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of convenience do not overcome the policies served by the attorney-client privilege."³⁷

The weaknesses of the control group test result from attempting to apply the attorney-client privilege to corporations in the same fashion it is applied to natural persons.³⁸ The test does not allow for the realities of the corporate structure, where corporate decision-makers are distinct from the people who possess information on which those decisions are based.³⁹ Restricting the flow of relevant information to corporate counsel may adversely affect the quality of legal advice. Valuable attempts by corporations to uncover and correct their own wrongdoing would be hampered.⁴⁰ The *Upjohn* Court recognized these deficiencies of the control group test and took a realistic approach to the corporate attorney-client privilege. Although not specifically adopting the subject matter test,⁴¹ the Court essentially has endorsed its reasoning.⁴² This reasoning, therefore, will guide the future application of the attorney-client privilege to corporations.⁴³

WILLIAM WOODY SCHLOSSER

GUARDIAN AD LITEM REQUIRED WHEN PATERNITY OF CHILD DISPUTED

S. ____ v. S. ____¹

A wife filed for dissolution and requested custody of the couple's four children. The husband and wife both denied that the husband was the father of the youngest son.² The wife did so apparently to defeat her husband's custody claim. The husband did so apparently to reduce his wife's claim for

37. *Id.* See Weissenberger, *supra* note 10, at 904. See also note 20 *supra*.

38. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 608 (8th Cir. 1977). See Weissenberger, *supra* note 10, at 910.

39. See note 24 and accompanying text *supra*.

40. See notes 26 & 27 and accompanying text *supra*.

41. See notes 30-32 and accompanying text *supra*.

42. See notes 22-37 and accompanying text *supra*.

43. Although the Federal Rules of Evidence have not adopted either test, at one point the control group test was endorsed by a proposed draft of the rules. See 9 CAP. U.L. REV., *supra* note 5, at 812 n.22.

1. 595 S.W.2d 357 (Mo. App., W.D. 1980).

2. *Id.* at 361.

maintenance. He alleged that he had had a successful vasectomy ten years prior to conception of the child and that his wife had been involved in an illicit relationship. Nonetheless, the circuit court found that the youngest child was born of the marriage³ and awarded custody to the husband, who no longer challenged paternity and was eager to continue providing support and companionship to the child. The Missouri Court of Appeals for the Western District affirmed, but held that in any future case when, by pleading or evidence, the paternity of a child becomes an issue, the trial court must appoint a guardian ad litem.⁴

The requirement that a guardian ad litem be appointed when a child's paternity is questioned marks a change in Missouri law. Prior to *S. _____ v. S. _____*, appointments of guardians ad litem to represent minors in paternity disputes were discretionary, and trial courts had no clear guidelines to follow. Appellate courts considered the nonappointment of a guardian ad litem on a case-by-case basis.

The *S. _____ v. S. _____* court offered three justifications for its shift from a discretionary to a mandatory appointment: protection of the interests of the child, integrity of the fact-finding process, and judicial efficiency. Although illegitimacy no longer has the consequences for the child it did historically,⁵ substantial social and legal interests of the child are still involved.⁶ The child's welfare rights,⁷ economic support,⁸ custody,⁹ and the right to inherit from the mother's husband¹⁰ can be affected by a determination of paternity. In many cases, no party is interested in seeking the best interests of the child,¹¹ and thus the child is protected only by appointment

3. *Id.* at 358.

4. *Id.* at 363.

5. At common law, an illegitimate child was *filius nullius*, son of no one. *Cobb v. State Security Ins. Co.*, 576 S.W.2d 726, 733 (Mo. En Banc 1979). United States Supreme Court decisions have invalidated, usually under the equal protection clause, many practices that adversely affected illegitimate children. *E.g.*, *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973) (welfare benefits); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (workmen's compensation benefits through father); *Levy v. Louisiana*, 391 U.S. 68 (1968) (wrongful death claims).

6. *Amber B. v. Leland S.*, 592 S.W.2d 201, 202 (Mo. App., E.D. 1979); *J.M.L. v. C.L.*, 536 S.W.2d 944, 947 (Mo. App., St. L. 1976).

7. *Hannibal v. Hannibal*, 604 S.W.2d 824, 825 (Mo. App., W.D. 1980).

8. *McNulty v. Heitman*, 600 S.W.2d 168 (Mo. App., E.D. 1980); *Mueller v. Jones*, 583 S.W.2d 222 (Mo. App., E.D. 1979).

9. *In re Lisa R.*, 13 Cal. 3d 636, 642, 532 P.2d 123, 126, 119 Cal. Rptr. 475, 478 (1975); *R. v. F.*, 113 N.J. Super. 396, 401, 273 A.2d 808, 811 (Union County Juv. & Dom. Rel. Ct. 1971).

10. *Labine v. Vincent*, 401 U.S. 532 (1971).

11. *Levin, Guardian Ad Litem in a Family Court*, 34 MD. L. REV. 341, 342-43 (1974). *Cf. Doe v. Norton*, 365 F. Supp. 65 (D. Conn. 1973) (upholding requirement that mother disclose identity of putative father to collect AFDC), *vacated on other grounds per curiam sub nom. Roe v. Norton*, 422 U.S. 391 (1975).

of independent representation.¹² The *S. ____ v. S. ____* court compared the need for independent representation of a child when paternity is at issue with the need for it during custody disputes, where its necessity is widely recognized.¹³ The court found that the reasons for independent representation were even more compelling when paternity is at issue.¹⁴ It reasoned that the child's interests are affected more significantly in paternity actions because the judgments are difficult to modify,¹⁵ the parent-child status is severed, and social stigma is involved.

The second justification for independent representation is to prevent "debilitation of the fact finding process."¹⁶ Integrity of the fact-finding process is often questionable in paternity disputes because of the positions taken by the parties in their self-interest.¹⁷ Generally, there is little evidence¹⁸ of paternity other than the testimony of the interested parties. The guardian ad litem may be unable to present contradictory evidence, but he will be able to test and evaluate the evidence and draw the court's attention to its weaknesses. Thus, the presence of the guardian ad litem may discourage the parties from distorting the truth.

The third justification for independent representation is to promote the fair and efficient administration of justice.¹⁹ Appointment of a guardian ad litem is necessary to ensure that the proceeding will result in a final adjudication of the child's legitimacy.²⁰ *O. ____ F. ____ L. ____ v. M. ____ R. ____ R. ____*²¹ established that the child will not be bound by a judgment unless he is a party to the litigation²² and a guardian ad litem is appointed for him.²³ It is desirable

12. Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L.L. REV. 565, 578 (1976).

13. See, e.g., McCoy v. Briegel, 305 S.W.2d 29, 39 (Mo. App., St. L. 1957).

14. 595 S.W.2d at 360.

15. See notes 20-24 and accompanying text *infra*. Modification of a custody order requires that a change have occurred in the circumstances of the child or his custodian and that the modification be necessary to serve the best interests of the child. MO. REV. STAT. § 452.410 (1978).

16. 595 S.W.2d at 361.

17. In *S. ____ v. S. ____*, the mother asserted the child's illegitimacy to defeat her husband's claim to custody. The husband asserted illegitimacy to weaken the wife's claim for maintenance. *Id.*

18. There may be evidence of impotency, sterility, absence or nonaccess, physical appearance, conduct of the putative father, or blood tests. MISSOURI BAR, C.L.E., *Family Law* § 17.11 (1976).

19. But see notes 27-30 and accompanying text *infra*.

20. 595 S.W.2d at 361.

21. 518 S.W.2d 113 (Mo. App., K.C. 1974).

22. *Id.* at 125.

23. *Id.* at 128. See also *J.M.L. v. C.L.*, 536 S.W.2d 944, 947 (Mo. App., St. L. 1976); Solender, *The Guardian Ad Litem: A Valuable Representative or an Illusory Safeguard?*, 7 TEX. TECH. L. REV. 619, 622-25 (1976).

Missouri has provisions allowing appointment of a guardian ad litem. MO.

to have the child's paternity finally decided in one proceeding to preclude possible embarrassment and trauma to the child and parties and to prevent waste of judicial resources. In addition, the rule should prevent parents from raising spurious issues of paternity for personal or tactical reasons because the guardian ad litem will challenge these issues and the parents probably will have to pay his fees.²⁴

The new rule has a broad effect. The most common types of proceedings affected are paternity suits, dissolutions, and nonsupport cases. Missouri, unlike most states, has no statutory cause of action to establish paternity of a child.²⁵ Thus, paternity suits are brought as declaratory judgment actions often coupled with claims for support.²⁶ In these cases, *S. _____ v. S. _____* will require appointment of representation for the child. Paternity issues may arise in marriage dissolutions when adultery is the ground for dissolution, when a party seeks to invalidate a marriage for fraud because the wife was pregnant with another man's child when the marriage occurred, when the custodial parent seeks child support from the noncustodial parent, or when a custody dispute arises.²⁷ Since paternity of the child is not the major issue, these proceedings will become more complex and time-consuming.²⁸ This process will be judicially efficient in the long run, however, since the issues of paternity will not be relitigated in future proceedings.²⁹ For example, paternity may be at issue in statutory nonsupport proceedings because the prosecutor must establish the paternity of a child for whom support is sought.³⁰

Several unanswered questions concerning the rule in *S. _____ v. S. _____* remain, including criteria for determining the child's best interests by the

REV. STAT. § 475.090 (1978) ("If it appears to the court that a guardian should be appointed for a minor . . . the court shall appoint a guardian."). When a minor is made a party, a guardian ad litem is required by statute. *Id.* § 507.110 (minor as plaintiff); MO. SUP. CT. R. 52.02(a) (same); MO. REV. STAT. § 507.150 (1978) (minor as defendant); MO. SUP. CT. R. 52.02(e) (same). It was clear, however, that noncompliance with the statute did not void the proceedings. *Id.* 52.02(m).

24. Casasanto, *Guardians Ad Litem: A Proposal to Better Protect the Interests of Children of Divorce*, 20 N.H.B.J. 35, 56, 57 (1978); Genden, *supra* note 12, at 591. *Cf.* Tracy v. Martin, 363 Mo. 108, 113-14, 249 S.W.2d 321, 323 (En Banc 1952) (action to cancel trust indenture and quiet title); McCoy v. Briegel, 305 S.W.2d 29, 39-40 (Mo. App., St. L. 1957) (custody).

25. See *Illegitimate Children—No Civil Liability for Support*, 30 MO. L. REV. 154, 155 n.10 (1965) (list of statutory bastardy proceedings).

26. This cause of action was recognized in Missouri in *E. _____ M. _____ R. _____ v. G. _____ E. _____ R. _____*, 431 S.W.2d 152 (Mo. 1968).

27. Annot., 78 A.L.R.3d 846, 849 (1977). See also *Hannibal v. Hannibal*, 604 S.W.2d 824 (Mo. App., W.D. 1980) (remand to follow *S. _____ v. S. _____*).

28. 595 S.W.2d at 361 n.2 (court suggests that putative father might be joined in dissolution proceeding so determination of paternity would bind him).

29. *Id.* See also notes 20-24 and accompanying text *supra*.

30. MO. REV. STAT. § 207.025(5) (1978).

guardian ad litem,³¹ the amount of conflict of interest the courts will tolerate,³² and attracting and compensating qualified guardians ad litem.³³ With respect to the first problem, the duty of a child's guardian ad litem is to assist the court in determining the best interests of the child.³⁴ Unfortunately, the best interests of the child are not easily defined. Moreover, it is not clear whether the guardian ad litem should represent the desires of the child or the interests he determines to be the child's best interests.³⁵ The guardian ad litem is the child's representative before the court, and he should consider and advocate the wishes of the child. The relationship between the guardian ad litem and the child, however, is not an attorney-client relationship.³⁶ A guardian ad litem usually is appointed because the child has immature judgment and is incapable of making decisions involved in litigation. His expressed desires might be the result of coercion or immaturity. These factors indicate that the guardian ad litem should decide the child's best interests. The desires of the child should be one factor considered by the guardian ad litem, especially if the child appears to have mature judgment.³⁷ Other factors that should be considered are the stigma of illegitimacy, emotional ties of the child, stability of the home environment, and financial support.³⁸

If the guardian ad litem is to protect the child, he must represent the child without a conflict of interest.³⁹ This may be difficult because the child usually does not choose his guardian ad litem and the guardian ad litem may feel loyalty to the parent, who usually pays his fees.⁴⁰ The most recent Missouri Supreme Court case involving a conflict of interest problem is *In*

31. See notes 34-38 and accompanying text *infra*.

32. See notes 39-46 and accompanying text *infra*.

33. See notes 48 & 49 and accompanying text *infra*.

34. Levin, *supra* note 11, at 362. Cf. *In re M _____ and M _____*, 446 S.W.2d 508, 513 (Mo. App., Spr. 1969) (termination of parental rights).

35. Casasanto, *supra* note 24, at 51; Genden, *supra* note 12, at 588-89, 593; Solender, *supra* note 23, at 638-39.

36. See *Veazy v. Veazy*, 560 P.2d 382, 390 (Alaska 1977); MO. SUP. CT. R. 4, EC 7-11 to -12; Casasanto, *supra* note 24, at 49.

37. MO. REV. STAT. § 452.375 (1978) (Missouri version of UNIFORM MARRIAGE AND DIVORCE ACT § 402) states that "the wishes of a child as to his custodian" is one factor to be considered, without specifying the child's age. Cf. *Galeener v. Black*, 606 S.W.2d 245, 247-48 (Mo. App., Spr. 1980) (wishes of child of 11 considered significant).

38. 595 S.W.2d at 362.

39. *McCoy v. Breigel*, 305 S.W.2d 29, 39 (Mo. App., St. L. 1957); Levin, *supra* note 11, at 362-64.

40. See *Stegemann v. Fauk*, 571 S.W.2d 697, 701 (Mo. App., St. L. 1978) (partial allowance for attorneys fees made under court's equitable jurisdiction to care for minor); *In re G _____*, 389 S.W.2d 63, 66 (Mo. App., Spr. 1965) (appointment of petitioner's attorney as guardian ad litem to represent minor in adoption held improper). See also MO. SUP. CT. R. 4, DR 5-107.

re L _____, *Part II*.⁴¹ In that case, the mother sought support and a declaration that the defendant, a man other than her husband, was the father of her child. The mother represented the child as next friend.⁴² The trial court found the defendant to be the father of the child and ordered him to pay support. On appeal, the Missouri Supreme Court acknowledged the mother's conflict of interest between her financial concerns and the child's best interest.⁴³ Nonetheless, the court did not require disqualification of the mother in all similar situations.⁴⁴ The court deferred to the trial court, stating that the trial court must have been satisfied that the child was adequately represented.⁴⁵ In spite of the questionable representation of the child, the court affirmed the finding of illegitimacy. A dissenting judge suggested that a guardian ad litem other than the mother should have represented the child born during coverture since the conflict of interest when the mother was seeking support from the putative father was obvious.⁴⁶ The rule of *S. _____ v. S. _____* would not directly prevent the conflict of interest present in *In re L _____, Part II* from recurring since a representative was appointed for the child as the rule requires. Because of the policies behind the rule, however, the representation in *In re L _____, Part II* would violate the spirit of *S. _____ v. S. _____*.

Sufficient numbers of qualified guardians ad litem may be hard to find under the new rule. The problem will be greatest when the parents of the child cannot afford to pay a fee. One commentator has suggested that the court should appoint and the legislature should compensate the guardian ad litem.⁴⁷ The danger with public funding, however, is that compensation may be insufficient to encourage guardians ad litem to represent the child with adequate energy and force.⁴⁸ A guardian ad litem who is poorly prepared or ineffective might cause more harm to the child than if the child were unrepresented.⁴⁹

41. 499 S.W.2d 490 (Mo. En Banc 1973).

42. A next friend rather than a guardian ad litem is used when the suit is brought by a minor plaintiff. MO. REV. STAT. § 507.110 (1978). There is little or no difference in the role or duty of the two, and some jurisdictions no longer distinguish between the two. *See Tracy v. Martin*, 363 Mo. 108, 112, 249 S.W.2d 321, 323 (En Banc 1952).

43. *See* note 17 and accompanying text *supra*. The mother's husband corroborated her testimony. 499 S.W.2d at 492.

44. 499 S.W.2d at 494-95. *Cf. Amber B. v. Leland S.*, 592 S.W.2d 201, 202 (Mo. App., E.D. 1979) (mother disqualified because child had substantial interests that could conflict with interests of mother).

45. 499 S.W.2d at 495.

46. *Id.* (Donnelly, C.J., dissenting). *But see* note 49 and accompanying text *infra*.

47. Casasanto, *supra* note 24, at 57.

48. Genden, *supra* note 12, at 591.

49. *Id.* at 591-92.