

The Role of the Child's Wishes in California Custody Proceedings

I. INTRODUCTION

The spirit of reform which brought fundamental changes to the California law of marital dissolution had little effect upon the child custody proceeding.¹ The present statutory basis for this proceeding differs little in fundamentals from those prior to the Family Law Act.² This article discusses one aspect of these child custody pro-

¹Several of the 1966 recommendations of the Governor's Commission on the Family were not adopted by the legislature. Among the most important recommendations by the Commission were the deleting of the statutory preference for maternal custody of children of tender years, permitting the award of custody to a non-parent even in the absence of a finding of parental unfitness, empowering the court to order an investigation and report by its own professional staff, and empowering the court *sua sponte* to appoint a guardian *ad litem* for the child. CALIFORNIA GOVERNOR'S COMMISSION ON THE FAMILY, REPORT, 38ff. (1966) (hereinafter cited as REPORT). Only the non-parent custody award was enacted. Ch. 1608, § 8, [1969] Cal. Stats. 3314, operative January 1, 1970. Certain minor changes were enacted in 1970. Ch. 1545, § 2, [1970] Cal. Stats. 3139. The maternal preference was deleted last year. Ch. 1007, § 1, [1972] Cal. Stats. ²In this article the designation "Family Law Act" refers to CAL. CIV. CODE § § 4000-5138 (West 1970 and West Supp. 1972).

A comparison between Ch. 1700, § 6, [1951] Cal. Stats. 3911 (former CAL. CIV. CODE § 138) and the new CAL. CIV. CODE § 4600 (West Supp. 1972) reveals several changes. Particularly important are the authorization of non-parent custodians and the rewording of the entire provision. However, the basic standards for this proceeding have remained essentially unchanged. Ch. 1700, § 6, [1951] Cal. Stats. 3911 (former CAL. CIV. CODE § 138):

In actions for divorce or for separate maintenance the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody of such minor children as may seem necessary or proper and may at any time modify or vacate the same. In awarding the custody the court is to be guided by the following considerations:

(1) By what appears to be for the best interests of the child and if the child is of a sufficient age to form an intelligent preference, the court may consider that preference in determining the question;

(2) As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, custody should be given to the mother; if the child is of an age to require education and preparation for labor or business, then custody should be given to the father.

CAL. CIV. CODE § 4600 (West Supp. 1972):

In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at

visions,³ the role of the child's wishes. It examines the statutory and judicial milieu within which the expression of these wishes takes place and concludes with a recommendation to mitigate the possible harm resulting from the traditional two party adversary proceeding.⁴

II. DAVID, A CUSTODY CASE⁵

When David was seven years old, as an incident to his parents' marital dissolution proceeding, he was placed in the custody of his mother. Both of his parents agreed to this arrangement at the time. Today at age nine-and-a-half the father has returned to court seeking an alteration of the prior decree. Presently he contends that he, not his former wife, is most suited to meet David's best interests. After an enjoyable summer visit with his father, David claims that despite

any time thereafter, make such order for the custody of such child during his minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to his wishes in making an award of custody or modification thereof. Custody shall be awarded in the following order of preference:

(a) To either parent according to the best interests of the child, but other things being equal, custody should be given to the mother if the child is of tender years.

(b) To the person or persons in whose home the child has been living in a wholesome and stable environment.

(c) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a non-parent is required to serve the best interests of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearing on this issue.

³California is plagued with a multiplicity of statutory child custody provisions. These can be classified into three categories: juvenile dependency, guardianship of the person, and custody arising out of the marital separation or dissolution. It is the latter of these which is the subject of this article. For a comprehensive discussion of the difficulties associated with this multiplicity and some recommendations for a solution see B. Bodenheimer, *The Multiplicity of Child Custody Proceedings: Problems of California Law*, 23 STAN. L. REV. 703ff. (1970-71).

⁴In at least 85 percent of California divorces the parties reach an agreement prior to the formal hearing. Such agreements are normally approved by the court and generally concern property settlement and support claims. But it is also customary for the custody of the children to be decided in this manner without a separate judicial hearing. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *Custody of Children*, THE CALIFORNIA FAMILY LAWYER, VOL. 1, 542 (1961). Such consensual arrangements allow little inquiry into the welfare of the children involved.

⁵The story of David's custody proceeding is based on a true case related during an interview.

his love for his mother, he would prefer to continue living with his father.

With sufficient funds available counsel for David's father is able to obtain psychologists to testify to the boy's maturity. Over the objections of his mother's attorney the court permits David to testify at the hearing.⁶ "David, would you like to remain with your father?" "Yes." Certainly he loves his mother, but he would rather stay with his father.

Aside from this evidence the court has little else upon which to base its decision. David is a bright, articulate child and according to the custody provisions of the Civil Code the judge is required to "consider and give due weight to his wishes in making an award of custody or modification thereof" if he determines David "is of sufficient age and capacity to reason so as to form an intelligent preference."⁷ The witnesses produced by David's father seem convincing. The mother's attorney has found no way, as far as the court can see, to discredit their testimony. David's demeanor reflects a maturity rare for a child of his age. With some misgivings the judge transfers custody of David from his mother to his father. His order notes the important role assigned by the custody statute to the child's preference.

III. THE STATUTORY FRAMEWORK

Though somewhat atypical⁸ the matter of David's custody reflects a number of the difficulties inherent in the structure of the California custody proceeding. Like its predecessor,⁹ Civil Code section 4600 prescribes the limits within which the trial court is bound to frame its decree.

Both the old and the slightly modified provisions of the new Family Law Act¹⁰ instruct the court to take several factors into consideration in evaluating each particular case. On the whole these factors consist of little more than a hierarchy of preferred recipients of custody. The parents, naturally, are the first whose rights to the

⁶For a discussion of the ways in which children are allowed to express their wishes in the custody proceeding, see Section V, *infra*.

⁷CAL. CIV. CODE § 4600 (West Supp. 1972).

⁸More often than not neither party to the dispute can afford the expert witnesses secured by David's father. Far more normal is the situation in which the court must make its determination unaided by non-legal professionals except those made available to it through the Probation Office or the Domestic Relations Commissioner.

For an interesting example of a case in which a lawyer and a psychologist worked together over a period of time in preparation for a custody hearing, see Church, *Counselor-at-Law: A Game of Chess?*, TRIAL 23, 31, Case I, (September-October 1972). See also, Littner, *The Doctor's Role in Contested Child Custody Matters*, 9 CONCL. CTS. REV. 34 (1971).

⁹Ch. 1700, § 6, [1951] Cal. Stats. 3911 (former CAL. CIV. CODE § 138).

¹⁰CAL. CIV. CODE § 4600 (West Supp. 1972).

child are protected.¹¹ After them third parties may qualify as custodians and may be permitted to be joined as parties to the proceeding.¹² The child himself, though not a recognized party to the dispute, may,¹³ as in David's case, testify if the court first determines he possesses the requisite capacity to reason so as to form an intelligent preference. Taking precedence over these factors is the idea that the decision of the court is to be made "according to the best interests of the child."¹⁴

The provisions of this act, like the old, obviously leave a wide range of discretion for the trial court judge.¹⁵ The application of law to fact requires determinations which are often in the nature of value judgments.¹⁶ Given the subject of the dispute sought to be resolved — the custody of a child — there is no indication this discretion can or should be significantly reduced.¹⁷

For the attorneys and judge who must function in this proceeding there is usually little in the way of inexpensive non-legal professional assistance available. Yet though they are often ill-prepared to evaluate the issues of import in the custody proceeding, it is they who are formally charged with the duty of resolving the conflicting situations which emerge from the collapse of the domestic relationship. The attorney for David's father was fortunate to have the assistance of

¹¹*Id.* at (a).

¹²*Id.* at (b) and (c).

¹³Since the child is not a recognized "party" to the dispute, his preference may only be entered as evidence upon the motion of either of the parties or of the court.

¹⁴CAL. CIV. CODE § 4600 (a) and following (c) (West Supp. 1972).

¹⁵*Kelley v. Kelley*, 75 Cal. App. 2d 408, 410, 416, 171 P.2d 95, 96, 100 (1949); *Thompson v. Thompson*, 142 Cal. App. 2d 741, 743-44, 298 P.2d 866, 868 (1956); *Stuart v. Stuart*, 209 Cal. App. 2d 478, 483, 25 Cal. Rptr. 893, 895-96 (1962); *Sanchez v. Sanchez*, 55 Cal. 2d 118, 121, 10 Cal. Rptr. 261, 263, 358 P.2d 533, 535 (1961); *Foster v. Foster*, 8 Cal. 2d 719, 730, 68 P.2d 719, 724 (1937).

¹⁶*See In re Gates*, 30 P. 596, 95 Cal. 461 (1892). Although not based upon a statutory foundation, this habeas corpus case provides an interesting example of the type of determination a court of first instance often must make.

¹⁷*See Stack v. Stack*, 189 Cal. App. 2d 357, 363-73, 11 Cal. Rptr. 177, 182-88 (1961). "A careful examination of the cases leaves us with the feeling that there are no real legal guidelines to assist the appellate court in deciding such a case as this. Guidelines there are, but they are addressed to the trial court in exercising its almost unlimited discretion, and usually, when one or more of them has been relied upon on appeal, the appellate court has in substance indicated that they are not guidelines upon appeal. Many of the cases in which an order that either changed or refused to change custody has been reversed involved also an error of the court in refusing to receive material evidence, or some other comparable matter not going to the substance of the question before the court." *Id.* at 363-64, 11 Cal. Rptr. at 182-83. The opinion continues by reviewing the legislative and decisional guidelines under former CAL. CIV. CODE § 138. It concludes by noting that "It is apparent . . . that over the years the appellate courts have almost completely abdicated in this field in favor of the trial courts. This may well be the only practicable course . . ." *Id.* at 372-3, 11 Cal. Rptr. at 188.

professional psychologists to establish the child's maturity. As a result of their testimony he was able to base his strategy almost entirely on the effect of David's testimony on the court. As the results indicate this was a particularly wise action in this case. Yet within the custody statute the reference to the child's wishes undoubtedly was not intended as a basis for adversary stratagem.¹⁸ Its use as such reflects an ambiguity inherent in the present form of the custody proceeding in California, an ambiguity which, as we shall see later, permeates the entire area.

The new statutory reference to the child's wishes differs only slightly from that of the prior law.¹⁹ The legislature modified the content of the new Family Law Act by the addition of "capacity to reason" to the prior requirement that the child be of "sufficient age to form an intelligent preference" before the court may consider his testimony. At the same time the "may consider" of the superseded section was changed to "shall consider" in the new.²⁰

In David's case the fact that little evidence beyond the psychological reports of the child's maturity and the expression of his wish to remain with his father was presented to the court seems to have been critical. Certainly the recent modifications in the code were of assistance to the judge in forming the "reasons" for his determination. But it is unlikely that the actual considerations of the court, or of the parties for that matter, were altered by the statutory change.

The new language merely expands the definition of "sufficient age" without substantially limiting the ultimate discretion of the court in making its own decision as to whether or not a particular child may have his wishes entered in evidence. So too the change from "may" to "shall" probably has no substantial significance to the proceeding.²¹ Under prior law once the court had determined

¹⁸The fact that the court is instructed that "[if] a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court *shall consider* and give due weight to his wishes in making an award of custody" indicates that the preference of the child was intended to be considered on its own merit regardless of whether or not it served the interests of either parent. CAL. CIV. CODE § 4600 (West Supp. 1972). (Emphasis added).

¹⁹Ch. 1700, § 6, [1951] Cal. Stats. 3911 (former CAL. CIV. CODE § 138) and CAL. CIV. CODE § 4600 (West Supp. 1972).

²⁰*Id.*

²¹One might argue the change from "may" to "shall consider . . . [the child's] wishes" is substantial. However, the court is only compelled to hear the child after it determines he is "of sufficient age and capacity to reason so as to form an intelligent preference." Further, the weight which it assigns to this evidence, if admitted, also rests on its discretion. *See supra*, notes 15 and 17 and accompanying text.

Although the new statutory language may not change the results reached by the trial court, that court should see that "the record reflect that the child's preference *has been considered* regardless of whether it was followed." CALIFORNIA CONTINUING EDUCATION OF THE BAR, ATTORNEYS' GUIDE TO FAMILY LAW ACT PRACTICE, SECOND EDITION, 281-82 (1972).

that the child was of sufficient age to form an intelligent preference, it was quite unlikely that he would have been denied the opportunity to state that preference to the trier of fact. Under the new provisions this change should impress upon the court and its officers the apparent policy of the legislature that the child, the subject of the entire proceeding, should be allowed some voice in the proceeding if this is at all feasible.

In actual practice the courts have turned elsewhere than to the custody statute for guidance in these matters.²² In two different California statutes related matters are dealt with in a much less ambiguous manner.

Probate Code section 1406 specifically allows the child over fourteen years of age to nominate his own guardian "and such nominee must be appointed if approved by the court."²³ If a guardian has been appointed prior to his reaching that age, the statute permits the situation to be altered if the child of fourteen or above so desires. For the child under fourteen it promulgates a standard of "sufficient age" identical to the superseded custody provisions and thus much like those of concern to us.²⁴

Civil Code section 225, concerning adoption proceedings, requires the consent of a child over the age of twelve years before the proceeding may be completed.²⁵ This latter section has had no identifiable impact on judicial considerations affecting custody, though one might have imagined some rather inventive court finding in this provision some justification for permitting children twelve years old and above to express their wishes in the custody proceeding.

The situation is quite different with regard to the use of Probate Code section 1406. Prior to 1953 it was possible for a child who had been awarded to the custody of one parent in conjunction with a

²²Ludlow v. Ludlow, 89 Cal. App. 2d 610, 617, 201 P.2d 579, 583 (1949); Robelet v. Robelet, 130 Cal. App. 2d 244, 248, 278 P.2d 753, 755 (1955). See also CLARK, THE LAW OF DOMESTIC RELATIONS, 583 (1968) and CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 4 at 559-60.

²³CAL. PROB. CODE § 1406 (West 1956):

In appointing a general guardian of a minor, the court is to be guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare; and if the child is of sufficient age to form an intelligent preference, the court may consider that preference in determining the question. If the child resides in the state and is over fourteen years of age, he may nominate his own guardian, either of his own accord or within ten days after being duly cited by the court; and such nominee must be appointed if approved by the court. When a guardian has been appointed for a minor under fourteen years of age, the minor, at any time after he attains that age, may nominate his own guardian, subject to the approval of the court.

Also note and compare CAL. PROB. CODE § 1440 (West 1956).

²⁴CAL. CIV. CODE § 1406 (West 1956).

²⁵CAL. CIV. CODE § 225 (West 1954).

separation or divorce under the provisions of the old Civil Code section 138 (now section 4600) to have that decision later relitigated as a guardianship matter. As a consequence, the child whose wishes were not considered in the earlier custody proceeding or who had changed his mind might seek a new adjudication of the matter under different ground rules upon attaining the age of fourteen years.²⁶ The courts were not unaware of this possibility and its affect on their decisions.²⁷

In 1951 the California Supreme Court in *Greene v. Superior Court* held that the court which had issued the original custody decree retained exclusive jurisdiction over the matter. Neither of the parties to that original dispute could overturn the original decree merely by seeking appointment as guardian in the Probate Court of another county.²⁸ *Greene* did not settle the issue as to whether the child upon his own petition in the Probate Court could upset the prior custody decision.²⁹ However, the same Court in 1953 all but precluded such action. In *Guardianship of Kentera*³⁰ the child of divorced parents petitioned to have his grandmother appointed his guardian. Such an action would have overturned an earlier decree awarding custody to his mother. Affirming the trial court's refusal to take such action, the Supreme Court noted the guardianship "provisions were not intended to upset the normal relationship of parent and child, or to disrupt normal family discipline by allowing the fourteen-year-old minor to withdraw from the family circle at his whim."³¹ This being so, the fourteen-year-old must first show the appointment of a guardian is "necessary or convenient" before the court may consider his petition.³² This decision all but eliminated

²⁶*In re Burket's Guardianship*, 58 Cal. App. 2d 726-28, 137 P.2d 475-76 (1943), the District Court of Appeals held the Superior Court may appoint as guardian the father of a fourteen year old boy, who has been nominated by the boy, where five years before in a divorce proceeding another court had awarded custody to his mother. *See also infra*, note 27.

²⁷*In Ludlow v. Ludlow*, 89 Cal. App. 2d 610, 617, 201 P.2d 579, 583 (1949) the court refused to reverse the transfer of custody from the father to the mother noting the child, Barbara, was "almost 12½ years of age and [in] another year and a half, or thereabouts . . . will have the right to express a choice between her mother and her father as to which one shall be named as her guardian (Prob. Code, § 1406)." *But see text at note 28, infra*.

²⁸*Greene v. Superior Court*, 37 Cal. 2d 307, 231 P.2d 821 (1951). For a recent discussion of another aspect of the relationship between CIVIL CODE § 4600 and the guardianship provisions of the Probate Code, *see In re Guardianship of Marino*, 30 Cal. App. 3d 952, 106 Cal. Rptr. 655 (1973).

²⁹*Greene* implies that this would be permissible. "If it is still necessary or convenient that a guardian be appointed, despite the custody award . . . conflict in jurisdiction may be avoided by bringing the proceedings in the court having jurisdiction over the original custody decree." *Id.* at 312, 231 P.2d at 423-424. *See also Bodenheimer, supra* note 3 at 707.

³⁰*Guardianship of Kentera*, 41 Cal. 2d 639, 262 P.2d 317 (1953).

³¹*Id.* at 643, 262 P.2d at 319.

³²*Id.* at 642-43, 262 P.2d at 318-19. The court reached its decision by comparing

the necessity of weighing the possible implications of future guardianship proceedings on the decree of a custody action. Whatever consistency and guidance the statutory age of fourteen years had given to the interpretation of the custody provisions of the Civil Code³³ — however tenuous this consistency and guidance might have been — were gone. Hereafter the standard of fourteen years of age remains merely as an analogous referent or a convenient dividing line for purposes of custody.³⁴

IV. FURTHER STATUTORY AIDS: INVESTIGATIVE REPORTS

The 1966 Governor's Commission on the Family recommended that the then proposed Family Court Act (which became the Family Law Act) contain some procedure whereby the trial court could obtain unbiased information about the child and his parents. The Commission advocated the trial court be given the power to order an investigation and report by its own professional staff "whenever it [believes] that good cause for such investigation exists."³⁵ Furthermore, it recommended that such a report be received into evidence without the stipulation of the parties.³⁶

Under the new act the results of the Commission's efforts are contained in Civil Code section 4602.³⁷ This provision authorizes the court to order, at its discretion, an investigation and report by a probation officer or a domestic relations investigator. However, the

PROBATE CODE § 1405 and § 1440 with § 1406. *See supra*, note 23. The former sections require a showing of necessity or convenience before a guardian may be appointed while the latter appears to give the child the unfettered right to nominate such a guardian. The court then declared the requirement that the appointment of a guardian be "necessary or convenient" must be shown *before* the right of the fourteen-year-old to choose his guardian becomes "absolute."

³³CAL. CIV. CODE § 4600 (West Supp. 1972).

³⁴*Robelet v. Robelet*, 130 Cal. App. 2d 244, 248, 2278 P.2d 753, 755 (1955) provides an interesting example. The Court of Appeals without citing other authority merely stated that "the children were under 14 years of age, and the trial judge did not abuse his discretion in deciding the matter without the opinion of the children." Similarly, in an interview with Judge Warren Taylor of the Yolo County Superior Court, the Judge referred to fourteen years as a convenient age after which he would be more inclined to hear the testimony of a child in open court. Interview, December 21, 1972.

³⁵REPORT, *supra* note 1 at 41.

³⁶*Id.*

³⁷CAL. CIV. CODE § 4602 (West Supp. 1972):

In any proceeding under this part, when so directed by the court, the probation officer or domestic relations investigator shall conduct a custody investigation and file a written confidential report thereon. The report may be considered by the court and shall be made available only to the parties or their attorneys at least ten days before any hearing regarding the custody of the child. The report may be received in evidence upon stipulation of all interested parties.

results of such action may not be entered in evidence without the stipulation of all parties to the action. The substance of these innovations while new to the custody sections of the Civil Code merely combine provisions already available to the court through other statutes.³⁸ As we shall later see, the fact that these investigative reports are used is significant to the actual mechanics of the custody proceeding. Without their presence that proceeding would undoubtedly necessitate a harsher application of the adversary process.³⁹

³⁸Under CAL. WELF. & INST. CODE § 582 (West 1972), itself a reenactment of Ch. 322, § 1 [1949], Cal. Stats. 609 (former CAL. WELF. & INST. CODE § 638.1), the Juvenile Court can "in any matter involving the custody, status, or welfare of a minor or minors" order the probation officer to "make an investigation of appropriate facts and circumstances and prepare and file with the court written reports and written recommendations in reference to such matters." While perhaps originally intended only for Juvenile Court proceedings, a 1956 opinion of the Attorney General gave this authorization broader application. The Opinion asserted that the former section was not limited to matters arising under Juvenile Court law. 27 OPS. CAL. ATTY. GEN. 292, 293-94 (Opinion No. 56-125, May 18, 1956). Furthermore, the statute itself permits the report of the probation officer to be received in evidence over the objections of any or all parties.

Similar provisions are to be found in the CAL. CODE OF CIV. PROC. § 263 (West 1954). Enacted in 1951, it permits the court to order an investigation and report by the domestic relations case investigators where such investigations are statutorily authorized. This section, however, requires the stipulation of both parties before an investigative report is admissible as evidence.

See also CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 4 at 577-79, Dahl v. Dahl, 237 Cal. App. 2d 407, 46 Cal. Rptr. 881 (1965), Russo v. Russo, 21 Cal. App. 3d 72, 77-8, 91, 98 Cal. Rptr. 501, 504-5, 514-15 (1971).

Since neither of these prior sections has been repealed, the interesting question remains whether they may still be used in the custody proceeding in place of the newer CIVIL CODE § 4602. Most likely they cannot. FREEMAN, *et al.*, *supra* note 21, at 298-99.

³⁹Another alternative in contested custody cases is presently being pursued by Judge Charles W. Johnson of the Sacramento Superior Court.

Our procedure is as follows: when the issue of custody first appears the court makes an order transferring the case to the Conciliation Court, and the parties are immediately sent to the Marriage Counselor's office. Appointments are made. Both parties are interviewed, separately and sometimes conjointly. The children are interviewed, and a home visit is made. References are contacted. And finally, a report is prepared for the court. Only one copy of the report is made, and this report is not placed in the court file. It may be examined by counsel, but it is not put in evidence. Since the court is sitting as a conciliation court, I think this is proper. The parties are given an opportunity to testify, and to present witnesses, and also to examine the marriage counselor. The procedure takes six weeks

The legal basis for this procedure, according to Judge Johnson, is § 1760, CAL. CODE OF CIV. PROC. which

provides whenever any controversy exists between spouses which may *** result *** in the disruption of the household, and there is any minor child of the spouses or either of them whose welfare might be affected thereby the conciliation court has jurisdiction. Under Section 1744(d) of the same code, the conciliation counselor

V. COURT AND COUNSEL

A. THE COURT AND THE CHILD'S WISHES

In the actual courtroom situation the role played by the child's expression of his own preference varies depending on the age of the minor involved.⁴⁰ Despite the lessened need to be attentive to any particular age, courts are loath to ignore the wishes of a child approaching majority.⁴¹ So, too, children of more mature years are more likely to have their preferences favorably considered than those younger in age.⁴²

The general rules used by one Superior Court judge⁴³ indicate something of the complexity and variety of situations that the trial court must face when evaluating the preferences of children in custody cases. First, this judge does not usually consider the wishes of a child under ten years of age. He has found, through experience, that the testimony of a minor below this age usually reflects the influence of the parent with whom the child is living. This general guideline is, of course, not an absolute but rather a standard gleaned from experience and applied where there is no indication that an exception should be made. This particular judge recognizes certain children mature more rapidly than do others. If evidence of maturity is presented to the court, it will ignore its general rule and hear the child. Second, the court does not permit children under fourteen to testify in open court. In such instances the children's wishes are heard in chambers by the judge alone. The attorneys for the parents *must* stipulate to this procedure, and for the most part they do. And third, a child fourteen years and older is sometimes allowed to take the stand if the situation warrants it and he is of sufficient maturity.⁴⁴

Apparently the judge who sat for David's custody proceeding operated under slightly different ground rules.⁴⁵ Yet the fact remains

may make any investigation ordered by the court.

Excerpts from a letter of Judge Johnson to Professor B. Bodenheimer, School of Law, University of California, Davis, March 13, 1971 [not published]. See note 86, *infra*.

⁴⁰CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 4 at 559.

⁴¹*Barton v. Barton*, 230 Cal. App. 2d 43, 48-49, 40 Cal. Rptr. 676, 679-80 (1964). The court refused to apply restraints to a girl of eighteen years who had chosen to live with her father rather than with her mother as a previous custody decree had dictated. "[There] are practical difficulties involved in placing coerced restraints upon adolescents who have so nearly reached maturity."

⁴²CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 4 at 559-60.

⁴³Judge Taylor of the Yolo County Superior Court.

⁴⁴Interview with Judge Taylor of the Yolo County Superior Court, December 21, 1972.

The child's testimony need not be given in open court. CAL. CIV. CODE § 4600 (West Supp. 1972) permits the court, at its discretion, to exclude the public from a hearing on the custody issue. See also CAL. CIV. CODE § 4360 (West Supp. 1972).

⁴⁵David was nine-and-a-half at the time he was allowed to take the witness

that in both David's case and in the court referred to above it was the trial judge who had to formulate the particular rules under which he then chose to operate. Obviously such a situation does not engender uniform decisions. While the parents, as recognized parties to the action, have access to the court, the child for whom the proceeding is actually conducted is accorded no such automatic consideration of his wishes. In some instances he may only be heard if he fits into the proper category of some preconceived guidelines. In others, he may have the opportunity to express his preference if one of his parents' attorneys is able to persuade the court that he presents, for some reason — usually an asserted "maturity" — an exception to the judicially created norm.

Another adaptation the courts have had to make in response to the unique situation thrust upon them is the private interview.⁴⁶ Without such a procedure it would be almost impossible for the court to receive the testimony of a minor of tender years. Despite this one cannot feel altogether comfortable with evidence received under such secretive arrangements. In 1953 the Court of Appeals for the Second District recommended that the trial judge keep some record of such interviews.⁴⁷ There are some indications that this advice has not always been heeded.⁴⁸

Aside from this direct reception of testimony from the child, it is not uncommon for the court to obtain reports from either the juvenile probation officer or the domestic relations investigator.⁴⁹ Often such information contains an in-depth report of interviews with the child. Because these are conducted by persons more familiar with the psychological make-up of children than are most judges, they can be

stand. *Supra* p 333.

⁴⁶In certain cases the Judge finds it useful to interview the child privately in chambers. Such a consultation often has the advantage of minimizing parental influence over the minor. Interview with Judge Johnson of the Sacramento County Superior Court, November 21, 1972. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 4 at 560. The cases by their casual reference to such interviews reflect a general acceptance of this procedure. *Swenson v. Swenson*, 101 Cal. App. 440, 445, 281 P. 674, 676 (1929); *Kelley v. Kelley*, 75 Cal. App. 2d 408, 413-14, 171 P.2d 95, 97 (1946); *Stuart v. Stuart*, 209 Cal. App. 2d 478, 482-83, 25 Cal. Rptr. 893, 895 (1962) to cite only a few.

⁴⁷*Morris v. Morris*, 121 Cal. App. 2d 707, 709, 264 P.2d 106, 107 (1953).

The proposed Uniform Marriage and Divorce Act recommends that private judicial interviews be allowed by statute. But it requires that some record be kept of such interviews. Uniform Marriage and Divorce Act (1970), Section 404.

For a general discussion of custody proceedings under the proposed uniform act see LEVY, ROBERT J., UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS, Prepared for the Special Committee on Divorce of the National Conference of Commissioners on Uniform State Laws, 222-46, undated [1969].

⁴⁸Comment by one officer of the court.

⁴⁹Interview with Judge Taylor, *supra* note 44; interview with Judge Johnson, *supra* note 46; interview with Miss Ann Marie Day, Deputy Domestic Relations Commissioner, San Francisco City and County, December 21, 1972.

of immense value to the court. Again, usually it is not difficult to obtain the required stipulation from the attorneys in the case.⁵⁰ Unlike the private interview with the judge this procedure involves no ultimately secret interrogation of the minor. Under Civil Code section 4602 the report in question must be made available to the parties or their attorneys at least ten days before any hearing.⁵¹ This procedure gives the court the opportunity of "hearing" a child from whom it otherwise might not receive testimony. It also has the advantage of providing the court with a non-legal professional appraisal of the child's testimony. However, it must be noted that these reports are only intended to assist the court. The ultimate power of decision remains with the judiciary and cannot be delegated.⁵² This is reflected in the stipulation required by section 4602 which apparently⁵³ prohibits the trial court from circumventing the traditional rules of evidence and due process applicable in other adversary proceedings. Thus, "an investigator may make no secret report, but stands like any other person. . . . There is no back door to the courts for witnesses, investigators, litigants or others."⁵⁴ So too, the investigator should be available for direct and cross-examination on matters contained in the report.⁵⁵

B. THE ATTORNEY AND THE CHILD'S WISHES

For the attorney most custody disputes present a very uncomfortable situation.⁵⁶ Because the action remains adversary in form his

⁵⁰Interview with Judge Taylor, *supra* note 44; interview with Judge Johnson, *supra* note 46; interview with Miss Ann Marie Day, *supra* note 49. Miss Day noted that the San Francisco Superior Court usually received the stipulation of the attorneys prior to the commencement of the domestic relations investigation. Aside from the concern most lawyers have for the children in custody proceedings, their readiness to stipulate to these reports is probably related to pressure from the court and a fear of adverse decision if they refuse to cooperate.

⁵¹CAL. CIV. CODE § 4602 (West Supp. 1972).

⁵²Washburn v. Washburn, 49 Cal. App. 2d 581, 589-90, 122 P.2d 96, 101 (1942); Fewel v. Fewel, 23 Cal. 2d 431, 435-36, 144 P.2d 592, 594-95 (1943).

⁵³See *supra*, note 38.

⁵⁴Washburn v. Washburn, 49 Cal. App. 2d 581, 590, 122 P.2d 96, 101 (1942). In *Russo v. Russo*, 21 Cal. App. 3d 72, 91, 98 Cal. Rptr. 501, 515 (1971), *quoting Washburn*, the court stated that it was reversible error for the trial judge to confer privately with the investigator who filed a report pursuant to a prior court order. These decisions were made pursuant to CAL. CODE OF CIV. PROC. § 263 (West 1954) but are most likely applicable to the similarly worded CAL. CIV. CODE § 4602 (West 1970). See note 38, *supra*.

⁵⁵CAL. CIV. CODE § 4602 (West 1970) does not contain the provisions of CAL. CODE OF CIV. PROC. § 263 (West 1954) which require that the investigator be present at the hearing for direct and cross-examination, but the holdings under CODE OF CIV. PROC. § 263 are probably still applicable. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 21 at 299. In particular, see *Dahl v. Dahl*, 237 Cal. App. 2d 407, 413-15, 46 Cal. Rptr. 881, 885-86 (1965).

⁵⁶Most attorneys do not like custody disputes and would rather avoid them if at

role is fundamentally defined by the position taken by his client, a position which in many instances is inseparable from the emotional milieu out of which it has emerged. Conflicting with this role is his awareness that the interests he represents may not be those which best serve the child. On the whole most attorneys do show their concern. This is reflected in their general behavior in court, their readiness to stipulate to the statutorily authorized investigation and report and their usual willingness for the child to be interviewed by the judge in chambers.⁵⁷ However, most attorneys probably do not fully appreciate the emotional impact of the proceeding in which they are engaged or its psychological effects on the persons involved in the dispute.⁵⁸

A fundamental variable in all such proceedings is the age of the minor in question. As noted previously, many courts have developed general guidelines for determining what weight a child's stated preference should be given at a particular age. It is essential that counsel be aware of the principles used by the judge before whom he is to argue. Ignorance of these guidelines can spell the difference between success or failure for his position, particularly so when his strongest evidence may be the favorable testimony of the child.

Inseparable from age are the various psychological factors present in any such dispute.⁵⁹ Where outside expert testimony is not used, some of these elements will often be brought to the court's attention by the investigative report.⁶⁰ Though most attorneys probably feel incompetent in either using or evaluating this material, they cannot afford to ignore it. Similar to the expert testimony of a medical witness, this evidence can be decisive. Likewise, it can also be refuted. If counsel feels it necessary and if funds are available, outside psychological advice should be sought and used. Such assistance, like that of other experts, can be of aid both in trial preparation and at the hearing itself. In custody much of the evidence or potential

all possible. Interview with Judge Taylor of Yolo County Superior Court, *supra* note 44; interview with Attorney Roger Gambatese, Davis, California, December 18, 1972.

⁵⁷Interview with Judge Taylor of the Yolo County Superior Court, *supra* note 44; interview with Judge Johnson of the Sacramento County Superior Court, *supra* note 46; interview with Attorney Thomas Frankel, Davis, California, December 19, 1972; interview with Attorney Roger Gambatese, Davis, California, *id.*

⁵⁸Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYR. L. REV. 55, 65 (1969-70).

⁵⁹See generally Suarez, *The Role of the Child's Choice in Custody Proceedings*, 43 L.A.B. BULL. 211 (1967-68).

⁶⁰Because of their training the court appointed investigators are often able to detect the hidden psychological elements in the parent-child relationship. These insights are reflected in the reports made to the court. Interview with Miss Ann Marie Day, Deputy Domestic Relations Commissioner, City and County of San Francisco, *supra* note 49.

evidence is obviously linked with the psychological development of the child and his relationship to his parents.

The attorney for David's father was fortunate. The psychologists he employed were able to directly affect the outcome of the proceeding in which they testified. Considering the age of the child together with the other elements of the case, this was no mean accomplishment. Though, perhaps the court should not have placed such heavy weight on the child's testimony. Other emotional factors, apart from the maturity to which the psychological witnesses testified, may have been at play behind this expression of preference.

The emotional crisis which marks most custody battles affects children in any number of ways. Quite often these effects can only be detected with professional assistance. If at all possible, their implications for the hearing and the child's long term best interests should be considered.⁶¹ One little girl, when first asked with whom she wished to live, expressed a desire to be with her father.⁶² However, as her interview with the Deputy Domestic Relations Commissioner progressed, it became apparent that this sentiment was merely a way the child had developed to express her confusion and guilt over the traumatic collapse of her parents' marriage. Such a disclosure changed the whole import of her expressed desire.

David's case presents similar, though unexplored, difficulties. Like many children the experience of a pleasant vacation with the non-custodial parent appears to have had an effect on the child's attitude. Whether or not this was due to direct parental influence or merely reflects the enjoyment of a break in the normal routine of school and custodial discipline is often difficult to determine.⁶³ Counsel should be aware, however, that in many circumstances a more direct seduction of the child's affections may lurk behind a statement of preference. In some cases the sheer viciousness of the situation will disclose the problem.⁶⁴ In others a more thorough investigation may be required to discover the difficulty.⁶⁵ The expert witnesses in David's

⁶¹Suarez, *supra* note 59 at 211ff. Dr. Suarez gives several excellent examples of the ways the psychological adjustment of the child affects the expression of his wishes. For a painful account of the short term effects and long term implications of a guardianship dispute of an eight-year-old boy, see *In re Guardianship of Marino*, 30 Cal. App. 3d 952, 106 Cal. Rptr. 655 (1973).

⁶²Interview with Miss Ann Marie Day, Deputy Domestic Relations Commissioner, San Francisco City and County, *supra* note 49.

⁶³Judge Johnson of the Sacramento Superior Court has noted a sharp increase in the number of custody cases during the latter part of the summer. Conversely during the winter, particularly around the holidays, the case load drops sharply. Interview, *supra* note 46.

⁶⁴*Swenson v. Swenson*, 101 Cal. App. 440, 281 P. 674, 675-76 (1929). The mother used various tactics to ruin the father's character and destroy the children's love and affection for him.

⁶⁵*Tarling v. Tarling*, 186 Cal. App. 2d 8, 10, 8 Cal. Rptr. 621, 623 (1960). During the judicial interview it developed that the son's preference for his father

case were called to testify to the boy's maturity. Perhaps if the mother's counsel had been aware of the possible underlying influence of the summer with father and had used this knowledge, these witnesses would not have had the influence they did.

VI. THE ADVERSARY PROCEEDING

A. MARITAL DISSOLUTION AND ITS EFFECTS

Intense anger and guilt may mark the collapse of a marriage as one of the most emotion laden experiences a person may ever undergo. Unfortunately, the intense feelings generated by this event are not confined to the parents.⁶⁶ For it is within this milieu of crisis that the majority of custody proceedings take place. As a result, the legal dispute often bears little relationship to the actual needs of the child involved. Instead it is merely a new battle in the continuing war between his parents. For all practical purposes the child has become an object to be won, a way of scoring points in the struggle for self-justification and revenge. The ostensible goal of securing his best interests has all but vanished.⁶⁷

Where adults may have the resources to sustain and recover from the emotional assaults of these events, the minor more often than not is unable to compensate for the emotional upheaval he is forced to undergo.⁶⁸ The child's basic need for a continuing relationship with both mother and father becomes an impossibility, particularly in the situation where one parent is characterized as "bad."⁶⁹ If the child is quite young, he may come to believe the blame for the situation rests with his own actions. The burden of the guilt thus created may distort the child's perception of reality in unpredictable ways.⁷⁰

B. THE INHERENT AMBIGUITY IN THE PROCEEDING

Within this twisted, highly volatile emotional atmosphere our legal system attempts to conduct the child custody proceeding, a proceeding whose basic format remains, like most other judicial determinations, adversary in nature. The courts have not been unaware of the difficulties inherent in this adversary procedure. For example, in 1955 the Court of Appeals for the First District pointed out that the custody action "is not an ordinary adversary [proceeding]. The per-

was due to his desire to go to college. The boy's father had said that if his son remained with him he would provide necessary assistance when it was needed.

⁶⁶Suarez, *The Post-Divorce Syndrome*, 6 CONCL. CTS. REV. 13-14 (1968).

⁶⁷*Id.*, 14.

⁶⁸Watson, *supra* note 58 at 60-61.

⁶⁹*Id.*, at 61.

⁷⁰Interview with Miss Ann Marie Day, Deputy Domestic Relations Commissioner, San Francisco City and County, *supra* note 49.

sonal rights of the parties are by no means the sole subject of judicial concern. Their children are the persons beneficially interested." Continuing, the court noted that the real question was always: "What is for the best interests of [the children]." ⁷¹ This realization that the parties contesting custody are not the "persons beneficially interested" in the ultimate outcome of the case indicates a fundamental ambiguity or tension in the custody proceedings as it presently exists in California. Is it the "interests" of the parents or the child which are actually determined by the proceeding? The court bases its insight into the proper focus of the action on the overriding theme of the custody statute itself — "the best interests of the child." ⁷² This theme clearly differentiates the custody action from the traditional adversary proceeding. Yet under the present law the person vitally concerned with the matters at issue, the child, has no place among the recognized parties to the dispute. And it is difficult to imagine that the contesting parties are in any position to adequately represent the crucial interests of the minor. The intense emotional atmosphere of most custody actions would make suspect even the best parental intentions.

Interestingly, the guardianship provisions of the Probate Code substantially reduce this procedural tension between the interests of the parents and the interests of the child by permitting the minor fourteen years of age and older to petition the court regarding his guardianship. ⁷³ This recognition of the child's preference together with the mandatory right of the fourteen-year-old to nominate his guardian ⁷⁴ assures the minor that his interests must be acknowledged by the court vis-a-vis his parents. The ambiguous relationship between the interests of the child and the interests of the parents (or others contesting custody) in the custody provisions would have been substantially reduced if the independent recognition afforded the child's interests by the guardianship sections had been incorporated in the new Family Law Act. Perhaps the traditional association of custody with marital separation and dissolution tended to emphasize the rights of the parents at the expense of those of their offspring.

In its adversary form the custody proceeding resembles a dispute between once friendly neighbors over a piece of property. Only in this case the court is instructed to "consider and give due weight to [its] wishes in making an award." ⁷⁵ Although preserving the *form* of traditional advocacy, the custody statute in its general purpose —

⁷¹Smith v. Smith, 135 Cal. App. 2d 100, 107, 286 P.2d 1009, 1013 (1955).

⁷²Ch. 1700, § 6, [1951] Cal. Stats. 3911 (former CAL. CIV. CODE § 138) and CAL. CIV. CODE § 4600 (West Supp. 1972).

⁷³CAL. PROB. CODE § 1440 (West 1956).

⁷⁴CAL. PROB. CODE § 1406 (West 1956).

⁷⁵CAL. CIV. CODE § 4600 (West Supp. 1972). Change in gender added for emphasis.

-serving the best interests of the child, not the parents — and its call for a consideration of the minor's preference bears evidence of a deep inconsistency between the asserted purpose of the statute and the procedures actually used. In form the proceeding is a dispute between the parents regarding their respective rights to the child. All the evidence⁷⁶ before the court must come by way of either party (the child is *not* a party to the action) or by stipulation of both. The child is not represented, though his preference may be admitted. His "best interests" are the ostensible purpose of the proceeding, yet those interests are in the end achieved by declaring one party or the other the winner in the proceeding. Thus, it is not at all surprising that the very case which recognized the child as the person beneficially interested in the outcome of the action also likened the judicial interview with the minor to evidence "quite similar to the view which a trial judge upon occasion takes of property."⁷⁷

The confusion in the statute and the cases reflects a basic conflict of interests rarely articulated. Behind the rather amorphous discussions of judicial discretion and the weight which the court should give to the child's preference lies a field of inarticulate policy considerations bearing on the nature of conflicting parental rights and the rights of the child, not to mention those of interested third parties. While section 4600, like its predecessor, attempts to deal with the relation of these rights to one another, neither the provisions of the code nor the cases ever clearly indicate the full extent and content of these rights. Thus, at times judges are caught speaking of children as if they were chattels and custody was a proprietary right of the parents, while in other situations their primary concern is obviously with the well-being of the minor.⁷⁸ Up to the present neither the legislature nor the appellate courts have delineated the precise nature of these respective rights. In the resulting vacuum the trial courts act — in their "discretion" — led only by custom and their own feel for the sense of the community in these matters. This situation hardly engenders consistent decision-making or its corollary guidance for counsel. Until we can evolve some uniformly accepted definitions of these rights or new procedures within which they may evolve, the current predicament is likely to continue. The ambiguity of allowing the outward form of the proceeding to be maintained as an adversary action solely between the parents will continue to produce judicial results which waver between an emphasis on parental

⁷⁶ Except for the child's wishes.

⁷⁷ *Smith v. Smith*, 135 Cal. App. 2d 100, 105, 286 P. 1009, 1012 (1955).

⁷⁸ *Roche v. Roche*, 25 Cal. 2d 141, 145-46, 152 P.2d 999, 1000-1 (1944) (dissenting opinion). Schauer, J., chastised the majority for using as precedents cases which imply a proprietary interest of the parents in the child. As a response, he urged a more open consideration of the rights of the minor.

interests and the interests of the minor.

Fortunately, there are indications that the current situation will not remain static. In various parts of the nation it appears we are moving into a new stage in the historical development of children's rights vis-a-vis society and their parents.⁷⁹ Though California law does not as yet completely reflect this trend, one can anticipate changes resulting from these pressures. The statutory change from "may consider . . . his wishes" to "shall consider"⁸⁰ indicates the process of evolution.⁸¹ The question remains, however, what procedural form or forms this development will take in California.

VII. THE CHILD'S WISHES — THE CHILD'S BEST INTERESTS — THE CHILD'S RIGHTS

Whatever their ultimate form, new or expanded procedures for determinations of custody seem already present in rough form within the current statutory provisions, the recommendations of legislative committees and the 1966 Governor's Commission on the Family, and in the practices of certain non-California courts. Generally, these tentative solutions follow two trends. One seems to be moving in the direction of eliminating the adversary process altogether. The other appears to expand that process by an alteration of the traditional two-party action.

A. MINIMIZING THE ADVERSARY APPROACH

Even prior to the completion of the Report of the Governor's Commission, the Assembly Interim Committee on Judiciary had

⁷⁹The history of the evolution of children's rights goes beyond the scope of this article. For an analysis of this process as well as some current recommendations, see the Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L. J. 151 (1963); Kleinfield, *The Balance of Power Among Infants, Their Parents and the State*, a three-part series, 4 FAM. L. Q. 319, 4 FAM. L. Q. 409, 5 FAM. L. Q. 63 (1970-71); Specia and Wehrman, *Protecting the Rights of Children in Divorce Cases in Missouri*, 38 U.M.K.C. L. REV. 1 (1969-1970); Foster and Freed, *A Bill of Rights for Children*, 6 FAM. L. Q. 343 (1972).

⁸⁰Ch. 1700, § 6, [1951] Cal. Stats. 3911 (former CAL. CIV. CODE § 138) and CAL. CIV. CODE § 4600 (West Supp. 1972).

⁸¹A similar and, I suspect, related evolution in women's rights has already produced a significant modification in the custody provision. For with the passage of Ch. 1007, § 1, [1972] Cal. Stats. the legislature struck from CAL. CIV. CODE § 4600(a) the provision that "other things being equal, custody should be given to the mother if the child is of tender years" and with it one of the more convenient shelters for both judge and counsel. Prior to this action it was always possible for the trier of fact to use this provision as an escape from a particularly difficult determination. So, too, counsel for the husband could avoid the discomfort most general practice attorneys feel in custody disputes by advising his client that unless there was clear evidence of his spouse's unfitness she would inevitably receive custody of the children. Now both court and counsel will be forced to make a more realistic evaluation of the situation with all the difficulties that such an evaluation involves.

noted the dissatisfaction of many with the use of the adversary form of proceeding in custody cases.⁸² While satisfactory in the ordinary civil case, this form of action forced the parents to renew battles similar to those which had caused the divorce. In the welter of conflicting charges, countercharges and recriminations the child became a mere pawn.⁸³ To counter this unhealthy situation the Committee recommended a unified family court staffed with personnel equipped to handle the problems surrounding custody. Though emphasis was placed on the function of investigations, the Committee's report seemed to envision the use of other professionals in conciliatory roles.⁸⁴ The Report of the Governor's Commission completed in the following year basically took the same position.⁸⁵

The failure of the legislature to enact these proposals left the courts in almost the same position they were in prior to the Family Law Act. Though at least a few local efforts appear to have been made to alleviate some of the harshness of the adversary approach,⁸⁶ these innovations probably cannot achieve the full results envisioned by the Assembly Committee or the Governor's Commission until a basic procedural reorganization of the custody proceeding is approved by the legislature.

B. AN EXPANDED ADVERSARY APPROACH

The Governor's Commission on the Family recognized that whatever conciliatory procedure might be adopted the custody proceeding would often remain a dispute between conflicting parties. It, therefore, recommended that the legislature enable the trial court to appoint someone to speak affirmatively on behalf of the child. The Commission felt this could most adequately be done through an attorney acting as a guardian *ad litem*.⁸⁷ His function would be to represent the child "as a deeply concerned and affected party."⁸⁸ By

⁸²Final Report of California Assembly Interim Committee on Judiciary Relating to Domestic Relations, 157-58 (1965).

⁸³*Id.*

⁸⁴*Id.*

⁸⁵REPORT, *supra* note 1 at 9. For a trial judge's evaluation of the proposal for a family court made by the Governor's Commission on the Family, see Lindsley, *The Family Court: A Rational, Reasonable, and Constructive Revolution in Domestic Relations Law*, 5 CAL. WEST. L. REV. 7 (1968-69).

⁸⁶One of the major purposes behind Judge Johnson's use of marriage counselors in custody cases, letter, *supra* note 39, is to provide counseling in the critical period before the hearing. As Judge Johnson says: "We believe that the adversary system is wholly unsuited for the determination of custody matters. What we aim at doing is to separate the parties from the attorneys and get the two parties talking to each other. We follow the same basic procedure in cases where the mother and father are fighting over visitation 'rights,' and we have equally good success in these cases."

⁸⁷REPORT, *supra* note 1 at 41-3, 100-1.

⁸⁸*Id.* at 42.

failure to enact this recommendation the legislature left the courts with little opportunity to secure adequate protection for the child's interests in the actual give and take of the courtroom dispute.

In California today the only obvious statutory variation from a strict adversary proceeding is Civil Code section 4602 — the investigative report — and related provisions.⁸⁹ But the report does not actually represent the child. To the contrary, as the Governor's Commission noted, its primary function is investigative,⁹⁰ that is, descriptive in nature. If the courts come to depend primarily on these reports, the end result may very well be a proceeding largely formal in nature with the actual decision resting, not in the judiciary, but rather in its professional staff. Whatever ultimate benefits this possible development might have in reducing the contentiousness of the custody proceeding, they should be carefully weighed against the possible disadvantages of such a development.

Civil Code section 4600, with its emphasis on the role of the child's wishes, would seem to point away from the investigative reports to a solution more like that originally advocated by the Governor's Commission. Its recommendation was based in large measure on the experience of the courts of several sister states, particularly the Family Court of Milwaukee, Wisconsin.

Under the guidance of Judge Hansen (now Associate Justice of the Wisconsin Supreme Court) the Milwaukee Court, relying upon its inherent power to protect the rights of children, established the practice of appointing attorneys as guardians *ad litem* in custody cases.⁹¹ This procedure, together with the use of court-appointed social investigators, recognizes that children are concerned parties to the marital dissolution of their parents.⁹² Apparently, this procedure has proven successful.⁹³ The guardians themselves have on a number of occasions expended significant effort exploring the alternative custodial arrangements available in their respective cases. There is evidence that this concern has continued in some cases beyond the entry of the judgment.⁹⁴

Representation for the child would not eliminate the trauma and heartbreak that accompanies the collapse of a marriage, but if the

⁸⁹CAL. CIV. CODE § 4602 (West 1970), CAL. WELF. & INST. CODE § 582 (West 1972), CAL. CODE OF CIV. PROC. § 263 (West 1954).

⁹⁰REPORT, *supra* note 1 at 42.

⁹¹Hansen, *Three Dimensions of Divorce*, 50 MARQ. L. REV. 1 (August 1966); Hansen, *Guardians Ad Litem in Divorce and Custody Cases: Protection of the Child's Interests*, 4 JOUR. OF FAM. L. 181, 183 (1964). For an endorsement of this procedure by the Wisconsin Supreme Court see *Wendland v. Wendland*, 29 Wis. 2d 145, 138 N.W.2d 185 (1965).

⁹²Hansen, *Three Dimensions of Divorce*, *supra* note 91.

⁹³See the articles by Judge Hansen, *supra* note 91.

⁹⁴Hansen, *Three Dimensions of Divorce*, *supra* note 91 at 10.

experience of the Milwaukee Family Court is any indication, such representation can reduce the tension created by the two party custody dispute and at the same time assure adequate protection of the minor's rights. While undoubtedly a similar reduction of tension may occur as the court comes to place more reliance on the investigative report, such a procedure tends merely to shift the focus of the fact gathering process without really providing the protection the rights of the child may require. Neither the Report of the Governor's Commission nor the procedure of the Milwaukee Court require legal representation for all children in custody disputes. But both do advocate such when, from the circumstances, the court determines the best interests of the child cannot adequately be protected without such assistance.⁹⁵

Despite the failure of the custody proceeding to include legal representation for the child, such representation is provided for in related areas of California law. Section 679 of the Welfare and Institutions Code recognizes the right of a child in a juvenile court hearing to be represented by counsel. However, this does not include the right to have court appointed counsel except in cases involving refusal to obey parents or a violation of the law.⁹⁶ Civil Code section 237.5, which concerns freedom from parental control, authorizes "the court [to] appoint counsel to represent the minor whether or not the minor is able to afford counsel"⁹⁷ The tradition established by these provisions would seem to recognize that minors whose interests are subject to adjudication are entitled to the same protection of those interests as are adults of their own rights.

VIII. CONCLUSION

If the fundamental question in any custody proceeding is "what is for the best interests of the child," then, perhaps this same question should be put to those procedures by which that proceeding is conducted. Clearly the present use — if in large measure only formal — of the traditional two party adversary process is not adequate. Its inherent ambiguity becomes apparent when we observe the courts attempting to ascertain the wishes of the child without, at the same time, procedurally recognizing his right to be represented as a party to the action itself. One need not deny the rights of the parents to acknowledge the child's own independent interests vis-a-vis their own. Whatever rights our society may eventually choose to recognize as inherent rights of the child remain unclear. Yet the recognition

⁹⁵REPORT, *supra* note 1 at 42; Hansen, *Three Dimensions of Divorce*, *supra* note 91 at 10; *Wendland v. Wendland*, 29 Wis. 2d 145, 138 N.W.2d 185, 191 (1965).

⁹⁶CAL. WELF. & INST. CODE § 679 (West 1972).

⁹⁷CAL. CIV. CODE § 237.5 (West Supp. 1972).

afforded the wishes of the child by Civil Code section 4600 would appear to indicate fairly clearly that this right, at least, should be protected with all the safeguards usually afforded persons whose interests are the subject of adjudication.

The Governor's Commission, in making its recommendation for the statutory authorization of guardians *ad litem*, noted that the courts very likely already possessed the power to undertake such an action.⁹⁸ It was upon such an assumption that the Milwaukee Family Court first undertook its own substantial procedural reform.⁹⁹ Such a step now seems called for in California. The present procedures clearly do not insure that the wishes of the child are considered by the courts in a manner that adequately recognizes his independent rights as the person most directly affected by the adjudication. To do otherwise while preserving the form of the adversary proceeding will merely perpetuate the ambiguities in the present system. The now strengthened requirement that the child's wishes be considered would provide ample foundation for an aggressive court to appoint a guardian where from the circumstances of the case it was apparent no other procedure could adequately guarantee the protection of the minor's interests. Whatever the deficiencies of Civil Code section 4600, it does recognize that the child has at least this one right independent from those of his parents, and that right should be protected to the fullest extent possible under our legal system. This is not to say that the duties of the guardian *ad litem* would merely be to represent the wishes of the child. To the contrary, it would be his responsibility to see that the adversary process itself is not misused by the parents or their attorneys. They would be free to represent their own interests, but the interests of the child could be represented independently when this was called for. Thus, the wishes of the minor would be but one aspect — albeit an important one — of the guardian's concern. The weight given those wishes would be the product of many factors, not the least of which would be, as today, the age of the child. And certainly it would be a rare case where the child's wishes would be made the sole criteria for decision. Such a burden might prove too heavy to bear. The ultimate basis of decision should remain the best interests of the child. The modification of the present adversary process would only make the discovery of those best interests more easily attainable.

John Edward Hatherley

⁹⁸REPORT, *supra* note 1 at 42.

⁹⁹Hansen, *Three Dimensions of Divorce*, *supra* note 91 at 10.