for the first time in the Alberta Supreme Court by Mr. Justice M. E. Manning in the case of Woods v. Woods, 1966, No. 41784.

(a) The Procedure

While this procedure has occasionally been resorted to in cases involving an abused or neglected child, the courts have used it most often in cases involving custody or access disputes. The court, either on its own initiative or upon the request of the parties, orders that an amicus curiae be appointed to represent the infant and to make an investigation and recommendation to the court on the issues of custody and access. The frequent result is an agreement between the parties as to what custody and access arrangements would be

in the best interests of the child, thus relieving the court from the task of resolving the dispute. Where the issue is tried, the amicus curiae may call and tender evidence subject to counsel's right to cross examine.

The procedure as developed largely by Mr. Alexander Hogan when he was Assistant Public Trustee and frequently called upon to act as amicus curiae involves two separate investigations, one by an experienced social worker and another by an independent child psychiatrist who has been given the social worker's report. The report of the child psychiatrist is submitted to the amicus curiae and usually adopted as his recommendation to the court. Both reports are submitted to the parties and a meeting is arranged between the amicus and counsel involved to determine whether the dispute can be resolved on the basis of the recommendation. If the issue goes to trial both the social worker and the psychiatrist are called to give their evidence and recommendations. The amicus generally does not cross examine witnesses called by the parties. The costs of the amicus are paid for by the parties although Legal Aid will apparently cover his costs where one of the parties qualifies.

(b) The Problem

The above procedure depended entirely on the availability and willingness of both the psychiatrist and the social worker to give attention to the problem in addition to their regular duties and often for little or no remuneration. So long as the case load was small and the psychiatrist and social worker were both willing and available the system worked. But the referrals have been on a constant increase resulting in a backlog of investigations and further delay and frustration for the parties. The psychiatrist who originally did most of the investigations is no longer available and many recommendations are

based on the report of the social worker alone. To confuse matters further, the courts have been inconsistent in appointing the amicus; the appointment may be directed to a lawyer within the office of the Public Trustee, a lawyer within the Department of the Attorney General, a lawyer in private practice or even a member of the Family Court staff, each of whom may follow a different procedure and none of whom have any clearcut definition of their proper role as amicus curiae either before or at the trial.

4. Summary

This brief overview of the Alberta position shows that this province has given no legislative recognition to any right in the infant to have his interests represented in legal proceedings directly affecting his welfare but to which he is not a party. The guidelines set out for the exercise of the discretion given the Director under section 13 of the Maintenance and Recovery Act to retain counsel for the complainant is "the public interest", not the interest of the infant. There is no guideline given in the Act for the exercise of the judge's discretion to appoint the Public Trustee or other person to safeguard a minor's interest in the proceedings. In relation to matters of custody, access and guardianship, there are absolutely no legislative provisions allowing for representation of the child. As a result, courts concerned that the child's welfare be given more than passing attention have used their common law pater patriae powers to safeguard his interests. The practice of appointing amicus curiae is an example. Mr. Justice Manning makes this point in Woods v. Woods when he quoted the words of the Lord Chancellor in the case of in Dyce Sombre (1849) 41 E.R. at 1208:

> "In the case of infants, it is the habit of the court very much to disregard form when necessary in order better to protect their interests."

The use of Rule 218 of the Rules of Court to allow the court to have a social worker do a custody investigation is another example of the court discovering new ways of exercising its paternal jurisdiction. That the courts have begun to recognize the rights of children to representation in proceedings to which they are not parties is certainly a step in the right direction; however, what is really needed to secure such a right for the child is legislative sanction of this growing recognition through provisions expressly allowing for the representation of the child by legal counsel.

B. The Position in Other Jurisdictions

This part of the paper briefly surveys methods used in selected jurisdictions other than Alberta for the purpose of comparison and insight into possible alternative solutions to the problem of child representation. No exhaustive criticism of the various procedures has been attempted.

1. Provincial

(a) Ontario

Through legislation and judicial innovations Ontario has developed two methods by which the interests of the child are represented.

(i) The Official Guardian

Section 6 of the Matrimonial Causes Act[9] requires the Official Guardian to investigate and report to the court on all matters relating to the custody, maintenance and education of every child mentioned in a statement of claim in an action for the dissolution of marriage. In cases other than divorce or annulment the Official Guardian may be required to prepare a report upon any application for custody

of or right of access to the child.[10] If the report is disputed, the Official Guardian may be required to attend the trial on behalf of the child.

Although initially the investigations involved personal interviews in each case, the present practice is to send to each party to an action for the dissolution of marriage a form questionnaire, the results of which are analyzed by social workers within the Office of the Official Guardian. If no serious problems come to light through these questionnaires, the Official Guardian prepares a mini-report to that effect for the court. Further investigation involving personal interviews and other field work is carried out only if the results of the analysis of the questionnaires is thought to warrant it.

This system has been criticized[11] and it is questionable whether or not the present practice carries out the intent of the legislation. One judge of the Ontario High Court, while finding the report of the Official Guardian to be "indispensible" feels also that the Official Guardian is "...severely limited in that he does not have the resources to carry out the full, complete, in-depth investigations that would really assist in the difficult cases...."[12] This same judge advocates the development of the procedure for a "judicial inquiry" into the interests of the child. Both parents and child would be represented with the Official Guardian, if given the resources, as the logical person to act as the child's representative.[13] The Ontario Law Reform Commission recommends the setting up of the institution of "Law Guardian" to represent the interests of the child in any proceeding concerning his upbringing.[14] The Commission sees the role of this Law Guardian as analogous to that of an amicus curiae rather than "child advocate" and recommends that an entirely new official take over this role leaving the Official Guardian with his well-established and traditional

role as protector of the infant's property interests.

(ii) The "Haines Order"

This is a procedure which was introduced by Mr. Justice Haines of the Ontario High Court whereby the parties to an action in which custody is disputed consent to the preparation of a psychiatric report containing recommendations as to custody of and right of access to children. If the report is disputed by either party or if they fail to settle the issue the psychiatrist may be cross-examined on his report which is filed with the court; if the parties agree with the report a consent order is taken out. Some basis for this procedure may be found in Rule 267 of the Ontario Rules of Practice which allows the court to use "expert" evidence. In practice this procedure has resulted in the frequent settling of the custody issue, a fact which gives rise to the criticism that this technique perhaps causes the parties in many cases to reach agreement reluctantly in order to avoid further delay and expense.

(b) Prince Edward Island

Under the Prince Edward Island Supreme Court Rules[15] a copy of every divorce petition containing particulars of children must be served upon the Director of Child Welfare who may then apply to the court for the appointment of a Queen's Proctor to intervene for the purpose of protecting the interests of the children concerned. According to one study done of this procedure,[16] the Director will apply for the appointment of a Queen's Proctor in all cases in which custody is in dispute or a cross petition is filed, or if there appears to be a serious problem involving the children, and his decision as to the necessity of a Queen's Proctor is based solely on the information available to him from the petition and his files. The Queen's Proctor is appointed

from among the practicing lawyers of the province and apparently does his own interviews and field work and files a written report with the judge, although in difficult cases he may have the Director of Child Welfare investigate the situation and prepare a report. When one considers the fact that the lawyer in many cases prepares his own report, conducts his own investigation and is charged, as Queen's Proctor, with the duty of protecting the interests of the children, it is difficult to understand the ruling of Mr. Justice Bell of the Prince Edward Island Supreme Court concerning the duties of a Queen's Proctor:[17]

> The duties of the Queen's Proctor are plainly set out. I feel that this appointee is limited in his duties and cannot make recommendations of his own as to custody of children for the simple reason that he is not qualified or has any experience in that line. Only a trained officer from the proper department of Child Welfare could take on that work....

Section 78(4) of the Children's Act[18] provides another method of representing the child's interest to the court, one that is not used in divorce cases where the procedure discussed above is followed. Upon the application of either parent for custody of or access to a child, a judge may require the Director of Child Welfare to investigate and report on "all matters relating to the custody, maintenance and education of the child."

(c) British Columbia

Prior to 1974, there had developed in British Columbia the practice of requesting background reports in disputed custody cases in an effort to give the court some objective information upon which to base its decision as to what order would be in the best interests of the child. In

1974, the Unified Family Court Act[19] was enacted and brought into force and a pilot project was set up in a designated area of the province. The legislation empowers the Attorney General to appoint "family advocates" and "family counsellors".[20] Under section 8 a family advocate may:

> (a) attend a proceeding in a court respecting a family matter or a matter respecting the delinquency of a child;
>
> (b) intervene at any stage in a proceeding under clause (a) for the purpose of acting as a counsel for a child, who, in the opinion of the family advocate or the court, requires representation by counsel; and
>
> (c) upon the request of a court, assist any party to a proceeding under clause (a) who is not represented by counsel.

Under section 9, a family counsellor may refer parties involved in a dispute respecting a family matter to the appropriate community resources board, or to such public or private counselling agency as, in his opinion, is qualified to assist in resolving the dispute and the counsellor must, where he has knowledge of such dispute, give to the parties such advice and guidance as, in his opinion, will assist in resolving the dispute. Under section 10, the court upon ex parte application by a party or counsel to a proceeding involving a family matter may direct a person who has had no previous connection with the parties and who may be a family counsellor, social worker or probation officer to investigate a party to the family matter or a person associated with the family matter and to report the results of the investigation to the court.

The roles of the family advocate and family counsellor are set out and discussed in the Fourth Report of the British Columbia Royal Commission on Family and Children's Law.[21] The scope of each role as it relates to children

involved in the judicial process is not yet clearly defined. Part of the family counsellor's function is to prepare custody reports; this is done upon request for judges of the provincial, county and supreme courts. The family advocate, on the other hand, is charged with the responsibility of representing the child, protecting his interests and advocating that resolution of dispute which he considers to be in the best interests of the child. An unique aspect of this pilot project is the close working relationship between the family counsellor and the family advocate. They are both part of the court system itself. The family counsellor first becomes involved in a case at the initial intake interview; he may also be specifically assigned to the case under section 10 of the Act. Section 8 gives the family advocate the right to intervene in any proceeding for the purpose of acting as counsel for a child but in practice his involvement in most cases is the result of a referral to him by a family counsellor.[22] This does not necessarily mean that the representation of the child in the court will coincide with the recommendations of the family counsellor's custody report as the family advocate can call evidence independent of that contained in the report. The Royal Commission has apparently found no serious problems arising from this close interrelationship[23] and the family advocates themselves have urged that "...the position of family advocate continue and remain within the court system, as opposed to a separate office of Child's Counsel."[24]

The family advocate is not confined to actual representation of children or other parties in court; he is described as an officer of the court and is available for consultation and advice and acts as liaison among the family, the child, the family counsellors, the bar, the Department of Human Resources and other related agencies, the bench, the police, prosecutors, schools and hospitals.[25]

2. Elsewhere

(a) England

Under the Matrimonial Causes Rules,[26] where a petition for divorce, nullity or judicial separation discloses that there is a minor child of the family, the petition must be accompanied by a separate written statement outlining the arrangements made for the child. The court cannot make absolute a decree of divorce or nullity of marriage, or grant a decree of judicial separation unless it makes a declaration that it is satisfied that arrangements for the welfare (including custody, education and maintenance) of the child have been made and are satisfactory or are the best that can be devised in the circumstances, or that it is impracticable for the parties to make such arrangements or that there are circumstances making it desirable that the decree be made absolute or granted without delay, in which case the parties must undertake to bring the question of the arrangements for the child before the court within a specified time.[27] While the intent of these provisions is commendable it is questionable whether this intent is being realized in practice for the court rarely has the time in the average hearing to conduct a thorough investigation into the arrangements nor is there adequate followup machinery.[28]

The interests of the child are further protected under the provisions in the Rules for his separate representation in the proceedings. Rule 72 requires that the child be separately represented on any application for the variation of a settlement order unless the court is satisfied that the proposed variation will not adversely affect his rights or interests. In any other matrimonial proceeding Rule 108 gives the court a discretion to appoint the Official Solicitor or other person to act as guardian ad litem for the child with authority to take part in the proceedings on the child's behalf.

Further recognition of the rights of the child to separate legal representation is seen in the "Children's Bill", the present status of which is unclear; apparently it has been given third reading and is awaiting royal assent. It is reported that the legislation provides that in any proceedings relating to a child in any court the court must consider whether it is in the minor's interest to be represented and in contested proceedings must order that he be separately represented[29] with such representation being mandatory also in applications for the revocation of a care order where the child has been ill-treated or neglected.[30]

(b) Australia

Section 71 of the Commonwealth Matrimonial Causes Act of 1959 is similar to section 41 of the English Matrimonial Causes Act in that it also provides that a decree nisi cannot be made absolute until the court has declared that it is satisfied that proper arrangements have been made for the welfare of the child. Under Rule 41 of the Matrimonial Causes Rule 1960[31] the petition for the decree must state the arrangements proposed by the petitioner and generally information is given in support of the proposed arrangements. The court may adjourn any proceedings relating to the custody, guardianship, welfare, advancement or education of children of the marriage until a welfare report has been obtained,[32] and under Part VII of the Act the Attorney General may intervene in these proceedings on his own initiative where he believes there are matters relevant to the proceedings that ought to be made known to the court and may be requested by the court to intervene for the purpose of arguing any question arising out of any proceeding under the Act.[33]

Under Rule 115 a guardian ad litem may apply for leave to intervene on behalf of the child under Part VII of the Act and Rule 115A gives the court the discretion to

appoint a guardian ad litem for the purpose of representing a child to whom section 71 of the Act applies. The Western Australia Law Reform Committee concludes that if the guardian ad litem is granted leave to intervene, the child will become a party to the suit by the operation of section 82 of the Act.[34]

(c) New Zealand

New Zealand legislation gives extensive recognition to the necessity of protecting the interests of the child in legal proceedings to which he is not a party. No final decree of dissolution of a marriage can be made unless the court is satisfied that satisfactory arrangements have been made for the custody, maintenance and welfare of any children of the marriage ar the court has a discretion to request a social worker's report on the arrangements proposed by the parties as well as a discretion to direct that any children of the marriage be represented by counsel.[35] In proceedings other than for the dissolution of marriage, the court is given powers under the Domestic Proceedings Act 1968 to request welfare reports, to call its own witnesses and to appoint a lawyer to "assist the court in the proceedings".[36]

Under section 18 of the Guardianship Act 1968 the court must not enforce a custody agreement made between the parents of a child if it is of the opinion that it is not for the welfare of the child to give effect to it. Section 23 requires the court to ascertain the wishes of the child and take account of them in any proceedings relating to the custody or guardianship of or access to the child. Section 29 gives the court the discretion to appoint counsel to assist or to represent any child who is the subject of the proceedings and provides that a copy of any application for guardianship or custody be served on the Director General of Social Welfare where the court so directs; in such cases the Director General must report on the application and may appear on it.

(d) The United States of America

Several states have adopted provisions similar to section 310 of the Uniform Marriage and Divorce Act which gives the court a discretion to appoint counsel to represent the interests of a minor or dependent child with respect to his custody, support or visitation. In 1971 the Wisconsin Family Code was amended to provide that in cases affecting a marriage the court shall appoint a guardian ad litem to represent minor children whose welfare the court is especially concerned about with the result that a guardian ad litem is appointed in every case where custody is contested.[37] Michigan's "friend of the court" system has apparently failed in its initial object of protecting the rights of minor children as a result of a heavy case load and lack of professional staff.[38]

Section 249 of the Family Court Act of the State of New York 1962 (as amended to May 30, 1974) requires the court to appoint a "law guardian" to represent any minor who is the subject of delinquency or abuse--neglect proceedings and gives the court a discretion to appoint a law guardian in cases involving the support, paternity, adoption, guardianship or custody of a minor. The appointment is made where independent legal counsel is not available to the child. The intent of the Act is set out in section 241:

> This Act declares that minors who are the subject of Family Court proceedings should be represented by counsel of their own choosing or by law guardians. This declaration is based on a finding that counsel is often indispensible to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition.

The function of law guardian has been variously described as that of an advocate, adversary, adviser, lawyer, social worker and parent.[39] In fact it has been suggested that the role of the "wise parent" has been transferred from the court itself to the law guardian.[40] Criticism of this legal aid "law guardian system" has stressed the heavy case load and institutional bent of the urban lawyers as well as the problems of conflict between the roles of advocate and guardian and the lack of active representation of the child.[41]

C. Conclusion

Legislative recognition of a right in an infant to legal representation in proceedings involving his welfare is non-existent in Alberta. The brief survey of the practice in other jurisdictions only serves to underline the problem of the unrepresented child in Alberta where the law goes to the extent only of granting a dubious safeguard to an illegitimate child's right to maintenance (see p. 17 infra).

As a result, those interested in seeing the child's interests represented have been forced to fall back on the common law concepts of the parens patriae power and the amicus curiae procedure. Neither is adequate. The parens patriae power is too broad, discretionary and non-specific to be the sole support upon which to base a right to representation. Furthermore the practice presently followed by those appointed as amicus curiae bears little real resemblance to the original amicus and does not follow any consistent rational pattern.

The outlook for a child who should have his interests represented in proceedings to which he is not a party is bleak. The court may use Rule 218 to get "expert" evidence from a social worker or the court may appoint almost anyone to investigate and report on that solution which will be in the best interests of the child.

Legislation is needed to clarify the position of the child in such matters. This has been done to a greater or lesser extent in each of the foreign jurisdictions surveyed. At the very least, each jurisdiction has legislated specifically to deal with some form of representation for the child; in all these jurisdictions there is specific

discretionary legislation and in several rules have been set out making representation mandatory in certain situations. Alberta, by contrast has not even legislatively reocgnized the problem.

While it is not recommended that Alberta adopt in whole the practice or legislation of any specific jurisdiction, the wirter wishes to emphasize that the pilot project presently in use in the province of British Columbia appears to be the most logical, rational and humane approach to the many problems in the area of "family" law of which child representation is only a part. The writer would like to see a similar comprehensive approach taken in Alberta, but, assuming for the moment that this is not feasible for some time, the following tentative recommendations are made.

IV. RECOMMENDATIONS

1. It is recommended that no changes are necessary in the area of protection and representation of the child's property interest except that, if it is thought to be advisable, the Rules of Court could be amended to allow applications to dispense with the requirement of next friend or guardian ad litem in cases where the infant is 16 years of age or older.

2. It is recommended that an office of Amicus Curiae be instituted as an entity separate from but attached to the Department of the Attorney General (in the same way that the Office of Public Trustee or the Ombudsman is a "separate" entity).

3. It is recommended that the relevant existing legislation be amended to make mandatory the intervention of the Amicus Curiae to represent the child in all cases of abuse or

neglect as well as all cases involving a dispute as to custody, access or guardianship, while giving the courts a large measure of discretion in all other cases.

4. It is recommended that the procedure established by Mr. A. Hogon as set out in pages 21-23 of this report be the basic guideline for the functioning of the Amicus Curiae.

5. It is recommended that sufficient resources of high quality be made available for use by the Office of Amicus Curiae to allow it to function in representing well the interests of children.

NOTE: A lesson can be learned from those jurisdictions in which mandatory legislation is too broad in scope. The incredible case-load that develops results in reduced standards of protection and representation. It is felt that what resources we have must be focused in those areas of greatest danger to the child's welfare.

FOOTNOTES

II. REPRESENTATION AND PROTECTION OF THE INFANT'S INTERESTS WHERE HE IS A PARTY TO THE PROCEEDINGS

1. Alta. Rules of Court, Rs. 58, 59. For a general review of the law relating to the "next friend" see Vano v. Canadian Coloured Cotten Mills Co. (1910), 21 O.L.R. 144.

2. Alta. Rules of Court, R.59(2).

3. MacAllister v. MacAllister and Middleton, [1944] 2 D.L.R. 399 at 400.

4. Stachuk v. Nielsen (1958), 26 W.W.R. 567 at 570.

5. Straughan v. Smith (1890), 19 O.R. 558; York v. Schwartz (1927), 32 O.W.N. 329 at 330.

6. Machniewicz v. Kowalchuk, [1942] 2 D.L.R. 510 at 511.

7. 21 Halsbury's Laws, 667 and 680 (3d ed. Simonds, 1957). See also, Ingram v. Little (1883), 11 Q.B.D. 251; Duncan v. Ross (1869) 2 Chy. Chrs. 443; Vano v. Canadian Coloured Cotten Mills Co. (1910), 21 O. L.R. 144 at 148-49; Poulin v. Naden, [1950] 2 D.L.R. 303 at 305, Shartner v. Yoski Yoka (1957), 21 W.W.R. 322 at 324. Mr. Justice Orde of the Ontario Supreme Court summarized the position of the next friend in Lucas v. Coupal, [1931] 66 O.L.R. 141 at 142:

> Under the law of this Province, when something arises which gives to an infant a right of action, that right is his own. He must himself come to the Court to enforce it, and the action is brought in his name. If he succeeds, the judgment is in his favour and its fruits are his. But in order to protect the defendant in the matter of costs, the infant plaintiff must have associated with him in the action an adult, who ought to be within the jurisdiction, as his next friend.

> The next friend is, however, not a party, though liable for costs; and, while he has in a sense some control over the conduct of the action, in that he instructs his and the infant's solicitor, he is not really dominus litis, for he has no power to bind the infant plaintiff by compromising or settling the action. Once the action is launched, the infant's rights are in the hands of the Court, and no disposition of the action binding upon the infant can be made without the Court's approval. And the Court usually takes possession of or otherwise disposes of the moneys received by the judgment for the infant's benefit. The intervention of a next friend under our practice is merely a matter of procedure. He does not represent the infant except in a very limited sense. It is clear that no interest in the infant's cause of action or in the fruits thereof is at any time vested in the next friend.

8. 21 Halsbury's Laws, 665 (3d ed. Simonds, 1957).

9. See Practice Note, [1926] W.N. 8.

10. See Jacob, Adams The Supreme Court Practice, 1967, Vol. 1, para 80/311.

11. The corresponding sections in R.S.A. 1970, c. 113 are ss. 39, 52(2).

12. Gagnon v. Stortini (1974), 4 O.R. (2d) 270 (District Court.)

13. R.S.O. 1970, c. 222, ss. 2, 20.

14. Lucas v. Coupal, [1931] 66 O.L.R. 141 at 142.

15. Supra, n. 4 at 569.

16. Scott v. Niagara Navigation (1893), 15 P.R. 409 at 411. See also Simpson v. Jackson (1622) Cro. Jac. 640.

17. McKenzie, Statutes Affecting Infants and Infant's Rights, (1966) 5 West. Ont. L. Rev. 153 at 155.

18. The personal observation of S. Hogan, formerly with the Office of the Public Trustee, now Director of Civil Law, Dept. of the Attorney-General. (See Appendix B for a summary of an interview with the writer on August 6, 1975.)

19. Alta. Rules of Court, R. 17.

20. The Public Trustee Act, R.S.A. 1970, c. 301, s.6; Alta. Rules of Court, R. 581.

21. The Devolution of Real Property Act, R.S.A. 1970, c. 109, s. 12.

22. The Infant's Act, R.S.A. 1970, c. 185, s. 2.

23. Id., s. 3; see also Alta. Rules of Court, R. 583(1).

24. Id., s. 16.

25. R.S.A. 1970, c. 134, s. 14(3).

26. R.S.A. 1970, c. 1, s. 8(2).

27. Supra, n. 18.

FOOTNOTES

III. REPRESENTATION AND PROTECTION OF THE INFANT'S INTERESTS WHERE HE IS NOT A PARTY TO THE PROCEEDINGS

1. R. S. A. 1970, c. 193, s. 16.

2. See pp. 108-113 of the report.

3. R.S.C. 1970, c. D-8.

4. An Act to amend the Maintenance and Recovery Act, S.A. 1971, c. 67.

5. For a discussion of the constitutional problem see: Richard Gosse, The Custody, Care and Upbringing of Children of Divorcing Spouses. Research paper prepared for the Law Reform Commission of Canada, 1973 at pp. I26 - I34.

6. Section 50(2) states:
   > Nothing in this Act interferes with or affects the power of the court to consult the wishes of the infant in considering the order that ought to be made, or diminishes the right that an infant now possesses to the exercise of free choice.

7. Family Court Act, R.S.A. 1970, c. 133, s. 10(1).

8. See Appendices A and B for the comments of Mr. G. Way and Mr. A. Hogan on this practice.

9. R.S.O. 1970, c. 265, s. 6, as amended by S.O. 1972, c. 50.

10. The Infant's Act, R.S.O. 1970, c. 222, s. 1(6).

11. Bradbrook, An Empirical Study of the Attitudes of the Judges of the Supreme Court of Ontario Regarding the Workings of the Present Child Custody Adjudication Laws (1972), 49 Can. Bar Rev. 557; Gosse, supra, n. 5 at IV67, IV72.

12. Galligan, Protection of Children in Family Disputes, 21 Chitty's L.J. 145 at 147 (1973).

13. Id.

14. Ontario Law Reform Commission, Report on Family Law, Part III, 1973 at pp. 123-130.

15. Rule 18 of Order 65 of the Prince Edward Island Supreme Court Rules.

16. Gosse, supra , n. 5 at IV 81-84.

17. Rennie v. Rennie [1973] 11 R.F.L. 287 at 295-296.

18. R.S.P.E.I. 1951, c. 23 as amended by S.P.E.I. 1968, c. 5 and S.P.E.I. 1972, c. 5.

19. S.B.C. 1974, c. 99.

20. Id., ss. 8 and 9.

21. Fourth Report of the Royal Commission on Family and Children's Law, The Family, The Courts, and The Community, February 12, 1975, Vancouver, B. C. at 10-20.

22. Id., Appendix H-21 sets out the breakdown of source referrals over a five month period as follows:

    30% from family counsellors,
    12% from lawyers,
    12% from judges, and
    12% initiated by the family advocate.

23. Fifth Report of the Royal Commission on Family and Children's Law, Part VI, Custody, Access, and Guardianship, March, 1975 Vancouver, B. C. at 33.

24. Supra, n. 21, Appendix D.

25. Id.

26. S.I. 1971, No. 953, R. 8(2).

27. Matrimonial Causes Act 1973, c. 18, s. 41.

28. Stone, The Importance of Children in Family Law (1967) 6 Western Ont. L. Rev. 21 at 27.

29. Brown, Divorce Reform: Welfare of the Children, 125 New Law Journal 424 (May 1, 1975).

30. (1975) 5 Fam. Law 1.

31. The writer was able to find a copy of the Rules set out in full and updated to 1967 in--Brown and Morgan, Australian Matrimonial Causes Practice with Precedents, Butterworths, Sydney, Australia, 1967.

32. Commonwealth Matrimonial Causes Act 1959, s. 85(2).

33. Id., ss. 76, 77.

34. Western Australia Law Reform Committee Working Paper on Legal Representation of Children, Project No. 23, March 21, 1972. Section 82 states:

> A person intervening under this Part or Part VI of this Act shall be deemed to be a party in the proceedings with all the rights, duties and liabilities of a party.

35. Matrimonial Proceedings Act 1963, ss. 49, 50, 54.

36. ss. 8, 9, 10.

37. For a discussion of the practice in Wisconsin see: Devine, A Child's Right to Independent Counsel in Custody Proceedings: Providing Effective "Best Interests" Determination through the Use of a Legal Advocate (1975) 6 Seton Hall L. Rev. 303 at 309-315; Hansen, The Role and Rights of Children In Divorce Actions, (1966) 6 J. Family Law 1.

38. For a discussion of the practice in Michigan see: "Report of Custody Committee, Michigan Inter-Professional Association on Marriage, Divorce and the Family, Inc.", and, Anderson, "Safeguarding Children of Divorce in a Unified Court System", in Newman, ed., Children in the Courts, ICLE, Ann Arbor, 1967 at pp. 49 and 59; Devine, supra, n. 37 at 319-321.

39. Edelstein, The Law Guardian in the New York Family Court, (1973) 24 Juv. Just. 14 at 21.

40. Isaacs, The Role of the Lawyer in Representing Minors in the New York Family Court, in Newman, supra, n. 38 at 440-442.

41. Kaplan, Appointment of Counsel for the Abused Child--Statutory Schemes and the New York Approach, (1972) 58 Cornell L. Rev. 177.

APPENDIX A

SUMMARY OF POINTS MADE BY MR. G. J. WAY, CHIEF COURT COUNSELLOR, FAMILY COURT, IN AN INTERVIEW ON JULY 11th, 1975.

1. While the procedure followed in Family Court is not characterized as "appointment of an amicus curiae", he feels it is essentially the same: a court counsellor will do a custody investigation where there is a dispute involving the children.

2. Four methods have been used by the Alberta Supreme Court to safeguard the interests of the child:

(1) A member of the Family Court staff is appointed as "court expert" under Rule 218 to give evidence relating to what would be in the best interests of the child.

(2) The court may make an order to the Family Court to prepare a custody study. The order may be a general one or it may specify a "named individual" or a certain "position" to do the study. These orders may be "amicus curiae" orders and in the language and form commonly used for that purpose or at times they may be very general, i.e., " . . . appoint Gerry Way to represent the infant in this action." The latter form is, in Mr. Way's opinion, useless as it does not define his status before the court.

(3) The court may and usually does appoint a solicitor from the Office of the Public Trustee to act as amicus curiae who then enlists the help of the

Family Court staff to do the custody report, which is made available to all parties.

(4) The court may appoint a lawyer in private practice to act as an amicus curiae and who may or may not enlist the help of Family Court staff to prepare a report.

3. Mr. Way definitely prefers referrals to be made through a third lawyer as amicus rather than direct referrals to the Family Court staff.

4. Each custody report should be the responsibility of one person only with no delegation of any of the work involved. This will ensure continuity throughout the report. It takes an average of 10 days' concentrated effort to produce one custody report.

5. In January of 1975 a letter was sent to all interested solicitors from Family Court Services outlining the problems faced by the Family Court staff and urging all solicitors to follow certain guidelines in an attempt to alleviate the large workload that was being super-imposed on the regular Family Court duties of the staff:

(1) All referrals were to be made through a third lawyer (amicus curiae) whose responsibility was the best interest of the children (a Family Court counsellor was not to be appointed as the amicus curiae);

(2) Fixed or peremptory dates were to be avoided if possible due to the overload of custody cases;

(3) Custody reports would be completed at the discretion of the Family Court staff without pressure from clients or their lawyers, it being emphasized that the custody reports were designed to show what was in the best interests of the children, and not designed to assist clients or solicitors to gain the upper hand in adversary proceedings.

6. The above letter was apparently largely ignored and, as a result, in May of 1975 the Family Court refused to do any more work in this manner as their status remained undefined and the work overload had continued.

7. There should be a separate and statutorily defined and constituted "office of amicus curiae" which would be "attached" to some existing structure, probably the Office of the Public Trustee. In the interim, he would like the funding and staff to allow the setting up of a unit of counsellors within the Family Court staff whose sole function would be work on Supreme Court referrals.

8. The adversary system is inadequate to resolve the question of the "best interests of the child"; it goes against the spirit and philosophy of the Family Courts. There is no need for a third "child advocate", a lawyer in the true sense. An amicus curiae has, by definition, no right to cross-examine; he is a friend and officer of the court whose only purpose is to provide the court with an impartial opinion based on evidence he tenders as to what disposition would be in the best interests of the child. Anything to be gained from cross-examination can be gained through the investigation by a properly trained investigator.

APPENDIX B

SUMMARY OF POINTS MADE BY MR. ALEXANDER HOGAN, DIRECTOR OF CIVIL LAW, DEPARTMENT OF THE ATTORNEY GENERAL, IN AN INTERVIEW ON AUGUST 6, 1975.

1. The central most important factor in the concept of independent representation of the child is the actual representation to the court of the child's interests in the proceeding. While only the court should decide what disposition will be in the best interests of the child, it should reach a decision based on considerations of the fullest disclosure of information as is possible. By giving the child a separate voice in any proceeding dealing either directly or indirectly with his rights the court is in a better position to act as an "impartial and independent arbitrator."

2. The role of amicus curiae is one of a true "friend of the court", a lawyer whose only loyalty is to the court and to the child, whose only concern is to see that disposition made which is in the best interests of the child, whose primary function is to put before the court all the evidence he can relating to the "best interests" of the child. To facilitate this function he should have authority to investigate fully the situation, to adduce evidence and also to cross-examine witnesses called by the parties, although in practice this should rarely become necessary if counsel for the parties perform their proper function in cross-examination.

3. In any system set up the representative of the child must be independent and separate from the court staff and from the social services. A division between the social worker or psychiatrist preparing the report and the lawyer

making use of the report is essential to prevent the possibility of the lawyer losing his sense of objectivity by becoming too closely identified with the biases of the social services staff. The lawyer as amicus must place himself somewhere inbetween the social worker's point of view and the pure legal point of view - he must find a proper balance before he can determine what recommendation would be in the child's best interests.

4. Although the lawyer should be "separate", his function should be "attached" to some existing governmental structure - the Attorney General's Department in general and the Office of the Public Trustee in particular. While there could be situations in which the traditional role of guardian of the estate of the infant would conflict with the proposed role of guardian of his best interests as a whole, this should cause no major problem in that such a conflict would be recognized by the Public Trustee when it arose and most probably an "outside" amicus would be procured to represent the child's interests before the court.

5. There should be mandatory independent representation in all cases of abuse, neglect and disputed custody, the opportunity of obtaining counsel in all cases of delinquency along with a system of duty counsel available to all infants who are or may be charged with an offense, whose function would be to advise, after investigating the situation, the child of his rights and whether or not he needs counsel.

6. There should be an independent committee set up to review all applications relating to matters of adoption, guardianship, affiliation, annullment and agreements made as to custody and maintenance of children for the purpose of deciding whether to investigate the situation to see if the

child should or should not have independent legal representation and, if so, such "recommendation" would be then made to the court. This would prevent "rubber-stamping" of such applications and would be an exercise in "preventative welfare".

7. Infants' property rights are so well protected under the law that it is pathetic when viewed in terms of the meager protection given the infant's personal rights -his welfare as a whole. The provisions involving the Public Trustee in the protection of the property rights do work; the function of the Public Trustee is taken seriously and nothing is ever done perfunctorily.