Golden Gate University Law Review

Volume 25
Issue 3 *Women's Law Forum*

Article 3

January 1995

Judicial Discretion is Insufficient: Minors' Due Process Right to Participate with Counsel when Divorce Custody Disputes Involve Allegations of Child Abuse

David Peterson

COMMENT

JUDICIAL DISCRETION IS INSUFFICIENT: MINORS' DUE PROCESS RIGHT TO PARTICIPATE WITH COUNSEL WHEN DIVORCE CUSTODY DISPUTES INVOLVE ALLEGATIONS OF CHILD ABUSE

I. INTRODUCTION

In divorce proceedings, the parental custody decision must reflect the best interests of the child.[1] Both the court and the parents have an obligation to act in the child's interests.[2] Ideally, the parents cooperate and the child need not participate in the action.[3] However, in contested custody proceedings,

---

1. *See, e.g.,* ALASKA STAT. § 25.20.090 (1991). Various factors considered in awarding custody include the child's preference, the stability of the home environment likely to be offered by each parent, and any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents. *See id.*

2. *See* Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925), where Judge Cardozo expressed the basis for custody decisions: "The Chancellor in exercising his jurisdiction upon petition does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against . . . anyone. He acts as *parens patriae* to do what is best for the interests of the child." *Id. But see* Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 835 n.36 (1977) (acknowledging that "judges . . . may find it difficult, in utilizing vague standards like 'the best interests of the child,' to avoid decisions resting on [their] subjective values"); Emile R. Kruzick & David H. Zemans, *In the Best Interests of the Child: Mandatory Independent Representation*, 69 DEN. U.L. REV. 605, 606 (1992) (concluding that the best interest test cannot be determined without independent representation for the child); Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 303 (1988) (noting that the best interests of the child standard reflects societal judgments rather than individualized fact-finding into the child's relationships).

3. *See In re* William T., 218 Cal. Rptr. 420, 424 (Ct. App. 1985), where the

parental cooperation can deteriorate, and the court must struggle to determine the child's best interests.[4] Counsel for the parents cannot represent both the child's best interests and the interests of their clients when those interests are divergent.[5] Thus, the judge must perform the passive role of arbiter between the parents and, at the same time, protect the child's interests under the doctrine of *parens patriae*.[6] To ensure that the child's interests receive priority in the midst of other competing interests, courts have discretion to appoint an independent representative for the child.[7]

Many commentators argue that the fundamental fairness of due process requires appointment of counsel for the child in all contested custody cases.[8] These commentators believe that

---

court noted that in most custody proceedings, the child depends upon others to represent her best interests. The child is normally not a party to the action, which is viewed as a civil action determining the right of parents. *Id.* A dependency proceeding adds the interest of the state, as the guardian for the child. *Id.*

4. *See* JUDGE BERNARD BOTEIN, TRIAL JUDGE 273 (1952) (commenting that "[a] judge agonizes more about reaching the right result in a contested custody issue than about any other type of decision he renders"); *see also* Flores v. Flores, 598 P.2d 893, 896 (Alaska 1979) (finding that "the crucial determination of what will be best for the child can be an exceedingly difficult one as it requires a delicate process of balancing many complex and competing considerations that are unique to every case"); Jessica Pearson & Maria A. Luchesi Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. L. 703, 722-23 (1982-83) (citing judges' statements that the importance and the unavailability of facts makes custody determinations troublesome); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 229 (1975) (stating that "the determination of what is 'best' . . . for a particular child is usually indeterminate and speculative").

5. Maurice K. C. Wilcox, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings*, 27 HASTINGS L.J. 917, 924 (1976) (emphasizing that the parent's attorney has a duty to his client to minimize the effect of evidence of parental unfitness, even when this conflicts with the best interests of the child).

6. *Id.* at 921. "*Parens Patriae*, literally 'parent of the country,' refers traditionally to the role of the state as sovereign and guardian of persons under a legal disability to act for themselves such as juveniles, the insane, or the unknown." West Virginia v. Charles Pfizer & Co., 440 F.2d 1079, 1089 (2d Cir. 1971).

7. *See* Judge Robert W. Hansen, *Guardians Ad Litem in Divorce and Custody Cases: Protection of the Child's Interests*, 4 J. FAM. L. 181, 183 (1964) (relying on the "inherent power of the court to implement . . . concern for the welfare of the child" through the power of appointment).

8. *See, e.g.*, Howard Davidson, *The Child's Right to be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255 (1991); James K. Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 564 (1976); Judge Robert W.

the circumstances surrounding contested custody disputes lead to inadequate proceedings when a single voice does not speak solely for the child.[9] This rationale is even stronger when allegations of child abuse are present.[10]

This comment will illustrate how allegations of child abuse[11] in a divorce custody dispute[12] dramatically alter the presumption that the child's interests are well represented. Therefore, appointment of counsel for the child becomes necessary. The author first summarizes current state laws which address this issue[13] and discusses the factors which cause discretionary appointment to fail.[14] Next, the author demonstrates the trend of appellate court decisions and state laws toward mandatory appointment of counsel when abuse is alleged.[15] The author then argues that mandatory appointment

---

Hansen, *Guardians Ad Litem in Divorce and Custody Cases: Protection of the Child's Interests*, 4 J. FAM. L. 181 (1964) (discussing the appointment of an attorney guardian by Wisconsin judicial decree in every case with disputed custody or concern for the child's welfare); Monroe L. Inker & Charlotte A. Perretta, *A Child's Right to Counsel in Custody Cases*, 5 FAM. L.Q. 108 (1971); Paul K. Milmed, *Due Process for Children: A Right to Counsel in Custody Proceedings*, 4 N.Y.U. REV. L. & SOC. CHANGE 177 (1974); Ralph J. Podell, *The "Why" Behind Appointing Guardians Ad Litem for Children in Divorce Proceedings*, 57 MARQ. L. REV. 103 (1973); Maurice K. C. Wilcox, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings*, 27 HASTINGS L.J. 917 (1976).

9. *See In re* Marriage of Rolfe, 699 P.2d 79, 86 (Mont. 1985), where the court observed that the child custody dispute presents a "unique situation because the child, although not a party to the action, is the person most affected by the action." The child lacks maturity to either determine or represent her own best interests. *Id.*

10. *See* 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, 1388 (1990).

11. Child abuse is typically defined by statute as "inflicting or causing physical or mental injury, harm or imminent danger to the physical or mental health or welfare of a child other than by accidental means, including abandonment, excessive or unreasonable corporal punishment, malnutrition or substantial risk thereof by reason of intentional or unintentional neglect, and the commission or allowing the commission of a sexual offense against a child as defined by law . . . ." WYO. STAT. § 14-3-202(ii) (1994).

12. Most allegations of abuse in custody disputes involve sexual abuse and about half of the sexual abuse allegations involve the child's father. Nancy Thoennes & Jessica Pearson, *Summary of Findings from the Sexual Abuse Allegations Project*, SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES 20, 21 (1988).

13. *See infra* notes 18-22 and accompanying text.

14. *See infra* notes 23-77 and accompanying text.

15. *See infra* notes 78-100 and accompanying text.

is necessitated by due process balancing of the child's and the government's interest.[16] Finally, the author highlights a custody proceeding's similarity to dependency and termination proceedings where representation is guaranteed.[17]

II. CURRENT TREATMENT OF CHILD ABUSE ALLEGATIONS

Presently, only one state requires appointment of a representative for the child in all disputed custody cases.[18] Four states have determined that allegations of child abuse or neglect always require appointment of a child's representative.[19] Most other states permit the appointment of a guardian *ad litem*[20] or counsel for the child at the discretion of the court.[21] Nevertheless, for various reasons, judges rarely decide

16. *See infra* notes 101-50 and accompanying text.

17. *See infra* notes 151-59 and accompanying text.

18. WIS. STAT. ANN. § 767.045 (West Supp. 1994) (providing for appointment of a guardian *ad litem* in all contested custody cases and when "the court has special concern as to the welfare of the child"). The guardian functions in the same manner as a party to the action. *Id.*; *see also* N.H. REV. STAT. ANN. § 458:17(II)(b) (Supp. 1994), which was modified from mandatory to discretionary appointment.

19. MO. ANN. STAT. § 452.423 (Vernon Supp. 1994) (requiring appointment of a "guardian ad litem in any proceeding in which abuse or neglect is alleged"); FLA. STAT. ANN. § 415.508 (West 1993) (requiring appointment at the earliest possible time in any child abuse or neglect proceeding); MINN. STAT. ANN. § 518.165(2) (West 1990) (requiring appointment of a guardian *ad litem* in all custody or visitation proceedings "if the court has reason to believe that the minor child is a victim of domestic violence or neglect"). Connecticut requires appointment by judicial precedent. *See infra* notes 80-85 and accompanying text.

20. This Comment does not discuss the differences between counsel and the position of guardian *ad litem*, which has many variations in different states from an attorney having the full rights of counsel to a lay person, filing a report but having no investigative duties.

21. *See, e.g.*, CAL. FAM. CODE § 3150(a) (West 1994) (providing for appointment of private counsel upon court finding that appointment would be in child's best interests); CONN. GEN. STAT. § 46b-54 (1986) (allowing for appointment of counsel); D.C. CODE ANN. § 16-918(b) (1989) (providing for appointment of an attorney); HAW. REV. STAT. § 571-46(8) (Supp. 1992) (providing for appointment of guardian *ad litem*); MASS. GEN. LAWS ANN. ch. 215, § 56A (West 1989) (providing for appointment of guardian *ad litem* for investigative purposes); IOWA CODE ANN. § 598.12 (West Supp. 1994) (allowing for appointment of an attorney to represent the interests of the child); WASH. REV. CODE ANN. § 26.09.110 (West Supp. 1995) (allowing for appointment of attorney if in the child's best interests). The Uniform Marriage and Divorce Act permits the appointment of an attorney in private custody disputes to act as an advocate on behalf of the child. UNIF. MARRIAGE & DIVORCE ACT § 310, 9A U.L.A. 443 (1987).

appointment is necessary.[22]

III. WHY JUDICIAL DISCRETION IS INADEQUATE WHEN ALLEGATIONS OF CHILD ABUSE EXIST

When appointment of counsel is discretionary, in each custody proceeding the court must make a determination of the adequacy of the child's representation.[23] This case-by-case assessment of due process can degenerate into a standard finding of adequacy based upon the court's preconceived notions.[24] Instead of developing pretrial procedures and standards to determine the need for counsel, judges are likely to be predisposed towards a single determination.[25] Because judges rarely have before them all of the facts concerning abuse, decisions are often fashioned to serve the interests of parents or the

---

22. Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 FAM. L.Q. 53, 56 (1992). Various reasons for the refusal to appoint include: judicial attempts to streamline procedures, added court costs for the parents, lack of competence of available guardians *ad litem*, and a belief that the child's interests are already adequately protected. *Id.* Because appointment is discretionary, the judge's decision is rarely overturned. *Id. See infra* notes 23-77 and accompanying text for a discussion regarding the inadequacy of judicial discretion.

23. *See* Mistretta v. Mistretta, 566 So. 2d 836, 837-38 (Fla. Dist. Ct. App. 1990). In *Mistretta*, the court found that the wife's interest in obtaining child support coincided with the best interests of the child and, thus, the child's representation was adequate. *Id.* at 838. The court noted that Florida law requires no appointment of a guardian *ad litem* if "the interest of the minor will be fully protected throughout an action." *Id.* at 837 (citing FLA. RULES OF CIV. P., Rule 1.210(b)). The court noted further that the child has due process rights when the interests of the child may be adverse to the interests of the parent. *Id.* at 837-38 (citing Johns v. Department of Justice, 624 F.2d 522 (5th Cir. 1980)). The Court of Appeals in *Johns* remanded for appointment of counsel for the child where the parties could not adequately represent the infant in a hearing to deport the infant to her natural mother. *Johns*, 624 F.2d at 524.

A right to counsel also guarantees the child's right to counsel of choice. Wagstaff v. Superior Court, 535 P.2d 1220 (Alaska 1975) (allowing a minor's retained counsel of choice over parents' objection in a dependency matter); Akkiko M. v. Superior Court, 209 Cal. Rptr. 568 (Ct. App. 1985) (obligating the court to honor minor's counsel of choice in a dependency hearing if the minor is competent to choose an attorney and chooses competent counsel).

24. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTEREST OF THE CHILD, 54 (1973) [hereinafter GOLDSTEIN, ET AL.] (contending that the "best interest test" is a misnomer).

25. *Id.*

general policies of administrative agencies.[26]

A. THE FAILURE TO FULLY INQUIRE INTO FACTS OF ABUSE

One reason why judges may not have enough information to adequately exercise their discretion is that often the parents themselves discourage investigation of abuse.[27] Normally, when accused of child abuse, one parent seeks to discredit any allegations of abuse while at the same time requesting some custody or visitation arrangement.[28] The other parent may have reasons not to fully explore the facts of alleged abuse as well. For example, the other parent may be involved in the abuse or subject to spousal abuse.[29] Often, one parent may fabricate charges of abuse to prolong or modify the custody decision[30] despite the imposition of penalties for false allegations.[31]

In addition to the parents, the court itself may proceed in a manner which discourages exploration of the allegations of abuse. Although the court has a duty to gather evidence in the absence of a diligent effort by parents,[32] the family court often

---

26. *Id. See infra* notes 57-77 and accompanying text for an explanation of why the interests of parents and the state often overshadow the interests of the child.

27. *See* Leigh v. Aiken, 311 So. 2d 444, 448 (Ala. Civ. App. 1975) (recognizing that parental motives in custody agreements can reflect "coercion, blackmail, consideration of property or other personal reasons not necessarily related to the best interest of the child"); *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1501, 1600 (1993) [hereinafter *Developments*] (noting that a mother who protects her child may hurt her chances of obtaining custody); *see also* UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 561 (1973) (suggesting that the court should not consider "conduct of a proposed custodian that does not affect his relationship to the child").

28. *See, e.g.*, TEX. FAM. CODE ANN. § 14.021(h) (West Supp. 1995) (prohibiting the award of joint custody "if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or any child").

29. *See infra* notes 46-47 and accompanying text for a discussion of the frequent occurrence of child abuse with spousal abuse.

30. Campbell v. Campbell, 604 A.2d 33, 35 n.2 (Me. 1992) (citing the trial court, which stated that a standard strategy in contested custody is to file an ex parte order for protection from abuse to gain temporary custody and delay); *see generally* DAVID HOROWITZ, FALSE ACCUSATIONS OF CHILD SEXUAL ABUSE, SEXUAL ABUSE ALLEGATIONS IN DIVORCE CASES 51, 53 (1988).

31. *See, e.g.*, CAL. FAM. CODE § 3027(a) (West 1994) (providing a monetary sanction for a knowing false allegation of child abuse during a custody proceeding).

32. *See, e.g.*, Sharp v. Sharp, 710 S.W.2d 696, 699 (Tex. App. 1986), where the

minimizes the allegations as exaggerations of spousal combat or relies solely on the determination of abuse by the juvenile authority, which applies a stricter standard of proof[33] than is applicable to custody determinations in family court.[34] Without a fully developed record, the family court may be forced to ignore important signs of abuse.[35] Moreover, when allegations of abuse are not fully examined or explored, the appellate court lacks sufficient justification to question the reasonableness of the trial court's decision.[36]

In Esdale v. Esdale,[37] the family court granted custody to a father despite testimony from county child protection workers, a psychologist, and the guardian *ad litem* that the father had abused the child.[38] Evidence that no child abuse had occurred included a psychiatrist's opinion that the father was not a child abuser and testimony that the mother fabricated the charges.[39] On appeal, although the court found the evidence supporting the father's sexual abuse "most troubling,"[40] the court nevertheless held that the record was insufficient to

---

lower court approved custody to the mother while refusing to allow the court-appointed psychologist to interview her live-in companion, who was accused of abusing the child. *Id.* The appellate court affirmed the decision, but the dissent emphasized that the trial court has a duty to inquire into all matters that affect the interests of the child even when the parties show a lack of diligence in gathering evidence of abuse. *Id.*

33. *See* Santosky v. Kramer, 455 U.S. 745, 769 (1982) (requiring clear and convincing evidence as the minimal due process standard in proceedings to terminate parental rights).

34. *See* Mallory v. Mallory, 539 A.2d 995, 998 (Conn. 1988), where the family court allowed only supervised visitation by the father on a fair preponderance of the evidence of child abuse instead of the clear and convincing criminal standard required to terminate parental rights.

35. *See* OR. REV. STAT. § 107.137(3) (1990) (requiring the court to ignore a parent's "conduct, marital status, income, social environment," or similar factors unless they are shown to cause damage to the child).

36. Changing the lower court's decision requires a finding of abuse of discretion or that the award is against the manifest weight of the evidence. *In re* Marriage of Siegel, 463 N.E.2d 773, 778 (Ill. App. 1984) (finding the presumption favoring the trial court is "strong and compelling"); Eschbach v. Eschbach, 436 N.E.2d 1260, 1264 (N.Y. 1982) (reversing the appellate court's modification of the trial court's custody determination). "Appellate courts should be reluctant to substitute their own evaluation of [the child's best interests]." *Id.*

37. 487 So. 2d 1219 (Fla. App. 1986).

38. *Id.* at 1220 (Glickstein, J., concurring).

39. *Id.*

40. *Id.* at 1219.

demonstrate that granting custody to the father was unreasonable.[41]

Even when the lower court restricts custody, the appellate court may find an abuse of discretion and place the child in the custody of a potentially abusing parent. In Gould v. Gould,[42] an Arkansas appellate court modified a trial court decision allowing only supervised visitation by the father who had been accused of abusing his daughters.[43] The court of appeal discounted the testimony of a pediatrician confirming evidence of sexual abuse.[44] Finding the evidence insufficient, the appellate court modified the trial court's decision by allowing unsupervised visitation with the father during summer vacation so that he could "form normal parental bonds with his children."[45]

Cases such as these illustrate that the child's welfare may be preempted where the lower court has not fully explored evidence of abuse and no one has spoken for the child. If child abuse indeed exists, decisions regarding custody and visitation which are based upon inadequate information may subject the child to continued physical and psychological harm.

---

41. *Id.* The concurring judge noted that he changed his opinion from a dissent due to the ruling in Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980) (preventing appellate judges from overruling the reasonable opinion of a trial court). *Esdale*, 487 So. 2d at 1220.

42. No. CA 90-365, 1992 Ark. App. LEXIS 255 (Ark. Ct. App. Mar. 25, 1992) (denial of petition for rehearing) (en banc).

43. *Id.* at *9 (en banc) (Mayfield, J., concurring) (stating that the trial court's decision was clearly against the preponderance of the evidence). *See id.* at *13-27 (Cooper, J., dissenting), for a reproduction of the original three judge panel court of appeal opinion.

44. *Id.* at *8 (Mayfield, J., concurring). However, the trial judge believed that the pediatrician's findings, concerning the physical evidence of sexual abuse of the three daughters, were "true and correct" and "had not been rebutted." *Id.* at *7.

45. *Id.* at *4 (Mayfield, J., concurring). The dissent from the denial of petition for rehearing questioned whether the appellate court could, with certainty, reverse the trial court based upon an appellate determination that a key witness was not credible. *Id.* at *28.

B. SIMULTANEOUS SPOUSAL ABUSE COMPLICATES MATTERS BY FURTHER SUPPRESSING RELEVANT EVIDENCE

Custody proceedings face added difficulties when allegations of child abuse arise in situations also involving domestic violence against a spouse.[46] The presence of spousal abuse greatly increases the probability that the child is also abused.[47] Nevertheless, many factors lead to an incomplete inquiry into the family situation and the relationship between spousal abuse and child abuse. For example, a parent is unlikely to fully report facts concerning abuse if that parent is not only subject to abuse, but also participating in the child abuse.[48] Furthermore, a battered spouse may choose not to report child abuse out of fear of retaliatory beatings by the other spouse.[49] If the battered spouse does report the abuse or leaves, that spouse risks losing the child,[50] for he or she will

---

46. Domestic violence refers to violence against a spouse. *See In re* Williams, 432 N.E.2d 375, 376 (Ill. App. 1982) (observing that domestic violence can be a "beacon" of potential harm to the child); *In re* Wiley, 556 N.E.2d 809, 814 (Ill. App. 1990) (holding that even when there was no evidence of child abuse, the trial court properly concluded that allegations of spousal abuse could be a decisive factor in the custody decision); *see also* Meisner v. Meisner, 490 N.Y.S.2d 536, 537 (N.Y. App. Div. 1985), where the trial court ignored allegations of physical and mental abuse toward the mother, the children, and third persons during a hearing on visitation. The appellate court deemed evidence of this violence relevant to the disposition of the case and remanded the matter for a new hearing. *Id.*

47. LEE H. BOWKER, MICHELLE ARBITELL & J. RICHARD MCFERRON, ON THE RELATIONSHIP BETWEEN WIFE BEATING AND CHILD ABUSE, FEMINIST PERSPECTIVES ON WIFE ABUSE 158, 162 (1988) (finding, in a study involving 1000 battered women, that child abuse was present in seventy percent of the families where spousal abuse occurred); Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations,* JUV & FAM. CT. J. 1992/Vol. 43, No.4, 33 (finding that daughters are six times more likely to be sexually abused when wife abuse occurs).

48. *See* LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 60 (1984). Walker found that women were eight times more likely to abuse children when they themselves were being battered than when they were not in abusive relationships. *Id.* She also found that 53% of men who abused their mates also abused their children, while 28% of the women who were abused did so. *Id.* at 59.

49. *See* M. Kara, *Domestic Violence and Custody — "To Ensure Domestic Tranquility,"* 14 GOLDEN GATE U. L. REV. 623, 634 (1984) (noting that abused spouses tend to be fearful and are often exposed to danger when they resort to the courts). *See generally* Linda R. Keenan, *Domestic Violence and Custody Litigation: The Need for Statutory Reform,* 13 HOFSTRA L. REV. 407, 422 (1985).

50. ANGELA BROWNE, WHEN BATTERED WOMEN KILL 113 (1987) (finding that if a battered woman leaves before the abuse gets serious, the court may decide that she is unstable for abandoning her child); Ilona M. Bessenyey, *Visitation in the*

have difficulty explaining how a person could tolerate the abuse but still be an effective parent.[51]

Although a majority of states require courts to consider the existence of domestic violence in determining custody and visitation,[52] these allegations often are not fully investigated. Both social workers and the judicial system tend to dismiss charges of spousal abuse which arise during divorce proceedings[53] or consider supporting evidence of spousal abuse irrelevant to child custody decisions.[54] When social workers and

---

Domestic Violence Context: Problems and Recommendations, 14 VT. L. REV. 57, 68 (1989) (concluding that lack of cooperation regarding visitation in abusive situations places the woman at risk of losing her child); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 46-47 (1991) (describing a situation where "a woman who had obtained a restraining order against her husband [and] awoke one night to find him wielding a knife in her bedroom; after she fled into the night, he claimed she had abandoned the children, and she was unable to regain custody").

51. *See Developments, supra* note 27, at 1601-02 (citing Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 556-57 (1992) and noting that a mother must demonstrate that she is an effective parent to receive custody, but remaining in an abusive situation conveys helplessness); *see also* Hill v. Hill, No. 86-0399, slip op. (Ill. App. Ct. Dec. 4, 1987), where a judge granted custody to the mother, changing the original award to the father, after the mother testified that she had initially agreed to give custody to the father because he had beaten her and the children. The court ordered the modification because the evidence of abuse was not before the judge at the time of the initial custody award. *Id.*

52. *Developments, supra* note 27, at 1603 (finding that most states recently have mandated domestic violence as a factor or as a presumption against custody); *see, e.g.*, ALASKA STAT. § 25.20.090(8) (1991) (requiring courts to consider "any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents").

53. *See* FIELDS, *Spouse Abuse as a Factor in Custody and Visitation Decisions*, in CHILD ABUSE AND NEGLECT 147, 162 (1986) (noting that "the issue of the harmful effect on children from witnessing parental violence has had little impact on our legal system"); *see also* Charlotte Germane, Margaret Johnson & Nancy Lemon, *Mandatory Custody Mediation and Joint Custody Orders in California: The Danger for Victims of Domestic Violence*, 1 BERKELEY WOMEN'S L.J. 175, 192-93 (1985) (stating that "[j]udges and mediators also may make it clear to a battered woman that the batterer's violence towards her is irrelevant in determining custody and visitation").

54. *See In re* Benjamin D., 278 Cal. Rptr. 468, 472 n.5 (Ct. App. 1991) (citing a California study which found judges often do not consider spousal abuse relevant in custody decisions). The lower court had limited the introduction of evidence of spousal abuse in spite of universal agreement of its detriment to children. *Id.* The appellate court, however, observed that CAL. CIV. CODE § 4608, as amended in 1990, requires consideration of spousal abuse. *Id.*; *see also* Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody*

courts do investigate the combination of spousal and child abuse, they may even decide that the battered spouse is an unfit parent for failing to protect the child.[55] Legislation in most states classifies a parent's failure to protect the child from abuse as child neglect and imposes possible criminal penalties.[56]

Because the occurrence of spousal abuse with child abuse increases the likelihood that evidence of child abuse will not be fully explored by either the government or the parents, the child has a strong interest in independent representation. Providing the child with independent representation encourages the development of a true picture of the family situation and assists in confirming or denying all of the allegations.

C. OTHER INTERESTS OFTEN OVERSHADOW THE CHILD'S INTERESTS

1. *State Interests*

State statutes, under the doctrine of *parens patriae*, reflect the policy of preserving the natural family.[57] Thus, joint cus-

---

Decisions, 44 VAND. L. REV. 1041, 1045 (1991) (concluding that the law punishes battered women in custody decisions because the mother is required to prove that domestic violence directly impacts the child in order to be relevant as evidence).

55. *See In re* Betty J.W., 371 S.E.2d 326, 328 (W. Va. 1988), where the trial court terminated the mother's parental rights because she failed to protect children from her husband's abuse. The appellate court reversed termination of the mother's parental rights, finding that the mother had tried to stop the abuse and that she should be given time to overcome the effects of battered woman's syndrome on her parenting. *Id.* at 332-33.; *see also* WALKER, *supra* note 48 (observing that, although mothers often cannot control the violence against themselves or their families, child abuse workers frequently blame mothers for failing to protect the child).

56. Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U.L. REV. 520, 553 (1992). Schneider points out that thirty-five states include the concept of omission of protection in their statutory definition of "child abuse" and eight states criminalize the failure to protect. *Id.*

57. State public policy often emphasizes "frequent and continuing contact with both parents" after divorce. *See, e.g.*, CAL. FAM. CODE § 3020 (West 1994); *In Interest of* Betty J. W., 371 S.E.2d 326, 329 (W. Va. 1988) (stating that child welfare statutes reflect this *parens patriae* bias towards maintaining family bonds); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835, 854 (1985) (concluding that "a great deal of behavior that would be criminal or tortious between strangers may still be done with impunity within a

tody statutes usually presume that the best interests of the child require maintaining contact with both parents.[58] This presumption may even disfavor granting custody to a parent who believes abuse has occurred and opposes shared custody.[59] Visitation policies also presume that the child benefits from contact with the non-custodial parent.[60] Furthermore, the government may express a policy interest of minimal interference with family relations and thereby exercise deference to the family at the expense of preventing abuse.[61] These state policies foster continued contact with each parent even where one parent may be abusing the child.[62]

An additional state interest that may overshadow the

---

family").

58. Joanne Schulman & Valerie Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U. L. REV. 538, 554 (1982) (arguing that these "friendly parent" provisions in joint custody statutes discourage opposition to joint custody); *see* FLA. STAT. ANN. § 61.13(2)(b)(2) (West Supp. 1995) (providing that "parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child"). *But see* CAL. FAM. CODE § 3040(b) (West 1994) (establishing no preference for or against joint or sole custody); CAL. FAM. CODE § 3080 (West 1994) (creating a presumption, affecting the burden of proof, that joint custody is in the child's best interests only if the parents agree to joint custody).

59. *See In re* Marriage of Bolin, 336 N.W.2d 441, 446 (Iowa 1983) (observing that "[w]hen one parent's obduracy makes joint custody unworkable, the trial court in a modification proceeding may find the child's best interests require sole custody in the other parent"); ALASKA STAT. § 25.20.090(6)(E) (1991) (requiring consideration of which parent will encourage frequent contact with the other parent).

60. A parent is entitled to visitation unless the court finds that "visitation would endanger seriously the child's physical, mental, moral or emotional health." UNIF. MARRIAGE AND DIVORCE ACT § 407. For example, in *Beckham v. O'Brien*, the appellate court found an abuse of discretion where the trial court allowed visitation rights while criminal charges of abuse against the father were pending. 336 S.E.2d 375, 377 (Ga. App. 1985). The court also found that the mother was justified in refusing to obey the visitation order. *Id.* at 378.

61. *See* Laura Oren, *The State's Failure to Protect Children and Substantive Due Process: Deshaney in Context*, 68 N.C.L. REV. 659, 713-14 (1990) (explaining that increased state and federal interest in domestic violence during the late 1970s led to a conservative backlash to protect the family from government intervention). The Family Protection Act, seeking to eliminate federal funds for child abuse prevention, was introduced, and in 1981, President Reagan closed the Office of Domestic Violence. *Id.*

62. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-332(A)(6) (Supp. 1994) (stating that a relevant factor in the custody determination includes "[w]hich parent is more likely to allow the child frequent and meaningful continuing contact with the other parent").

child's interest is the conservation of fiscal resources.[63] Under discretionary appointment, the family court must consider that the state bears the cost if both parents cannot pay for the child's appointed counsel.[64] When neither parent can pay, the parents' own representation may be inadequate to fully examine allegations of abuse.[65] Thus, the state's interest in conserving fiscal resources may lead a court to deny appointment of representation in precisely the situations where it is most needed.

The state also has an interest in maintaining the integrity and reputation of its social service agencies as an adequate protector of the child. When child abuse allegations are investigated, the social worker often acts as the guardian *ad litem* for the child and is presumed to represent the child's interests.[66] The social worker prepares a family social study and is deemed a "disinterested party" whose reports are reliable.[67] However, state legislation requiring prompt reporting and investigation of child abuse, scarce resources, and the attendant problems of proof all combine to discourage the full civil and criminal investigation of abuse cases.[68] If the social work-

63. *See* State *ex rel.* Juvenile Dept. of Multnomah County v. Wade, 527 P.2d 753, 757 (Or. App. 1974) (finding that the state may overlook the child's interest to avoid expensive foster care).

64. *See, e.g.,* CAL. FAM. CODE § 3153 (West 1994) (allowing the court to apportion any costs of the child's counsel that parents are unable to pay to the county).

65. Judge Leonard P. Edwards, *The Relationship of Family and Juvenile Courts in Child Abuse Cases*, 27 SANTA CLARA L. REV. 201, 217 & n.103 (1987). Judge Edwards observes that one or both parents may be without an attorney, because government legal services is often unable to represent indigents in custody proceedings except under extraordinary circumstances. *Id.* The lack of counsel for the parents will limit examination of crucial issues relating to abuse. *Id.* at 217.

66. *See, e.g.*, CAL. WELF. & INST. CODE § 326 (West Supp. 1995). The guardian *ad litem* cannot be the attorney responsible for presenting evidence of abuse. *Id.*

67. *See In re* Malinda S., 795 P.2d 1244, 1248 (Cal. 1990) (finding a social worker's "objectivity and expertise" suggest that the findings are reliable, because they prepare such reports "in the regular course of their professional duties").

68. *See* Susan B. Apel, *Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt*, 38 AM. U. L. REV. 491, 500-01 (1989), where the author notes that juvenile authorities investigating abuse may lack adequate time and funding to fully investigate allegations. Apel cites MD. FAM. LAW CODE ANN. § 5-706 (1984) (requiring a completed investigation within 10 days) and IND. CODE ANN. § 31-6-11-5 (Burns 1987) (requiring a written report within 48 hours). *Id.* at 500-01 n.38. Proof frequently involves the child as the only witness to abuse and no resources are available for expert testimony. *Id.* at 501. These inherent problems, along with high caseloads caused by reporting requirements, persuade many

er does not confirm allegations of abuse, the court is unlikely to substitute its judgment for that of the social worker and may thus limit further investigation.[69] Because social workers must respond on an expedited basis with inadequate resources, the reliance on their investigation is often misplaced.

2. *Parental Interests*

Many cases of child abuse are not adequately investigated due to concern for the rights of parents. Parents traditionally have several important interests, including keeping their family affairs private,[70] maintaining family integrity,[71] and minimizing the acrimony of the divorce process.[72] Thus, in custody cases, parents are generally assumed to be fit, and they have "comprehensive" legal rights.[73]

Courts are generally willing to allow a temporary restric-

---

prosecutors not to prosecute child abuse cases. *Id.*

69. *See* Myra Sun & Elizabeth Thomas, *Custody Litigation on Behalf of Battered Women*, 21 CLEARINGHOUSE REV. 562, 573 (1987) (stating that according to one estimate, judges follow the recommendations of social workers approximately 90% of the time); *see also In re* Danielle W., 255 Cal. Rptr. 344, 350 (Ct. App. 1989) (finding that courts can grant limited discretion to Children Services to determine visitation).

70. *See* Santosky v. Kramer, 455 U.S. 745, 753 (1981) (finding general acceptance of the idea that freedom of personal choice in matters of family life is a fundamental liberty interest). *But see* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1510 (1983) (stating that "the assertion that family affairs should be private has been made by men to prevent women and children from using state power to improve the conditions of their lives").

71. Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) (stating that both parents and children possess reciprocal rights to preserve family integrity). Parents have an interest in the "companionship, care, custody and management of . . . children . . . ." *Id.* (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)). "[T]he children [have an interest] in not being dislocated from the emotional attachments that derive from the intimacy of daily association." *Id.* (citing Smith v. Organization of Foster Families, 431 U.S. 816, 844 (1977)).

72. *See, e.g., In re* Marriage of Morrison, 573 P.2d 41, 49 (Cal. 1978) (finding that the California Legislature created no fault divorce in order to reduce the acrimony which divorce proceedings engender).

73. *See* Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VAND. L. REV. 879, 884-85 (1984) (finding parental rights include custody of the child, discipline of the child, and decisions about education, medical treatment, and religious upbringing of the child). Parents may speak for the child and may assert or waive the child's rights. *Id.* at 884.

tion of parental rights where there is evidence that the child's safety may be threatened. For example, in emergency situations, most courts will grant temporary custody to one parent or restrict visitation through a civil protection order.[74] In a final custody determination, however, restriction of parental custody to protect the child from harm may require a "fair preponderance of the evidence."[75] Although the court has broad power to protect the child's interests,[76] lack of evidence of abuse may prevent the court from restricting custody.[77] Thus, this concern for the rights of parents effectively diminishes concern for the best interests of the child.

IV. THE MODERN TREND IN STATE COURTS AND LEGISLATURES: MANDATORY APPOINTMENT

Because appointment of counsel for the child is discretionary in most states, failure to appoint is rarely reviewed by appellate courts.[78] However, some state appellate courts have found an abuse of discretion in failing to appoint where there were allegations of child abuse.[79] In *G.S. v. T.S.*,[80] a Connect-

74. Most states allow a parent to obtain temporary custody of her children through a civil protection order obtained ex parte. Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 23 FAM. L.Q. 43, 51 (1989). Ex parte orders for emergency situations are typically valid for ten to fourteen days. *Id.*; Marquette v. Marquette, 686 P.2d 990, 995-96 (Okla. App. 1984) (allowing a temporary restriction on visitation). Before issuing such an order, California courts must consider whether the best interests of the child require suspended or denied visitation. CAL. FAM. CODE § 3100(b) (West Supp. 1995).

75. *See, e.g.*, Mallory v. Mallory, 539 A.2d 995, 998 (Conn. 1988) (requiring a fair preponderance of the evidence to restrict custody).

76. *See In re* Macomber, 461 N.W.2d 671, 672 (Mich. 1990) (finding that the legislature has given the court broad authority to define harmful conduct and fashion remedies as "necessary for the physical, mental, or moral well-being of a particular child"); *In re* Albert B., 263 Cal. Rptr. 694, 702 (Ct. App. 1989) (balancing the rights of parents and children in a dependency proceeding for neglect). The court found that children have a right to custody that does not constantly endanger them. *Id.*

77. *See supra* notes 35-41 and accompanying text.

78. *See* Elrod, *supra* note 22, at 56.

79. *See* M.M. v. R.R.M., 358 N.W.2d 86, 89 (Minn. App. 1984), where the appellate court held that the trial court erred in failing to appoint a guardian *ad litem* where the parents strongly disputed custody and the stepfather abused the children. Lack of independent representation resulted in minimal testimony by the children and an incomplete record. *Id.*; Leonard v. Leonard, 783 S.W.2d 514, 516 (Mo. Ct. App. 1990) (finding the trial court erred in failing to appoint a guardian

icut trial court failed to appoint counsel for the minor children despite a motion for appointment by one parent and knowledge that child abuse would be a major issue in the custody proceeding.[81] Finding that evidence was not conclusive concerning the custodial parent's knowledge of abuse by a cousin, the trial court maintained custody with that parent.[82] The appellate court remanded, however, noting that the presence of counsel for the children would likely have led to several changes in the trial proceedings.[83] The appellate court concluded that, in contested custody proceedings containing allegations of child abuse, neither the parents nor the court can be relied upon to advocate the children's best interests.[84] Therefore, the children both "[need] and [are] entitled to counsel to advocate their best interests."[85]

Similarly, in *C.J.(S).R. v. G.D.S.*,[86] a Missouri trial court found that "the child abuse was not a sufficient change in conditions to merit a change in [the children's] custody."[87] The appellate court reversed, stating that the child's interests typically are not represented in custody cases involving child abuse because "the evidence gatherers are the lawyers for the competing parents, whose primary purpose is to put their client's best foot forward."[88] The court held it was an abuse of discre-

---

ad litem where the court had knowledge of alleged abuse by a parent claiming a right to custody).

80. 582 A.2d 467, 470 (Conn. App. 1990) (finding that in contested custody cases where there are allegations of abuse, "children have a unique need to be represented by counsel who will advocate their best interests").

81. *Id.* at 468. Before the trial started, the court changed temporary custody based upon allegations that the custodial parent's cousin had sexually molested one of the children. *Id.* On the first day of trial, the cousin admitted the molestation. *Id.* at 469. The custodial parent denied knowledge of the abuse despite conflicting testimony. *Id.* at 468.

82. *Id.* at 469.

83. *Id.* at 470-71. The court of appeal noted that counsel for the child could have requested a family relations study and involved the court in assessing the allegations at the earliest possible date. *Id.* at 470. Counsel could have pointed out that the child was competent to testify and argued that the child's testimony was pivotal. *Id.* Counsel could also have contested the parent's waiver of the child's confidentiality with her sexual abuse counselor. *Id.* at 471.

84. *Id.* at 471.

85. *G.S.*, 582 A.2d at 471.

86. 701 S.W.2d 165 (Mo. App. 1985).

87. *Id.* at 168-69.

88. *Id.* at 169.

tion not to appoint a guardian *ad litem* where the trial court in a custody dispute knows of past or current child abuse.[89] Acknowledging the court's holding, in 1988 the Missouri Legislature passed a statute mandating appointment of a representative for the child where there are allegations of child abuse or neglect.[90]

Other courts, however, have not been so willing to find an abuse of discretion in the failure to appoint a representative for the child.[91] In *Sucher v. Sucher*,[92] the Minnesota Court of Appeal refused to find an abuse of discretion in the trial court's failure to appoint a guardian *ad litem* though each parent had alleged abuse and had requested appointment.[93] The trial court found that the mother's friends had either sexually "abused the children or behaved in a less than exemplary manner."[94] Nevertheless, the court concluded that the evidence was insufficient to confirm that the mother had allowed sexual abuse of the children or that the father had physically abused the mother or coached the children to allege abuse.[95]

The dissent in *Sucher* argued that the children's safety required an independent representative for the children's interests.[96] Following that logic, the Minnesota Legislature amend-

---

89. *Id.* The court urged the legislature to codify the decision. *Id.*

90. *See* MO. ANN. STAT. § 452.423.1 (Vernon Supp. 1994) (providing that "[t]he court shall appoint a guardian *ad litem* in any proceeding in which child abuse or neglect is alleged"); *see also* Leonard v. Leonard, 783 S.W.2d 514, 516 (Mo. App. 1990) (finding that *C.J.(S).R v. G.D.S.* took away judicial discretion in appointment "where custody is an issue and the court has knowledge of alleged abuse by one claiming a right to custody").

91. *See* Schenk v. Schenk, 564 N.E.2d 973, 979 (Ind. Ct. App. 1991) (finding no abuse of discretion in not appointing a guardian *ad litem* in modification proceeding where the trial court removed custody from the mother who was currently involved with the past abuser of the children). In *Schenk*, although the trial court did not appoint counsel, it did, however, remove the children from a potentially abusive situation. *Id.* at 975.

92. 416 N.W.2d 182 (Minn. Ct. App. 1987).

93. *Id.* at 186.

94. *Id.* at 184.

95. *See id.* at 183-84. The prevalence of child abuse when there is spousal abuse is discussed *supra* notes 46-47 and accompanying text.

96. *Id.* at 186 (Lansing, J., dissenting). The dissent noted that the threat to the children's safety required "vigorous independent representation of the children by counsel acting in their interest and their interest only." *Id.* (quoting M.M. v. R.R.M., 358 N.W.2d 86, 89 (Minn. Ct. App. 1984), where the appellate court con-

ed the pertinent state statute to require appointment when the court has reason to believe that a child may be a victim of abuse.[97]

When the trial court knows of allegations of abuse and yet refuses to appoint an independent representative for the child, the court denies the child a voice in a proceeding that endangers the child's well-being.[98] Although four states recognize this danger and have concluded that the child requires independent representation when there are allegations of child abuse,[99] every state should acknowledge this need for counsel as a due process right.[100]

V. DUE PROCESS PRINCIPLES REQUIRE MANDATORY APPOINTMENT

Due process guarantees are implicated when government procedures threaten a life, liberty, or property interest protected by the Fourteenth Amendment.[101] These "liberty interests" are not limited to protection from government confinement, but also include involvement in government proceedings which

---

demned the trial record as "woefully incomplete" because there was a past history of abuse, yet the trial court had not ordered a home study because the parents believed it unnecessary).

97. *See* 1986 Minn. Laws ch. 469, § 1. The statute requires the appointment of a guardian *ad litem* in any child custody proceeding in which "the court has reason to believe that the minor child is a victim of domestic child abuse or neglect." MINN. STAT. ANN. § 518.165(2) (West 1990).

98. *See* Ford v. Ford, 371 U.S. 187, 193 (1962) (finding that the child's "well-being" cannot be left to discretion of estranged parents); *see also* Short v. Short, 730 F. Supp. 1037, 1039 (D. Colo. 1990) (stating that children may be pawns between parents and, therefore, require independent representation); Higgins v. Higgins, 629 S.W.2d 20, 22 (Tenn. App. 1981) (stating that in cases of intense hostility, the rights of children are not properly represented without independent counsel); Clark v. Clark, 358 N.W.2d 438, 441 (Minn. App. 1984) (remanding for appointment to assure that "one voice" represents the child); GOLDSTEIN, ET AL. *supra* note 24. Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L.Q. 287, 293 (1983) (concluding that parents cannot be expected to represent the child's best interests when their interests conflict with those of the child).

99. Connecticut requires appointment by judicial precedent. Missouri, Minnesota, and Florida require appointment by statute. Wisconsin requires appointment in all contested cases. *See supra* notes 18-19 discussing the state statutes.

100. *See infra* notes 101-50 and accompanying text.

101. U.S. CONST. amend XIV, § 1 ("Nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .").

affect safety and well-being.[102] Furthermore, the United States Constitution generally affords children rights coextensive with those of adults when the government seeks to deprive children of these interests.[103]

The circumstances implicating due process depend upon the nature of the government function and the private interest affected by the government action.[104] In extending due process rights to civil divorce proceedings, the United States Supreme Court stressed the exclusiveness of the judicial remedy and the fundamental nature of the subject matter.[105] Additionally, judges generally recognize parental loss of custody as "punishment more severe than many criminal sanctions."[106]

The policy behind extension of due process rights to civil divorce proceedings is equally persuasive when viewed from

---

102. *See* Board of Regents v. Roth, 408 U.S. 564, 572 (1972). Liberty has a broad meaning extending to rights "essential to the orderly pursuit of happiness . . . . " *Id.* (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)); Ingraham v. Wright, 430 U.S. 651, 674 (1977) (finding school children have a liberty interest in personal security).

103. *See* Bellotti v. Baird, 443 U.S. 622, 634-35 (1979).

104. *See In the matter of* K.L.J., 813 P.2d 276, 278 (Alaska 1991) (holding an indigent father has a due process right to counsel in termination proceedings). The court noted that parental rights are of the highest significance when faced with the finality of termination. *Id.* at 283. *But see* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961) (noting that notice and hearing are not constitutionally required when the private interest is a privilege granted by the government).

105. Boddie v. Connecticut, 401 U.S. 371, 383 (1971). The Court held that due process prohibits denying an indigent access to divorce courts because the requirement of a judicial decree for divorce is "entirely a state-created matter." *Id.* The Court stated that the right of access to divorce courts is "the exclusive precondition to the adjustment of a fundamental human relationship." *Id.*; *see* Flores v. Flores, 598 P.2d 893, 895 (Alaska 1979), where the court found that there is a strong state interest in divorce-child custody proceedings. Unlike commercial contracts, legally binding marriages and divorces are wholly creations of the state." *Id.*

106. Annotation, *Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary Termination of Parental Rights*, 80 A.L.R. 3d 1141, 1145; *cf.* May v. Anderson, 345 U.S. 528, 533 (1953) (noting that custody is far more important than property rights); *see also* Order—Probable Jurisdiction Noted or Postponed, 402 U.S. 954, 954-61 (1971), where Justices Black and Douglas comment that the due process found in *Boddie* should apply to all civil disputes. Justice Black noted that when due process guarantees "meaningful access to civil courts in divorce cases, . . . *Boddie* necessitates the appointment of counsel for indigents." *Id.* at 959.

the child's perspective.[107] Although children are legally considered "persons,"[108] courts limit their constitutional rights because of their immaturity and in deference to the role of parents in overseeing children.[109] Normally, parents assume control of the child. However, when parental control fails, the government adopts the role of *parens patriae*.[110] When both the parents and the government fail to protect a minor's rights, due process must provide the child with constitutional guarantees.[111] Divorce custody decisions are exemplary of a situation where the child's rights may lack protection because both the government and the parents have other interests that overshadow the interests of the child.[112]

A. THE SUPREME COURT'S BALANCING TEST

The United States Supreme Court has adopted a balancing test to determine what process is due.[113] The Court looks at three distinct factors: the private interest affected by the offi-

---

107. *See* Hansberry v. Lee, 311 U.S. 32, 42 (1940) (holding a lack of due process exists where procedures do not protect the interests of those bound but not present). In states with discretionary appointment a child is usually not present or independently represented. *See supra* notes 3 & 9 and accompanying text.

108. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) (stating that "constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority"); *In re* Gault, 387 U.S. 1, 13 (1967) (stating that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone").

109. *See* Bellotti v. Baird, 443 U.S. 622, 634 (1979) (invalidating a Massachusetts law requiring parental consent for abortions by unmarried minors). The Court summarized the rationale for treating children differently than adults, stressing "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child-rearing." *Id.*

110. Schall v. Martin, 467 U.S. 253, 265 (1984) (allowing pretrial preventive detention for juvenile suspects). *Parens patriae* originally referred to the state's protection of the property and person of the child. *In re* Gault, 387 U.S. at 16.

111. *Cf. In re* Gault, 387 U.S. at 27-28 (establishing a minor's constitutional right to counsel in juvenile delinquency proceedings which may result in commitment to an institution); *see* Donald N. Bersoff, *Representation for Children in Custody Decisions: All that Glitters is not Gault*, 15 J. FAM. L. 27, 27 (1976-77) (finding that *Gault* changed "the balance of power in child-populated, adult-dominated institutions").

112. Bersoff, *supra* note 111, at 30-33. *See supra* notes 57-77 and accompanying text for the author's discussion regarding how the states' and parents' interests often overshadow the interests of the child.

113. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

cial action, the risk of error in the state's chosen procedure and the probable value of additional procedural safeguards, and the state's interest in maintaining the current procedure.[114]

1. *The Child's Interests*

The child has a strong interest in growing up free from abuse.[115] "[C]hildren who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens."[116] An abused child has an increased likelihood of later winding up in juvenile court and, finally, in adult criminal proceedings.[117] Thus, by appointing counsel to ensure representation of the child's best interests, the court can fully explore the possibility that the child is being abused. Moreover, by removing the child from an abusive situation, the court promotes the child's growth into a responsible adult.

2. *The Risk of Error in Current Procedures and the Probable Value of Additional Safeguards*

Contested custody determinations are by their nature exceedingly difficult decisions for a court, requiring a prediction of the future welfare of the child based upon limited information.[118] When allegations of child abuse exist, the complexity of these proceedings is enhanced,[119] thereby increasing the danger that a court might ratify an ongoing relationship with a potentially abusive parent.[120] Evidence in custody proceed-

---

114. *See id.* The state's interests include the government function involved and "fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Id.*

115. *See* Prince v. Massachusetts, 321 U.S. 158, 165 (1944) (observing that the entire society benefits when the child is "safeguarded from abuses and given opportunities for growth").

116. Santosky v. Kramer, 455 U.S. 745, 789 (1982) (Rehnquist, J., dissenting).

117. Podell, *supra* note 8, at 106 (observing that the public will pay more in future costs if the child's welfare is not properly considered at the divorce custody proceeding).

118. *See supra* note 4.

119. Nancy Thoennes, *Child Sexual Abuse: Whom Should a Judge Believe? What Should a Judge Believe?*, THE JUDGES' JOURNAL, Summer 1988, Vol. 27, No. 3, 14, 17 (1988) (observing that contested custody proceedings with allegations of abuse are the most complex and time-consuming proceedings in family court).

120. *See* GOLDSTEIN, ET AL., *supra* note 24, at 66. The authors state that "the

ings is often entered in the form of opinion not subject to cross-examination.[121] Moreover, the frequent lack of outside witnesses or any physical evidence can make the child's statement concerning abuse the key factor supporting allegations.[122] However, one parent typically challenges the veracity or relevance of the child's statement.[123] Furthermore, there may be repetitive and improper physical or psychological examination of the child which can violate the child's best interests and produce questionable results as well.[124] Finally, the court

---

presumption [of parental representation of the child] should not prevail . . . once the child's placement becomes the subject of a dispute" in the courts and that the state's "policies or practices" may also be adverse to the child. *Id.* In these cases, the child should be accorded party status and given independent representation. *Id.*; *see also* Inker & Perretta, *supra* note 8, at 111 (suggesting that independent evidence, rather than partisan parental advocacy, would better determine the child's best interests); Podell, *supra* note 8, at 103 (arguing that the child of divorce is often a "disenfranchised victim used as a pawn in a game of chess being played between its warring parents who frequently want the court to physically cut up and divide the child between them in the same manner that they have [done] emotionally"); *cf. In re* Gault, 387 U.S. 1, 30 (1967), where, in the criminal area, the court found that the state's paternalistic dogma of state protection under the doctrine of *parens patriae* can be an "invitation to procedural arbitrariness" that violates due process for the child and requires independent representation. When the court reaches results of "tremendous consequence, [it] must measure up to the essentials of due process and fair treatment." *Id.*

121. *See* Leary v. Leary, 627 A.2d 30, 41 (Md. App. 1993), where the court noted that "child custody reports often contain double- or triple-level hearsay, as well as opinions of various social workers, medical or paramedical personnel, psychologists, teachers and the like, which may or may not have a reasonable basis." *Id.* "Generally, these reports are not under oath and often emanate from people having an overt or covert bias." *Id.*

122. *See* State v. Myatt, 697 P.2d 836, 841 (Kan. 1985), where the court observed that witnesses other than the child are rare, as molestation is usually done in private. Since the physical evidence may be inconclusive, proof of abuse depends upon the child's statements. *Id.*

123. Apel, *supra* note 68, at 496 (explaining that children are often accused of fabricating abuse); HOROWITZ, *supra* note 30, at 60 (concluding that the pressures on the child can lead to either false denial or false affirmation of the allegations); Marian D. Hall, *The Role of Psychologists as Experts in Cases Involving Allegations of Child Sexual Abuse*, 23 FAM. L.Q. 451, 463 (1989) (concluding that psychologists lack a profile to separate abuse from other traumatic experiences such as divorce); *see generally* John R. Christiansen, *The Testimony on Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 WASH. L. REV. 705 (1987) (summarizing problems associated with determining the child's competency and credibility).

124. *See* Gotwald v. Gotwald, 768 S.W.2d 689, 701 (Tenn. App. 1988) (Franks, J., concurring) (recommending that the court protect the child from repetitive evaluations and physical examinations by "hired guns"); Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE AND NEGLECT 177 (1983), where the authors find that repeated questioning of an abused child about a trau-

may apply current fads in social research pertaining to custody[125] or overly rely upon reports from social welfare agencies which may minimize the consideration of abuse.[126] Because the risk of an erroneous custody determination increases when allegations of abuse exist, the probable value of additional procedural safeguards is magnified.

Numerous courts have acknowledged a need for independent counsel for the child in sharply contested custody disputes to ensure that the presentation of evidence remains clearly focused on the best interests of the child.[127] Appointment of counsel helps guarantee that the possibility of child abuse will be fully explored.[128] Additionally, appointment of counsel can guarantee the child a continuing relationship if there are multiple proceedings or if new facts concerning abuse come to light.[129] Thus, if states were required to appoint counsel for

---

matic event will double the trauma. Unless the child is strongly supported, the child normally retracts her complaint of abuse. *Id.* at 188.

125. *See* Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, WIS. L. REV. 107, 118-19 (1987). The authors analyze the use and misuse of social science research in custody decisions and argue that current emphasis on "father custody" literature has seriously eroded the mother's position in custody decisions to the detriment of the child's best interests. *Id. But see* David Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005 (1989) (defending the usefulness of social science data which is free from the bias of the individual researcher).

126. *See* Apel, *supra* notes 68-69 and accompanying text for a discussion of the inherent problems of investigating allegations of child abuse.

127. *See, e.g.*, Yontef v. Yontef, 440 A.2d 899, 904 (Conn. 1981) (stating that the court should appoint independent counsel in seriously contested cases); *see also* Gennarini v. Gennarini, 477 A.2d 674, 675 n.3 (Conn. App. 1984) (stating that the trial court should appoint an attorney for the child in a bitterly contested visitation dispute); *In re* Marriage of Kramer, 580 P.2d 439, 444-45 (Mont. 1978) (finding that the trial court erred in failing to allow counsel for the children to participate in all hearings); de Montigny v. de Montigny, 233 N.W.2d 463, 467 (Wis. 1975) (finding an abuse of discretion in failure to appoint counsel).

128. Linda L. Long, *When the Client is a Child: Dilemmas in the Lawyer's Role*, 21 J. FAM. L. 607, 629 (1982-83) (finding that as the proceeding becomes more complex, the child has greater need for an independent advocate to protect her interests and to bring out all relevant facts); *see* Martin Guggenheim, *The Right to be Represented But Not Heard: Reflections on Legal Representation for Children,* 59 N.Y.U. L. REV. 76, 121-22 (arguing that because the best interests test makes virtually all aspects of a parent's life relevant, a child advocate may probe into "deeply held secrets" which parents have privately agreed to keep out of the court's view); *supra* notes 20-77 and accompanying text emphasizing that concern for parental rights often conceals child abuse.

129. Esdale v. Esdale, 487 So. 2d 1219, 1219 (Fla. App. 1986) (stating that

the child in all custody disputes involving allegations of abuse, the child's attorney could act as an independent advocate to ensure a full investigation, to protect the child's rights, and to develop a full record for judicial review.

3. *The Government's Interest in Maintaining Procedural Status Quo*

In evaluating whether due process principles require mandatory appointment of counsel, the child's interests and the gravity of an erroneous determination must be balanced against the interest of the state in maintaining its current procedure.[130] In divorce custody proceedings, although the state shares some of the child's interests, other state interests are divergent.

The state's foremost interest is to ensure the best interests of the child.[131] Because the custody proceeding defines the limits of the child's relationship with a parent, the state must assume certain affirmative duties to protect that child's interests.[132] Nevertheless, other state interests conflict with the interests of the child and thereby favor the state's maintenance of the current discretionary appointment procedure. These state interests include minimal interference in family relations,[133] supporting confidence in social services' determina-

---

appointment of guardian *ad litem* for six months where abuse was not confirmed allows the child's interests to be monitored).

130. *See supra* notes 114-15 and accompanying text for a discussion of the Supreme Court's balancing test.

131. *See* Ford v. Ford, 371 U.S. 187, 193 (1962) (observing that "probably every State in the Union . . . requires the court to put the child's interest first"); *supra* note 2 for substantiation of the difficulty of determining that interest; *cf.* Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1980) (finding a shared interest between the state and the parent in a just and accurate decision in a termination proceeding).

132. *See* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 200 (1989) (observing that "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf").

133. *See supra* note 61. *But see* Prince v. Massachusetts, 321 U.S. 158, 166 (1944), where the court notes that the state may interfere in family affairs to safeguard the child's health, educational development and emotional well-being. *Id.*

tion of abuse,[134] and saving the cost of appointment where the parents are indigent.[135]

Because the "best interests of the child" is the commanding purpose of custody proceedings,[136] and because these interests are not advanced when courts have discretion whether to appoint independent counsel for the child,[137] other state interests that conflict with the interests of the child should be accorded less importance. When the state's interest in assuring that children are adequately represented is compared with conflicting state interests that favor maintenance of discretionary appointment, these latter interests appear insignificant.

B. THE BALANCING TEST FAVORS MANDATORY APPOINTMENT

Although courts are hesitant to presume a due process right to state appointed counsel in a particular class of cases, when the party's "interests [are] at their strongest, the States' interests [are] at their weakest, and the risks of error [are] at their peak," the presumption against the appointment of counsel can be overcome.[138] In child custody proceedings involving allegations of abuse, the child's interest in representation is strong,[139] the risk of error without an independent representative for the child is substantial,[140] and the countervailing state interest in maintaining discretionary appointment is negligible.[141] Because current procedures do not promote the commanding purpose of custody determinations, the best interests of the child, the state's interest in avoiding appointment is not sufficient to outweigh the child's interest in adequate representation.[142]

---

134. *See supra* notes 66-69 and accompanying text.
135. *See supra* notes 63-68 and accompanying text.
136. *See supra* notes 1 & 2 and accompanying text.
137. *See supra* notes 23-77 and accompanying text.
138. Lassiter v. Department of Social Servs., 452 U.S. 18, 31 (1981).
139. *See supra* notes 116-118 and accompanying text.
140. *See supra* notes 23-77 and 119-30 and accompanying text.
141. *See supra* notes 132-136 and accompanying text.
142. *Cf.* Lassiter v. Department of Social Servs., 452 U.S. 18, 28 (1981) (finding that the state's pecuniary interest is not sufficient to overcome a parent's interest in appointed counsel in a termination proceeding). In its brief the State admitted that the potential costs of appointed counsel in termination proceedings are admittedly *de minimis* compared to the costs in all criminal actions. *See id.*

In *Lassiter v. Department of Social Services*,[143] the Supreme Court found that the United States Constitution allows a case-by-case determination of the parental right to appointed counsel in termination proceedings rather than guaranteeing that right in every case.[144] The Court admitted that informed public opinion recommends, and most state statutes provide, appointed counsel in termination proceedings.[145] The Court noted, however, that the decision whether to require mandatory appointment is left to the states.[146]

Justice Blackmun, in dissent, argued that a bright-line rule guaranteeing appointment is necessary to provide due process to parents.[147] He stressed that a bright-line approach provides "procedural norms" in error-prone areas[148] and simplifies appellate review.[149]

Lassiter involved proceedings where the parent was present and had a right to be represented by retained counsel. In divorce custody proceedings where there are allegations of child abuse, the fact that the child lacks both party status and a right to retained counsel greatly increases the likelihood that

---

143. 452 U.S. 18 (1981) (leaving the determination to the trial court with appellate review). *But see In re* K.L.J., 813 P.2d 276, 286 (Alaska 1991) (holding that termination proceedings require court appointed counsel for the indigent parent). The court in *K.L.J.* cited Annotation, *Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary Termination of Parental Rights*, 80 A.L.R. 3d 1141, 1144-45 as support for the proposition that courts generally find that loss of child custody or permanent termination requires procedural due process. *Id.* at 285.

144. *Lassiter*, 452 U.S. at 31-32.

145. *Id.* at 33-34. The Court stated that "[i]nformed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but in dependency and neglect proceedings as well." The Court noted that 33 states and the District of Columbia provide for the appointment of counsel in termination cases by statute. *Id.* at 34.

146. *See id.*

147. *See id.* at 35-59 (Blackmun, J., dissenting).

148. *Id.* at 50 (arguing that when the generality of cases is subject to error, procedural norms should be devised to provide justice); *see also In re* Gault, 387 U.S. at 18 (noting that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure").

149. *Lassiter*, 452 U.S. at 50-51. Justice Blackmun stated that a case-by-case approach does not lend itself practically to judicial review, because the transcript will not be dispositive of whether an unrepresented indigent was disadvantaged. *Id.* Consequently, the reviewing court must expand its analysis into a "cumbersome and costly," time-consuming investigation of the entire proceeding. *Id.* at 51.

the child's interests will not be adequately protected because the child must depend upon the other parties to represent his or her interests.[150] Under these conditions, an even stronger basis supports Justice Blackmun's assertion that discretionary appointment violates due process principles and that a bright-line rule for appointment is critical.[151]

VI. COMPARING CHILD CUSTODY PROCEEDINGS TO DEPENDENCY AND TERMINATION PROCEEDINGS

Dependency and termination proceedings parallel "a child custody controversy between parents, except that the controversy is not between parents but one, between a parent . . . and the state as *parens patriae*."[152] State laws generally require that a guardian *ad litem* or counsel be appointed for the child in state proceedings resulting from a report of abuse or neglect.[153] About half the states statutorily require that an attorney represent the child.[154] Moreover, while the representation of allegedly abused children in these state-initiated proceedings is governed by state statutes, it is frequently argued that due process principles impose a duty upon the states to

---

150. *See supra* notes 3 & 9.

151. *See Lassiter,* 452 U.S. at 35-59 (Blackmun, J., dissenting) (finding that the complexity of the proceedings and the inability of the parent to present her own case could require due process appointment).

152. Santosky v. Kramer, 455 U.S. 745, 748-49 (1982). In *Santosky*, the Court noted that a dependency proceeding permits the state to remove a child temporarily from his home to the care of an authorized agency if the child appears "neglected." *Id.* at 748. The state has an obligation to attempt to reunite the family. *Id.* However, if the child appears "permanently neglected," the state can permanently terminate all parental rights based upon a presentation of clear and convincing evidence to this effect in a termination proceeding. *Id.* at 748-49; *see also In re* Robinson, 87 Cal. Rptr. 678, 680 (Ct. App. 1970).

153. In order for states to receive funding under the Federal Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. § 5101, they must provide by statute that "in every case involving an abused or neglected child which results in a judicial proceeding, a guardian *ad litem* shall be appointed to represent the child in such proceedings." 45 C.F.R. § 1340.3-3(d)(7) (1985). The American Bar Association adopted a policy in 1989 stating that, in child abuse and neglect-related judicial proceeding, all children should be represented by both a lay guardian *ad litem* and an attorney acting as the child's legal counsel. Davidson, *supra* note 8, at 262.

154. Davidson, *supra* note 8, at 268-69. Other states provide a lay or government representative for the child, instead of an attorney, and thereby qualify for federal funding under the Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-07 (1988). *See id.*

provide representation.[155]

Just as in divorce custody cases, dependency and termination proceedings involve potential conflicts between the parent and the child as well as the state and the child.[156] Contrary to divorce custody proceedings, however, in termination and dependency proceedings the importance of independent representation for the child is universally recognized.[157] In dependency proceedings courts have required appointment of counsel for the child once the government alleges that a home is unfit.[158] Without independent representation, "plea" bargaining or an agreement between parents and the government may

155. *See* James R. Redeker, *The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases*, 23 VILL. L. REV. 521, 530 (1978) (arguing that independent counsel for the child should be required in any proceeding which may affect the child's custody or quality of life); *see also* Inker & Perretta, *supra* note 8, at 116-19 (maintaining that fair treatment requires a right to counsel when government action may seriously injure an individual).

156. State *ex rel.* Juv. Dept. of Multnomah County v. Wade, 527 P.2d 753, 757 (Or. App. 1974) (requiring independent counsel for the child because the parent and government do not provide effective representation).

157. *See supra* note 152.

158. *In re* Melissa S., 225 Cal. Rptr. 195, 201-02 (Ct.App. 1986). Counsel continues until relieved by the court. *Id.* CAL. WELF. & INST. CODE § 317(e) (West Supp. 1995) provides in relevant part:

> The counsel for the minor shall be charged in general with the representation of the minor's interests. To that end, the counsel shall make . . . further investigations that he or she deems in good faith to be reasonably necessary to ascertain the facts, including the interviewing of witnesses, and he or she shall examine and cross-examine witnesses in both the adjudicatory and dispositional hearings. He or she may also introduce and examine his or her own witnesses, make recommendations to the court concerning the child's welfare, and participate further in the proceedings to the degree necessary to adequately represent the minor . . . . In addition, counsel shall investigate the interests of the child beyond the scope of the juvenile proceeding and report to the court other interests of the minor that may need to be protected by the institution of other administrative or judicial proceedings . . . .

Id.

disadvantage the child's best interests.[159]

When abuse is alleged in a private custody dispute, termination or severe restriction of custody and visitation is often sought. Because the child's need for representation in parental termination proceedings is well established,[160] even if not recognized as a due process right, this interest should extend to private proceedings which involve the same conflicts and have the same consequences. The child's interest in a continuing relationship with a parent is no less important when another parent, rather than the state, seeks to effectively terminate that relationship.

VII. CONCLUSION

Juvenile courts, which provide direct representation for the child, were designed to handle dependency and termination cases involving parental abuse of children.[161] Unfortunately, family courts, designed to decide custody between parents, are increasingly forced to deal with allegations of child abuse.[162] Under these conditions, divorce custody proceedings represent an important opportunity for the state to protect the child when dependency or termination hearings are not initiated or are dismissed for insufficient evidence.[163] Even when the "best interests of the child" standard explicitly includes a history of child abuse as a factor in determining custody and visitation, "substantial corroboration" may be required.[164] Corrobo-

159. *In re* Melissa S., 225 Cal. Rptr. at 203. In *Melissa S.*, the court found:

> When a welfare department's social worker has recommended a minor be made a dependent child and removed from parental custody, and when a parent has entered into a "plea" arrangement, conceivably to preclude adjudication of the more serious acts alleged in the petition, both the welfare department and the parent may have an interest in letting the allegations of the petition and the substance of the report pass unchallenged. This does not, however, assure that the best interests of the minor are being served, precisely the reason that independent counsel is statutorily required.

Id.

160. *See supra* note 152.

161. Edwards, *supra* note 65, at 204.

162. *See id.*

163. *See id.* at 269.

164. CAL. FAM. CODE § 3011 (West 1994) (requiring substantial independent

ration may be lacking, however, because often the child is not adequately represented and evidence of abuse is not fully explored. Appellate courts must depend upon trial courts to develop a factual record concerning both the allegations of abuse and the existence of adequate representation for the child. Consequently, the legislatures and courts of several states have recognized that allegations of child abuse require mandatory appointment of a representative for the child.[165]

Although states may resist adding another participant to an already complex proceeding, protection of the child's due process right to a custody decision that ensures his or her safety requires imposing upon the courts a "bright-line" rule for appointment of counsel. When allegations of child abuse cloud a custody proceeding, an initial case-by-case judicial determination of the adequacy of the child's representation by others is too problematic. Children's need for independent representation in dependency and termination proceedings, where their interests are similarly threatened, is universally acknowledged. Giving children the equivalent opportunity to be heard through appointment of counsel in divorce custody proceedings will accomplish the procedural regularity which due process principles demand.

David Peterson[*]

---

corroboration for consideration of child abuse or spousal abuse in custody decisions).

165. *See supra* notes 78-100 and accompanying text for a discussion of these states. When the court has reason to appoint counsel for the child, the child's counsel implicitly has standing to challenge all matters dealing with him or her. Lapides v. Lapides, 437 A.2d 251, 254 (Md. App. 1981). The court's appointment of counsel presumes that the parents cannot provide the minor proper representation. *Id.*; *see also In re* Benjamin D., 278 Cal. Rptr. 468, 473 (Ct. App. 1991) (considering minor's lack of counsel at a custody hearing a factor in relitigating abuse charges at a protection hearing).

* Golden Gate University School of Law, Class of 1995.