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IN THE BEST INTERESTS OF THE CHILD: MANDATORY INDEPENDENT REPRESENTATION

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INTRODUCTION

Our justice system articulates reliance upon the best interests of the child standard when dealing with the child. This simple standard implies that the child is the focus of any decision making process which impacts upon the placement or welfare of the child. In application, however, courts appear to experience great difficulty with the application of the test, particularly because they must consider the competing interests of parents in custody and access conflicts, and the interest of the state, or its agencies, in child welfare matters. The focus of this Article is custody and access. Notwithstanding difficulties applying the best interest test, we are of the view that the test should remain the primary analytical tool used by courts in the determination of child custody and access cases. However, to ensure that the best interests of the child are met, independent representation for children should be made mandatory in all child custody cases.

Interest in the subject matter evolved as a result of an invitation to participate in the American Bar Association conference titled "Family Law and the 'Best Interest of the Child,' " held at Ripon College, Ripon, Wisconsin, April 11-14, 1991. The multi-discipline symposium focused on the issue of best serving the interests of the child. It became apparent during the four day conference that our institutions that were designed to serve the needs of the child often ignore that voice and fail to represent the child's best interests. This Article explores the history of the best interest test and its application within the justice system by first considering custody and access from a Canadian perspective, through Canadian statutes and jurisprudence and their respective application in Canadian courts, and second, considering similar developments in England and other common law jurisdictions, specifically making comparisons with the United States. The Article concludes with a discussion of the role of counsel for the child in custody disputes.

Upon examination of the inherent difficulties in applying the standard and the available alternatives, our conclusion is that in order to ensure that the best interests of the child are met, mandatory independent representation of the child is an essential safeguard and worthy of

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the resources necessary to implement such a program. Without independent representation, it is impossible to guarantee that the best interest test will be applied in such a manner as to protect the child's best interests.

I. THE BEST INTEREST TEST

A. *Early History*

The best interest test is relatively new to the common-law system. Until the last century in our society, the common-law regarded children as an economic asset which denied them legal identity and treated them as objects. Fathers had the prerogatives of ownership until children reached twenty-one years of age,[1] and only "extraordinary unfitness would deprive the father of his custodial right."[2] Through the vague doctrine of parens patriae, however, the Chancery Court did occasionally intervene to ameliorate a paternalistic common-law system.[3] The phrase "parens patriae" is used to describe the power of the court to act in loco parentis to protect the personal or the property interest of a child.[4]

> Under this "wardship" jurisdiction, the Court of Chancery assumed guardianship of the child. This power developed . . . from about the time of the Restoration of the Monarchy in 1660, when the Ancient Court of Wards was abolished . . . and for three centuries was used almost exclusively to protect the property and persons of infants. The power was not created by any statute and could not therefore . . . be affected, restricted or curtailed by any legislation unless that legislation [was] clearly directed to that power or purpose.[5]

In the old English case of *Shelley v. Westbrooke*,[6] the court exercised its parens patriae jurisdiction after considering whether a father was fit to exclusively make decisions on behalf of his children. The court stated:

> I consider this, therefore, as a case in which the father has demonstrated that he must, and does deem it to be [a] matter of duty which his principles impose upon him, to recommend to those whose opinions and habits he may take upon himself to form, that conduct in some of the most important relations of life, as moral and virtuous, which the law calls upon me to consider as immoral and vicious - conduct which the law animadverts upon as inconsistent with the duties of persons in such relations of life, and which it considers as injuriously af-

1. Tenures Abolition Act , 1660, 12 Car. II, ch. 24, (Eng.).
2. Harvey R. Sorkow, *Best Interests of the Child: By Whose Definition?* 18 PEPP. L. REV. 383, 384 (1991) (citing Shelley v. Westbrooke, 37 Eng. Rep. 850, 851 (1821)).
3. Greenspan v. Slate, 97 A.2d 390 (1953).
4. Monrad G. Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV., 167, 173.
5. OLIVE M. STONE, THE CHILD'S VOICE IN THE COURT OF LAW 123-24 (1982).
6. 37 Eng. Rep. 850 (1817).

> fecting both the interests of such persons and those of the community.
> I cannot, therefore, think that I should be justified in delivering over these children for their education exclusively, to what is called the care to which Mr. S. wishes it to be intrusted.[7]

Not until the 1839 enactment of the Custody of Infants Act[8] could a mother apply to the Court of Chancery, which "might, in its discretion, give her custody of her younger children . . . and access or visitation rights to all her minor children."[9]

The past century saw the demise of the common-law notion that the father should always have custody, and the emergence of the best interest test. In the United States, these opinions were first expressed by Justice Brewer,[10] and later by Justice Cardozo.[11] Assuming a mother was morally fit, this new standard resulted in an almost automatic preference for the mother with no meaningful inquiry into what would be in the best interest of the child.[12] What emerged was a shift in the proprietary interest in children from the father to the mother.[13] However, at the turn of the century in most common-law jurisdictions, legislation entrenched the rights of children expressed in the best interest test, though it was not until the last half of this century that the status of the child gained attention and courts gave children individual identity and attention as an independent person.

B. *Current Applications*

Legislation in most jurisdictions has entrenched the application of the best interest test. In Canada, the statutory basis for the test is found in the federal Divorce Act of 1985.[14] The Divorce Act has universal application in all of Canada when parties are dissolving a marriage and continues to apply to the status of children after the divorce judgment where custody and access are at issue. As well, each province has its own applicable legislation. Provincial legislation can be invoked where there is no divorce proceeding or in conjunction with a divorce action. In the Province of Ontario, for example, the Children's Law Reform Act[15] deals with custody and access. While both the federal Divorce Act and the provincial Children's Law Reform Act differ in some respects, they both provide guidance and parameters to the adjudication of custody matters, and require that the issue of custody and access be deter-

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7. *Id.* at 851.
8. Custody of Infants Act, 1839, 2 & 3 Vict., ch. 54 (Eng.).
9. *Id.* (custody was considered for children up to age 7 in 1839, and later extended to age 16 in 1873).
10. Chapsky v. Wood, 40 Am. Rep. 321 (1881).
11. Finlay v. Finlay, 148 N.E. 624 (1925).
12. Robert F. Drinan, *The Rights of Children in Modern American Family Law*, 2 J. FAM. L. 101 (1962).
13. HENRY H. FOSTER, JR., A "BILL OF RIGHTS" FOR CHILDREN 3-7 (1974).
14. Divorce Act of 1985, S.C., ch. 4 (1986) (Can.).
15. Children's Law Reform Act, R.S.O., ch. 152 (1980) (Can.).

mined in accordance with the best interests of the child.[16] Section 24(2) of the Children's Law Reform Act, however, is more directive and provides more statutory criteria than the federal Divorce Act which must be considered by a court in determining what constitutes the best interests of the child. The Act reads:

> In determining the best interests of a child for the purposes of an application or motion under this Part in respect of custody of or access to a child, a court shall consider all the child's needs and circumstances, including
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> (a) the love, affection and emotional ties between the child and,
>
> (i) each person seeking custody or access,
>
> (ii) other members of the child's family residing with him or her,
>
> (iii) persons involved in the child's care and upbringing,
>
> (b) the child's views and preferences, if they can be reasonably ascertained;
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> (c) the length of time the child has lived in a stable home environment;
>
> (d) the ability of each person seeking custody or access to act as a parent;
>
> (e) the ability and willingness of each parent seeking custody to provide the child with guidance, education and necessities of life and meet any special needs of the child;
>
> (f) any plans proposed for the child's care and upbringing;
>
> (g) the permanence and stability of the family unit with which it is proposed that the child will live; and
>
> (h) the relationship, by blood or through an adoption order, between the child and each person who is a party to the application or motion.[17]

Both the federal and provincial statutes, which are meant to achieve similar purposes, exemplify the differing approaches that the various provincial legislatures have taken.[18]

An examination of relevant case law leads to the conclusion that Canadian courts have difficulty in applying the applicable law and its best interests philosophy. In the Ontario Court of Appeals case of *Carter v. Brooks*,[19] the court considered the best interest test and how it remains the primary analytical tool used by contemporary courts when determin-

16. Compare Divorce Act at § 16(8) ("In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.") with Children's Law Reform Act at § 24(1) ("The merits of an application . . . in respect of custody of or access to a child shall be determined on the basis of the best interests of the child.").

17. Children's Law Reform Act at § 24(2).

18. *See* R.S.A., ch. D-37, Part 7 (1980) (Can.); R.S.B.C., ch. 121, sec. 24 (1979) (Can.); R.S.M., ch. 8, sec. 2(1) (1985-86) (Can.); S.N.B., ch. F-22, sec. 129 (1980) (Can.); NFLD. R.S., ch. 61 (1988) (Can.); R.S.N.S., ch. 160, sec. 18(5) (1989) (Can.); R.S.P.E.I., ch. C-33 (1988) (Can.); R.S.Q., ch. 39, sec. II, arts. 568-70 (1980) (Can.); S.S., ch. c-8.1, pt. II, sec. 8 (1990) (Can.).

19. 30 R.F.L.3d 53 (Ont. C.A. 1990).

ing custody. The court also discussed some of the difficulties courts face in their application of the test. The court stated:

> What guidance can be given for the application of the best interests of the child test? This area of the law is no different from many others where, in the application of a broad legal standard, what is desired is both predictability of result and justice to the parties based on the particular circumstances of the case. It is often difficult to ensure by "rules" that both objects are met. If the rules are too precise, it may be that important circumstances in some cases will be left out of account in applying the governing test, and justice will suffer. On the other hand, if there is [sic] not certain common understandings in how the issue is to be approached, the danger is one of undue subjectivity, with the consequence of reduced predictability. Having regard to the foregoing, I am satisfied that the best interest test cannot be implemented by the devising of a code of substantive rules, even if this could be done within the confines of a single case.[20]

In the British case of *J v. C*,[21] Lord MacDermott outlined his view of the statutes to be considered by a court applying the *best interests test*. He stated:

> Reading these words in their ordinary significance, and relating them to the various classes of proceedings which the section has already mentioned, it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed is that which is most in the interests of the child's welfare as that term is now to be understood. That is the first consideration because it is of the first importance in the paramount consideration because it rules upon and determines the course to be followed.[22]

It appears that the best interest test is a balancing and weighing of numerous factors that may impact upon the upbringing of the child. Consequently, this is an area of law where subjective views and feelings can and often do, exert subtle influences.

Author Kingsley Davis discussed the difficulty with the application of the best interest test and wrote that "[t]he welfare of the child rather than the claims of the parents is supposed to be the goal, but what is 'welfare' to one Judge is apt to differ from what is welfare to another."[23] Professor Adrian Bradbrook later discussed the Ontario Court's application of the best interest test, and compared the similarities between On-

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20. *Id.* at 61.

21. 1 All E.R. 788 (1969).

22. *Id.* at 820-21.

23. Kingsley Davis, *Sociologic and Statistical Analysis*, 10 LAW & CONTEMP. PROBS. 700, 706 (1944).

tario's application of custody law with the findings of Kingsley Davis' similar Pennsylvania study twenty-seven years earlier.[24] Professor Bradbrook writes:

> There is no area of law over which the Judge has a wider discretion than child custody adjudication. . . . In view of the disparity of opinions expressed by the judges in almost every topic discussed in the study, it would seem that the findings of the 1943 Pennsylvania study, that there are no universally applicable principles in custody disputes, still apply today . . . in Pennsylvania there was an almost complete lack of crystallized opinion regarding custody. The judges needed to use rough and vague rules of thumb in making their decisions and believed that general principles were inapplicable because of the different fact-situation in each case. Although the majority of the judges relied to some extent on the advice of social work agencies, only twenty-five percent admitted that they were influenced by changing customs and social values when formulating their judgments.[25]

It is submitted that in the twenty years following Professor Bradbook's article, and despite clearly defined statutory guidelines, common-law courts continue to grapple with the application of the best interest test in the determination of child custody and access.

II. Analysis of Experience With the Best Interest Test

A. *Inherent Difficulties*

In presenting the issues that impact the child, a parent's position is not only opposing, but also subjective. In *Ford v. Ford*,[26] the United States Supreme Court considered the application of the best interest test and the inherent problems in relying on bitter and acrimonious parents to adequately represent their children during the custody proceeding. The Court found "experience has shown that the question of custody, so vital to a child's happiness and well being, frequently cannot be left to the discretion of parents. This is particularly true where . . . the estrangement of husband and wife beclouds parental judgment with emotion and prejudice."[27]

Canadian authors Philip Epstein and Susanne Goodman find that the central issue in child custody disputes is determining what type of evidence must be presented to enable the presiding judge to objectively ascertain the best interests of the child.[28] In addressing custody and access issues, the authors write:

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24. Adrian 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*, 49 Can. B. Rev. 557 (1971).

25. *Id.* at 571.

26. 371 U.S. 187 (1962).

27. *Id.* at 193. *See also* Donald N. Bersoff, *Representation for Children in Custody Decisions: All that Glitters is not Gault*, 15 J. Fam. L. 27 (1976-77).

28. Philip Epstein & Susanne Goodman, *Custody and Access*, *in* Family Law Reference Materials, ch.4, 1 (Law Society of Upper Canada 1991).

> It is clear from the opening words of § 24(2) [of the Ontario Legislation] that the enumerated criteria are not to be viewed as exhaustive. Also evident from this section is that the paramount consideration in a custody dispute is the best interests of the child. Accordingly, the object of the proceeding is to place the child, rather than the persons applying for custody, at the crux of the decision. Due to the inherently adversarial nature of a court proceeding, coupled with the emotional anxiety which is part and parcel of a custody dispute, the central focus is often misplaced. As was stated by Mr. Justice Bayda in *Wakaluk v. Wakaluk* (1976), 25 R.F.L. 292 (Sask. C.A.), at 292-293:
>
> > The issue of custody is without doubt the most important one — and was so treated by counsel at the hearing of this appeal — and the most troublesome. While at the hearing of the appeal the parties concentrated their attention on this issue, they were not so mindful at the hearing of the petition, even though the issue was far from settled. From the standpoint of custody, the meaning of the petition was, in my respectful view, quite unsatisfactory. Virtually no evidence was directed to this issue. The parties primarily concerned themselves with adducing evidence to show whether, on the basis of the many material battles engaged in by them, one or the other of them should be favoured by the trial judge in his determination of the issue of cruelty.
> >
> > No one bothered to bring forward much information in respect of the two individuals who of all the persons likely to be affected by these proceedings least deserved to be ignored — the children.[29]

Child psychiatrist Dr. Richard Gardner studied the effects of custody litigation on parties and concludes from his research that parents may not be capable of the objectivity required to represent the best interests of their child during a custody dispute.[30] Dr. Gardner writes:

> People involved in custody litigation are fighting. They are fighting for their most treasured possessions — their children. The stakes are extremely high. Litigation over money, property, and other matters associated with the divorce produce strong feelings of resentment and anger. However, they are less likely to result in reactions of rage and fury than are conflicts over the children. Children are the extensions of ourselves, our hopes for the future, and thereby closely tied up with our own identities. Fighting for them is almost like fighting for ourselves. The two may become indistinguishable, and the fight becomes a 'fight for life.'[31]

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29. *Id.* at 4-8.

30. RICHARD GARDNER, CHILD CUSTODY LITIGATION - A GUIDE FOR PARENTS AND MENTAL HEALTH PROFESSIONALS (1986).

31. *Id.* at 19.

Custody hearings are wrought with underlying hostility and conflicting opinions and attitudes regarding the child's best interests. When considered logically, the only reason courts are involved is because of the parents' inability to agree on what is in the child's best interest.

B. *Alternatives*

Many writers have criticized the best interest test in child custody proceedings and have argued for a more defined and easily applied test. Professor Martha A. Fineman argues that there are viable and perhaps preferable alternatives to the best interest test.[32] Professor Fineman recommends a test that is not dependent on the weighing of parental attributes, but one that boldly prioritizes the most significant factors to be considered by courts when determining child custody. In her article, Professor Fineman discusses what she considers to be the amorphous, undirected, incomprehensible and indeterminable subjective standard that has evolved in custody matters as a result of the best interest test, and argues in favour of courts alternatively applying a "primary-caretaker" rule.[33] With respect to the "primary-caretaker" rule, Professor Fineman states:

> This rule has been characterized in different ways, but the essence of the primary-caretaker standard is that children need day-to-day care, and that the parent who has performed this primary care during the marriage should get custody. . . . The primary-caretaker rule implicitly recognizes that no expert can confidently make the predictions required under the future-oriented best-interest placement, and that past behaviour may in fact be the best indication we have of commitment to the future care and concern for children.[34]

Professor Fineman's approach may be distinguished from the general judicial application of the best interest test in that it may be a more intellectually honest approach and more objective in its application as between the parties, and not as dependent upon the norms and values of a particular judge or the presentation by parents' counsel. In fact, when the courts apply the best interests standard, are they not in fact addressing who is best able to provide the child with day-to-day care? There is no doubt that a better test could assist the courts in awarding custody in a more consistent and seemingly less arbitrary manner. A test where

32. Martha A. Fineman, *The Politics of Custody and the Transformation of American Custody Decision Making*, 22 U.C. DAVIS L. REV. 829 (1989).

33. *Id.* at 835 n.19 ("The best interest of the child test involves a comparative balancing of the strengths and weaknesses of the parents. Factors such as health, wealth, education, and moral conduct have all been considered. The test is indeterminate and easily manipulated by judges and lawyers. Appellate review is rare since it is very fact specific and the trial judge has wide discretion to conclude which parent will act in the child's interest."). *See also* Jon Elster, *Solomonic Judgments: Against the Best interest of the Child*, 54 U. CHI. L. REV. 1 (1987).

34. MARTHA A. FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 181 (1991).

prior to trial, the parties could know more precisely on what factors the court will place emphasis could also result in more out of court settlements of custody and access issues. Professor Fineman's approach, however, has the inherent danger of ignoring the child.

Professor David L. Chambers also perceives difficulties in the application of the best interest test.[35] Professor Chambers writes:

> The current approach states use for resolving custody disputes in divorce — a case-by-case inquiry into the best interests of the child — has many flaws. One has been that neither legislatures nor custom has provided judges with a coherent framework for thinking about what children's interests are. A second, equally serious, has been the inability of judges to make accurate determinations, under the circumstances prevailing in the context of litigation, of the quality of most individual children's relationships with their parents or of the parents' skill at childrearing. . . . Because of the many ways in which court determinations under the current rules are likely to be unreliable, if there is a sound basis for believing that any general rule will produce better outcomes than a random assignment, such a rule has a plausible foundation.[36]

Professor Chambers concludes, however, by stating that despite numerous criticisms of the best interest test, that it should remain the primary analytical tool used by courts in the determination of child custody disputes.[37]

III. MANDATORY INDEPENDENT REPRESENTATION: A NECESSARY SAFEGUARD

We are of the view that the best interest standard is still the best test to be applied in contested child custody and access cases, and that a child's best interests can be properly considered by a court if the child is independently represented by a child advocate or comparable legal counsel. We are of the view that independent representation is essential to ensure that the trier of fact is provided with all the salient information necessary to canvass and consider the issue of child custody. Independent counsel can also ensure that the child's rights are vigorously advocated and defended. Authors Goldstein, Freud and Solnit, however, express concerns about encouraging state involvement in the resolution of "private" domestic disputes.[38] The authors do, however, acknowl-

35. David L. Chambers, *Rethinking The Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984).

36. *Id.* at 558-59.

37. *Id.* at 559 ("Having completed the review, I now believe that no new or revived presumptions based on gender or primary-caretaker status can meet this standard on the basis of the existing empirical studies standing alone. There is simply not enough hard evidence that children in general are better off with women, primary-caretakers, or the parent of same sex than with the opposite parent. However, the state of evidence with regard to the three factors is not identical, and one of them, primary-caretaker status, may still warrant some sort of preference, when developmental theory and practical values that a preference — serve are taken into account.").

38. JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD (1979).

edge the need for intervention by the state to protect the best interests of the child in contested custody disputes:

> In divorce and separation proceedings, the imposition of counsel under this ground is justified only if the parents are unable to decide custody on their own—that is, if they ask the court to decide. By failing to agree on a disposition, separating parents waive their claim to parental autonomy and thereby their right to be the exclusive representatives of their child's interests. The child then requires representation independent of his parents' to assure that his interests are treated as paramount in determining who shall have custody.[39]

Independent representation is premised on a growing recognition that children have interests and rights that need to be considered distinctly and separately from those of adults, particularly their parents. Independent representation allows for the identification of the rights and needs of the child. A policy whereby children would be universally entitled to, and represented by their own counsel will ensure that the child's needs are given the priority the best interest test assumes it does. The authors of one study wrote:

> [W]ithout separate representation for the child, the court may neglect important interests of the child in both the outcome and the process of the proceeding. Because the best interests standard is a general principle or statement of values rather than a precise test, it has been criticized for providing "no indication of the degree of attention paid to the child's needs" in application, for reducing judicial opinions to "amorphous platitudes or generalizations," and for leaving the custody decision essentially indeterminate.[40]

Former Chief Judge Andrews of the Ontario Provincial Court's Family Division, and Pasquale Gelsomino write in their article:

> Traditionally, the courts have been satisfied the children's interests were adequately represented by the adult parties. In recent years, however, children have been increasingly recognized as individual persons, with views, preferences and interests distinct from those of their parents, guardians and child protection agencies.[41]

It is submitted that the best interest test, as it is currently applied, makes the court dependant upon the feuding parents' counsel to adduce and present all the information necessary to make an informed decision with regard to the custody of the child. Consequently, a court's decision in any proceeding where a child in a contested custody hearing has not been represented by independent counsel, should be suspect. Furthermore, a lawyer with a professional obligation to an adult client will not

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39. *Id.* at 115.

40. Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1135 (1977-78) (citations omitted).

41. H. Andrews & Pasquale Gelsomino, *Legal Representation of Children in Custody and Protection Proceedings: A Comparative View*, *in* FAMILY LAW: DIMENSIONS OF JUSTICE 141, 141 (Rosalie S. Abella & Claire L'Heureux-Dube eds., 1983)).

present evidence that is relevant to the child's best interests where that evidence is damaging to the adult's case. As well, if counsel is expected to represent the parent's and child's best interest, ethical and professional dilemmas will arise by having to prioritize conflicting interests. There is also a real danger that if parents are not cross-examined by the independent counsel representing the child, that the intentions and integrity of each parent's testimony will not be adequately challenged, or at the very least not adequately examined through the eyes of the child. Where a child is not independently represented, the cumulative effect is that the court may be making decisions without truly addressing the child's best interest.[42]

Some would also argue that court appointed mental health professionals are capable of presenting all the necessary information and evidence pertaining to the child's best interests. It is our view that while mental health professionals play a crucial role in assisting the court in child custody disputes, they are not adequate replacements for a child being represented by independent legal counsel. Legal counsel, unlike mental health professionals, are able to participate in all aspects of the proceeding, including negotiations between parents' counsel. A child's independent counsel is also able to actively participate in the trial and ensure that the focus of the trial remains in the best interests of the child.

Appointing independent legal counsel to represent the child will also "assure that one voice will be raised in sole representation of the best interests of the minor child."[43] Professor Kerin S. Bischoff discusses the potential dangers of a system in which the appointment of independent representation is not mandatory, particularly in custody cases where child sexual abuse has been alleged.[44] The advocate for the child, rather than the trial judge or parents' counsel, is in the best position to determine whether the child's circumstances have been fully litigated.[45] Bischoff concludes that absent this vigorous independent representation, the record available for the trial judge will be "woefully incomplete,"[46] and that such representation should be mandatory in all custody proceedings.

In 1974, the Law Reform Commission of Canada issued a report challenging the long held belief that a child's interests in a custody matter would be adequately protected by the child's parents.[47] The Com-

42. *See supra* text accompanying note 40. "[T]he judge is not well placed to reduce the rancor of the proceedings, and is restricted to the courtroom and cannot on his own obtain the facts pertaining particularly to the child's viewpoint." *Id.* at 1136.

43. Clark v. Clark, 358 N.W. 2d 438, 441 (Minn. Ct. App. 1984).

44. Kerin S. Bischoff, *The Voice of the Child: Independent Legal Representation of Children in Private Custody Disputes When Sexual Abuse is Alleged*, 138 U. PA. L. REV. 1383, 1390 (1990).

45. *Id.* at 1390-91.

46. *Id.* at 1391.

47. LAW REFORM COMMISSION OF CANADA, WORKING PAPER NO. 1 - THE FAMILY COURT 40-41 (1974) (where the right or interest of a child is directly or indirectly affected by the court proceeding, it is not enough to rely on the judge, the parents, or the parents' counsel to act as an advocate of the child). *See also* ONTARIO LAW REFORM COMMISSION REPORT

mission's report provoked a number of Canadian provinces to legislate certain recommendations embodied in the report and to begin considering the need for children to be independently represented, particularly in acrimonious custody proceedings where the court could not confidently conclude that the parties would present all the evidence relevant to the best interests of the child. Ontario's 1984 Court of Justice Act, for example, makes provision for minors to be represented by the Ontario government's Official Guardian.[48]

In the Saskatchewan case of *McKercher v. McKercher*,[49] the Court of Queen's Bench shied away from the normative attitude that the interests of children always coincide with those of the parents, and that parents always act in the best interests of their children.[50] The Saskatchewan court's decision in *McKercher* reflected a growing recognition of the fact that a child has interests, wishes and needs which conflict with those of his or her parents. Despite resistance from the Official Guardian, whose role had until then been limited to protecting the child's property interests, the court ordered that the child be represented by independent counsel.[51]

Legislation governing custody and access in most Canadian provinces now provides for appointment of independent counsel for children at the court's discretion. The Canadian Law Reform Commission's recommendation that a child be represented in all custody proceedings, however, has yet to be adopted in full by any Canadian court or legislature. The prevailing attitude apparently remains to be that a child's interests and needs will be protected by his or her parents unless the court determines otherwise.

Some countries and jurisdictions take a more active role in seeing that the child's interests are independently represented. The Australian Family Law Act governs the appointment of independent legal counsel for children in custody disputes and makes specific provisions for a child's separate representation.[52] However, similarly to the statutes in most North American jurisdictions, the Australian act lays down no guidelines indicating when the court should appoint independent counsel to represent the child, nor does it absolutely require appointment. Section 65 of the Australian act provides:

> Where, in proceedings with respect to the custody, guardianship or maintenance of, or access to, a child of a marriage, it appears to the court that the child ought to be separately represented, the court may, of its own motion, or on the application

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ON FAMILY LAW, PART III - CHILDREN 124 (1973) (discussing the child's right to be independently represented by counsel).

48. Court of Justice Act, S.O., ch. 11, § 102 (1984) (Can.).

49. 2 W.W.R. 268 (Sask. Q.B. 1974).

50. *Id.* at 270.

51. *Id.* A case comment on *McKercher* notes it is reasonable to assume that independent counsel is the most viable method of representing the child, given that other techniques have proven their own inadequacies and no viable alternative has yet presented itself. Ron W. Hewitt, *Case Comments*, 42 SASK. L. REV. 295, 297 (1977-78).

52. Family Law Act, No. 53, § 65 (1975) (Austl.).

> of the child or of an organization concerned with the welfare of children or of any other person, order that the child be separately represented, and the court may make such other orders as it thinks necessary for the purpose of securing such separate representation.[53]

In the United States, while the majority of states have enabling legislation authorizing courts to appoint independent representation, only Wisconsin[54] and New Hampshire[55] currently mandate independent representation of children in custody proceedings. Legal scholars widely applaud the Wisconsin approach, stating:

> Wisconsin moved to the forefront of developing child custody law by recognizing the complex aspects of custody disputes. Wisconsin realized that courts may be incapable of protecting and advancing the child's best interests because a court must "evaluate evidence which is offered by the parents within a highly volatile and emotional atmosphere."[56]

The evolution of Wisconsin's child custody law can be traced to the Wisconsin Supreme Court's *Wendland v. Wendland*[57] decision. In *Wendland*, the court discussed why independent legal representation for children, in certain circumstances, was crucial to ensure that the court's decision reflected what was in the best interests of the child. Justice Wilkie stated:

> The appointment of a guardian *ad litem* to represent the interests of children who are the subject of a custody fight in a divorce proceeding is a step that the trial court should take only in an extraordinary situation where the trial court believes that what may be in the best interests of the children may not be brought out by the two contesting parties. . . . Where there have been instances of immoral misconduct on the part of one (or both) parties and where the court is concerned over the effect of such misconduct on minor children, the court, in its capacity as a family court, recognizing that "children involved in a divorce are always disadvantaged parties," may well take additional affirmative steps to protect the welfare of the children. . . . Where there is a hotly contested dispute, and the court is satisfied that the procedure of relying on the two parties and the investigation of a welfare agency may not produce all the important evidence that the court should consider in looking after the best interests of the children, a guardian *ad litem* should be appointed. Inevitably this will add to the expense of the divorce proceedings. But such expense will be re-

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53. *Id.*

54. WIS. STAT. § 767.045 (1991).

55. N.H. REV. STAT. ANN. § 458:17-a (1989).

56. Brenda M. Flock, *Custody Disputes Arising From Divorce: The Child's Need For Counsel In Pennsylvania*, 87 DICK. L. REV. 351, 354 (1983); *see also* Tari Eitzen, *A Child's Right To Independent Legal Representation in a Custody Dispute: A Unique Legal Situation, A Necessarily Broad Standard, The Child's Constitutional Rights, The Role of the Attorney whose Client is the Child*, 19 FAM. L.Q. 1, 53 (1985).

57. 138 N.W.2d 185 (1965).

warding if the interests of the children are better served.[58]

While the court in *Wendland* clearly stated that the discretion to appoint independent legal counsel should be exercised in only limited circumstances, the same court held ten years later that children are "indispensable parties to the proceedings," and stressed the need for children to be independently represented in any custody proceeding.[59] It is submitted that Wisconsin's legislation is an excellent basis upon which to model similar legislation in Canada, and for this reason the germane sections of the Wisconsin statute are worthy of note:

> (1) APPOINTMENT (a) The Court shall appoint a guardian ad litem for a minor child in any action affecting the family if any of the following conditions exists:
>
> 1. The court has reason for special concern as to the welfare of a minor child.
> 2. The legal custody or physical placement of the child is contested.
>
> . . .
>
> (4) RESPONSIBILITIES. The guardian ad litem shall be an advocate for the best interests of a minor child as to legal custody, physical placement and support. The guardian ad litem shall function independently, in the same manner as an attorney for a party to the action, and shall consider, but shall not be bound by, the wishes of the minor child or the positions of others as to the best interest of the minor child. The guardian ad litem shall consider the factors under s. 767.24(5) and custody studies under s. 767.11(14). The guardian ad litem shall review and comment to the court on any mediation agreements and stipulation made under s. 767.11(12). Unless the child otherwise requests, the guardian ad litem shall communicate to the court the wishes of the child as to the child's legal custody or physical placement under s. 767.24(5)(b). The guardian ad litem has none of the rights or duties of a general guardian.
>
> . . .
>
> (6) FEES. The guardian ad litem shall be compensated at a rate that the court shall determine is reasonable. The court shall order either or both parties to pay all or any part of the fee of the guardian ad litem. In addition, upon motion by the guardian ad litem, the court shall order either or both parties to pay the fee for an expert witness used by the guardian ad litem, if the guardian ad litem shows that the use of the expert is necessary to assist the guardian ad litem in performing his or her functions or duties under this chapter. If either or both parties are unable to pay, the court may direct that the county of venue pay the fees, in whole or in part, and may direct that any or all parties reimburse the county, in whole or in part, for the payment.

58. *Id.* at 191 (citations omitted).

59. Montigny v. Montigny, 233 N.W.2d 463, 468 (Wisc. 1975). One author argues that even in the absence of statutes mandating consideration of the child's wishes, judges who fail to elicit or who totally ignore children's custodial preferences are increasingly likely to have their custody orders reversed on appeal. Howard A. Davidson, *The Child's Right to be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255, 270 (1991).

> The court may order a separate judgment for the amount of the reimbursement in favour of the county and against the party or parties responsible for the reimbursement. The court may enforce its orders under this subsection by means of its contempt power.[60]

Wisconsin's legislation clearly articulates the need for children to be independently represented in contested custody matters and ensures that the focus of any proceeding remains where the enabling legislation meant it to be - on the best interests of the child.

IV. ROLE OF COUNSEL FOR THE CHILD

Although the role of counsel for the child is to express the child's point of view, in court, counsel for the child plays a unique role in contested custody dispute resolutions. Dan L. Goldberg, counsel for the Office of the Official Guardian in Ontario, Canada wrote:

> Unless an assessment has been conducted it is likely that counsel (and possibly his/her social worker) are the only person(s) to have met all the key people. If we have done a thorough job of preparation and appropriately express our knowledge the Official Guardian counsel should be cloaked with a high degree of credibility with the parties and their lawyers when we hold a settlement meeting.
>
> Given our previous interviews we will, hopefully be able to know the difficult issues and those that are capable of easier resolution. By continually emphasizing the benefits to their child of an amicable resolution to the dispute as well as the high cost of litigation the parties' focus often begins to move from antagonism with each other to a greater willingness to compromise.[61]

Because child custody trials have the potential for having a debilitating effect on all the parties involved, it is of the utmost importance that negotiation and settlement are encouraged. Dr. Richard Gardner adds that litigation should be avoided due to its devastating impact on the respective parents and children involved.[62] Dr. Gardner writes:

> The adversary system, which professes to help parents resolve their differences, is likely to intensify the hostilities that it claims it is designed to reduce. It provides the litigants with ammunition that they may not have realized they possessed. It contributes to an ever-increasing vicious cycle of vengeance — so much so that the litigation may bring about more psychological damage than the pains and grief of the marriage that originally brought about the divorce.[63]

Independent legal counsel for the child in custody disputes is in a better position to foster out of court settlements because he or she is in

60. WIS. STAT. § 767.045 (1991).

61. Dan L. Goldberg, *Representing Children in Custody and Access Proceedings in Ontario*, CAN. B. ASS'N INST. C.L.E. 37 (1989).

62. GARDNER, *supra* note 30.

63. *Id.* at 19.

a unique position that enables them to shift the focus of the dispute from the feuding parents to the needs of the child. Counsel for the child is also in a better position to assess the chances of success at trial. At a preliminary stage, independent counsel can also assist in forcing parents to seriously consider alternatives to a prolonged and difficult trial, bearing in mind the needs of the child.

In *Leatherdale v. Leatherdale*,[64] the Supreme Court of Canada discussed the need, and even responsibility of legislatures, courts and the bar to develop more easily applied and understandable tests in family law matters. Mr. Justice Estey wrote:

> Family law, more than any other branch of the law, must provide, where it is possible, simple and clear rules which readily lend themselves to expeditious application in the trial courts. Litigation over family matters is never economic, always a heavy expense and a painful experience. The simpler the rules, the easier their application by the courts; and even more importantly, the more readily applied by the legal advisors to the members of the family who must always strive to settle differences without recourse to the delays, expense and pain of court proceedings.[65]

Independent counsel for the child may not necessarily simplify the case, but the role of counsel for the child should be to attempt to settle differences from the child's point of view, without litigation if possible. As well, if parents are confronted with the additional burden of paying the legal fees of counsel representing their child, as they would be under the Wisconsin legislation for example, parents will be more likely to evaluate their chances of success before the beginning of a long trial in order to minimize the risk of having to pay additional fees to legal counsel who represented their child.

V. CONCLUSION

We support the best interest test because it is simple and clear. Application of the standard, however, begs the question, in whose best interest? We must ensure that the child remains central to the test. Professor Foster's summary targets the denial of due process and the failure to regard children as persons with rights, as the result of not providing a child independent legal counsel. Professor Foster writes:

> Children do have a right to childhood but it must be recognized that childhood is preliminary to adolescence and eventual adulthood and moreover, it is the most crucial period in human development. It is also obvious that much depends upon one's definition of "childhood" . . . . But there are certain fundamentals that are constant, such as the interest in having independent counsel whenever the placement of a child is at stake, and the right to fair treatment from all those who are in authority.[66]

64. 2 S.C.R. 743 (1982).
65. *Id.* at 772-73.
66. *Supra* note 13, at 3-7.

Children should therefore have independent counsel whenever their interest is in issue. This recommendation ensures that the best interest of the child is met and is made within the context of the legal and adversarial system, which we believe is here to stay. Given this adversarial system, independent representation is essential if the child's voice is to be heard. Although most legislation affords the child access to independent counsel, statutes do not go far enough to mandate representation. In the administration of justice, if the best interest of the child is to be served, then the child must be heard and must have legal status where placement or welfare is in issue. Counsel for the child should be afforded full status throughout the matter as if the child were a party to the proceeding.[67] The Law Reform Commission made its recommendation for independent representation for the child in 1974.[68] Professor Foster made his plea some eighteen years ago.[69] The legal community has come a small distance, but a great distance remains to ensure that the legal system serves the best interests of the child.

67. Reid v. Reid, 11 O.R.2d 622, 630 (Ont. H.C.J. 1975).
68. *See supra* text accompanying note 47.
69. *See supra* text accompanying notes 13 & 68.