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45 Landmark Decisions: Four Experts Look at the Most Significant Cases Handed Down during the Last Two Decades

Sanford N. Katz
Boston College Law School, katzs@bc.edu

Monroe L. Inkler

Frances H. Miller

Walter O. Weyrauch

Randall M. Chastain

The Revolution in Family Law

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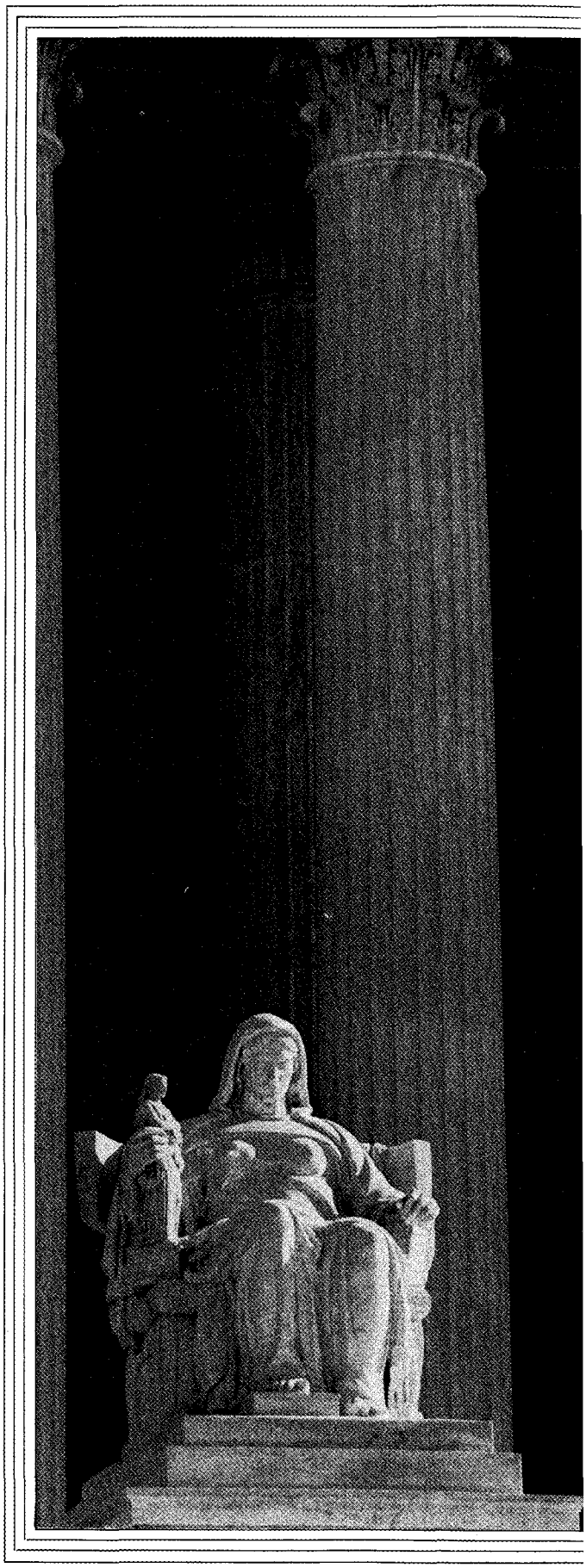

Editor's Note: *Family Advocate* asked four family law specialists to name the decisions that they feel have had the most impact on family law. Contributing to this list of cases (beginning on next page) are: Monroe L. Inker, a Boston attorney; Sanford N. Katz, professor at Boston College Law School; Frances H. Miller, professor at Boston University School of Law; and Walter Weyrauch, professor at the University of Florida College of Law in Gainesville. The introduction, which discusses major family law developments, is by Randall M. Chastain, professor at the University of South Carolina.

Liberal divorce reform, like most major social legislation, did not herald the coming of social changes, but reflected views that already existed. The interplay of forces seeking liberal or conservative divorce laws has been with us for years. The result, however, has not been a continuous, if gradual, movement toward more liberal approaches, but rather an up-and-down movement.

In 1849, for example, Connecticut passed a divorce law that permitted divorce for "any such misconduct as permanently destroys the happiness of the petitioner and defeats the purpose of the marriage relation." (Public Act 1849.17) Despite its reference to "misconduct," this was essentially a unilateral divorce statute since the nature of misconduct is made dependent upon the destruction of the petitioner's happiness and defeating the purpose of the marriage relation. The divorce rate in Connecticut rose so dramatically after the statute was passed that it was repealed in 1878.

The debate over what should constitute justifiable reasons for dissolving a marriage raged with vigor between the end of the Civil War and the beginning of World War

John Neubauer

II. Legislatures tended to remain on the conservative side, reversing a trend toward liberalization that had existed before the Civil War. But by the late 1940s, the country had begun a process of social rethinking that continues to this day.

NO-FAULT DIVORCE

In the 1950s, however, the laws were not much different than when Chester G. Vernier surveyed the country's divorce laws in 1931. At that time, every jurisdiction that permitted divorce—all American jurisdictions except South Carolina—recognized adultery as a ground for divorce. Not one jurisdiction directly recognized a no-fault ground.

Then it was time for the pendulum to swing back to more liberal approaches to divorce access. And by 1969,

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1961

Commissioner v. Lester, 366 U.S. 299 (1961)
The Internal Revenue Code makes alimony payments pursuant to a written agreement taxable to the wife and deductible by the husband, except for the part of such payments that the agreement fixes as a sum payable for the support of minor children. In this case, the Supreme Court allowed the taxpayer to deduct the *full* amount of his payments to his former wife on the ground that the agreement did not "fix" the portion of the payments made as payable for the support of the children. The code "does not say that a 'sufficiently clear purpose' on the part of the parties would satisfy." (at 311)

1962

United States v. Davis, 370 U.S. 65 (1962)
The Supreme Court held that the transfer of appreciated property by one spouse to another at divorce or pursuant to a separation agreement results in a taxable gain to the transferor.

1965

Griswold v. Connecticut, 381 U.S. 479 (1965)
Executive and medical directors of Connecticut Planned Parenthood League challenged conviction on the charge of violating a statute making use of contraceptives a criminal offense. They had given information, instruction, and advice to married persons to prevent conception. The Supreme Court held that the statute unconstitutionally invaded "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." (at 485)

1966

Painter v. Bannister, 140 N.W. 2d 152 (Iowa 1966)
After mother's death, father asked maternal grandparents to take temporary custody of his child. Two years later, after his remarriage, father sought to regain child's custody. The Iowa Supreme Court held that the child should stay with the grandparents, focusing its attention on the best interest of the child. If return to natural parent is "likely to have a seriously disrupting and disturbing effect upon the child's development, this fact must prevail." (at 156)

1967

Loving v. Virginia, 388 U.S. 1 (1967)
The Supreme Court held that Virginia's statutory scheme to prevent marriages solely on the basis of racial classifications violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

1971

Boddie v. Connecticut, 401 U.S. 371 (1971)
The Supreme Court held that "due process does prohibit a state from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages." (at 374)

Thompson v. Thompson, 57, 489 P.2d 1062 (Colo. 1971)
Husband's noneconomic contribution during the marriage requires the same consideration as the wife's for the purpose of property division.

1972

Eisenstadt v. Baird, 405 U.S. 438 (1972)
Baird challenged his conviction under Massachusetts law for giving contraceptive foam to a woman after a lecture to students on contraceptives. State law made it a felony to distribute contraceptives, except when a registered physician administered or prescribed it for a married person or a pharmacist furnished it to a married person under prescription. The statute was held to violate the equal protection clause in providing for dissimilar treatment of married and unmarried persons who are similarly situated.

If *Griswold* held that the state could not ban distribution of contraceptives to married couples, then this statute is unconstitutional since the right of privacy

the California legislature passed a law permitting dissolution of marriage simply on the basis of irreconcilable differences. (*See* Cal. Civil Code § 4506 (w.1970.) This enactment both legitimized and energized the already existing movement toward change, and was probably the single event in no-fault divorce.

By August 1980, Illinois and South Dakota were the only two states that still limited divorce to traditional "fault" grounds. And today, California has gone so far as to allow divorce to be granted by affidavit under some circumstances.

EQUITABLE DISTRIBUTION IN COMMON LAW STATES

As of 1981, Mississippi, Virginia, and West Virginia were the only three states that could be definitely cate-

protects the individual, not married couples. If *Griswold* does not prevent a ban on distribution of contraceptives, then a prohibition applicable only to unmarried persons would be underinclusive and invidiously discriminatory.

Stanley v. Illinois, 405 U.S. 645 (1972)
The presumption that all unmarried fathers are unfit to assume the care, custody, and management of their children conflicts with due process of law and denies such fathers equal protection of the law. Unwed fathers are entitled to a hearing on parental fitness as are other parents.

1973

Cleveland v. Cleveland, 289 A.2d 909 (Conn. 1971), 328 A.2d 691 (Conn. 1973)
Courts have the power to direct parents to pay for school based on financial ability of parents, the schools attended by children prior to the divorce, and the special needs and general welfare of the children. (boarding school and college)

Roe. v. Wade, 410 U.S. 113 (1973)
The Supreme Court held that included in the protection against state action invading the right to privacy of the Fourteenth Amendment's due process clause is a qualified right of a woman to terminate her pregnancy. In the first trimester, state regulation of the abortion procedure cannot go beyond a requirement that the abortion be performed by a licensed physician. After the first trimester, the state "may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health," at 163. (After the first trimester, a compelling state interest in health of the mother qualifies the woman's privacy right.) After viability, "the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother," at 164-65.

1974

Beeh v. Beeh, 214 N.W.2d 170 (Iowa 1974)
The fact that a wife had been removed from her profession for 16½ years, had lost all chances in the interim for seniority, pay increases, and pension rights, and that her employment opportunities were not what they were at the time that she was married were relative factors to be considered in making an alimony award.

Rothman v. Rothman, 320 A.2d 496 (N.J.1974)
Construes the public policy underlying the equitable distribution statute as a recognition of a marriage as a partnership entitling the homemaker to a share of the family assets.

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)
Village zoning laws restricted land use to single-family dwellings and prohibited occupancy of a dwelling by more than two unrelated persons as a "family," but permitted occupancy by any number of persons related by blood, adoption, or marriage. The zoning ordinance was upheld as constitutional because:

- it was not aimed at transients, so there was no unconstitutional burden on interstate travel;
- no fundamental right of association or privacy was implicated;
- no procedural disparity was inflicted on some but not on others;
- the ordinance was reasonable and bore rational relation to a permissible state objective.

1975

Morgan v. Morgan, 366 N.Y.S.2d 977 (Supreme Ct. 1975)
A wife dropped out of college to work while her husband finished law school. The New York City Supreme Court awarded $200 per week in alimony and support for the wife who was a pre-med student at the time of divorce. Alimony was to continue until the wife completed college and medical school, but would terminate if she dropped out or remarried.

Sosna v. Iowa, 419 U.S. 393 (1975)
The Supreme Court upheld the Iowa statute that imposed a one-year residency requirement as a precondition to filing of petition for divorce. The Court found the durational residency requirement did not burden interstate travel unconstitutionally, and did not deny equal protection or due process.

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gorized as "title" states in which their courts have no power to distribute property upon divorce unless one of the traditional equitable trust doctrines can be applied, or unless the property was jointly titled to begin with. While there is some question about the exact extent and reach of notions of equitable distribution of property to either spouse regardless of how it is titled, the bulk of the common law states have joined the eight community property states in at least considering the notion of marriage as partnership.

In *Wirth v. Wirth,* 326 N.Y.S. 2d 308 (App. Div. 1971), for example, the court refused to be "set in motion" by allegations that a husband lived solely off his wife's earnings for more than ten years after representing to her that he was going to invest his earnings "for the two of them" for their "latter days," and then claimed title to all the savings as well as the rest of the property. The court noted that it might be possible to make a moral judgment regarding the husband's representations, activities, and claims, but was willing to do more than that.

But in 1980, New York passed a comprehensive equitable distribution statute. A memorandum that accompanied the revising act establishing equitable distribution included the following:

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1976

Craig v. Boren, 429 U.S. 190 (1976)
An Oklahoma statute prohibiting the sale of 3.2 beer to males under 21 and females under 18 was attacked on the ground that the statutory gender-based differential constituted invidious discrimination against males 18-20 years old. This case articulated an equal protection test for gender-based discrimination: "classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." (at 197). The test was not met in this case.

Knox v. Remick, 358 N.E.2d (Mass. 1976)
To be valid, a separation agreement must be free from fraud and coercion, and must be fair and reasonable at the time the divorce judgment is entered.

Marvin v. Marvin, 557 P.2d 106, 134 Cal. Rptr. 815 (1976)
The court held that "agreements between nonmarital partners fail only to the extent that they rest upon a consideration of meretricious sexual services." Express contracts should be enforced, yet no express contract is necessary for courts to grant relief. In the absence of an express contract, conduct of the parties may demonstrate an implied-in-fact agreement, a partnership agreement, or a joint venture. When warranted, courts may apply quantum meruit or equitable remedies such as constructive or resulting trusts.

See also Marvin v. Marvin, 176 Cal. Rptr. 555 (2d Dist. 1981). Equitable remedies should be devised to protect expectations of nonmarital partners. The female cohabitant was not entitled to a rehabilitative award having benefited economically and socially, having suffered no damage, and where the male cohabitant was not unjustly enriched.

1977

Carlson v. Olson, Minn., 256 N.W.2d 249 (1977)
The court held an implied agreement to share accumulated property. The court looked to the conduct of the parties that evidenced an agreement: living together over 21 years, raising a son to maturity, holding themselves out to the public as husband and wife, and holding their home and some personal property in joint tenancy.

Moore v. City of East Cleveland, 431 U.S. 494 (1977)
Grandmother lived with her two grandsons, who were not brothers but first cousins, and was convicted of violating a city housing ordinance that restricted occupancy of dwelling units to members of a single family, where "family" was narrowly defined. This regulation was found unconstitutionally burdensome to the fundamental right to choose family living arrangements. (Distinguished from *Belle Terre,* in which the ordinance affected only *unrelated* individuals.)

1978

Dziokovski v. Babineau, 380 N.E.2d 1295 (Mass. 1978)
Mother who witnessed her child's severe injury from automobile accident was allowed recovery for negligent infliction of emotional distress. The lack of physical impact or presence in the zone of danger no longer precludes action for physical injuries resulting from emotional distress.

Kulko v. California Superior Court, 436 U.S. 84 (1978)
The state court's exercise of in personam jurisdiction over a nonresident, divorced father on the basis of his acquiescence of his child's desire to live with the mother in a different style was held to be violative of the father's due process rights.

In re Marriage of Graham, 574, P.2d 75 (Colo. 1978)
A professional degree is not property and therefore is not divisible. This is the leading case that rejects the concept of a spousal interest in a professional degree or license. The trend, however, is to recognize at least restitutionary relief for spousal investment in the attainment of the degree or license.

In re the Marriage of Hortmann, 263 N.W.2d 885 (Iowa 1978)

> This legislation proposes the adoption of law to current social values. It is hoped it will serve to bring New York law into today's reality which will serve the best interests of the family.

This indicates the shift in attitude in which marriage is no longer viewed as a joining together of a provider and homemaker. "Current social values" demand that marriage be treated as something of a business, which is commensurate with the attitude that it ought to be dissolvable when either party is dissatisfied with any aspect of it.

Because of this ready acceptance of dissolution and the easing of the way for it financially, the increase of divorce is likely to continue. This in turn will put pressure on family lawyers and family courts to process cases through the system in a prompt, efficient, and yet morally and emotionally satisfactory fashion.

RECOGNITION OF TAX CONSEQUENCES OF DIVORCE AND SETTLEMENTS

If lawyers do not specialize in tax law or family law, they may overlook the potential tax effects of support monies characterized as alimony and child support, and

The wife is entitled to the direct costs of her investment in her husband's education. Additionally, the court may consider increased earning capacity as an asset.

Zablocki v. Redhail, 434 U.S. 374 (1978)
The Supreme Court held that marriage is a fundamental right which cannot be "significantly" impaired absent a compelling state interest.

1979

Hubbard v. Hubbard, 603 P.2d 741 (Okla. Sup. Ct. 1979)
A professional degree or license is not property but a wife is still entitled to fair compensation for past investment on a theory of quasi-contract and unjust enrichment.

Orr v. Orr, 440 U.S. 268 (1979)
A statutory scheme imposing alimony obligations on husbands and not on wives violates the Equal Protection Clause of the Fourteenth Amendment.

R.E.T. v. A.L.T., 410 A.2d 166 (Del. 1979)
Because the marriage was a true partnership in every sense of the word and the wife had abandoned her own career during a 20-year period to be a wife and mother, the court concluded that the parties' property division and spendable income should be equalized to the extent possible.

Rosenberg v. Lipnick, 389 N.E.2d 385 (Mass. 1979)
Antenuptial agreements concerning property rights upon the death of a spouse are subject to fair disclosure rules. The parties occupy a relationship of mutual trust and confidence requiring the "highest degree of good faith, candor, and sincerity in all matters bearing on the agreement."

1980

Albright v. Corn ex rel. Fetters, 421 A.2d 157 (1980)
Custody of children was awarded to maternal grandparents on a finding that this was in the children's best interest. Factors that have a significant impact on the well-being of the child can justify a finding in favor of the nonparent, even though the parent has not been shown to be unfit.

Bezio v. Patenaude, 410 N.E.2d 1207 (Mass. 1980)
A state may not deprive parents of custody of their children "simply because their households fail to meet the ideals approved by the community. . .or simply because the parents embrace ideologies or pursue lifestyles at odds with the average." In the absence of evidence suggesting a correlation between the mother's homosexuality and her fitness as a parent, a denial of custody is without basis.

Boyce v. Boyce, 6 F.L.R. 2390 (April 1980)
A determination that a party to the divorce has fraudulently concealed assets in negotiating a property settlement is a fraud upon the plaintiff and the court, requiring that the divorce be set aside.

Ferriter v. O'Connell's, 413 N.E.2d 690 (Mass. 1980)
In addition to the wife's action for loss of consortium and severe mental anguish, children of an injured employee were allowed to bring an action for loss of father's companionship and society. Children must show that they are dependent not only economically but also "in filial needs for closeness, guidance and nurture."

Green v. Brittner, 424 A.2d 210 (N.J. 1980)
In parents' suit for wrongful death of their high-school-age child, damages are not limited to pecuniary loss, but may include damages for parents "loss of companionship as they grow older when it may be most needed and valuable as well as the advice and guidance that often accompanies it."

Lepis v. Lepis, 416 A.2d 45 (N.J. 1980)
This case sets forth the elements of changed circumstances relevant and sufficient to warrant modification of alimony and child support. Such circumstances are not limited in scope to events that were unforseeable at the time of the divorce, i.e. maturation of the children.

Sachs v. Sachs, 6 F.L.R. 2478 (June 1980)
An adult daughter has standing to sue her father for

(Continued on next page)

of property distributions characterized as division of previously owned property, support, or as property exchanged for release of marital rights. Because many thousands of dollars in federal and state taxes can ride on these determinations, the potential for malpractice liability is awesome.

The need to consider tax consequences throughly was illustrated in *United States v. Davis,* 370 U.S. 65 (1962) and *Commissioner v. Lester,* 366 U.S. 299 (1961). Although these decisions are 20 years old, their ramifications have taken some time to penetrate the profession.

Certainly tax consequences were important before *Davis* and *Lester,* which highlight the potentially devastating tax effects of an improperly planned divorce. But the radical tax increases that were needed to support the Second World War, which have remained on the scene, combined with the effects of inflation and the failure to index the tax laws to inflation, have rendered income tax considerations more important than they were in the 1940s and 50s.

CHILD CUSTODY AND SUPPORT

Recent uniform acts such as the Uniform Reciprocal Enforcement of Support Act (URESA), its descendant, RURESA, and the Uniform Child Custody Jurisdiction Act (UCCJA), and federal enactments such as the Federal Child Support Enforcement Program under the Social Services Amendments of 1974 and the Parental Kidnapping Prevention Act of 1980, have in yet another way required the family lawyer to look beyond the narrow confines of state statute and decisional law. They reflect a social determination that the "local" business of child custody, child support, and enforcement of alimony decrees is a matter of nationwide concern.

Within the last decade, there has been an increased realization that white-and blue-collar workers are not on-

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breach of divorce decree where there was an incorporated stipulation that provided that he was to pay all her college expenses.

1981

Berger v. Weber, 303 N.W.2d 424 (1981)
A child has an independent cause of action for loss of parental society and companionship when a parent is negligently injured. The child, a minor, retarded daughter was severely handicapped from birth, but the court did not base its decision on her special needs. The court further noted the importance of the child to our society.

Fundermann v. Michelson, 304 N.W.2d 790, (Iowa 1981)
There is an inherent and fatal contradiction in the phrase: the alienation belies the affection. The right of action is "useless as a means of preserving the family" and "demeans the parties and the courts." In abolishing the action, the court noted that spousal love is not property subject to theft.

Heyer v. Peterson, 307 N.W.2d (Iowa 1981)
When the issue of custody arises from the competing claims of unwed parents, the critical issue is not which parent possesses the greater right to the child, but rather which parent better fulfills the best interest of the child. Here the court awarded custody of the child to the father because he had demonstrated greater concern for the child's welfare and was the more mature and stable of the two parents.

Kikkert v. Kikkert, 427 A.2d 76 (N.J. Super. 1981)
On appeal, a vested unmatured pension is an asset subject to division upon divorce.

McCarty v. McCarty, 453 U.S. 210 (1981)
The Supreme Court held that federal law governing military retirement pay precludes the state courts from dividing it in divorce proceedings pursuant to state community property laws. The Court contrasted the Civil Service Retirement Act which expressly permits such division.

Scheinberg v. Smith, 8 F.L.R. 2018 (5th Cir. 1981)
A Florida statute required that a married woman presently living with her spouse must notify her husband of intent to have an abortion and provide him with an opportunity to consult with her concerning the procedure. The fifth circuit upheld the statute finding a compelling state interest, justifying the spousal notice burden, in "maintaining and promoting the marital relationship, and protecting a husband's interest in the procreative potential of the marriage." The court remanded the case for a determination of whether the statute is overbroad in failing to limit notice requirement to abortions of "jointly conceived" children.

1982

Mills v. Habluetzel, 451 U.S. 936 (1982)
The Supreme Court held that the statutory one-year period for establishing paternity in Texas denies children equal protection of the law. The period for an illegitimate child to obtain support must be of sufficient duration to present reasonable opportunity for the child's representative to assert claim on his behalf.

Santosky v. Kramer, 102 U.S. 1388 (1982)
The Supreme Court held that the statute permitting termination of parental rights on proof by a "fair preponderance" of the evidence that the child is permanently neglected violates due process. Allegations supporting termination of parental rights must be proved by "clear and convincing" evidence.

ly capable of earning reasonable incomes, but can be effectively traced by more efficient use of the mechanisms already in place. Thus, their earnings can be used for legitimate support purposes. Perhaps the single most effective national legal reform in the last several years has been the federal government's creation of the Parent Locator Service. This service allows properly identified cases to be handled with the assistance of federal data.

INDEPENDENT LEGAL RIGHTS OF CHILDREN

During the last 25 years, courts and psychologists have recognized that legal infants—persons under the age of 18 years old—have independent legal rights and can to some extent see them enforced in the court system. Although there has been no clear consensus in this area, the developments have indicated that the court system, as well as the psychiatric and psychological professions, is aware of the need to evaluate children individually—not merely as insensate ciphers in a system in which the real participants are adults.

There is some tension between this concept and that of familial privacy. The interplay between parental rights and children's rights and the working out of the limits of interaction between family units and the legal structure probably will be one of the principal areas of development in family law in the final two decades of the twentieth century.

Domestic relations law has and will continue to become more complex largely because of an increased social awareness of the consequences of legal decision making in family matters. Moreover, the role of the law in regulating both family activity and the interaction of the family with society bodes to become ever-greater. Whether this is as it should be is something we will have to decide in our legislatures and courts over the next 25 years. ■

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