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The Right of a Minor to Independent Status - Three Models

Yitshak Cohen*

This article examines a minor’s right to independent status in matters of family law, the importance and benefits of that right, the interests it competes with, and possible approaches for the future. The right of a minor to independent status was initially intended to resolve a concern that parents, while undergoing divorce proceedings and focused on their own interests, might compromise the interests of their children. I argue that this concern has developed into a legal presumption that parents compromise the interest of minors in divorce proceedings. However, this presumption contradicts the assumption, fundamental to every legal system, that parents are natural guardians who safeguard the interests of their children. In addition, the development of a minor’s right to independent status has several negative effects on divorce proceedings, among them: contractual uncertainty, lack of finality of judgment, waste of judicial resources, and prolonged divorce proceedings between parents.

This article offers the following three models for protecting the interests of the minor: (i) requiring the court to comprehensively examine the interests of the child and then granting a presumption of validity to the court’s determination—that determination should also serve as binding precedent for a subsequent court; (ii) legislating clear considerations and guidelines for defining the best interests of the child and thereby reducing future relitigation; and (iii) appointing independent representation for the minor. These models may serve to create a more appropriate formula for balancing the competing interests in family law proceedings.

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INTRODUCTION

In the United States, the number of divorce proceedings is almost unmanageable.\(^1\) Accordingly, the number of children involved in such proceedings is growing every year.\(^2\) The decisions made during a couple’s divorce proceedings have a crucial effect upon the lives, personal development, tranquility, and security of that couple’s children. These


decisions will affect the children even though the children are usually not parties to the proceedings that take place between their parents. The courts have expressed concern over the conflicts of interests between parents and children during divorce proceedings.\(^3\) When parents are involved in a struggle over their interests and personal freedoms, they might neglect or even compromise the interests of their children. In order to protect a child’s interests, the courts established and strengthened the minor’s right to independent status by determining that decisions or agreements made in the proceedings between the parents are not binding upon the minor.\(^4\) Children are therefore allowed to subsequently reopen such agreements in a new proceeding initiated on their behalf.\(^5\) In this relitigation proceeding, the interests of the children appear before the court as separate and distinct from the matters between their parents.\(^6\) This is the first opportunity for the child to be heard. As a consequence, prior decisions that affect the minor might be changed.

However, excessive use of the minor’s right to independent status detracts from the finality of judgments, and can result in certain issues remaining open and unresolved.\(^7\) This uncertainty might also be detrimental to the motivation of the couple to resolve their dispute. The parties may wrongfully use the minor’s right to independent status in their own conflict as a couple. It may even burden limited judicial resources with the relitigation of claims, while other parties with new matters wait to come before the court. However, even though the potential for abuse exists, limiting and restricting minors’ rights to independent status might be detrimental to the interests of the children if their interests are compromised in favor of their parents.

In the first Part of this article, I will examine the importance of the right to independent status, its necessity for the protection of minors, its place in legal systems today, and possible trends for the future. This right

\(^4\) CA 404/70 Evron v. Evron, 25(1) PD 373, 378 [1971] (Isr.).
\(^5\) Id.
\(^6\) Id.
\(^7\) Leite & Clark, supra note 1, at 260-61 (“From a legal point of view, divorce traditionally required a couple to address grounds for the divorce, property distribution, alimony, child custody, and child support. Today, only those issues associated with children remain open issues in most states.”) (citation omitted).
does not exist in a legal vacuum, and it has significant implications for the remaining interests involved in a family law matter. Therefore, in the second Part of this article, I will evaluate the present balance between contractual certainty, the finality of judgments, and the right of a parent not to be repeatedly brought before the court for relitigation versus the best interests of the child and his right to independent status. In the third and final Part of the article, I will consider different practical models that have been used to address a minor’s right to independent status. Throughout the article I will draw from American, Israeli, and other foreign law to provide examples and examine difficult scenarios. This examination may assist in building a formula that more appropriately balances the competing interests in family law matters.

I. THE IMPORTANCE OF THE MINOR’S RIGHT TO INDEPENDENT STATUS

A. Finality of Judgment

The principle of finality of judgment is fundamental to legal systems. Simply put, finality of judgment means that a matter conclusively decided by a court of competent jurisdiction will not be relitigated between the same parties. The principle of finality of judgment includes three cumulative conditions: final resolution by a competent court, identical litigants, and the same claim. The rationales at the basis of this principle include prevention

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8 See, e.g., Jullie Steakley & Wedo U. Howell, Ruminations on Res Judicata, 28 Sw. L.J. 355, 355 (1974) (“The doctrine of res judicata...[states] that a cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, cannot afterwards be litigated by new proceedings either before the same or any other tribunal”) (citations omitted).

9 See, e.g., Amstad v. U.S. Brass Corp., 919 S.W.2d 644, 652 (Tex. 1996) (The elements of res judicata are: “(1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action”); Wayne Cnty. v. Detroit, 233 Mich. App. 275, 277 (1998) (“Under the doctrine of res judicata, ‘a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.’” (citing BLACK’S LAW DICTIONARY 1305 (6th ed. 1990)).
of relitigation, the right of a litigant not to be repeatedly called back to court, the concern over conflicting decisions made by different courts on the same issues, and the efficient use of judicial resources.\(^\text{10}\) Therefore, once a court has granted a final judgment, a procedural barrier arises before the parties, preventing any relitigation between them on the same cause of action.\(^\text{11}\)

The importance and effectiveness of this principle has resulted in its expansion on several levels. For example, finality of the judgment is not restricted only to the parties who were formally present during the first action, but may also bar the initiation of a proceeding by others who are privy with the parties to the earlier action.\(^\text{12}\) The classic example of this sort of privity, as discussed in this article, is the natural guardianship of parents. In matters associated with their children, parents are authorized to represent them in legal actions.\(^\text{13}\) The legal significance of such representation is, among other considerations, that a decision concerning the minors is binding upon them and prevents them from relitigating the same matter. The rationale behind obligating a minor by a legal proceeding in which he was not even present is sufficiently clear: parents appropriately protect the interest of their children. In representing the children, it is assumed the parents do the most to ensure that the children’s interests are thoroughly considered by the court.\(^\text{14}\) Therefore, finality of judgment is intended to prevent the minor's relitigation.

B. Natural Guardianship

The natural presumption that parents safeguard the interests of their children is not as simple as it seems. This presumption is challenged by the

\(^{10}\) CA 9085/00 Shirit v. Sharvat Brothers Ltd, 57(5) PD 462, 475 [2003] (Isr.).

\(^{11}\) CA 246/66 Klosner v. Shimony, 22(2) PD 561, 583 [1968] (Isr.).

\(^{12}\) See, e.g., Getty Oil Co. v. Ins. Co. of N. Am., 845 S.W.2d 794, 800-01 (Tex. 1992) (People can be in privity in at least three ways: (1) they can control an action even if they are not parties to it; (2) their interests can be represented by a party to the action; or (3) they can be successors in interest, deriving their claims through a party to the prior action); Mathison v. Public Water Supply Dist. No. 2 of Jackson Cnty., 401 S.W.2d 424, 431 (Mo. 1966) (“to make one ‘privy’ to an [earlier] action he must have acquired his interest in the subject matter of the action subsequent to the commencement of the suit or rendition of judgment.”).

\(^{13}\) Capacity and Guardianship Law, 5722 – 1962, 380 Laws of the State of Israel (LSI) 120, §§ 14-15 (1962) (Isr.).

\(^{14}\) See Getty, 845 S.W.2d at 800-01.
concern that parents who are in the midst of divorce proceedings, struggling over their own personal matters, including freedom—and sometimes even motivated by the desire for revenge—may unknowingly or unintentionally compromise the interests of their minor children. When one spouse focuses on proving his own parenting skills and abilities, or the other spouse’s lack thereof, that spouse may fail to properly consider the children’s interests. The picture presented to the court may be distorted if the atmosphere in the divorce proceedings is controversial and charged. Since the spouses are concerned with personal gain, the interests presented before the court are their own and not necessarily the interests of their children. In addition, divorce proceedings sometimes cause a rift between children and their parents. Consequently, parents may not be sensitive to or aware of the needs of their children. Moreover, the interests of the parents may sometimes be at odds with their children’s interests. For example, while in principle, broad visitation arrangements with both parents are in the best interests of the child, it is certainly possible that the noncustodial parent will prefer more restricted visitation that will not burden him in finding new work or in establishing a new family.

Legal systems in the United States are aware of the gap that exists between the interests of parents and those of their children during divorce proceedings. In the case of Jaramillo v. Jaramillo, the court stated:

When, however, the interests of a third party (or parties—the children) are not only significantly affected by the outcome of the litigation but indeed are paramount in determining that outcome, placing on one party the burden of establishing that his or her interests are the ones that should be vindicated can subordinate the interests of the third party—who may be absent and may not even be represented—in the clash over the other two parties’ competing hopes and desires.

Similarly, the alienation that might occur between parents during divorce proceedings could negatively impact their parental judgment with respect to the interests of their children.\textsuperscript{18}

\textbf{C. The Right of the Minor to Independent Status}

The concern that parents might compromise the interests of their children is not merely an academic or theoretical issue. A proceeding between parents, especially when uncontested or resolved by agreement, does not bind a subsequent court in matters that only concern the child.\textsuperscript{19} Such matters are brought before a court apart from earlier proceedings that involved the parents.\textsuperscript{20} A parent should not be permitted to purchase his personal freedom at the cost of his child’s peace and safety, even if the court approves such an agreement.

In \textit{Guillermo v. Guillermo}, the Family Court in Mexico confirmed a divorce agreement, which determined, among other issues, that the father would pay fifteen dollars a week for child support.\textsuperscript{21} Eight months thereafter, the mother brought a claim against the father, on behalf of the child, before a different court of parallel jurisdiction.\textsuperscript{22} She argued that the amount of support did not meet the needs of the child.\textsuperscript{23} The court held that in some cases the mother might be so anxious to end her marriage that she may compromise her children’s needs for a matrimonial decree.\textsuperscript{24}

The court further stated that there had been no change in either the child’s or the father’s circumstances since the initial judgment.\textsuperscript{25} The court noted that the only change was simply that of the mother’s own situation.\textsuperscript{26} While she had previously been constrained by her matrimonial dispute, eight

\begin{itemize}
  \item \textsuperscript{18} Ford v. Ford, 371 U.S. 187, 193 (1962) (“Unfortunately, experience has shown that the question of custody, so vital to a child's happiness and well-being, frequently cannot be left to the discretion of parents. This is particularly true where, as here, the estrangement of husband and wife beclouds parental judgment with emotion and prejudice.”).
  \item \textsuperscript{19} CA 42/49 Mashkeh v. Mashkeh, 3(1) PD 88 (1950)(Îsr.).
  \item \textsuperscript{20} \textit{Id.}
  \item \textsuperscript{21} Guillermo v. Guillermo, 252 N.Y.S.2d 171, 172 (1964).
  \item \textsuperscript{22} \textit{Id.}
  \item \textsuperscript{23} See \textit{id.} at 172-73.
  \item \textsuperscript{24} \textit{Id.} at 173.
  \item \textsuperscript{25} \textit{Id.}
  \item \textsuperscript{26} \textit{Id.}
\end{itemize}
months later she was free to litigate. This change, for the first time, enabled the mother to independently raise the issue of support of her minor child. The court indicated that the ruling of the previous court relied only on the divorce agreement of the parties: there was no discussion, interrogation process, or examination of the needs of the child. The court concluded that according to the income of the father, he was required to pay child support in an amount fifty percent higher than the amount previously determined. The court stated that when matrimonial litigation is uncontested or results in a settlement between the parties, the incidental provision of child support cannot control a subsequent court where the interests of the child are first considered separate and apart from the earlier proceedings between the parents.

No parent should be able to bind a child by buying matrimonial freedom at the price of selling a child's material or other security, even if a court approves such agreement. No child support decree should be sacrosanct if “incidental” to, and inequitably incidental to, the problems of adults.

A minor has no control over the process or the strategies used. Therefore, the findings should not obligate him. In sum, because children are not privy to their parents in divorce proceedings, they should not be bound by the results of proceedings that take place between their parents.

The most important implication of these concerns is the development of the minor’s right to independent status. Accordingly, a voluntary agreement between the parents in matters concerning the child is not binding

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27 Id.
28 Id.
29 Id. at 178.
30 Id.
31 Id. at 181.
32 Id.
33 See, e.g., Simcox v. Simcox, 546 N.E.2d 609, 611 (Ill. 1989) (“We, therefore, hold that children are not privies of their parents in dissolution proceedings and, as such, are not bound by findings of paternity in such proceedings unless they are parties to the proceedings.”) (emphasis in original).
upon the child—even if approved by the court.\textsuperscript{34} Merely including the minors in the proceedings and having the parents declare that they are creating an agreement in the interests of their children does not make any difference.\textsuperscript{35} The child is allowed to initiate a new legal proceeding in a matter that was previously determined by the court, even if there is no material change of circumstances that would otherwise be necessary to justify relitigation.

It is interesting to note that under the Israeli legal system, as opposed to that in the United States, the change that takes place in the status of the minor also affects those circumstances in which the right to independent status applies. For many years, the presumption that parents might compromise the interest of their children applied exclusively to issues of child support. In all remaining matters, the agreement between the divorcing parents was binding upon the minor.\textsuperscript{36} In recent years, however, the concern that parents may compromise the interests of their children has arisen with

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item In the Israeli legal system, it is insufficient to merely determine that the agreement meets the needs of the child and serves his best interest. Two procedural conditions must be fulfilled for it to be binding upon the minor: (1) a separate claim on behalf of the minor, and (2) a separate proceeding in his matter, that is not connected to the remaining issues of the divorce. \textit{See, e.g.}, CA 404/70 Evron v. Evron, 25(1) PD 373, 378 [1971] (Isr.). In my opinion, Israeli law identifies three stages in the development of a minor’s right to independent status: In the 1960s and 1970s, the determining standard was procedural. In the 1980s, the courts adopted a more substantive model. They sought to identify if decisions concerning the minors were indeed made in their interest, whether or not a separate proceeding was brought on their behalf. \textit{See, e.g.}, CA 289/82 Dauba v. Dauba, 36(4) PD 625, 628 [1982] (Isr.); CA 82/544 Hamami v. Hamami, 38(3) PD 605, 608 [1984] (Isr.). In the last decade the courts again adopted the procedural standard, and in that way broadened a minor’s right to independent status. In this third stage, even if it is determined that the decisions made concerning a child are good, the second court will reverse them if they were not made in a separate proceeding on behalf of the minor. \textit{See} HCJ 2898/03 Anonymous v. The Supreme Rabbinical Court, 58(2) PD 550, 563 [2004] (Isr.). The Supreme Court recently decided that the substantive model should be determinative. \textit{See} HCJ 4407/12 Anonymous v. The Supreme Rabbinical Court (Feb. 7, 2013), Nevo Legal Database (by subscription) (Isr.).
\item CA 81/1 Nagar v. Nagar, 38(1) PD 365, 387 [1984] (Isr.).
\end{enumerate}
\end{footnotesize}
respect to a broader variety of issues. Thus, the presumption now applies to child custody and visitation, as well as matters of education in Israel.

The establishment and broadening of the minor’s right to independent status is intended to benefit the minor and to protect his interests. The law must protect minors from anyone who might compromise their interests, even if that person happens to be their parent. This sort of protection is of the utmost importance.

II. EXCLUSION OF OTHER INTERESTS IN FAMILY LAW

Judicial decisions must balance different interests. The emphasis of one interest is generally at the expense of another. In this Part, I will more closely examine the negative costs that the right of a minor’s independent status has on other interests.

A. Res Judicata and the Burden of Proof

Among the first interests to be compromised by the minor’s right of independent status are the interests incorporated in the doctrine of res judicata, and principles concerning finality of judgment, such as prevention of relitigation, *functus officio*, the right of a party not to repeatedly face claims on the same matter; prevention of burdening the court with relitigation while new claims are waiting to be heard; and other finality considerations. Certainly, the principle of res judicata in family law is

37 HCJ 2898/03 Anonymous v. The Supreme Rabbinical Court, 58(2) PD 550, 563 [2004] (Isr.).
38 HCJ 9539/00 Eitan v. The Supreme Rabbinical Court, 56(1) 125, 133 [2001] (Isr.).
39 CA 9085/00 Shitrit v. Sharvat Brothers Ltd, 57(5) PD 462, 475 [2003] (Isr.).
41 See NINA SALTMAN, RES JUDICATA IN CIVIL PROCEEDINGS 3-12 (Ramot, Univ. of Tel Aviv 1991) (in Hebrew); CA 219/87 Artzi Ltd. v. Shemesh Hadar Ltd., 43(3) PD 489, 497 [1989] (Isr.).
more flexible than is customary in other areas of law.\footnote{Barry B. McGough & Gregory R. Miller, \textit{Domestic Relations}, 56 MERCER L. REV. 221 (2004) (“The court of appeals, however, held that ‘the doctrine of \textit{res judicata} is less strictly applied in divorce and alimony cases, including cases dealing with child support issues’” (citing Dial v. Adkins, 265 Ga. App. 650, 651-52 (2004) (emphasis in original))).} I have written more extensively elsewhere about this flexibility with respect to child support, custody, and alimony.\footnote{See generally Yitshak Cohen, \textit{Issues Subject to Modification in Family Law: A New Model}, 62 DRAKE L. REV. 101 (forthcoming 2015).} In those matters, the court determined that when there is a change in circumstances, the final decision of the court may be modified to suit the new reality.\footnote{See \textit{id.} at 2-6.}

In order to balance the interest of adjusting a payment amount to meet changed circumstances, on one hand, and the interest of the finality of judgment on the other hand, the court requires that the change be a “material change of circumstances.”\footnote{See, e.g., Joan G. Wexler, \textit{Rethinking the Modification of Child Custody Decrees}, 94 Yale L.J. 757, 766 (1985); \textit{accord id.} at 779 (“Each of the approaches to modification applications described above represents an attempt to balance competing policy interests. Trying to balance the policies behind the \textit{res judicata} doctrine on the one hand, and the policies in favor of making the best-advised contemporary determination of the child's welfare on the other, the traditional changed circumstances doctrine holds that not just any changed circumstances, but only substantial ones, should warrant changing custody.”); Sally Burnet Sharp, \textit{Modification of Agreement-Based Custody Decrees: Unitary or Dual Standard?} 68 VA. L. REV. 1263, 1264 n.9 (1982) (“The change of circumstances standard is based on principles of \textit{res judicata}.”); Richard Montes, Harold J. Cohn, & Shelley L. Albaum, \textit{The Changed-Circumstances Rule and the Best Interest of the Child}, 24 L.A. LAW. 12, 12 (2001) (“[O]ne of the purposes of the rule [i.e. changed circumstances] is to recognize the finality of judgments and protect the parties and the child from harmful and needless relitigation of the issues of custody and visitation.”).} This balance requires two distinct conditions that are intended to offset and “make up for” the conflict with the principle of the finality of judgment. First, the burden of proving changed circumstances is placed upon the individual initiating the later proceeding and requesting to modify the earlier decision.\footnote{The burden for modifying maintenance awards rests with the party seeking modification, and the decision of whether to grant such modification is within the sound discretion of the trial court. \textit{See, e.g.}, Pala v. Loubser, 943 N.E.2d 400, 409} Second, not every change in
circumstances is sufficient. Instead, a material change in circumstances is mandatory, and meeting this burden of proof is not an easy task.\textsuperscript{47}

In contrast, with respect to the right of the minor to independent status, the conflict with the principle of res judicata is not balanced in any way. On the contrary, the burden of proof is placed upon the individual requesting to maintain the previous ruling without change.\textsuperscript{48} Only a few days subsequent to a final determination in the matters concerning a couple, one parent may initiate a new claim on behalf of the child, without being required to prove a material or any other change in circumstances.\textsuperscript{49} Therefore, this right of independent status actually reverses the original fundamental presumption: it assumes that the representation of the minor by his parents in the first proceeding was not fitting representation, and thus the minor is allowed to initiate a new proceeding to modify the result.\textsuperscript{50} The burden shifts and is placed on the party that objects to initiating a new proceeding.\textsuperscript{51} In other words, the burden is borne by the individual wishing to maintain the determination that has already been adjudicated—not the party requesting to modify it. Accordingly, the individual bearing the burden must prove that in the earlier proceeding the representation of the minor was appropriate.\textsuperscript{52} This requirement contradicts the natural presumption, which assumes that a parent adequately represents his child and faithfully fulfills his duty to protect the minor’s interests. Thus, by changing the customary premise, the court assumes, instead, that the representation of the child by the parents is inappropriate. Anyone arguing that the parental representation...

\textsuperscript{47} See Wexler, supra note 45, at 766; Montes, Cohn, & Albaum, supra note 45, at 12.

\textsuperscript{48} Ruddock v. Ohls, 91 Cal. App. 3d 271, 277 (1979) (“If a judgment determining the existence of the parent-child relationship is to be binding upon the nonparty minor child, respondent has the burden of proving the minor was a party to the action or in some other manner is bound prospectively by the findings and judgment in the parents' marital dissolution action.”).

\textsuperscript{49} Famcourt 37181/97 L.Ti v A.Ti (Nov. 26, 2002) Nevo Legal Database (by subscription) (Isr.).

\textsuperscript{50} HCJ 6103/93 Levi v. The Supreme Rabbinical Court, 48(2) PD 591 [1994] (Isr.).

\textsuperscript{51} Id.

\textsuperscript{52} See Ruddock, 91 Cal. App. 3d at 277.
is proper bears the burden of proof. The question of the burden is far more than a theoretical matter. It actually determines, as a matter of policy, who will win in the litigation and who will lose.

B. Contractual Certainty, Rehabilitation, and Motivation to Settle

The right of independent status, which is intended to focus on the interest of the minor, might be used, instead, by one of the parents as a way of avoiding his own obligations. A spouse—who just consented to a range of separation and divorce conditions, including matters of joint property, custody, or support—can go back and object to the same agreement,

53 See Jaramillo v. Jaramillo 823 P.2d 299, 307 (N.M. 1991). Placing the burden on the party that wishes to maintain the present situation was of concern to the court in this matter. The court determined that even though the matter involved minors, it is appropriate to determine a presumption favoring the party that wishes to maintain the existing situation, while the burden of proof should be imposed on the individual requesting the change. The court stated:

When parents are operating under a joint custody arrangement and one of them seeks to alter the arrangement, it makes perfectly good sense to impose a presumption in favor of the parent who wishes to continue to operate under the joint custody decree and to place on the party wishing to change the decree the burden to produce evidence that the arrangement is no longer workable and needs to be changed.

Id. The court added and explained that as a rule, placing the burden on one of the parents to justify maintaining the existing situation could result in focusing on the question of whether or not that party met the burden, and the interests of the minor might be hurt. Thus the court stated: “But beyond this presumption in favor of an existing joint custody arrangement, further presumptions for or against the relocating parent and the one who remains behind only frustrate achievement of the ultimate goal of determining the arrangement that will best serve the child's interests” Id. at 307. In our matter, the burden in the proceeding is not intended to focus on the lack of trust in the parents but on the question of whether the requested change is in the best interests of the child.

54 Id. (“In the typical bipolar model of adversary litigation—in which one party's interests are pitted against those of the opposing party—the use of presumptions and the assignment of burdens of proof probably effectuate, in most instances, the relevant policy goals involved in determining who wins and who loses.”)
requesting it be changed on the grounds that he is not bringing his own
claim, but the claim of the minor.\textsuperscript{55} The court sometimes defines such claims
as fictitious when it becomes clear that the minor does not even know how
to express his needs or what he is lacking, or when the initiation of the
proceeding is neither the minor’s initiative nor his idea.\textsuperscript{56}

The presumption of compromising the interests of the minor might
therefore be wrongfully taken advantage of by one of the spouses. In a
separate proceeding, that spouse could argue that the child had not been
properly represented, and thus he might avoid his own obligations under a
prior agreement with the other spouse. Therefore, the right of the minor to
independent status might detrimentally impact the interest of the contract
and contractual certainty, making it difficult for the couple to plan their
individual futures.\textsuperscript{57}

In addition, the duality in the position taken by the court is not easily
understood. On one hand, when a parent creates an agreement with his
spouse, the court does not trust the parent to protect the interests of the
minor. On the other hand, after some time has passed, when a parent brings
a separate claim against the other spouse on behalf of the child, such trust is
granted.\textsuperscript{58} Yet, it is possible that the parent’s actual purpose in the new claim
is the continuation of the dispute with the other spouse. If the concern is that
a parent may be focused on his own interests and not on those of his child,
then it is unclear why a proceeding brought prior to the divorce is
differentiated from one brought afterwards.\textsuperscript{59}

\textsuperscript{55} See D.N. 4/82 Kot v. Kot, 38(3) PD 197, 209 [1984] (Isr.).
\textsuperscript{56} See CA 411/76 Sher v. Sher, 32(1) PD 449, 454 [2003] (Isr.).
\textsuperscript{57} See, e.g., CA 508/70 Natovich v. Natovitch, 25(1) PD 603, 615 [1971] (Isr.).
\textsuperscript{58} See CA 289/82 Dauva v. Dauva, 36(4) PD 625, 628 [1982] (Isr.).
\textsuperscript{59} This problematic duality is also expressed in Hunter v. Hunter, 170 Cal. App.
2d 576, 583 (1959) (holding that a parent may not waive reasonably due present and
future support on behalf of his or her children, but that a parent may still make a
binding agreement about such support). What is the meaning of the validity of an
agreement between them if one party is allowed to change it in the name of the
minor? What is the difference if a parent is allowed to change the agreement in his
own name, or in the name of the minor? In Van Buskirk v. Todd, for example, we
found similar duality: on the one hand the mother is seen as one who acted on
behalf of the child and represented his interests. On the other hand, when the minor
requests to reopen the proceedings, in contradiction to the agreements that were
reached by the mother, the mother’s action is ignored. 269 Cal. App. 2d 680, 687
(1969) (“[T]he defendant could not get the case reversed by claiming for the first
The minor’s right to independent status creates a sort of balance of terrors, which threatens the parties and could become an incentive to prevent economic rehabilitation, or at least hide it, due to concerns over relitigation. For example, the economic rehabilitation of one spouse could encourage the second spouse to initiate new litigation. A claim could be brought for increased child support from the first spouse due to his improved level of income. The flexibility of an agreement between the spouses, and the possibility of breaching it, also negatively impacts their motivation to resolve their dispute by agreement. The minor’s right to independent status, as noted, places the burden on the individual requesting to preserve the existing agreement so that the party wishing to revise it is in a more advantageous position. This determination thwarts the completion of the agreement.

In addition, one should also consider that maintaining the contract between the spouses might serve the interests of the minor as well. In a home where the parents constantly argue and the atmosphere is filled with hate and bitterness, it is desirable and in the interest of the children that the tension be brought to an end and that the parents divorce. In other words, there could be situations in which the child is interested in the separation of his parents no less than in his economic well-being. A low level of child support or less than customary visitation does not necessarily mean that the interest of the child has been compromised and that representation by his parents is inappropriate.

From another perspective, the minor’s right of independent status serves as a way to protect the weaker spouse. The first proceeding between the parents takes place before the divorce decree is awarded, while the second proceeding takes place afterwards. Following the divorce, the spouses appear with “equal strength” in a monetary claim. It is not without reason that suits on behalf of minors are sometimes filed only days following the divorce. During this short period of time, the expenses for the

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time on appeal that the child had no standing in court because he did not have a guardian ad litem on the paternity issue. We will presume that the mother acted in the manner of a guardian ad litem, and it is clear that she acted in behalf of the minor consistently with the duties of a guardian ad litem.”) It is unclear how the mother is viewed in one proceeding as acting on behalf of the child by obligating the father, while at the same time she is viewed in another proceeding as acting contrary to the child’s interests in her relationship with the child.

60 CA 411/76 Sher v. Sher, 32(1) PD 449, 454 [2003] (Isr.).
child did not really increase, the prices of commodities did not actually skyrocket, and the minor did not suddenly mature and discover that he lacks adequate support. Only one thing changed: the parent who initiates the proceeding on behalf of the child is freed from the limitations of the divorce proceedings and is not concerned about a lack of cooperation from his spouse.  

In Israel, for instance, the courts have welcomed re-litigation in the name of the minor, and have viewed such re-litigation as an adjustment to the divorce proceedings. Adjustment is required because there is a gap between the ruling of the rabbinical court and the ruling of the Civil Court, which will be filed upon re-litigation.

To that end, Israel courts have even established the minor’s right to independent status. This right of independent status can be used by courts not only to protect the interest of the minor, but to no lesser extent, to protect the interest of the weaker spouse as well. Indeed, typically the second proceeding only deals with issues associated with the minor, and not directly with matters between the couple. However, through the issues related to the minor it is also possible to balance and amend other concerns that are clearly those of the couple. In essence, it is not a matter of separate entities, and there is no absolute differentiation between payments due to the minor and payments due to the custodial parent.

Undoubtedly, the minor’s right to independent status and the development of that right is an excellent means of protecting the interest of helpless minors in a legal proceeding. This right is also an excellent tool for

61 An interesting judgment in New York argues that the “release” itself following a divorce decree constitutes a “change in circumstances.” See Guillermo v. Guillermo, 43 Misc.2d 763, 773 (1964) (“As soon as the parent's marital freedom is adjudicated, the parent’s ‘circumstances’ thereby ipso facto are changed by the new freedom itself. Having been safely separated, divorced or the marriage annulled, the parent for the first time is in a radically ‘changed’ position—to litigate freely, to strive vigorously for an equitable order of support without fear of refusal by the other parent to co-operate in the separation, divorce, or annulment by consenting to appear, or by declining to controvert the proof. Here in the Family Court, the Judge is for the first time given both sides of the circumstances as contended for by the respective parents, and he can find the facts as they are rather than as a separation agreement and mute parents made them appear to another court.”) (italics in original).

safeguarding the interest of the weaker spouse. But when considering these important advantages it is impossible to ignore the potential disadvantages and implications of that right.

By presuming that parents compromise the interests of their children, courts are in conflict with other fields of law. In other areas of law, courts do not presume that parents compromise the interest of their children. For example, in tort law, parents routinely represent their children. Parents regularly act on behalf of their children through litigation and settlement agreements.

But, family and tort law are very different. In tort matters, the parents are not typically opposing each other whereas in family law the parents are typically in the midst of a controversy. A “battle” between the parents can cloud parental judgment. Moreover, in family law, the presumption of neglecting the interest of the minor is relevant even when the parents reach an agreement without going through a conflict.

In every other field of law, parents are presumed capable of appropriately protecting the interests of their children. So, it should be questioned whether the American and Israeli courts went too far in broadening the minor’s right to independent status. It may be worthwhile to reexamine whether the path chosen by the legal systems in the United States and Israel is correct. Arguably, the United States and Israeli systems allow a court of competent jurisdiction to conduct an entire proceeding while knowing that its decisions are not binding and may subsequently be relitigated just a few days after the first adjudication. The broadening and establishment of the minor’s right to independent status might add to the uncertainty and lack of peace and security that already troubles minors in

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63 See CA 404/70 Evron v. Evron, 25(1) PD 373, 378 [1971] (Isr.).

64 See Ministry of Justice, the Committee on Children and the Law, Report of the Subcommittee on Education, at 36 (Feb. 2003), available at www.justice.gov.il/MOJHeb/HavaadLeZhuyot/YezugNifrad [hereinafter Rotlevy Committee Report] (indicating that the committee did not examine the independent representation of the minor in the area of torts since it did not see this as important and urgent; the Committee recommended minor tort independent representation be reviewed in the future review).

65 CA 363/81 Fayga v. Fayga, 36(3) PD 187, 189 [1982] (Isr.).

66 Capacity and Guardianship Law, 5722-1962, 380 Laws of the State of Israel (LSI) 120, §§ 14-15 (1962) (Isr.) ("The parents are the natural guardians of their minor children. . . . The guardianship of the parents includes the obligation and the right to care for the needs of the minor . . . and the authority to represent him.")
divorce proceedings. It is not clear whether the important benefit of independent status is greater than its cost.

III. THREE MODELS FOR BALANCING THE COMPETING INTERESTS

The matters described above may be resolved with an appropriate formula for balancing the competing interests: the interest of the child and his right to independent status, as compared with, contractual interests and the finality of judgments. In this section, I will examine three legal models for achieving a balance among these factors.

Model A: Consideration of the Interest of the Minor by the Court

The simplest model requires the court to closely examine the interests of the minor when it makes decisions or approves agreements on matters concerning the minor. This requirement should bring about trust in the court’s faithful performance of its duties. The initial assumption is that the court appropriately considers the interests of the minor and thus properly accounts for the child’s interests. Whoever wishes to argue otherwise should bear the burden of proof. This would encourage parents to reach a final agreement.

The present situation, where there is a presumption against the first hearing, raises certain difficulties when one court allows itself to open an agreement that was previously confirmed by another court. The subsequent court is not a court of appeals, but shares concurrent jurisdiction with the first one. Customarily, courts at the same level of jurisdiction will not intervene in each other’s decisions.

However, one must also consider the limited ability of the court to ensure that an agreement submitted for approval is indeed in the best interests of the child. Although the court is able to subpoena witnesses and gather evidence, it does not take it upon itself the role of managing a proceeding. Its ability to access evidence is also limited. The court does not seek new information, call upon experts, or even question them.

[Under most states' laws a court must review an agreement to determine whether it is in the child's best interests. . . . Despite the appearance of review, however, independent judicial inquiry is difficult because of the inaccessibility of facts that might dictate a different result. The result is the worst of both worlds: parents enter
the divorce process with their autonomy to make arrangements for their children officially abridged, and yet arrangements that might truly be detrimental to children are unlikely to be identified.\textsuperscript{67}

Despite these objective difficulties, there are instances in which the proceeding between the parents is binding upon the children without requiring further action.\textsuperscript{68} Additional litigation, separate from the other issues of divorce, may not even be necessary. Similarly, the minor may not need to be added as a party to the proceeding. An “identity of interests” between parent and child is often sufficient to render the proceedings binding upon the child. In other words, when the parent shares common interests with the minor whom he represents, the legal proceeding is viewed as binding on the minor as well, even if the minor takes no part in the legal proceeding. For example, in Armstrong v. Armstrong, children whose parents went through divorce proceedings requested an increase in the amount of their support.\textsuperscript{69} Their mother brought a claim on their behalf.\textsuperscript{70} These proceedings sought a result contradicting the prior proceeding between the parents.\textsuperscript{71} Normally, a court assumes the interest of the children may be overshadowed by the interest of the parents and thereby compromised. In this case, however, the interest of the mother was identical to that of the children and therefore her representation of the children was proper. The court determined:

The doctrinal reach of the res judicata bar extends, however, to those persons “in privity with” parties . . . . We have previously held that privity exists where the person involved is “. . . so identified in interest with another that he represents the same legal right.” . . . In the present case, plaintiffs’ mother was entrusted with their care and custody and was a proper representative of their interests. While in similar situations we can conceive of a commingling of interests of parent and child in the negotiation of a marital dissolution agreement to the degree that the future interests of a child are clearly

\textsuperscript{68} See, e.g., Armstrong v. Armstrong, 15 Cal. 3d 942, 951 (1976).
\textsuperscript{69} See id. at 945.
\textsuperscript{70} See id. at 945-47.
\textsuperscript{71} See id. at 945-46.
and deliberately subordinated to the present interests and advantages of a parent, the record before us discloses no such circumstances. For this reason, we conclude that plaintiffs are bound by the judgment in the divorce action to which their mother was a party.\footnote{Id. at 951 (citations omitted); accord Stevens v. Kelley 57 Cal. App. 2d 318, 323-24 (1943); Murdock v. Eddy 38 Cal. App. 2d 551, 553-554 (1940); Ruddock v. Ohls, 91 Cal. App. 3d 271, 276 (1979) (“Under California law children who are not parties to a divorce action still may be bound by some aspects of a marital dissolution proceeding if the interests of the child are adequately represented by one of the parents.”).}

Identity of interests is the standard that determines whether a minor is bound by a proceeding in which he was not present.\footnote{See Amstadt v. U.S. Brass Corp., 919 S.W.2d 644, 653 (Tex. 1996) (“To determine whether subsequent plaintiffs are in privity with prior plaintiffs, we examine the interests the parties shared. . . . Privity exists if the parties share an identity of interests in the basic legal right that is the subject of litigation.”) (citation omitted).} When identity of interests is appropriately applied during the initial divorce proceedings, the court’s determination is binding upon a subsequent court.\footnote{See Yarborough v. Yarborough, 290 U.S. 202, 210 (1933) (“The provision which the Georgia law makes of permanent alimony for the child during minority is a legal incident of the divorce proceeding. As that suit embraces within its scope the disposition and care of minor children, jurisdiction over the parents confers eo ipso jurisdiction over the minor's custody and support. Hence, by the Georgia law, a consent (or other) decree in a divorce suit, fixing permanent alimony for a minor child is binding upon it, although the child was not served with process, was not made a formal party to the suit, and no guardian ad litem was appointed therein.”).}

The American and Israeli legal systems should require that the court’s confirmation of the agreement between the parties not be a mere rubber stamp, but instead, be aimed at ensuring proper and sufficient protection of the interests of the minor. In other words, a clear presumption should be established that the prior court’s confirmation incorporates within it the concern for and examination of the needs of the child. Ideally, this presumption would also determine that the prior legal proceeding is binding on the minor.

However, since a court’s decision does not presently prevent subsequent proceedings, each case actually remains open, even when the court has
confirmed the divorce agreement between the parties.\textsuperscript{75} Today, the confirmation by the court is not considered final because the court acts according to the definitions and the terms determined by law—such as the “best interests of the child,” which can be interpreted with flexibility. Courts have broad discretion and, therefore, each court may view the issues differently, resulting in relitigation with respect to the level of child support, visitations, etc.

This problem can be resolved, or at least limited, by determining clearer definitions for identifying the child’s best interests. The following section, examines such a model.

\textit{Model B: Clear Legislative Guidelines}

In the United States legal system, before state child support guidelines were set forth for determining child support, court decisions relied on vague standards such as “the best interest of the child,” and “substantial change in circumstances.”\textsuperscript{76} Reliance on these abstract terms was problematic for the legal system because courts interpreted the terms differently.\textsuperscript{77} This broad judicial discretion resulted in inconsistency when courts awarded economic child support and determined the adequacy of spousal support. Later courts found the earlier court decisions to be erroneous and sought to change them, even if no change in circumstances had occurred.\textsuperscript{78} This prevented finality of judgment in family law cases involving decisions regarding children.

\textsuperscript{75} See, e.g., CA 404/70 Evron v. Evron, 25(1) PD 373, 378 [1971] (Isr.).


\textsuperscript{77} See, e.g., Elster, supra note 76, at 4-8 (arguing the best interests of the child standard is problematically indeterminate).

\textsuperscript{78} Hill v. Hill, 620 P.2d 1114, 1119 (Kan. 1980) (“[W]here a custody decree is entered in a default proceeding, and the facts are not substantially developed and presented to the court, the trial court may later, in its discretion, admit and consider evidence as to facts existing at the time of the earlier order, and upon the full presentation of the facts the court may enter any order which could have been made at the initial hearing whether a ‘change in circumstances’ has since occurred or not.”).
Historically, the United States Congress has been concerned about possible harm to minors not awarded adequate child support. Awarding low amounts of support places a heavy burden on American assistance organizations. In the mid-1980s, Congress expressed concern “about the adequacy of child support awards.” In 1984, Congress conditioned its aid to states and assistance organizations on the development of clear guidelines for child support. In 1988, Congress further demanded that these guidelines be given the validity of a presumption in legal proceedings. Thus, a litigant who wished to overcome that presumption had to provide justification. In light of this requirement, guidelines have been defined in each of the fifty states. Child support requirements are usually formulated based on estimates of the minimal expenses spent on children in two-parent families. The amount of basic child support is calculated as a certain percentage of parental income.

In every state, clear standards and guidelines have been established for calculating child support and enforcing payment. The establishment of

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84 Id.
86 Id.
87 Id. (“All states now calculate the basic child support obligation as a percentage of parent earnings.”).
88 Id. State law governs family law, and each state is allowed to create its own laws. See Simms v. Simms, 175 U.S. 162, 167 (1899) (“[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the State, and not to the laws of the United States.” (citing In re Burrus, 136 U.S. 586, 593-94 (1890))); see also Boddie v. Connecticut, 401 U.S. 371, 376 (1971).
these guidelines encourages the finality of child support judgments in disputes.

Similarly, the system in Australia was also criticized for its inconsistency due to a lack of guidelines. These objections brought about reform in the Child Support (Assessment) Act 1989 (CSA). In order to improve the processes of assessment and payment, the new Australian law removed from the courts the authority to determine the level of economic child support and transferred it to an administrative body that operates according to a structured formula. The formula provides quick and easy determinations of the level of child support that the non-custodial parent is required to pay. Initially, it was possible to appeal the decision of the administrative body to the courts. Today, the CSA is the entity from which parties can request changes in set formulas. The removal of this authority from the courts narrowed the discretion in the matter and resulted in greater certainty and finality.

Under the Canadian legal system, the courts also had broad discretion with no real guidelines. Unavoidably, a situation of uncertainty and inconsistency developed with respect to the level of economic child support. This vagueness was detrimental to the willingness of the parents to voluntarily reach agreement regarding the level of support, and it encouraged them to initiate legal proceedings. As a result, the Federal Child Support Guidelines were created in Canada. The Guidelines are designed to ensure certainty, consistency, restriction of the court’s

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91 Id. at Part 5.
92 Id.
93 Fehlberg & Maclean, supra note 89, at 6-7.
95 Id.
discretion, and especially important to our matter—the finality of judgment. 96

In contrast, the Israeli legal system does not clearly define the level of child support obligation. The payment amount is determined according to the personal (religious) law of the individual required to pay the support. 97 Under this law, only the father is obligated to provide the “necessary support” for his children. 98 That term is certainly abstract. Thus, the rabbinic court and the civil court, which have parallel jurisdiction with respect to the level of child support, have different outcomes. 99 On June 5, 2006, the Israeli minister of justice appointed the Committee to Examine the Issue of Child Support in the State of Israel, chaired by Professor Shifman. 100 On September 20, 2012 the committee presented its recommendations. 101 The findings of the committee show that awards are even inconsistent among the judges in civil court. 102 While the court has determined a minimum level of child support, the determination of the maximum level of support is more problematic. 103 Therefore, the committee recommended the establishment of a formula for child support according to the existing Australian model. 104


97 See Family Law Amendment (Maintenance) Law, 5719 – 1959, 276 Laws of the State of Israel (LSI) 72, § 2 (1959) (Isr.) (“A person is responsible for spousal support, according to the rules of the personal law applicable to him”).

98 Id.

99 Id.

100 Report of the Committee to Examine the Issue of Child Support in the State of Israel (Shifman Committee), at 106 (Sept. 2012) [hereinafter: Shifman Committee Report].

101 Id. at 3.

102 Id. at 25; see also Mor Yogev & Ayelet Giladi, Mom Give Me Equality, 3 Hearat Din 1, 6 (2006); HCJ 5969/94 Aknin v. The Rabbinical Court (Haifa), 50(1) PD 370, Para. 11 [1996] (Isr.). (acknowledging that different interpretations are given to the required level of child support but stating that this is not a desirable conclusion).


104 Shifman Committee Report, supra note 100, at 59 (“The bill formulated by the committee is based primarily on the Australian model founded on the
This formula will prevent judicial discretion, and hopefully even the need for separate relitigation of a claim on behalf of the minor.

Under both the United States and the Israeli legal systems, the issues of custody and visitation have no uniform standards and are thus subject to relitigation.

From a legal point of view, divorce traditionally required a couple to address grounds for the divorce, property distribution, alimony, child custody, and child support. Today, only those issues associated with children remain open issues in most states. Additionally, while all 50 states have enacted some form of standardized child support calculation and child support enforcement networks, both child custody and visitation remain often hotly contested issues in divorce proceedings.\textsuperscript{105}

Therefore, uniform standards, through legislation, may bring about finality to these matters. Uniform guidelines will undoubtedly contribute to the finality of judgment, strengthen the principles of res judicata and contractual certainty, and prevent misuse of the minor’s right to independent status in the dispute between spouses.

\textit{Model C: Independent Representation for the Minor}

Some legal systems do not allow parents to enter agreements on behalf of their children. While parents may discuss their own matters in connection with divorce agreements, they know in advance that the issues involving their children are not subject to negotiation at all.

It is worth examining whether a similar model should be adopted in all legal systems, so that parents in divorce proceedings will be able to determine only matters affecting themselves—such as distribution of family property—but not matters associated with the minor. For this proposal to be enacted, it should be considered in conjunction with the model described below.

\textsuperscript{105} Leite & Clark, \textit{supra} note 1, at 260-61 (citation omitted).
It seems that one of the most practical proposals for resolving the concerns discussed above, or at least for preventing their exacerbation, is including the minor in the proceedings between his parents by the appointment of an independent representative for the minor.\textsuperscript{106} This modern approach recognizes the need for independent representation of the minor, due to the concern that the parents may subordinate the minor’s interests in favor of their own. The independent representation for the minor ensures that the process of factual investigation will be protected, and that parents will not subsequently relitigate subjects that have already been determined.

Preserving the finality of judgment is of the utmost importance, and independent representation serves this goal.\textsuperscript{107} John Speca and Robert Wehrman analyzed all the cases in the Missouri regarding the inherent jurisdiction of the court to appoint temporary representation for a minor, and came to the clear conclusion that children have their own rights, and only receive adequate protection in divorce proceedings when they have independent representation.\textsuperscript{108} Despite this modern approach, only Wisconsin requires a separate attorney to independently represent a minor in divorce proceedings.\textsuperscript{109} The remaining states grant broad judicial discretion for appointing a guardian ad litem for a minor in a legal proceeding:

Several other states have adopted the provisions of the Uniform Marriage and Divorce Act, which provide the court with discretionary power to appoint a guardian ad litem for a minor or dependent child in proceedings for support, custody, and visitation.\textsuperscript{110}

\textsuperscript{106} The authority to appoint representation for the minor exists under Israeli law. See Capacity and Guardianship Law, 5722-1692, 16 LSI 106, § 29 (1962) (Isr.). It requires limiting the natural guardianship of the parents, showing the court a special reason justifying the limitation, and hearing the parents: “If guardianship of one parent was limited, the court may, in addition to the parents, to appoint a guardian for minor for matters be prescribed by him.” \textit{Id.}

\textsuperscript{107} S. v. S., 595 S.W.2d 357, 360 (Mo. Ct. App. 1980) (“First, the modern trend of authority recognizes the necessity for independent representation of a child when the parents in a dispute over the custody of the child do not, in any proper sense, protect the best interests of the child.”).


\textsuperscript{109} Meyer, \textit{supra} note 2, at 446 (citing Wis. Stat. Ann. § 767.045 (West 1993)).

\textsuperscript{110} \textit{Id.}
But, several of the states within the United States grant judicial discretion to appoint independent representation for the matters of minors.\textsuperscript{111} In certain American states, the appointment of the minor’s representative and that representative’s responsibilities and duties are broadly determined in legislation \textsuperscript{112} including the representative’s independent investigation of the evidence.\textsuperscript{113} Many scholars argue that it is not sufficient to rely on the courts or parents to protect the interest of minors.\textsuperscript{114} Instead, these scholars argue that independent representation must be appointed for the minor.\textsuperscript{115} The importance of independent representation is emphasized in the adversary system of law, in which the court relies on the evidence of the parties and does not gather it by itself.\textsuperscript{116}

The Australian legal system also defined the principles for appointing independent representation, giving parties a non-exhaustive list of possible arguments for independent representation.\textsuperscript{117} In the Canadian legal system, there are still no clear instructions as to when and how to appoint an independent representative, but the courts have broad discretion to make such determinations.\textsuperscript{118} Canadian judicial decisions offer three different

\textsuperscript{112} See, e.g., \textsc{CAL. RULES OF COURT, RULE 5.240 (2014); UNIFORM MARRIAGE AND DIVORCE ACT §310 (1973).}
\textsuperscript{113} 2012 S.C. Acts 361, § 63-3-830 (“(A) The responsibilities and duties of a guardian ad litem include . . . (1) representing the best interest of the child; (2) conducting an independent, balanced, and impartial investigation to determine the facts relevant to the situation of the child and the family….”).
\textsuperscript{115} Drinan, \textit{supra} note 114, at 103. \textit{See generally} Hansen, \textit{supra} note 114.
\textsuperscript{116} Marshall A. Levin, \textit{Guardian Ad Litem in Family Court}, 34 Md. L. Rev. 341 (1974) (“[W]ithout meaningful representation of the interests of the child, the adversary system cannot properly effectuate the legal test of what is in the ‘best interest’ of the child.”).
\textsuperscript{117} Stefuseak v. Chambers, [2004] 6 R.F.L. 6th 212, para. 73 (Can.).
\textsuperscript{118} Puszczak v. Puszczak, [2005] 56 Alta. L.R. 4th 225, para 11 (Can.) ABCA 426, para. 11 (Can.) (“The case law in Canada is not highly developed in setting out
models for characterizing the nature of independent representation of minors: “the amicus curiae, the litigation guardian, and the child advocate.”

The child advocate model is similar to other approaches that view the independent representation of the minor as the most efficient way to ensure the minor is accorded “zealous” representation. This model emphasizes the autonomy of the minor as a client and the importance of her participation as a party to the legal proceeding. This representation advances the interest of the child because the court does not view the child as an individual requiring protection and consideration, but rather as an individual with rights. Thus explains Barbara Ann Atwood, a leading scholar:

[T]hose who endorse a child's attorney model emphasize the child’s basic right to have his or her wishes presented by a zealous advocate. Proponents emphasize the child client’s autonomy and the value to the child and to the court of the child’s participation in the proceedings. Under this approach, the child’s dignity interests are served when the child has a representative committed to advocating the child's preferences.\(^\text{120}\)

This model may balance the concern over possible harm to the child’s interests, and result in the finality of judgment. However, while this model seems tempting, it would burden the legal proceeding. Another “zealous” attorney joining the dispute between the spouses might prolong the proceedings and delay the resolution of the conflict.\(^\text{121}\)

\(^{119}\) Dormer v. Thomas, [1999] 65 B.C.L.R. 3d 290, para. 44 (Can.).
\(^{121}\) For example, in the case of A.M., an attorney was appointed for the independent representation of a minor. This attorney requested, on behalf of the minor, to bring his own evidence, to cross-examine witnesses, to retain an expert on his behalf, etc. See A.M. (Guardian ad litem of) v. K.A.A.M., [2008] N.J. No. 267 (“The child argued that he was granted a role as a fully participating party and sought to call evidence, question witnesses and retain experts. The mother agreed with the child. The father objected to the child making applications”.


minor’s attorney might increase the animosity between the spouses. Lucy McGough, another leading scholar, argues that adding another attorney to an already charged atmosphere could cause more disagreements, additional lack of clarity regarding the role of the court as a protector of minors, and increase the costs of the proceeding. For these reasons, an attorney is only occasionally appointed to represent a minor.

Due to these concerns, McGough argues that the appointment of an attorney for independent representation is not justified in regular circumstances, though it would be correct to grant the court authority to appoint an attorney in exceptional instances where the interests of the parents severely conflict with those of the children. In that context, the appointment of the guardian may be limited only to the specific proceedings (i.e. litigation guardian). This temporary guardian can also serve as a mediator or arbitrator between the parents and provide recommendations to the court. McGough suggests not appointing an attorney in this role, since an attorney generally lacks professional training in child development and family dynamics. She proposes that it would be preferable to appoint professionals in the therapeutic field. This approach is similar the model used in Canada for appointing an independent representative—a friend of the court (amicus curiae).

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122 Lucy S. McGough, Protecting Children in Divorce: Lessons from Caroline Norton, 57 Me. L. Rev. 13, 26 (2005) (“Throwing another lawyer into the fray, however, may not be the solution. The third attorney may compound or even create unnecessary adversarialness in the trial, cause additional confusion about the court's role as the protector of the child, produce delay, and add to the costs of the case. The persuasiveness of these counterarguments explains why separate counsel is rarely appointed for the child.”).

123 Id.

124 Id. at 27.

125 Id. at 26-27 (“More states authorize the appointment of a guardian ad litem for the child. The guardian need not be an attorney . . . . Aside from needless expense and role confusion, lawyers or guardians typically have no special knowledge of child development or family dynamics . . . .why not appoint a child psychiatrist or child psychologist who can conduct an investigation, interview all parties, analyze the child's best interests, and tell the court how it should decide?”) (citations omitted).
Similarly, in Israel, the Rotlevy Committee\textsuperscript{126} looked into this matter within the Israeli legal system. The committee found that independent representation of a child by an attorney does not cause the lengthening of the proceedings.\textsuperscript{127} To the contrary, since the attorney is not subject to considerations of bureaucracy and budget, the attorney makes sure that the matter proceeds quickly.\textsuperscript{128} The Rotlevy Committee also rejected the concern over additional figures in the life of the child, arguing that it is possible to require the attorney to maintain an ongoing and trustworthy relationship with the child throughout the entire proceeding.\textsuperscript{129} Formal measures could also be established to ensure permanent representation. The Rotlevy Committee determined that clear and defined criteria for the appointment of representation safeguards parental authority.\textsuperscript{130} The Committee determined that, from a legal perspective, it is preferable that the duty of representation remain with an attorney, and not with a welfare officer or similar official who may be subject to the considerations of welfare offices, policy, budgets, and additional factors that are not always consistent with the interests of the child.\textsuperscript{131} The Rotlevy Committee further stated that the approach of the welfare officer is through a broad family perspective that does not focus specifically on the child as required for independent representation.\textsuperscript{132} The committee members did not discuss how independent representation could influence the other issues of concern raised in this article.

Decisions reached in proceedings where an independent representative is appointed for the minor should be given the validity of a final judgment. Such matters should not be open to future relitigation based on the claim that the interest of the minor did not receive proper representation.

\textsuperscript{126} The Rotlevy Public Committee on Children and the Law, chaired by Judge Saviona Rotlevy, was appointed by the justice minister in Israel on June 27, 1997. This committee was divided into six subcommittees. One of the subcommittees dealt with “Independent Representation of Children in Civil Proceedings.” The subcommittee’s report was submitted to the Minister of Justice in February of 2003. See Rotlevy Committee Report, \textit{supra} note 64.

\textsuperscript{127} \textit{Id.} at 97.
\textsuperscript{128} \textit{Id.} at 100.
\textsuperscript{129} \textit{Id.} at 102.
\textsuperscript{130} \textit{Id.} at 103.
\textsuperscript{131} \textit{Id.} at 114.
\textsuperscript{132} \textit{Id.} at 115.
Some legal systems include therapeutic professional assistance units associated with the family court. The professionals’ appointment as independent representatives for minors is easy to arrange and may lessen the costs of the proceedings, assuming the professionals are qualified to serve on behalf of the minors. This method is effective because it adds the minor as a party to the proceedings, ensuring the finality of judgment and protecting the interests derived from it. Legal systems that provide attorneys for minors, such as these, contribute significantly to the efficiency of these types of proceedings.  

In light of the different models for appointing legal representation for a minor, either the legislator or the court should resolve the remaining uncertainties. The duties, obligations, and limitations of independent representation need to be clearly defined. As long as the roles of the representatives for minors are uncertain, the court will refrain from appointing them.

CONCLUSION

Parents in the midst of divorce proceedings may compromise the interests of their children. The increased risk of conflicts of interests between parents and children, coupled with the worsening of the scope and severity of divorce disputes, have strengthened the presumption that parents may compromise the interests of their children. In response to apparent concern for the minor’s right to independent status, the courts allow relitigation in divorce proceedings. Courts allow relitigation even if the children are considered in the initial proceedings and the parents make statements regarding their interests in the children. The burden of proof is borne by the individual wishing to maintain the previously adjudicated determination—not by the child requesting the modification. The right to independent status, therefore, provides important protection for the interests of the minor.

133 A.I. v. Ontario (Director, Child and Family Services Act), [2005] 136 CRR (2d) 13, para. 141-42 (“The OCL [Office of the Children’s Lawyer] is statutorily mandated to act in the best interests of the children it represents. It is axiomatic, therefore, that a position taken by the OCL is one which the OCL believes to be in the best interests of the child. . . . The OCL is frequently an invaluable resource to this court, and I find this case no exception. I found the OCL’s involvement to be very helpful.”).
On the other hand, this right enables courts to reverse earlier judicial decisions, based on the argument that the decisions were detrimental to the minor. The presumption of compromising the interests of the minor and its impact on the possibility of relitigation is detrimental to contractual certainty and finality of judgments. A spouse who just consented to a range of separation and divorce conditions can object to that agreement and request that the agreement be modified by bringing a claim on behalf of the minor.

This sort of relitigation enables one spouse to prolong the dispute: it creates an incentive to prevent economic rehabilitation out of concern for possible future relitigation, negatively impacts the motivation of a couple to resolve their dispute by agreement, wastes precious judicial resources and brings about relitigation while other new claims are waiting to be heard for the first time, and misleads the couple who believes the legal proceeding will allow each of them to begin a new path in life. Courts may have gone too far in establishing the right of the minor to independent status given that the right may even be an obstacle to the minor.

Three models better balance the competing interests. The first model requires the court to comprehensively protect the interests of the child, and then grant a presumption of validity to the court’s determination. The initial assumption should be that the court appropriately considers the interests of the minor, and thus properly accounts for the child’s interests. Whoever wishes to argue otherwise should bear the burden of proof. That determination should also serve as binding precedent for a subsequent court.

The second model suggests creating clear legislative guidelines for defining the best interests of the child in order to avoid future relitigation. The establishment of guidelines for child support results in the finality of child support judgments in later disputes. The American, Australian, and Canadian systems adopt this approach, to varying extents. Some of the systems have even transferred the determination of child support matters to administrative entities, drastically restricting judicial discretion. These entities implement an established formula based on the objective data of the parents; this standardized system makes it difficult to initiate relitigation by arguing that the interest of the minors was compromised. The Israeli system is likely to move in this direction as well, though it currently still relies on abstract terms in determining child support, making it easier to relitigate on behalf of the minor.

The third model appoints independent representation for the minor. Such representation adds the minor as a party to the proceedings, thereby
ensuring finality of judgment. Decisions in proceedings with independent representatives should be given the validity of a final judgment. Several models are available for determining who should serve as the minor’s representative, including a zealous attorney, a social worker, or a friend of the court.

These models, or a combination of them, can be used to create a formula for more appropriately balancing the competing interests and concerns in family law proceedings. Such a system could protect the interests of the minor while, at the same time, preserving contractual certainty and the stability of agreements between spouses.