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ARTICLES

INFANTS' LIABILITY FOR LEGAL SERVICES

VICTOR M. GORDON*

How so absurd and mischievous a maxim [—"no man of full age shall be received in any plea by the law to disable his own person"—] could have found its way into any system of jurisprudence professing to act upon civilized beings, is a matter of wonder and humiliation. There have been many struggles against it by eminent lawyers in all ages of the common law; but it is, perhaps, somewhat difficult to resist the authorities which assert its establishment in the fundamentals of common law—a circumstance which may well abate the boast, so often and so rashly made, that the common law is the perfection of human reason.

—STORY, EQUITY § 225.

A. INTRODUCTION

We are concerned here with the liability of an infant for professional services rendered him by a lawyer. The myriad doctrines, principles and propositions of law concerning the validity, nullity, and voidability of contracts; degree of exposure to the liability, whether the contract is executed or executory; questions of ratification and disaffirmance, by whose action such effect is achieved and the extent thereof—all these matters *inter alia* are to be treated in this writing only in their pertinence to the limited topic under consideration: The lawyer's just claim for compensation for services rendered as an attorney to, for, or on behalf of his infant client.

Some, if not most, of the surrounding doctrines, theories and principles will emerge in the discussion below; to the extent that their intrusion in this writing may appear irrelevant, to just that extent are

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they necessary to this exegesis, for it must be remembered that a contract with a lawyer is only one of many kinds of contracts an infant may enter, and the arguments in favor of or contrary to the upholding of an agreement with a lawyer are, in the main, identical to those which might be advanced in the case of any other kind of infant's contract.

The most difficult aspect of this writing is the organization of its material. There have been many cases and a goodly number of text writers concerned with the subject-matter of this article, none, however, going into the questions presented as intensively and extensively as appears here. Each case, unfortunately, is treated by the court rendering the decision almost as though this were the first case of its kind, with the result that in a fair modicum of them there is much philosophic speculation on the part of the judge, tinged with jurisprudential, equitable, sociological, historical and economic observations—not all particularly valuable to the decision, yet most of them possessing such scholarly and practical wisdom as to cry out for recognition and reproduction here, if for no other reason than to give the reader an “atmosphere,” so to speak, what the physicists refer to as a “field,” traversed by varying lines of decisional force.

To separate these different thrusts is a nigh-impossibility. The opinions of the courts ultimately lead up to one of two conclusions: judgment for the plaintiff, or judgment for the defendant. This is obvious enough. Yet, to reach this point, much is said in the cases, which, taken all together appears repetitious, were it not for the fact that each case, replete with the judicial ruminations, does present something new, something different, or says the same thing as the precedents for that case, but in a different way, with a new emphasis, or with a novel intellectual ingredient. In order to preserve these factors much is quoted below which will be regarded as periphrasis. The writer offers no apology for this, but rather the explanation aforesaid, coupled with the practical difficulty of separating one part of the opinion from the other, so that the several portions might be neatly pigeonholed into exclusive categories. True, better organization of our material might then have resulted, but transitional substance would have been lost, and the reader would be forced to footnote-jumping. As it is, even with the definitely *labeled* parts of this writing, there is overlapping of material from one section to another, and it is hoped that the elusive point will not be lost to the reader because it has been buried in a part of this article outside his logical ken.

B. SOME STATUTORY CONSIDERATIONS

I.

Apparently there are no direct constitutional provisions in any of the fifty states which concern the question.¹ There have been many legislative enactments, however, either expressive of the common law or, in some instances, in derogation thereof. To set the stage for our topic, it might not be amiss to cite some of the Massachusetts pleading rules; they govern the initiation of the litigation and at the same time give a clue not only to what will develop on the merits at trial, but also to the subject matter to follow herein.

In the chapter relating to Pleading and Practice, concerning forms² ("Answers in Actions of Contract"), the prescribed defense is "... the defendant says that . . . he was a minor under the age of twenty-one."³ To this the proper replication is: "The plaintiff says that the articles mentioned in his bill of particulars were necessities for the defendant and suitable to his estate and degree."⁴

As we shall see, the Massachusetts, as well as the other states' statutory *pronunciamentos*, will reflect other jurisdictions' case law—the case law of common-law decisions, without reference to the wisdom of legislatures.

For instance, Georgia, with a provision on its statute books going back to 1858, enunciates the common law of our Anglo-Saxon heritage:

Generally the contract of an infant is voidable except for necessities. In order to charge an infant for necessities, the party furnishing them must prove that the parent or guardian fails or refuses to supply sufficient necessities for the infant. If, however, the infant receives property, or other valuable consideration, and after arrival at the age of maturity retains possession of such property or enjoys the benefits of such valuable consideration, such a ratification of the infant shall bind him.⁵

1. See, however, MISS. CONST. in MISS. CODE ANN. art. 4, § 90(f) (1942, recompiled 1956): "The Legislature shall not pass local, private or special laws in any of the following enumerated cases, but such matters shall be provided for only by general laws, viz.: . . . the removal of the disability [*sic*] of infancy . . ."

2. ANN. LAWS OF MASS., ch. 231, § 147 (1957).

3. *Ibid.*, Form No. 32.

4. *Ibid.*, Form No. 47.

5. GA. CODE ANN. § 20-201 (rev. to 1964). See quotation from *Spencer v. Collins*, text to note 215 *infra*, as to the impossibility of returning such "consideration" as a lawyer's time, skill and energies.

From the provisions quoted from Georgia and in the last footnote, it can be seen that there are a number of subsidiary questions in the states which *have* legislation on the subject which are also apt to come into issue in the jurisdictions where there is no controlling statute. First of all, was the contract one for necessities?⁶ Was there a guardian or parent? Was the person *in loco parentis* willing or able to provide the services for the infant?⁷ When did the infant attain his majority?⁸ Did

There are many statutory variations on the theme of returning the consideration to the party supplying it, upon the infant's disaffirmance of his contract, e.g., section 64-107 of REV. CODES OF MONT. (1947, rev. to 1957) allows the infant to disaffirm a contract *not* for necessities simply "upon restoring the consideration to the party from whom it was received."; IOWA CODE ANN. § 599.2 (1946): "A minor is bound not only by contracts for necessities, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money or property received by him by virtue of the contract, and remaining within his control at any time after attaining his majority . . ."; UTAH CODE ANN. § 15-2-2 (1953, rev. to 1963): "A minor is bound not only for the reasonable value of necessities but also by his contracts, unless he disaffirms them . . . majority . . . and restores to the other party all consideration or property received by him by virtue of said contracts and remaining within his control at any time after attaining his majority."

6. This question receives extensive treatment later on; see text, p. 112 ff. *infra*.

7. Here, too, as in other phases of this subject, there are many conflicting statutory concepts, from the provision in South Carolina simply that a minor is bound by contracts for necessities, CODE OF LAWS OF S. C. § 11-152 (1962), and LAWS OF PUERTO RICO ANN. tit. 31, pt. 2, Contracts, § 3402 (1956, rev. to 1963), which provides that minors who are not emancipated cannot give consent to the formation of a contract (derived from the Spanish Civil Code, art. 1263), to LA. CIVIL CODE ANN. art. 1785 (1870), whose effect is that when the minor has no tutor or one neglects to supply him with necessities for his support or education, a contract or quasi contract for providing him with what is necessary for those purposes is valid; and the more traditional enactments, such as G. L. IDAHO ANN. § 29-101 (1947), "All persons are capable of contracting, except minors . . ."; § 32-104: "A minor can not disaffirm a contract otherwise valid, to pay the reasonable value of things necessary for his support, or that of his family, entered into by him when not under the care of a parent or guardian able to provide for him or them."

See also, identical in language, REV. CODES OF MONT. § 64-108 (1947, rev. to 1957), and similar provisions in North and South Dakotas and in Oklahoma, note 9 *infra*; also GEN. STAT. KAN. § 38-102 (1949).

8. Most states have some legislation on this subject; frequently there are involved formulae for determining this, and the reader is left to the question in his own jurisdiction. Other states simply provide, without formulae, that minority ceases upon reaching such-and-such an age, as, e.g., 20 in our newest state, REV. LAWS HAW. § 330-1 (1955, rev. to 1964); or a different age for males (usually 21) from that for females (usually 18); or by statute, as for example, in Florida, the disability of nonage of married minors is removed. Once married, even though divorce or death of the spouse later occurs, the disability is removed; the party may "contract and be contracted with . . . and do and perform any and all acts, matters and things that he could do if he were twenty-one years of age." FLA. STAT. ANN. ch. 743, §§ 743.01-743.03 (1963).

he disaffirm (or possibly fail to ratify as is required under some statutes)⁹ within a "reasonable" time thereafter? Was his disavowal effective or wasn't the intention to disaffirm clear?¹⁰

Most of these questions are without the scope of this article, except as they might come into play as a common-law adjunct to the developing discussion.

II.

Other statutory provisions which invite the conclusion that attorneys' fees might be chargeable to the infant, and collectible, are found in many states. These enactments either lead one to this view by the route of implication; or there is a direct mandate to this result.

Workmen's Compensation acts sometimes permit the collection of an attorney's fee as part of the award, fixed by the commissioner or board;

9. North Dakota's statutes bring in a new question as to return of the consideration furnished the minor—his age of disaffirmance. The consideration (or its equivalent with interest) apparently needn't be returned, if the disaffirmance takes place before the minor reaches the age of 18 years. A précis of the complete relevant material follows: Section 9-02-01 provides that all persons are capable of contracting except minors; section 9-02-02 states that minors have only such capacity as is specified in the statutes relating to such persons; section 14-10-09 states that minors' capacity to contract is limited, whereas § 14-10-10 provides that minors can make any contract, the same as an adult, but with the power of disaffirmance; section 14-10-11 provides that upon disaffirmance of a contract made when the minor is over 18, then he must return the consideration or its equivalent with interest; and finally, § 14-10-12 says that an infant cannot disaffirm a contract to pay the reasonable value of things necessary for his support or his family's, if he is not under the care of a parent or guardian able to provide. N. DAK. CENTURY CODE ANN. (1960).

See also S. DAK. CODE OF 1939 (1960 SUPPL.) (§ 10.0202 provides that minors have statutory capacity; §§ 43.0103-43.0106 have the same provisions as those in North Dakota, *supra*); and OKLA. STAT. ANN., 15 § 11 *et seq.* (1956, rev. to 1964).

10. Missouri's statute is perhaps the most explicit of all in terms of what constitutes a ratification. Title 28 of VERNON'S ANN. MO. STAT. (1951), "Contracts and Contractual Relations," § 431.060, sets forth the ways in which an infant's contract may be ratified, after reaching his majority, (1) an acknowledgement of, or promise to pay, the debt—in writing; (2) partial payment; (3) disposal of part or all the *property* for which the debt was contracted; or (4) a refusal to redeliver the *property* to the creditor. It is to be noted that the statute says nothing about services, and is equally silent as to debts for necessities.

MISS. CODE 1942 ANN. § 271 (recompiled Vol. 1, 1956), requires writing for ratification of an infant's contract, while MAINE REV. STAT. ch. 119, § 2 (1954) provides that "no action shall be maintained on any contract made by a minor, unless he, or some person lawfully authorized, ratifies it in writing after he arrived at the age of 21 years, except for necessities."

Note that in Missouri and in Mississippi the provisions are substantive, whereas the Maine prohibition is procedural, "no action shall be maintained . . ." This is a distinction not without significance.

costs, including attorneys' fees, are frequently allowed the victorious plaintiff in a fraud or defamation action; or in a suit upon a bond or promissory note, where provision is made for therein in the event of default; or in a claim against the Veterans' Administration under a G.I. insurance policy; so also a plaintiff wife, if qualifying by poverty in a divorce action. In any of these cases, suppose the claimant/plaintiff is an infant? It seems to this writer that in such situations, wherein the aggrieved party can obtain maximum redress only through the ministrations of counsel; the fee—a "reasonable" fee—is determined by the tribunal; and in most of the situations cited the winning party has become enriched¹¹ beyond the amount of the judgment, award or settlement which theoretically makes him whole—under these circumstances, it hardly seems equitable to allow the infant to keep the additional amount awarded for counsel fees, and then adjudge that the lawyer is not entitled to compensation, either because his services are not regarded as "necessaries" or because of some procedural technicality, such as failure to obtain an advance agreement from the child's guardian, natural or *ad litem* or probate, or that the child, having obtained the benefits of the lawyer's talents and energies, subsequently disaffirms.

Would it not be monstrous to deny the attorney his fee in such cases? Monstrous, not only from the lawyer's standpoint, but from the infant's as well. We will have more than one occasion to note, below, that such a condition, if countenanced, would result in nothing but *pro se* proceedings on the part of infants. How many lawyers, however charitably inclined, would accept employment as counsel under such circumstances?

Some states are quite explicit about these matters. Massachusetts, for

11. Enriched, that is, if one can ever say a court-determined "reasonable" fee ever enriches anyone—particularly the lawyer—beyond half its equivalent in toil and sweat and tears.

In the case of a promissory note or bond which presumably carries a provision for attorney's fees in the event of default, the mortgagee, in Delaware at least, if permitted when contracted for, can obtain such fees as part of the judgment—this is in an action *against* the infant, not for his benefit—and the language of the statute seems broad enough to ensure payment to the attorney of fees earned from an infant between the ages of 18 and 21, if the former has secured from the latter an instrument executed with the proper ritual:

"The signature, seal and acknowledgement of a person under the age of 21 years and of the age of at least 18 years to any bond, other obligation and/or mortgage shall be valid and legally effective for all intents and purposes in law or in equity and shall bind him, his heirs, executors and administrators as effectively as if he was 21 years of age or upwards." (part of Chap. 21, "Mortgages on Real Estate." DEL. CODE ANN. § 2102 (rev. to 1964)).

example, permits the court to grant attorneys' fees in an action by an employee to collect minimum fair wages,¹² and Kentucky requires the appointment of a guardian *ad litem* for an infant defendant who "must be a regular, practicing attorney of the court," who shall be allowed by the court "a reasonable fee for his services, to be paid by the plaintiff and taxed in the costs." An affidavit is admissible to prove the rendition—but not the value—of the services. This is decided by the court "without reference to the opinion of the parties or other witnesses."¹³

Two states, New York and Virginia, protect the creditors of minors engaged in business and, because there is no limitation in their statutes as to what kind of creditors might be involved, assumedly lawyers are included in that class. Again there is a difference in approach between the two, the Commonwealth's provisions being adjectival,¹⁴ whereas the New York law is substantive.¹⁵

A goodly number of jurisdictions have enacted legislation pursuant to the Uniform Negotiable Instruments Law and/or the Uniform Commercial Code, under which, for purposes of stability in commercial transactions the infant merely acts as a catalyst¹⁶ or the common law or prior uniform law is preserved or clarified.¹⁷ In neither dealing does a liability for an attorney's fee seem apparent.

However, in other areas of commerce, the expansion of the common-law concept of what is a necessary, or, for purposes of our discussion here, the removal of the bar of nonage to litigation where an infant is concerned, has arisen. Many states have provisions now for

12. ANN. LAWS OF MASS. ch. 151, § 20 (1957). Same for overtime (§ 1B).

13. KY. REV. STAT. § 387.305 (1960).

14. VA. CODE ANN., ch. 5 (Rules, Parties and Pleadings), § 8-135 (1950, rev. to 1964): "If any minor [transacts] business as a trader [and] fail[s] to disclose by a sign . . . posted . . . wherein such business is transacted and also by a [newspaper notice] the fact that he is a minor, all property, stock and choses in action acquired or used in such business shall as to the creditors of any such person be liable for [his] debts, and no plea of infancy shall be allowed."

15. MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK (Debtor and Creditor Law) § 260 (1955) made an infant of 18 or over liable for contracts entered into in connection with a business the infant was engaged in and reasonable and provident when made. This was repealed on September 27, 1964, and is now covered by GENERAL OBLIGATIONS LAW § 3-101 (1964) with the identical provisions as those set forth in the former Debtor and Creditor Law. According to § 1-203(1), this covers all contracts made after April 13, 1941.

16. UNIFORM NEGOTIABLE INSTRUMENTS LAW § 22, which provides that although the infant incurs no liability thereon, the property in the negotiable instrument passes by negotiation. See also, UNIFORM COMMERCIAL CODE § 2-403(1).

17. UNIFORM COMMERCIAL CODE § 2-403:1, *Official Code Comment*.

infants to have bank accounts in their own names and to make deposits thereto and withdrawals therefrom; infants can enter life and fire insurance contracts; the National Housing Act¹⁸ and the Servicemen's Readjustment Act of 1944¹⁹ have given rise to auxiliary state legislation which in limited areas to be sure, but nevertheless explicit, gives the attorney an unqualified right to a fee when dealing with infants.²⁰

C. ATTORNEYS' SERVICES AS NECESSARIES

In an early, and still leading case, *Epperson v. Nugent*, the plaintiff had recovered property for the infant before the appointment of a guardian and sought counsel fees for services connected therewith. The defendant in opposition cited Tyler, Parsons, and Weeks.²¹ As to the latter citation, the plaintiff contended that the cases referred to did not support the text, in that

the ordinary fees of an attorney for the prosecution of an infant's rights to property cannot generally be said to be necessities; but when such services are requisite for the personal relief, protection, and support of the infant, the case is changed.²² If an impecunious infant has rights to property which, if recovered, would supply him food and make him a useful citizen, he should not starve because "his rights are not prejudiced" and because "he ought to have a guardian." It is not wonderful that Bacon and Coke took no notice of attorneys, who in their day were not allowed or expected to exact compensation; but the words they use, "necessary, meat, drink, apparel, physic, and such other necessities," (5 Bac. Abr. 118), imply that the term is flexible, and the courts in future ages are left to say, in each case as it arises, what is necessary.

18. 48 Stat. 1246 (1934).

19. 58 Stat. 284 (1944).

20. E.g., Missouri, although giving the minor the right upon reaching majority to rescind, removes the disability of minority for veterans' guaranteed loans pursuant to the Servicemen's Readjustment Act of 1944 "for the purposes of acquiring or encumbering, or selling and conveying property and the incurring of indebtedness or obligations incident to either or both, or the refinancing thereof, and litigating and settling controversies arising therefrom . . ." VERNON'S ANN. MO. STAT. § 442.100 (1951). Minnesota, Nevada and Mississippi have similar provisions. See, e.g., MISS. CODE ANN. § 7516.5-02-7516.5-03 (1956).

21. *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434 (1879). Works cited by the defendant were TYLER, INFANCY AND COVERTURE 121, 175, 185, 203 (1873); PARSONS, CONTRACTS 303 (6th ed. 1873); WEEKS, ATTORNEYS § 342 (1878).

22. *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151 (1863).

In supporting the plaintiff's claim, the court reviewed the basis for an infant's liability, as follows:

The liability of an infant for necessities is based on the necessity of his situation. As he must live, the law allows to anyone supplying his wants a reasonable compensation. The law implies the promise to pay from the necessity of the situation. What are "necessaries" cannot be determined by any arbitrary and inflexible rule. It depends on circumstances, and each case must be governed by its own. It is stated in the books that the wants supplied must be personal to the infant, either for the body or the mind, in order to come within the description of necessities, and that counsel fees and expenditures in a law suit are generally excluded. This is, no doubt, the general rule, and for an obvious reason. Usually an infant who has an estate has a guardian, who may and should engage and pay counsel, where the interests of the infant committed to his guardianship require it.

When an infant has no guardian, but has rights involved in litigation, and a lawyer has espoused the cause of the infant and devoted his services to the protection of the interests of the infant in such litigation, and as the result of the litigation an estate has been secured to the infant, it is just and proper, and within the principle on which an infant is held liable for necessities, that the reasonable fees of such counsel should be paid out of the estate thus obtained. If the infant had had a guardian who had employed [the attorney] he would have been entitled to reimbursement out of the estate of his ward for the reasonable fees so paid, to be allowed on settlement by the Chancery Court. Shall the fact that the infant had no guardian, until the acquisition of the estate involved in the litigation in which the services of counsel were rendered made one necessary, deprive counsel of just compensation? We say, no! It will operate for the benefit of infants to allow just compensation for counsel fees and expenditures in their behalf in maintaining their rights in litigation which results in securing to them the means of supplying their wants.

A statement of the genesis of the rule is well formulated by the court in *Reed Bros. v. Giberson*:²³

From the earliest times in legal history it has been the policy of the law to protect the infant, the Legislatures of today universally recognize by statutes that minors must be saved from unscrupulous persons, who might take advantage of inexperience and immaturity. At common law, and by our statute, the infant is not authorized to bind

23. *Reed Bros. v. Giberson*, 143 Me. 4, 54 A.2d 535 (1947).

himself or his property except for necessities . . . these disabilities of the minor are really privileges which the law gives him, and which he may exercise for his own benefit. The object is to secure him in his youthful years from injuring himself by his own improvident acts. Any person dealing with one who has not reached his majority, must do so at his peril. Coke's statement as to what are the necessities, for which the minor is fully responsible, has been recognized for generations as the rule: "Necessary meat, drink, apparel, necessary physic, and such other necessities, and likewise his good teaching,²⁴ or instruction, whereby he may profit himself afterwards."²⁵

The Coke quotation is expanded in *Slusher v. Weller*²⁶ in a quotation from one of the popular legal encyclopedias of the day,²⁷ by adding to the education category,

The professional services of an attorney may be a necessary for which an infant is bound, whether such attorney be employed to enforce or protect the civil or property rights of the defendant, or to defend him in a criminal action or prosecution.

Many authorities are cited in the notes sustaining the text.

In the principal case—*Slusher v. Weller*—the plaintiff, acting both as attorney, and as administrator of a decedent estate collecting a death claim, the court held that the plaintiff could not charge for services rendered as attorney for himself, but that he should be allowed the "reasonable" (*i. e.*, statutory) commission as administrator.

In a subsequent Kentucky case, *Vanover v. Cline*,²⁸ the court said that the question "is the service of an attorney a necessity for an infant?" is "by no means a settled question."²⁹ The case of *Slusher v. Weller*³⁰ was distinguished in that, "Weller was both attorney and administrator in that case. He was allowed \$300.00 for his services as attorney before his appointment as administrator. We reversed that judgment and directed that he be given an allowance of \$150.00 for his services as administrator."

The court concludes that there was no doubt that the attorneys did

24. See, as to education as a necessary expense to an infant, text to Siegel & Hodges v. Hodges, 191 N.Y.S.2d 984 (1959).

25. Reed Bros. v. Giberson, *supra* note 23, at 7.

26. *Slusher v. Weller*, 151 Ky. 203, 151 S.W. 684 (1912).

27. 22 Cyc. 593, INFANTS (1906).

28. *Vanover v. Cline*, 239 Ky. 335, 39 S.W.2d 477 (1931).

29. *Id.* at 340.

30. *Supra* note 26.

"render valuable services to these people," but denied recovery.³¹

The reluctance of courts to extend the kinds of items included in necessities is reflected in the decision of the court in *Freeman v. Bridger*,³² where, in another category than attorney's fees, the court refused to extend the rule saying "... the result would be to make the exception broader than the general rule, and take from infants that protection which the law considers they stand in need of, by reason of their want of discretion."³³

The court in Tennessee did not think a parent "bound to employ attorneys to defend the suits of his infant children, he being by law only responsible for necessities furnished them, among which the services of an attorney cannot be ranked," even where the services are in defense of a child on the charge of murder.³⁴

The Tennessee case just referred to was actually less dramatic and cruel than might appear at first blush. It was determined on a purely procedural point,³⁵ just as the next case was, ultimately.³⁶ Again, however, the extension of the categories of necessities, in modern idiom this time, came into question.

In *Siegel & Hodges v. Hodges*,³⁷ the subject of education as a "necessary" was under scrutiny, the plaintiff alleging that he had rendered valuable managerial, promotional and coaching services for a precocious and talented child, possessing much innate talent and abilities, for the purpose of educating and advancing his natural talent to equip him for a professional theatrical career, the defense being the language quoted from the Court of Appeals in *International Textbook Co. v. Connelly*,³⁸ "A common school education is doubtless necessary in this country because it is essential to the transaction of business and the adequate discharge of civil and political duties." But the court says³⁹

The tradition of a dynamic law adapting itself to changing needs

31. The services had been rendered twelve years before the claim for them was asserted, so they were barred by the statute of limitations. *Vanover v. Cline*, note 28 *supra*, at 340.

32. *Freeman v. Bridger*, 49 N.C. (4 Jones Law) 1, 67 Am. Dec. 258 (1856).

33. *Id.* at 3.

34. *Hill v. Childress*, 18 Tenn. (10 Yerg.) 514 (1837).

35. The existence of an express contract prevented the arising of an implied obligation. "Where one man is bound by express contract to pay for services rendered, the law in general never imposes the same obligation on another by implication." *Id.* at 516.

36. *Siegel & Hodges v. Hodges*, 191 N.Y.S.2d 984 (1959).

37. *Ibid.*

38. 206 N.Y. 188, 195, 99 N.E. 722, 725, 42 L.R.A. (N.S.) 1115 (1912).

39. The *Siegel* case, *supra* note 37, at 988.

is a proud mainstay of our juridical system. Previous interpretations which are not in harmony with modern conditions of life should not be woodenly applied merely for the sake of record consistency. The perpetuation of a fiction which has outlived its usefulness, and the adherence to which can only bring about an unjust result, is not required by either law or common sense.

. . . Decisions that fitted facts and circumstances of the horse and buggy era might not apply in a jet age, and . . . if that were the case such decisions should be overtly rejected.

The court concludes, leaving the door open for the plaintiff to attempt to make such proof of necessity for the advanced specialized tutelage as he might be able upon a trial.

Retaining, as we should, the sound policy of great solicitude for the rights of minors who are sought to be saddled with financial obligation, there may be circumstances where the rendition of services for such a minor are so palpably in his interests, their withholding would be so detrimental to the development of his proper potentials and growth ability, as to render him liable—in his own best interests—for their fair value.⁴⁰

The last case, although dealing with education rather than counsel's services, is to be commended for its trend and for the judges' refusal to remain precedent-bound. It is cited to demonstrate that there are many arguments, to be drawn from analogy, supporting the proposition that an attorney's services for an infant ought to be viewed, not through the opaque lenses of Lord Coke, but with the clarity of vision to determine, on at least a case-to-case basis, whether the services rendered "benefitted" or were "necessary" for the minor.

An analogy might be drawn for instance from an early New Hampshire case, *McCrillis v. Bartlett*,⁴¹ where the question of necessities came

40. *Id.* at 989. Upon appeal to the Supreme Court, Appellate Division, *sub nom.* Siegel v. Hodges, 222 N.Y.S.2d 989, 15 App. Div. 2d 571 (1961) the complaint was dismissed, since under New York statutory law (CHILDREN'S COURT ACT § 31; DOMESTIC RELATIONS ACT § 101; DEBTOR AND CREDITOR LAW § 260; DOMESTIC RELATIONS LAW §§ 74, 74a) the plaintiff alleged that the infant defendant had a natural guardian, but did not allege that the guardian was unable to pay for the necessities furnished by the plaintiff to the infant.

Quaere, whether if the infant defendant had been 18 years old (he was much younger in *Siegel*), the plaintiff could have prevailed under the GENERAL OBLIGATIONS LAW (note 15 *supra*) on the theory that "business contracts" include those for "show-biz."

41. *McCrillis v. Bartlett*, 8 N.H. 569 (1837).

up in a proceeding whereby the selectmen of a town might place a person under guardianship "for vicious habits" under further provision that any contracts made by the person so affected are void after filing with the town clerk notice of pendency of the proceedings. In holding that the services and expenditures of an attorney might be regarded as necessary and proper in resisting the complaint upon probable grounds of success,⁴² the court stated:⁴³

This provision of the statute must have a reasonable construction. It cannot have been intended to render invalid all implied contracts; for such construction might expose the party to actual suffering for the necessities of life, or oblige the town to maintain him and his family as paupers for a time, when he had ample means for their support; and thus produce the very mischief it was intended to prevent. And we are opinion [*sic*] that it cannot be construed to prevent the party from binding himself for necessary expenditures, by an implied contract . . .⁴⁴

Necessaries are a mixed question of law and fact. The court determines whether the articles furnished fall within the class of necessities suitable to anyone, infant or adult, in the defendant's situation and condition in life; and, if the court decides that they do come within the class, the jury are to decide whether the particular articles furnished were actually necessary under the circumstances of the case. Tyler on Infancy, § 73, and cases cited. Bibb, C.J., in *Beeler v. Young*, 1 Bibb. 519, lays down the rule thus: "Whether the articles are of those classes for which an infant shall be bound to pay is matter of law to be judged of by the court; if they fall under those general descriptions then, whether they were actually necessary and suitable to the condition and estate of the infant, and of reasonable prices, must, regularly, be left to the jury as matter of fact."⁴⁵

42. *Id.* at 572.

43. *Id.* at 573.

44. See in another, but similar connection, Ann. 22 A.L.R.2d 1438 (1952), *allowance of attorney's fee out of estate of alleged incompetent for services in connection with inquisition into sanity*. See also, *Greenough* doctrine, note 194 *infra*.

45. *Stanton v. Willson*, 3 Day 37, 56-57, 3 Am. Dec. 255 (Conn. 1808), distinguishes the relative functions of judge and jury:

"What articles are to be considered as necessities must depend, in some measure, on the circumstances of the party for whom they are furnished. The court can only instruct the jury as to the classes of articles, which, by law, are considered as necessities; but the quantity, or the extent to which they have been furnished is a fact to be left to the jury; and to what amount they shall be allowed must depend on their discretion."

Accord, *Decell v. Lewenthal*, 57 Miss. 331, 336-337, 34 Am. Rep. 449 (1879).

We have been speaking of such terms as "necessary," "beneficial," "benefit," as applied to infants' contracts. What do these terms mean? What do they mean with particular reference to the lawyer's relationship with his infant client? To answer these questions, let us try to determine the difference, if any, in the meaning of the terms.

The distinction between "necessary" and "beneficial" contracts is pointed out in *Riley v. Mallory*,⁴⁶

The law assumes the incapacity of an infant to contract. It also recognizes the fact that the limitation of infancy is arbitrary; that it is indispensably necessary that an infant should be at liberty to contract for necessities; and that he may happen to make other contracts which will be beneficial to him. It does not therefore forbid him to contract, but gives him for his protection the privilege of avoiding contracts which are injurious to him and rescinding all others, whether fair or not, whether executed or executory, and as well before as after he arrives at full age—excepting from the operation of the privilege only contracts for necessities, contracts which he may be compelled in equity to execute, and executed contracts where he has enjoyed the benefits of them and cannot restore the other party to his original position.⁴⁷ These exceptions are founded in the necessities of the infant, or required by a just regard for the equitable rights of others.⁴⁸

An earlier Connecticut case⁴⁹ contains the dictum "that all contracts of minors, unless the same appeared for their benefit or for necessities are absolutely void at common law and therefore they cannot be the subject of ratification or the foundation of an action."⁵⁰

In general, it is said that an infant binds himself by a contract for necessities, if equitable and reasonable, on the theory that he may make contracts beneficial to himself.⁵¹ The real problem, of course, is appli-

46. *Riley v. Mallory*, 33 Conn. 201 (1866).

47. See Part E of this article, Repudiation and Disaffirmance, p. 151 *infra*.

48. *Riley v. Mallory*, *supra* note 46, at 206.

49. *Alsop v. Todd*, 2 Root 105, 109 (Conn. 1794).

50. Whether the phrases "for their benefit" and "for necessities" are in apposition, or whether they encompass two differing concepts, is not discernible from other material in the decision. It is conceivable that a contract may be for someone's benefit and yet not be a legal necessity. It is even less conceivable that a contract may be a necessary, and yet not be for the benefit of the contracting party.

Fenn v. Hart Dairy Co., 231 Mo. App. 1005, 83 S.W.2d 120 (1935), held that the beneficial quality of an attorney's services are not sufficient to make such services necessary, the test being whether there is a "necessity" therefor. See quotation from *Tupper v. Cadwell*, 53 Mass. (12 Metc.) 559, 562, 46 Am. Dec. 704 (1847), text at note 101 *infra*.

51. *Smoot v. Ryan*, 187 Ala. 396, 402, 65 So. 828 (1914).

cation of the general rule. For instance, in one case the court declared a fire insurance policy as not being a necessary, *upon the analogy of services and expenses of counsel* in protecting the property of an infant; "the test of beneficiality, then, cannot be relied on as determining whether or not a thing is to be reckoned among necessities."⁵²

As the court said in *Breed v. Judd*,⁵³

It would be difficult to lay down any general rule upon this subject, and to say what would or would not be necessities. It is a flexible, and not an absolute term, having relation to the infant's condition in life, to the habits and pursuits of the place in which, and the people among whom he lives, and to the changes in those habits and pursuits occurring in the progress of society.

Speaking of what is actually necessary to the infant's state and condition, Judge Swift says "the law distinguishes between persons as to the fitness of necessities, according to their situation and rank in life."⁵⁴

In interpreting the meaning of the word "necessary" as used in a statute exempting certain goods from levy or execution, the Connecticut court said

[T]he word was obviously used in a larger sense; it was intended to embrace those things which are requisite, in order to enable the debtor not merely to live, but to live in a convenient and comfortable manner. It however excludes superfluities and articles of luxury, fancy, and ornament . . . [not] something indispensable, and without which the debtor cannot live, but something so essential as to

52. N. H. Mut. Fire Ins. Co. v. Noyes, 32 N.H. 345, 351 (1855).

53. *Breed v. Judd*, 67 Mass. (1 Gray) 455, 458 (1854).

54. 1 SWIFT DIG. 52 (Dutton & Cowdrey ed. 1874). See also, RESTATEMENT, RESTITUTION § 113(d) (1937): "The word 'necessaries' indicates such food, medicines, clothing, shelter, or personal services as are usually considered reasonably essential for the preservation and enjoyment of life, to the extent that the person having the duty of protection is under a duty to furnish them."

From the remainder of the Restatement comment it is clear that the standard of protection, measured by monetary obligation, is higher for the individual in his capacity as husband than it is for the same person in his capacity as father.

COOLEY, PERSONS AND DOM. REL. 481 (3d ed. 1921) says: "What are necessities is a mixed question of law and fact. It is for the court to say whether the articles in question *can* be necessities and for the jury to say whether they *are*," [emphasis supplied] citing ANSON, CONTRACTS 111, 112 (3d Am. ed. Corbin, 1919); CLARK, CONTRACTS 237 (3d ed. Throckmorton, 1914); 1 PARSONS, CONTRACTS 296 (9th ed. 1904). See also, cases referred to in note 45 *supra*.

be regarded among the necessities, as contradistinguished from luxuries.⁵⁵

Applying this standard to the services and disbursements of an attorney acting for an infant, even in the case of the latter's property rights, it is difficult to see why such a limitation should stand in those jurisdictions which prohibit recovery, on the ground that such services are not necessities. If the services of an attorney are reasonably necessary, *i. e. required*, for the attainment of the security of an infant's property rights, this can hardly be termed a luxury.

Ohio has adopted a rule in terms of detriment to the lawyer (whose rights are hardly ever mentioned!) rather than the ill effects upon the minor who has benefited from the lawyer's labors,⁵⁶ while in Arkansas a rule of reason was applied by the court, taking into consideration the maturity of the infant.

In *Midland Valley R. Co. v. Johnson*,⁵⁷ a suit on an attorney's lien which arose out of services and disbursements for a minor defendant in a personal injury action, wherein the attorney had been hired by the mother and father of the infant, with the latter's consent, and who later discharged the attorney, and settled the case by herself, the questions at issue were the right of the minor after becoming of full age to disaffirm her contract, and to repudiate the contract made by her parents to institute suit on behalf of the defendant.

"It is true she had not reached her majority," said the court,⁵⁸

but she had attained to the age where she was sufficiently intelligent to understand the nature and effect of a contract. We think a contract made for attorney's fees between an attorney and an infant, who is sufficiently intelligent to understand the nature and extent of the contract, is as binding as one for the necessities of life. The property rights of a minor, as a rule, cannot be protected without the aid and assistance of an attorney. The right to be protected involves litigation in the courts.

55. *Montague v. Richardson*, 24 Conn. 338, 347, 63 Am. Dec. 173 (1856).

56. "The lawyer should not be deprived of his rights accorded him by the fundamental and well-established principles of law of this state, because of the failure to press a claim against the guardian. In this state persons not *sui juris* are liable for necessities furnished them." *Markland v. Harley*, 107 Ohio App. 245, 158 N.E.2d 209, 216 (1958).

57. *Midland Valley R. Co. v. Johnson*, 140 Ark. 174, 215 S.W. 665, 7 A.L.R. 1007 (1919).

58. *Id.* at 180.

Accordingly it was held the infant had no right to disaffirm the contract upon reaching her majority.

D. KINDS OF SERVICES

The types of services attorneys have rendered infants, and which have reached the courts, law, equity, probate, and the administrative tribunals and agencies, have been the same as lawyers have traditionally been engaged in rendering for their adult clients. Likewise, the post-retainer suits against infants have arisen from all the types of matters which brought the attorneys' services into action in the first place. The two common factors in all the latter proceedings are that, the services having been rendered, the infant now refuses or neglects to pay for them; and a parent, probate guardian or guardian ad litem enters the picture, if indeed he had not already done so in the original proceeding. By subject matter this is perhaps the easiest section of this writing to categorize. Generally, the contingent fee arrangement is an incident to personal-injury litigation, whether it be before the courts or in the boards or commissions set up for the administration of employment injuries. What has usually happened in the cases shortly to be considered follows this scenario: *A* receives personal injuries and either by himself or through the intervention of his "next friend," *B*, perhaps his father, mother, or a probate guardian, engages *C*, a lawyer, to pursue *D*, the tort-feasor, say on a 50% contingent-fee basis. All the usual steps are taken: Investigation, conferences, correspondence, litigation. At any point in the proceedings, from first conference to final judgment, *C* is told either by *A* or by *B* that they have (1) hired *E*, another lawyer, to supplant *C*, or have (2) decided to settle the case without *C*'s further services, or (3) have just learned that an infant isn't liable for legal services. The effect in any of the situations is that it becomes obvious to *C* that *he* has to become a plaintiff now, against *A* and/or *B*, if he wants to be paid for his services in the case against the former defendant *D*. The plot sometimes gets a bit complicated by a claimed attorney's lien by *C* on the proceeds, or by such procedural niceties as a suit by the infant, *A*, to order the reconveyance of property or to cancel a deed which the lawyer might have had in payment of his fee; but the principles enunciated by the courts are but rarely affected by the *form* of action by which the lawyer-infant litigation comes before them;⁵⁹ rather, some *substantive* or *procedural* defect is used as the

59. As, e.g., in *Hill v. Childress*, notes 34-35 *supra*; *Charles v. Whitt*, 187 Ky. 77, 218 S.W. 994 (1920), or *Houck v. Bridwell*, 28 Mo. App. 644 (1888).

springboard for the courts' dismissal of the lawyer's claim for payment, sometimes without our ever knowing whether or not the type of services sued for might be classed as "necessaries."⁶⁰

The plot structure above, although designated for personal injury claims, is equally applicable to the other broad categories of litigation covered in this Part. The litigation has arisen, simply because the lawyer has not been paid, or because the infant is asking the court to order the lawyer to disgorge what he may already, if rarely, have received. Thus, the same observations contained in any subtopic of Part D might apply equally in any of the other subtopics.

I. *Guardian Ad Litem; Contingent Fees; Personal Injuries*

In a fairly typical case, the basis for holding the infant liable is set forth in *Searcy v. Hunter*⁶¹ as follows:

[T]o refuse to allow an attorney, who at the instance of a next friend has instituted a suit in behalf of a minor and recovered for him money or property, to claim from the infant a reasonable compensation for his services would be to establish a rule which would operate to the prejudice of the class it is designed to protect. In such case where the services have been beneficial to the infant we are of the opinion that reasonable compensation should be allowed.⁶²

Note, however, is also made of the fact that in the chancery or probate proceedings the attorney first had obtained the approval of the court to render the service involved. In this respect the case is also typical, although there are some holdings, as we shall see⁶³ which do not make such approval a condition precedent to recovery by the attorney. As the editors of one of the leading selective case reports has it,

The decisions on this subject are usually to the effect that where an infant's claim for personal injuries has resulted in a recovery by action or settlement, the attorneys of the infant will be entitled to a reasonable fee; and that if the infant or his next friend has contracted to

60. As in *Downey v. Northern Pac. R. Co.*, 72 Mont. 166, 232 Pac. 531 (1924) (attorney's services—false imprisonment).

61. *Searcy v. Hunter*, 81 Tex. 644, 17 S.W. 372 (1891).

62. *Id.* at 648.

63. See, e.g., *Burns v. Ill. Central R. Co.*, 190 Ill. App. 191, 258 Ill. 302, 101 N.E. 551 (1914); *Haj v. American Bottle Co.*, 182 Ill. App. 636 (1913); *Barker v. Hibbard*, 54 N.H. 539, 24 Am. Rep. 160 (1874); *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151 (1863); *Askey v. Williams*, 74 Tex. 294, 297, 11 S.W. 1105, 5 L.R.A. 176 (1889); *But see*, *Ryan v. Philadelphia R. Coal and I. Co.*, 189 Fed. 253 (2d Cir. 1911).

pay a certain percentage of the recovery, such contract will be carried out if it is reasonable. Perhaps this is as far as the courts can be expected to go. It will be observed that in some of the cases the courts justify the recovery on the ground that the services were a necessary, but that in one of the cases the court states that services "beneficial to the minor" are classed as necessities. If a case arose where an infant who had lost his action for personal injuries was sued by his attorney for services therein, it is conceived that there could not be a recovery if the action for injuries was an improvident undertaking. But suppose that such action was not improvident,—were the services of the attorney therein a necessary? This seems to be an open question on the authorities.⁶⁴

The court in *Plummer v. Northern Pacific Railway Co.*⁶⁵ gives the rationale for the conclusion that "... even if we regard the legal services of appellants as necessities, it does not follow that the contract made with them is binding," in the following quotation:

It is, however, inaccurate, strictly speaking, to say that the infant's contract, if for necessities, is valid and binding upon him. The more accurate statement is that he is liable to pay the reasonable value of such necessities as he has purchased or received; or, as it is sometimes expressed, he is liable on an implied contract, but not on the express contract which he has made.⁶⁶

Because the case was one to impress an attorney's lien upon the proceeds of a settlement, the court held that since the infant had elected to disaffirm his contract, it became void *ab initio* and therefore, the lawyers acquired no lien rights thereunder. While the court recognized that the lawyers might be entitled to recover compensation—reasonable compensation—from the infant, "that question is not before us."⁶⁷

That the guardian ad litem had agreed to pay 50% of the amount recovered had no significance.

The proper rule in cases like the present is that a guardian ad litem appointed to bring suit for an infant has power to employ and select counsel, but has no authority to contract with them in regard to their compensation; that the amount of compensation to be paid the attorney

64. See Ann. 7 A.R.L. 1011 (1920), *Liability of infant for attorney's services in personal-injury actions*.

65. *Plummer v. N. P. R. Co.*, 98 Wash. 67, 167 Pac. 73, 7 A.L.R. 104 (1917).

66. 14 RUL. CAS. L. 255.

67. *Plummer v. N. P. R. Co.*, *supra* note 65, at p. 70.

is a question to be submitted to the court and determined by it in view of all the circumstances attending the particular case.⁶⁸

In *Burns v. Ill. Central R. Co.*,⁶⁹ the court held that an attorney's services are necessary, and a minor, or his next friend, may make a binding agreement to pay a reasonable compensation. Here the services were also to prosecute a claim for personal injuries.

*Zazove v. Minneapolis & St. Paul & S. S. Marie R. Co.*⁷⁰ was similar to the *Burns* case, the chief question being the authority of the guardian ad litem to appoint the plaintiff lawyer. Here the child's stepmother entered a written contract with the plaintiff for the prosecution of a suit for personal injuries. The court accepted Bouvier's Law Dictionary as authority for the definition of "next friend": "One who, without being regularly appointed guardian, acts for the benefit of an infant, married woman, or other person not *sui juris*," and for the holding that "it is evidently a necessary incident to the duty of conducting a suit or maintaining a defense for an infant that the next friend or guardian ad litem should have the power of selecting and appointing counsel." The court went on the authority of *Haj v. Am. Bottle Co.*,⁷¹ where the court said

. . . this suit comes within the purview of necessities for the minor, and . . . the minor could make a valid contract, and so could his next friend, whereby to hire an attorney to prosecute the suit and agree to pay him a reasonable compensation, and if a compensation was named in the contract which did not strike the conscience of a court called upon to enforce it as unconscionable, it would be enforceable as to amount unless it appeared from the proof that it was an unreasonable amount.⁷²

68. *Id.* at 71. Similarly, a fifty per cent fee was approved by the court in *Ryan v. Philadelphia & R. Coal and I. Co.*, *supra* note 63, but the court held the guardian ad litem could not bind the infant by such contract except with the approval of the court. See also *Bryant v. Brooklyn Heights R. Co.*, 64 App. Div. 542, 72 N.Y. Supp. 308 (1901) (court took jurisdiction of the fund, not to be paid to any attorney without order of court).

69. *Burns v. Ill. Central R. Co.*, *supra* note 63.

70. *Zazove v. Minneapolis, St. P. & S. S. M. R. Co.*, 218 Ill. App. 534 (1920).

71. *Haj v. American Bottle Co.*, *supra* note 63.

72. *Id.* at 639. The *Haj* case was reversed on other grounds, 261 Ill. 362, 103 N.E. 1000, Ann. Cas. 1915A 220 (1913).

Although most of the Illinois cases arise under the Attorney's Lien Act, they are all to the same effect as the *Burns* and *Zazove* cases. See *Goldberg v. Perlmutter*, 308 Ill. App. 84, 31 N.E.2d 333 (1941); *Yellen v. Bloom*, 326 Ill. App. 134, 61 N.E.2d 269 (1945); *Caruso v. Pelling*, 271 Ill. App. 318 (1933). In *City Nat. Bank & Trust Co. v. Sewell*, 300 Ill. App. 582, 21 N.E.2d 810 (1939), the question was not so much the right of the

As in *Burns*, that the minor himself did not sign the contract would not prevent the recovery by the plaintiff, since the acquiescence of the minor, *inter alia*, was the basis upon which the plaintiff rendered services.

In two companion Connecticut cases, wherein the appellant was appealing from disciplinary proceedings against him as a member of the Bar,⁷³ and from a judgment disallowing the attorney's fee in a probate account,⁷⁴ it appeared that the client was a 19-year-old foreigner who could speak no English. She could have settled a claim for personal injuries against her employer all by herself for \$300.00, but her lawyer, who had been employed by her on a fifty-fifty basis, dissuaded her from accepting the proffered amount; subsequently the attorney settled for \$500.00, \$250.00 of which he offered to the minor claimant, retaining the balance for services (\$242.20) and disbursements (\$7.80). The probate court disallowed the fee, the Superior Court affirmed, neither tribunal stating what the fee should have been, and the Supreme Court of Errors doing⁷⁵ likewise, but also affirming the disallowance, stating that insufficient facts appeared in the record to determine whether the contractual price was a fair and reasonable compensation for the lawyer's services.

Regarding the contract in question in the light most favorable to the appellant, namely, that it was a contract by a minor for necessities, a point which we do not decide, it did not control the amount which the appellant should receive for his services. Even when an infant agrees to pay a stipulated price for necessities, he is not bound to pay the price stipulated in the contract, and the person furnishing them can recover only the fair and reasonable value of such necessities.⁷⁶

Just as in Connecticut, the Missouri court wanted it established that the attorney's services were legally necessary, before allowing them:

Plaintiff having failed to allege facts in his petition showing that his employment by the minor and his next friend was legally necessary, or that he was employed by a guardian or curator under the direction of the Probate Court, we hold that there was no binding, valid and

lawyers to compensation for the services rendered (in an accounting proceeding) but as to the extent thereof. The case was remanded to the trial court with a formula for the determination of the reasonable allowance to be given the attorneys for the services rendered.

73. *Grievance Committee v. Ennis*, 84 Conn. 594, 80 Atl. 767 (1911).

74. *Appeal of Ennis*, 84 Conn. 610, 80 Atl. 772 (1911).

75. *I.e.*, omitting, or avoiding.

76. *Supra* note 74, 84 Conn. at 612, 613; 80 Atl. at 773.

enforceable contract between plaintiff and the minor, hence there was no foundation for an attorney's lien.⁷⁷

On page 1017 of *Fenn v. Hart Dairy Co.* the court says:

The situation of a minor *plaintiff* with respect to the necessity of an attorney's services to protect his legal rights is entirely different from that of a minor *defendant*. There is no legal compulsion upon a minor plaintiff to bring a suit to protect his legal rights till after he attains his majority. It may indeed be beneficial and desirable for the minor to have a suit brought in his behalf prior to that time, but there is no legal necessity for doing so for the reason that the law, recognizing his disability because of infancy, grants to him the full period of the statute of limitations after he has reached his majority to bring his suit. The next friend and the attorney for a next friend of a minor may consider it advisable and in the interest of the minor to bring a suit in his behalf as soon as possible after the cause of action in his favor arises, but insofar as the legal necessity for doing so is concerned, we believe it cannot properly and accurately be said that there is any such necessity as would authorize a court to disregard all the law enacted for the protection of minors and hold them to be bound by contracts for attorney's fees made by their next friends.⁷⁸

We have seen that the general rule at common law is that where an infant agrees to pay a stipulated price for necessities, the party furnishing them does not necessarily recover that named price, but only the fair and reasonable value of the necessities.⁷⁹ How this rule applies to

77. *Fenn v. Hart Dairy Co.*, note 50 *supra* at 1019.

78. *Id.* at 1017. (Emphasis supplied). This language is to be compared with the 1888 action of the same Missouri court in *Houck v. Bridwell*, *supra* note 50, wherein there were two holdings: First, that since the next friend could not bind the infant for costs, he could *a fortiori* not bind him for attorney's fees, and secondly, that as an express contract would not be binding, but because the plaintiff sued thereon, he could not recover upon an implied contract in *quantum meruit* "where an express contract exists in reference to the same subject-matter." (p. 648). Compare this language with that in note 35 *supra*.

79. *Gregory v. Lee*, 64 Conn. 407, 30 Atl. 53, 24 L.R.A. 618 (1894); *accord*, *Ennis v. Beers* (cited *supra* note 74 *sub nom.* Appeal of *Ennis*); *Barnes v. Barnes*, 50 Conn. 572, 574 (1883). See also, the following: COKE, LITTLETON 172a; 3 BAC. ABR. 593, 594; 1 BL. COM. 466; 2 KENT, COMM. 234-242, Lecture 31, *Of Infants*; 22 CYC. 580ff. *Infants* (1906); 31 C.J. § 178, p. 1079 *Infants* (1923); 27 AM. JUR. *Infants* §§ 16-21—particularly § 21 (1940); 43 C.J.S. *Infants* § 78 (p. 192 particularly) (1945); A.L.R. DIG. *Infants* § 54: *What are necessities* (1950); TIFFANY, DOM. REL. p. 480ff. (3d ed. Cooley, 1921); SCHOULER, DOM. REL. 411 (6th ed. Blakemore, 1921); WILLISTON, CONTRACTS 712, §§ 240-243 (rev. ed. 1936).

attorneys' fees we have already seen, to some extent, in the preceding discussion, since the principles involved are difficult to divorce from other relevant portions of the decisions quoted, cited above for those other relevant reasons.⁸⁰ The ensuing authorities give emphasis to the application of the rule to a lawyer's charges for services to his small-fry clients.

While the court did not rule on the measure of damages in *Sutton v. Heinzle*,⁸¹ it did rule on the plaintiff's contract with the next friend for the minor, in whose behalf he prosecuted a claim for compensation for personal injuries, the court saying:

Whether or not an express contract as to the attorney's compensation was enforceable according to its terms, the services having been rendered and having been beneficial to the minor, a liability exists to pay for them on the ground that they are classed as "necessaries." (3 A & E Encyclopedia of Law 416, 417; 5 A & E Annotated Cases 131, note; 96 Am. St. Rep. 731, note.)

In *Richardson v. Downs*,⁸² plaintiff attorneys were suing for professional services rendered in five law suits against the defendant. The plaintiffs defended the suits successfully, the aggregate *ad damnum* in the cases exceeding \$20,000. During the defendant's minority the plaintiffs successfully defeated efforts to bring him into court; after his emancipation (a fee for which he paid the plaintiffs) he was finally brought to court in the five cases and successfully defended by the plaintiffs. The infant had "a large property in his own right," his father, insolvent, had actually engaged the services of the plaintiffs. It was held that the minor had ratified his father's action, and that the fees for the services rendered were reasonable and fair.⁸³

Leonard v. Alexander, citing many California precedents, held

Under these authorities we have reached the conclusion that the services rendered by the plaintiff [in a malpractice suit against physicians on behalf of the minor plaintiff] were for necessities of life of

80. See, for example, the quotations and text to notes 44-55 *supra*.

81. *Sutton v. Heinzle*, 84 Kan. 756, 115 Pac. 560, 34 L.R.A. (N.S.) 238, *rehearing denied* (on other grounds) 85 Kan. 332, 116 Pac. 614, 34 L.R.A. (N.S.) 239 (1911).

82. *Richardson v. Downs*, 23 La. Ann. 641 (1871).

83. It is not clear just when the minor ratified his father's action in terms of the minor's infancy/majority. It is submitted that if the contract is nugatory because not necessary, no amount of ratification, approval or confirmation by the infant *during his infancy* is going to give the original nullity any legal stature.

the minor and that their reasonable value is recoverable from him, but not from his mother,

who as guardian ad litem for the minor had hired the plaintiff and prosecuted the suit.⁸⁴

While the services of an attorney in personal injury actions on behalf of a minor are thus fairly universally held to be necessities,⁸⁵ the next question is: Is the lawyer entitled to the fee he has contracted for? The answer, from the foregoing discussion, obviously must be: No.

Most of the cases on the subject say that the fee has to be reasonable.⁸⁶ This is enunciated in various manners by the courts. It will be sufficient to cite just a few, bearing in mind, however, that there has to be a *necessity* for the lawyer's services, before *any* liability, on any basis, can attach. *McCloskey v. Sweeney*⁸⁷ is illustrative of just such a case. There the court held that the infant defendant, not served with process, was not authorized to nominate an attorney, nor was the court authorized to appoint a guardian ad litem. Except for the remand, the opinion is only 8 lines long, so one does know on what basis the infant is not authorized

84. *Leonard v. Alexander*, 50 Cal. App.2d 385, 389, 122 P.2d 984 (1942).

In the appendix to Vol. 14 of Mo. App., p. 576 (1883), a statement of "points decided in cases not reported," *Nagel v. Schilling* appears as authority for the proposition, "the proper defense of a suit against an infant is a necessity for the cost of which the estate may be liable." It should be noted that the guardian *ad litem*, not the infant, engaged the law firm for the defense of the action.

See 7 A.L.R. 108, note (1920) *power of guardian ad litem or next friend to bind infant by his contract with attorney fixing compensation*.

85. E.g., services of an attorney were held necessary to obtain satisfaction of a claim for personal injuries in *El Paso & S. W. Co. v. Hudspeth, Wallace & Harper*, 255 S.W. 772 (Tex. Civ. App. 1923).

86. The agreement of a guardian *ad litem* or next friend with an attorney fixing a reasonable compensation is enforceable. *Hickman v. McDonald*, 164 Iowa 50, 145 N.W. 322 (1914); ". . . The next friend of an infant may employ counsel to represent him and agree on the compensation to be paid, subject, however, to the limitation that the fee agreed upon shall be reasonable, and this is a question for the court. That being true, such a contract will be upheld if it appears that the compensation contracted is reasonable." *Sanders v. Woodbury*, 146 Ky. 153, 142 S.W. 207 (1912); a fifty per cent contingent fee contract, being *customary* and *reasonable* in the community, was upheld in *Elk Valley Coal Mining Co. v. Willis*, 149 Ky. 449, 149 S.W. 894 (1912); "While [the attorney's] employment by the injured boy's father on a contingent basis would not be binding on the court, he has in good faith rendered services to the ward and is entitled to be paid reasonable compensation for such services out of the fund realized on said claim." *In re Mikasino-vich*, 110 Pa. Super. 252, 257, 168 Atl. 506 (1933). See also, last paragraph of note 84 *supra*, and texts relating to *Roberts v. Vaughan*, 142 Tenn. (15 Thomp.) 361, 219 S.W. 1034, 9 A.L.R. 1528 (1920), note 129 *infra*; and *State v. Cosby*, 285 P.2d 210 (Okla. 1955).

87. *McCloskey v. Sweeney*, 66 Cal. 53, 4 Pac. 943 (1884), note 183 *infra*.

to nominate an attorney. Was this a case, wherein, because the file showed the infant was not served, there was no case, and therefore it was not necessary for him to have an attorney? In *Johnston v. Southern Pacific Co.*,⁸⁸ a statute required the plaintiff, if over fourteen years of age, to make application for the appointment of a guardian. In this case the guardian himself made the application, and the lower court was held to have been in error in appointing the guardian. It was held that "not only was [the order] made in violation of the express direction of the statute, but as made it denied to the minor a substantial right of nomination accorded her by law."⁸⁹

The attorney fared much better in *Kelly v. Kelly*,⁹⁰ acting on a fifty per cent contingent fee, but in this Oklahoma case the contingent fee arrangement was approved in advance both by the probate court and the county court.⁹¹

In *Ennis*,⁹² it will be recalled, the disciplinary action against the attorney was reversed by the Supreme Court; and the holdings of the court of probate and Superior Court, deciding that the services the appellant rendered were not worth \$242.20 were affirmed—the upper tribunal not stating what sum would constitute fair and reasonable compensation, that being purely a question of fact.

Most workmen's compensation acts provide for limitation or approval of attorney's fees for services rendered in proceedings thereunder. In Mississippi, where a 25% limitation was imposed for services before the commission, an attorney claimed 50% of the recovery on the basis of an agreement made with it does not say whom (the widow?), the case having gone to four tribunals before the merits were finally determined.

Holding⁹³ that the 25% statutory limitation is not applicable for *additional* services rendered in *appellate* courts, where minors are involved,

88. *Johnston v. So. Pac. Co.*, 150 Cal. 538, 89 Pac. 348 (1907).

89. *Id.* at 538.

90. *Kelly v. Kelly*, 134 Okla. 172, 272 Pac. 838 (1928).

91. However, the next intermediate court held that equity rules should prevail, and the district court, on appeal, acted as an equity court with power to cancel a contract. The Oklahoma Supreme Court held that first of all the issue had not been raised by the pleadings, the district court had no such power, and, under the authority of a quartet of Oklahoma cases, "the approval of the contract by the court settled the validity of the contract, as between the parties, as to the question of reasonableness of the compensation, as fixed for the attorney for his services to be performed for the minors." Accordingly, the contingent arrangement was ratified by the court. See also, *Hanlon v. Wheeler*, 45 S.W. 821 (Tex. Civ. App. 1898).

92. *Supra* notes 73 and 74.

93. *Sunnyland Contracting Co. v. Davis*, 221 Miss. 744, 75 So. 2d 638 (1954).

the courts must necessarily determine the fees; and any contract for fees does not bind the minors. We must, therefore, determine the amount of the fees on the basis of fairness to attorney and client. All of the justices are of the opinion that the fee for all services of claimants' attorneys in cases such as this should not exceed one-third of the sum recovered.

The court's language⁹⁴ does not make it clear which minors the contract for fees does not bind, but it is conceivable that the original contract may have been with the infant decedent, or possibly with the infant widow and three minor children who were the beneficiaries of the award.

*Scolavino v. State*⁹⁵ was the application for determination of a claim by attorneys for an infant claimant. Here again no question was involved as to the necessity of the lawyer's services; only the amount. There had been a 50% contingent retainer with the guardian ad litem, and the plaintiff carried the matter through several appeals all the way to the Appellate Division. A great deal of time and effort was spent, the Court of Claims remarking "This court is well aware that the attorneys for the claimant [*i.e.*, infant] conducted in this matter a difficult and stubbornly defended case with ability and thoroughness and were eminently successful in their efforts."⁹⁶ However under Section 474 of the Judiciary Law the court, having full discretion to determine the proper compensation for the attorneys of the infant party,

. . . feels that any arrangement whereby an attorney is to receive 50% of the proceeds of an infant's cause of action is unreasonable, excessive and unconscionable, and that no guardian ad litem or other representative of an infant should be permitted to carry out any such agreement. We do recognize the value and utility of a contingent fee arrangement where an infant has no funds with which to prosecute an action, but we feel that ordinarily such a contingent fee arrangement should not exceed approximately one third of the recovery—[even] recognizing that in this case the attorneys have certainly earned the maximum permissible amount . . .⁹⁷

94. *Id.* at 639.

95. *Scolavino v. State*, 190 Misc. (N.Y.) 548, 74 N.Y.S.2d 573 (1947).

96. *Id.* at 550.

97. The extent of the fees allowable to attorneys will not be fixed or adjudicated on an *ex parte* application. In the absence of contract with the guardian of the infant the right to some suitable proceeding in which the minor has his day in court is preserved. See Annot. 44 L.R.A. (N.S.) 411n (1913), *infantis: liability for legal services*.

II. *Property Rights*

This is the area treated in this writing, among the three main categories of services rendered by counsel, Personal Injuries,⁹⁸ Property Rights, and Personal Rights,⁹⁹ in which there is the greatest conflict of authority. Sandwiched between the fairly universal holdings permitting reasonable attorneys' fees are these property rights cases, which frequently don't even reach the second plateau of consideration, "How much?"—these cases denying recovery by the lawyers' being stalled on the primary and more fundamental question, "Were the services necessary?"

Englebert v. Troxel,¹⁰⁰ a case reminiscent of the 14th-Century legend of Maître Pathelin, came up on appeal from a decree cancelling and setting aside a deed made by the defendant to the plaintiff. The plaintiff, a minor, living with his father, was sued on a mortgage foreclosure in which the defendant, appearing as guardian ad litem for the infant, successfully defended the action, on the basis of an agreement with the father that he was to be compensated for his services by the conveyance to him of a half interest in the parcel of land. At the conclusion of the litigation, on payment of an additional sum in cash to the father, the minor son executed a deed conveying half interest in the lot. Upon reaching his majority, the infant sued in equity to cancel and set aside not only the deed he had executed in favor of the lawyer, but also other deeds the lawyer had in turn delivered to others under the original conveyance from the infant. The Supreme Court affirmed the decree of cancellation.

The question on appeal, of course, was whether the contract was a "necessary." On page 206 of the opinion, the court quotes from *Tupper v. Cadwell*:

An infant may make a valid contract for necessities, and the matter of doubt in the present case is what expenditures are embraced in the term "necessaries." . . . It has sometimes been contended that it was enough to charge the party, though a minor, that the contract was one plainly beneficial to him in a pecuniary point of view. That proposition is by no means true, if by it it be intended to sanction an inquiry in each particular case, whether the expenditure or articles contracted for were beneficial to the pecuniary interests of the minor. The expenditures are to be limited to cases where, from their very nature,

98. Subtopic D-I *supra* p. 122 ff.

99. Subtopic D-III *infra* p. 140 ff.

100. *Englebert v. Troxel*, 40 Neb. 195, 58 N.W. 852, 26 L.R.A. 177, 42 Am. St. Rep. 665 (1894).

expenditures for such purposes would be beneficial; or, in other words, they must belong to a class of expenditures which are in a law termed beneficial to the infant. What subjects of expenditure are included in this class is a matter of law to be decided by the court. The further inquiry may often arise whether expenditures, though embraced in this class, were necessary and proper in the particular case, and this may present a question of fact. It is therefore a preliminary question to be settled whether the alleged liability arises from expenditures for what the law deems "necessaries", and unless that be shown it is not competent to introduce evidence to show that in a pecuniary point of view the expenditure was beneficial to the minor.¹⁰¹

The court's chief stand was that the infant was living with his father at the time of his contract, even if the charges were to be regarded as for a necessary; that the lawyer was acting as an officer of the court, a guardian ad litem, and that it was his duty to make a proper defense and guard the rights of the defendant; and that he would have to look to the court for an allowance of attorney's fees to be taxed as part of the costs in the proceedings.¹⁰²

Grissom v. Beidleman, a 1913 Oklahoma case with statutory provisions similar to those in force today,¹⁰³ flatly turned down the attorney's claim for a fee, based on services and expenses incurred in employment and action to recover the minor's interest in lands.¹⁰⁴

There is an extensive review of the cases then extant, the court relying heavily upon *Phelps v. Worcester*,¹⁰⁵ a suit to protect the infant's title to his estate, and citing with approval the court's holding that "the infant's liability for them might be avoided, even under an express promise to pay for them." (The "them" were the services and expenses of counsel, which "could not be regarded as necessities.")

Even without the intervention of a next friend and if the infant were without aid, he still could not employ others to protect his rights to his property. Lord Coke is quoted,¹⁰⁶ and the good Lord is interpreted as meaning "such aid concerns the person and not the estate, and we

101. *Tupper v. Cadwell*, 53 Mass. (12 Metc.) 559, 562, 46 Am. Dec. 704 (1847).

102. It may incidentally be observed that the defendant's grantees were bound by actual and constructive notice of what the land and court records revealed.

103. OKLA. STAT. ANN., tit. 15, § 11 *et seq.* (1956, rev. to 1964).

104. *Grissom v. Beidleman*, 35 Okla. 343, 129 Pac. 853, 44 L.R.A.(N.S.) 411, Ann. Cas. 1914D 599 (1913).

105. *Phelps v. Worcester*, 11 N.H. 51 (1840).

106. COKE LIT. 172a. See quotation in the text immediately below note 22 *supra*.

know of no authority which goes beyond this." Further relying on Upham, J., the Oklahoma court reiterates

that necessities concern the person and not the estate, [as furnishing] the true test on this subject. Although there may be isolated cases where a contrary doctrine has obtained, we apprehend the true rule to be that those things, and those only, are properly to be deemed necessities which pertain to the becoming and suitable maintenance, support, clothing, health, education, and appearance of the infant, according to his condition and rank in life, the employment or pursuit in which he is engaged, and the circumstances under which he may be placed as to profession or position.¹⁰⁷

If this be so, then matters which pertain only to the preservation, protection, or security of the infant's property are excluded from the list of necessities, however beneficial. Whatever relates to his property is the legitimate business of a guardian, and, if transacted by the infant, may be avoided at his election.

Further reviewing the cases, *Barker v. Hibbard*¹⁰⁸ was cited as adhering to this doctrine. Because the lawyer's fee for defending the minor in that case—a bastardy proceeding—was classed as a "necessary," it was allowed. It was emphasized that the action concerned the minor's *person* and *liberty*.¹⁰⁹

*Thrall v. Wright*¹¹⁰ is cited as authority for the proposition that the Vermont court had not cared to establish the rule that as a matter of law, "in all cases where a father is indebted to his minor son, a law suit with the father is a necessary for the son." Professor Parsons¹¹¹ enumerates a number of unnecessary articles, among which are "counsel fees, and expenses of a lawsuit" but leaving the door open, that ". . . a lawsuit might be a necessary," under the circumstances of a particular case.

107. Citing COKE LIT. 172a; *Whittingham v. Hill*, Cro. Jac. 494, 79 Eng. Rep. 421 (1619); *Jene v. Chester* [*sub nom.* *Ive v. Chester*], Cro. Jac. 560, Poph. 151, 79 Eng. Rep. 1251 (1619).

108. *Barker v. Hibbard*, 54 N.H. 539, 24 Am. Rep. 160 (1874).

109. See Subtopic D-III *infra*, p. 140 ff.

110. *Thrall v. Wright*, 38 Vt. 494 (1866). In this case plaintiff represented the defendant, an emancipated infant, in a law suit on a promissory note against the latter's father, who was ready, willing and able to provide for the boy and desired him to remain at home.

True, Parsons was repudiated by the court, saying "a lawsuit might be a necessary"; however, *prima facie* this was not a necessary and the burden of proof is on the plaintiff to show that litigation was. "Though [the plaintiff's services] were in the class of necessities, it would not follow that they were necessary for the infant."

111. PARSONS, CONTRACTS 246 (4th ed. 1860).

The *McIsaac v. Adams* case¹¹² is cited, the plaintiff's services there having been rendered in connection with the settlement of an estate in which the minor defendant's only contending interest was equally minor, as he would have benefited by his grandfather's death in any event, either as legatee or as a descendant. A guardian ad litem was regarded as the only necessary for the protection of the interest of a minor coming within that ambit. The court (still in *McIsaac*) conceded that there might be situations where a minor might be bound to pay for an attorney's services on the ground that they were necessary; "but ordinarily this liability is limited to cases where the services are rendered in connection with the minor's personal relief, protection or liberty."

Continuing with discussion of the case of *Grissom v. Beidleman*,¹¹³ the court cites as authority for the last-mentioned proposition the cases of *Crafts v. Carr*,¹¹⁴ *Barker v. Hibbard*,¹¹⁵ *Munson v. Washband*,¹¹⁶ and *Askey v. Williams*.¹¹⁷

In the first, the services were rendered in an action, brought by the next friend of a female minor, to recover for an indecent assault upon her. In the second, the plaintiff had been employed to defend the defendant upon the charge of being the father of a bastard. In the third, the defendant had been seduced, and afterwards had been turned out of doors by her father, and the plaintiff had brought an action for the defendant against the seducer. In the fourth, the services were rendered in defending a minor upon an indictment for stealing. The cases recognize the general doctrine that legal services, rendered to a minor in regard to ordinary rights of property, are not necessities.

The court then goes on to cite various cases in which the infant was not held liable for attorneys' fees, where the services were rendered relative to the estate or property of the minor. On the other hand, various cases are also cited where the attorney may contract for a reasonable fee for prosecuting an action for personal injury; likewise bastardy actions; support actions; and appearance on a recognizance or bail bond; and for the services of a young lady's solicitor to prepare a settlement incident to a marriage contract.

112. *McIsaac v. Adams*, 190 Mass. 117, 76 N.E. 654, 112 Am. St. Rep. 321, 5 Ann. Cas. 729 (1906).

113. *Supra* note 104.

114. *Crafts v. Carr*, 24 R.I. 397, 53 Atl. 275, 60 L.R.A. 128, 96 Am. St. Rep. 721 (1902).

115. *Supra* note 108.

116. *Supra* note 22.

117. *Askey v. Williams*, 74 Tex. 294, 11 S.W. 1101, 5 L.R.A. 176 (1889).

These cases are within the principle that, when a contract comes within the term "necessaries", or that which he is under a legal obligation to do, or is made pursuant to statutory authority, the minor is bound so that he may not disaffirm same. In the case of the infant female, the solicitor's bill for drawing a marriage settlement was reasonably incidental to her contracting marriage. An infant may contract marriage and do everything that is reasonably incidental and beneficial to her in carrying out or consummating the marriage contract.¹¹⁸

In *Grissom v. Beidleman* the court makes the further distinction of attorney's fees coming out of a fund already administered by and in the custody and jurisdiction of the court. If the attorney's services are instrumental in, or productive of, establishing or creating the fund, then ". . . it is entirely proper that out of what belonged to [the infants] the fee should be paid . . ." ¹¹⁹

Cases, at actions in law, in which a recovery was sustained against the infant for legal services rendered relative to his property, were also cited,¹²⁰ the court observing that "these cases hold that the contract is binding only to the extent of a reasonable compensation."

Marx v. Hefner,¹²¹ is in accord with *Grissom v. Beidleman*. There, although combined in one count, which the court criticized, an action on an express contract and upon a *quantum meruit* were joined. It was accordingly held, the plaintiff not further alleging that the *lex loci contractus* was different from that of Oklahoma, that the lower court committed reversible error in overruling the demurrer directed against the petition.

Watts v. Houston,¹²² another Oklahoma case, followed *Grissom* and

118. Citing *Helps v. Clayton*, 112 Eng. Com. Law Rep. 553, 17 C.B.(N.S.) 553, 144 Eng. Rep. 222 (1864).

119. Citing *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 435 (1879); *Muskogee Development Co. v. Green*, 22 Okla. 237, 97 Pac. 619 (1908); *MacGreal v. Taylor*, 167 U.S. 688 (1897), reversing *Utermehle v. McGreal*, 1 D.C. App. 359 (1893); *Senseney, Trustee v. Repp*, 94 Md. 77, 50 Atl. 416 (1901); *Colgate v. Colgate*, 23 N. J. Eq. 372 (1873); *Connor v. Ashley*, 57 S.C. 305, 35 S.E. 546 (1899); *Owens v. Gunther*, 75 Ark. 37, 86 S.W. 851, 5 Ann. Cas. 130 (1905); *Petrie v. Williams*, 68 Hun. 589, 23 N.Y. Supp. 237 (1893). It is to be noted that these cases are all probate, equity, chancery, or other proceedings of like nature. See also quotation to note 129 *infra*.

120. *E.g.*, *Searcy v. Hunter*, 81 Tex. 644, 17 S.W. 372, 26 Am. St. Rep. 837 (1891); *Sutton v. Heinzle*, 84 Kan. 756, 115 Pac. 560, 34 L.R.A. (N.S.) 238 (1911); *Nagle v. Schilling*, 14 Mo. App. 576 (1883). These are referred to in notes 61, 81, and 84, respectively, *supra*.

121. *Marx v. Hefner*, 46 Okla. 453, 149 Pac. 207, Ann. Cas. 1917B 656 (1915).

122. *Watts v. Houston*, 65 Okla. 151, 165 Pac. 128 (1917). *Dillon v. Bowles*, 77 Mo.

Marx, but with additional facts: the plaintiff, an attorney, was retained by a few of several heirs to contest the admission of a will to probate, the will having cut off all the heirs. The plaintiff, who was successful in upsetting the will, was paid by the beneficiaries who had retained him, and then sought recovery, in this proceeding, against the remaining (minor) heirs with whom he had had no contractual relations whatsoever. There was no question but that the defendants had benefited by the services of this attorney, and had accepted their part of the estate with the complete knowledge that it was through the efforts of this attorney that they benefited at all.

In view of the foregoing, a bizarre *non sequitur* was introduced by the trial court which

found as a fact that the services rendered by the attorneys were not necessary, for the reason that the minors had another attorney employed by the year whose duty it was to attend to all legal matters pertaining to their estate.

The plaintiffs did not contend that there was any contract with the minors, with their guardian, that there was approval by the court of these fees, or that an allowance was made by the court for their services, but based their claim on the theory

that they are entitled to recover, independent of any contract, whether express or implied, upon the ground that the law creates an obligation in behalf of reason and justice, but, for the sake of finding a remedy, classifies said obligation as a quasi contract,

and

that it appears from the entire findings of the court, construed together, that the services of these plaintiffs were necessarily and essentially rendered for the benefit of said heirs at law, including these minors.

603, affirming 8 Mo. App. 419 (1883), is similar to *Watts v. Houston*, except that here the plaintiff sought certain *land* by partition rather than a money fee. The attorney's case was dismissed, as the infant could not be held liable on the basis of an express contract—which indeed the attorney did not claim he had made; rather, the lawyer argued, the defendant was liable *ex aequo et bono*, to which the court answered, "this is a vague phrase used generally in reference to the action for money had and received, and which has no application here. If so liable, for what would the infant be held? Not certainly upon an agreement to convey [a fraction] of this land; but it is upon this agreement, or what is the same, on the basis of the obligation of it, that is the plaintiff's position." *Supra* at 608.

In affirming the judgment of the trial court,¹²³ the Supreme Court did note that the attorneys rendered valuable services, actually increased the estate of the minors, that the minors accepted this benefit with full knowledge that this sum had been secured by the efforts of the attorneys, and "that in equity and good conscience they ought to pay the attorneys reasonable compensation for such services."

*Roberts v. Vaughn*¹²⁴ is authority for the proposition that the next friend might make a contract for the amount of counsel fees,¹²⁵ but "such fees must be allowed by the court after an investigation of their value."¹²⁶ "The attorney in such cases has been likened to an attorney appointed by the court to defend a criminal, and his rights are subject to the subsequent action of the court in fixing his compensation."¹²⁷

It is to be noted that *Roberts v. Vaughn* involves services arising out of a will contest. The attorneys were quite successful and obtained substantial benefits for the infant. After saying that the services rendered by counsel were necessities, and that the infant is liable for their value in the same way that he is liable for necessities,¹²⁸ the court nevertheless goes on to say¹²⁹

123. *Quaere*, would even *adult* beneficiaries of the estate be obliged to pay lawyers in such circumstances? Fortunately, the writer is not now and here concerned with this problem.

In *McIsaac v. Adams*, *supra* note 112, plaintiff, an attorney, represented various members of a family in a will contest. The defendant infant, who benefited by plaintiff's services had a probate guardian and a guardian ad litem, by neither of whom plaintiff was employed; nor was he engaged by the defendant himself. Defendant would have taken under the decedent in any event, either as heir or legatee. Plaintiff was held to be a mere volunteer; he could only prevail if the services were necessities, and when without the guardian's consent "rendered to a minor in regard to ordinary rights of property are not necessities." The personal rights cases are distinguished.

124. *Roberts v. Vaughn*, *supra* note 86.

125. Note that many cases *require* (cf. "might") a guardian to be appointed to make this contract, e.g., *Tupper v. Cadwell*, *supra* note 101.

126. *Roberts v. Vaughn*, *supra* note 124, at 368. Apparently the courts will hold that services furnished the infant will be presumed to be *unnecessaries* in contemplation of law, in the absence of proof that the services *were* necessities, or furnished under such circumstances as would impose a liability upon the infant to pay for them. *Edmunds v. Mister*, 58 Miss. 765 (1881).

127. *Roberts v. Vaughan*, *supra* note 124, at 368.

128. Citing *McIsaac v. Adams*, *supra* note 112; *Epperson v. Nugent*, *supra* note 119; *Munson v. Washband*, *supra* note 116; and *Jones v. Yore*, 142 Mo. 38, 43 S.W. 384 (1897).

129. *Roberts v. Vaughn*, *supra* note 86, at 371. See also *In re Mikasinovich*, *supra* note 86.

a distinction exists between the services of counsel, as in this case, and services rendered for the protection of the infant in the enjoyment of his general or civil rights, which we need not discuss here, because the distinction is clearly drawn in most cases above cited. The infant being liable as for necessities, the counsel are entitled to a lien upon the estate secured for him because the estate is in the hands of the court. It will not disburse the amounts secured the infant by the services of his counsel without first paying their reasonable fees.

It is difficult to perceive the relevancy of the quoted language, in view of the types of services for which the plaintiffs were suing infants in each of the cited cases, as compared with the type of services in the *Roberts v. Vaughn* case. Services were rendered in different kinds of cases; the Tennessee court points out the difference as though that difference would affect its decision; and then essentially—and anticlimactically—says it doesn't matter.

*Hanlon v. Wheeler*¹³⁰ was an action for a final accounting of the estate of an infant for whom attorneys had collected a judgment, the infant meanwhile having died. It was a 50% contingent fee. The agreement had been executed by both the minor and his next friend; the fees were for services rendered for the prosecution of a claim for damages for personal injuries. Error was assigned on appeal to the charge, which, in essence, was that if the contract for half the recovery was a reasonable compensation, then the infant would be bound thereby; but, if for more than reasonable compensation, then the attorneys would only be entitled to retain reasonable compensation. The judgment of the court below was affirmed.

*Cobbey v. Buchanan*¹³¹ presented on appeal the question whether certain instructions given the jury in the trial below were erroneous. The minor defendant's father had died intestate leaving a large amount of property. The plaintiff attorney, at the request of the minor, examined the records and advised the defendant as to his rights of inheritance. The plaintiff also rendered legal services to the defendant in a habeas corpus proceeding against a sheriff returning the defendant to reform school after violation of parole. The plaintiff claimed that the court should have determined whether those services were necessities, being questions of law, and not of fact. Citing *Englebert v. Troxell*,¹³² it was held that the lower court committed no error in sub-

130. *Hanlon v. Wheeler*, *supra* note 91.

131. *Cobbey v. Buchanan*, 48 Neb. 391, 67 N.W. 176 (1896).

132. *Supra* note 100, at 397.

mitting to the jury the question whether the services rendered were necessities.¹³³

Services and expenditures of the plaintiff, for which suit was brought, were rendered at the request of the defendant's guardian, the defendant being then a minor, to recover possession of a tract of land, claimed by the guardian as the property of his ward, the plaintiff claiming that these services were beneficial to the minor, and that the minor was therefore liable on an implied assumpsit. Judgment was rendered for the defendant, on the theory that where the guardian undertakes to act for the infant, an implied contract on the part of the infant is precluded, even for necessities.

The enquiry has been made, if there had been no guardian, and the infant were without aid, whether he might not employ others to protect his rights to his property, and be legally holden notwithstanding the interposition of his minority. We think clearly not. Though such services may promote the sound interests of the ward, they are not such assistance as comes within the terms of necessities . . . Such aid concerns the person, and not the estate; and we know of no authority which goes beyond this.

An infant's rights to his estate are not prejudiced by his infancy . . .

On the other hand, in *Lee v. Leibold*¹³⁴ the court stated

Unquestionably, and as a matter of right and necessity an infant is entitled to the assistance of an attorney in prosecuting a claim of this character [prosecuting a claim against the estate of a deceased person], and the attorney to reasonable compensation for his services. Likewise, there can be no doubt concerning the right and propriety of the infant's natural or legal guardian or next friend to select counsel in his behalf; . . . but he has no power to bind the infant or his estate by a contract as to the compensation to be paid.¹³⁵

The court was therefore of the opinion that the only fee the attorney could get would be through application to the court which appointed the guardian to act on behalf of the infant.¹³⁶

133. This is *contra* the holdings of other courts, as is abundantly clear from the decisions reported herein; in fact, it is submitted, it is *contra* the views of the Nebraska court itself, as appears from the language of *Englebert*, quoted at length in the text to note 101 *supra*.

134. *Lee v. Leibold*, 102 Colo. 408, 79 P.2d 1049, 116 A.L.R. 1319 (1938).

135. *Id.* at 413.

136. There is another interesting aspect to the *Lee v. Leibold* case, in that in

III. *Personal Rights*

Of the three broad categories, Personal Injuries,¹³⁷ Property Rights,¹³⁸ and the field we are now considering, this one provides least conflict amongst the holdings, and least hesitation in recognizing the lawyer's right to a fee for his services rendered for an infant. It should be pointed out, however, that here also observance of fundamental principles is insisted upon by the tribunals¹³⁹ and the procedural rituals of the jurisdiction must of course be obeyed.

These are the rights, generally, which arise from the invasion of one's freedom from corporeal or reputational harm or the threat thereof, whether directly from wrongful imprisonment,¹⁴⁰ legitimate arrest,¹⁴¹ or indirectly, in inter-spousal litigation or such legal proceedings as develop between seducer and seducee.¹⁴²

A typical case was *Crafts v. Carr*,¹⁴³ where

The situation was this. A girl of seventeen having no estate and no guardian was the victim of an indecent assault. She had a father and mother, and her father, her natural guardian, so to speak, at once took steps for his daughter's protection and for compensation for her sufferings, and incidentally for the punishment of her assailant. Her father was naturally her next friend, and legally became such to

Colorado, a person having a direct interest in the outcome of litigation was incompetent as a witness. (*Quaere*, how much influence this prohibition had on the court's ruminations.) The lawyer, having a contingent fee arrangement with the mother of the infant, the court held that the attorney had no present, direct, certain or vested interest in the proceeds of any judgment which might be secured, and "under the most favorable circumstances he could not legally secure more than a reasonable fee for his services . . ." (p. 413).

"In all civilized countries the law exercises a constant vigilance over the rights of infants, and the judiciary should not permit an assumed authority on the part of mother or lawyer, or the misadventure of either, to deprive a child of testimony, otherwise available to him, in the prosecution of litigation in his behalf." (pp. 413-414).

137. Subtopic D-I *supra* p. 122 ff.

138. Subtopic D-II *supra* p. 131 ff.

139. *E.g.*, that the services were necessary to that infant at that time under those particular conditions that obtained, and that the charge was a reasonable one for the services performed.

140. See the *Downey* case *supra* note 60, wherein the court eschewed a decision on whether services rendered an infant to vindicate his rights for this tort were a necessary.

141. For the commission of various criminal offenses. See *infra*.

142. *E.g.*, bastardy, breach of promise of marriage, etc.

143. *Crafts v. Carr*, 24 R.I. 397, 53 Atl. 275, 60 L.R.A. 128, 96 Am. St. Rep. 721 (1902).

enable a suit to be brought, as she, being a minor, could not, except under very extraordinary circumstances, bring it without the aid of a next friend to manage it, which the law presumes, from the disability of her infancy, she is unable properly to manage herself . . .

The question in suit was whether the legal services were technically "necessaries." After reviewing the cases, *Englebert v. Troxell*,¹⁴⁴ *Epperson v. Nugent*,¹⁴⁵ *Searcy v. Hunter*,¹⁴⁶ *Thrall v. Wright*,¹⁴⁷ *Munson v. Washband*,¹⁴⁸ *Barker v. Hibbard*,¹⁴⁹ and *Askey v. Williams*,¹⁵⁰ the court held

Following the analogy of the last three cases cited, which commend themselves to us, we think that in the case at bar, the action of the defendant against her assailant, was brought for her protection, even if the result of it, after paying the plaintiff's counsel fees, will increase her estate. We are of the opinion that the counsel fees sued for in this case were legal necessities.¹⁵¹

The claim was made by the defendant that the infant's father could not bind her estate by a contract with the plaintiff for professional services. This was dismissed with the ruling

The father's employment of the plaintiff as counsel in the action . . . was simply for his infant daughter while he was acting as her *prochein ami* and in connection with the conduct of his daughter was not the father's promise, but the implied promise of the infant daughter.¹⁵²

144. *Englebert v. Troxell*, 40 Neb. 195, 58 N.W. 852, 26 L.R.A. 177, 42 Am. St. Rep. 665 (1894) (defense of mortgage foreclosure, *supra* note 100).

145. *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434 (1879) (recovery of property, *supra* note 21).

146. *Searcy v. Hunter*, 81 Tex. 844 (1891) (recovery of property, *supra* note 61).

147. *Thrall v. Wright*, 38 Vt. 494 (1866) (suit on promissory note, *supra* note 110).

148. *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151 (1863) (prosecution for seduction and breach of promise of marriage, *supra* note 63).

149. *Barker v. Hibbard*, 54 N.H. 539, 24 Am. Rep. 160 (1874) (defense of bastardy action, *supra* note 108).

150. *Askey v. Williams*, *supra* note 63 (defense of cattle-rustlin' prosecution).

151. *Crafts v. Carr*, *supra* note 143, at 406. ". . . even if the result . . . will increase her estate." This is the writer's emphasis. It is submitted that the word "even" in the quotation might better have been written *particularly*. The court apparently feels there is some irreconcilability between a suit brought for an infant's protection and the infant's also obtaining an incidental pecuniary benefit from the suit; a preferred concept would be to argue that if, in addition to protection, there can be a monetary enhancement, this is all the more reason to call the services by which these are accomplished "necessaries," rather than offering an apology for such a ruling.

152. *Id.* at 407.

The claim was further made that it was the father's legal obligation, not his infant daughter's, to pay the attorney's fees. The court held as to this¹⁵³ that there were no losses of the infant's services for which the father could sue, nor could he sue for her suffering, all the recovery being payable to the infant. Since the father could derive no benefit from the recovery, the court felt it would not be fair to impose the burden of counsel fees to obtain that benefit—but not for himself—upon the father. Citing *Munson v. Washband*¹⁵⁴ again, the court compared the situation there, where the infant's father had turned her out of doors, with the case at bar, where the infant's father came to her aid “. . . but in the former case the court required the counsel's services to be paid, and we see no reason why in this case counsel is not equally entitled to pay for his services.”¹⁵⁵

The following agreed statement of facts appeared in *Barker v. Hibbard*:¹⁵⁶

The plaintiff is a practicing attorney, and the claim is for services in defending the defendant in a suit or process of bastardy. The defendant was at the time a minor, who had been emancipated¹⁵⁷ by his father. He was arested on a warrant . . . and was brought before a magistrate and bound over, [employing] the plaintiff to defend him. The services were such as are usually performed in similar cases and the charges reasonable and just . . .

Had the case been one for attorney's services in protecting the infant's *property* rights, the New Hampshire court undoubtedly would have dismissed the complaint.¹⁵⁸

153. *Ibid.*

154. *Supra* note 148; cited in *Crafts* at p. 408.

155. Just what the court is driving at by this *sequitur* is more than the writer can perceive. As a matter of analysis, if anything, *Munson v. Washband* weakens the *Crafts v. Carr* argument, any way you look at it. One could with equal elan claim that the ignoble father in Connecticut, after a quarter century of Queen Victoria's reign, having cast his daughter out, made it all the more necessary for the poor lass to have counsel, as one could assert that because dear old Dad in Rhode Island, the good Queen and her period having just died, stuck to his errant offspring, and therefore the lawyer (whom Pop had hired) was *a fortiori* entitled to his fee.

156. *Supra* note 149.

157. The court later in the opinion states that its conclusion would have been the same had the defendant at the time he employed the attorney *not* been emancipated by his father.

158. E.g., *Phelps v. Worcester*, 11 N.H. 51 (1840), text to note 105 *supra*.

Upon a diligent examination of reported cases, we have found no direct authority on the question whether an infant is liable for services rendered by an attorney in the defense of a bastardy proceeding or a criminal proceeding. But it seems that professional services which it is reasonable for him to have, rendered in defending him in a prosecution for a criminal offense in which his liberty and even his life may be at stake, are necessities for which he ought to be liable. It was, however, decided in *Hill v. Childress*,¹⁵⁹ that a father is not liable for the services of an attorney in defending his minor child upon a charge of murder, for the reason that a father is only responsible for necessities furnished to his minor child, "among which the services of an attorney cannot be ranked." But in this state a father would not be liable in such a case, though it were conceded that the plaintiff's services were necessities for his minor child.¹⁶⁰

Services of an attorney rendered to a wife in prosecuting a libel for divorce against her husband are not necessities,¹⁶¹—nor are those rendered in defending a libel of the husband against the wife,¹⁶² but if rendered in prosecuting the husband upon the complaint of his wife for a breach of the peace, and necessary for her safety, they are necessary.¹⁶³ If, however, there were no reasonable grounds for instituting the proceedings, the law is otherwise,¹⁶⁴ but if rendered in defending a groundless prosecution, brought by the husband against the wife to compel her to find sureties to keep the peace, they are necessities,¹⁶⁵ and, perhaps, if the prosecution was not groundless the result might be the same.¹⁶⁶

On the authority of *Munson v. Washband*,¹⁶⁷ a seduction case, resulting in the marriage of the parties after institution of action by the attorney, summarized by the court, "The decision was, that, if the services were necessary for the personal relief, protection, and support of the female defendant, the action might be maintained."

Although the object of a bastardy proceeding is to obtain money damages, there is substantial likelihood that the defendant might be deprived of his liberty in the process. "The services of an attorney in

159. *Supra* notes 34-35.

160. Citing *Kelley v. Davis*, 49 N.H. 187, 6 Am. Rep. 499 (1870).

161. Citing *Morrison v. Holt*, 42 N.H. 478, 80 Am. Dec. 120 (1861).

162. Citing *Ray v. Adden*, 50 N.H. 82, 9 Am. Rep. 175 (1870).

163. Citing *Morris v. Palmer*, 39 N.H. 123 (1859).

164. Citing *Smith v. Davis*, 45 N.H. 566, 570 (1864).

165. Citing *Warner & Ryan v. Heiden*, 28 Wis. 517, 9 Am. Rep. 515 (1871).

166. Citing note to *Warner v. Heiden* in 11 Am. Law Reg. (N.S.) 283. The two quoted paragraphs appear on pages 540-541 of the *Barker v. Hibbard* decision.

167. *Supra* note 148; *Munson v. Washband*, *supra* note 63.

thus procuring his release from imprisonment, or in procuring his discharge upon a recognizance pending the proceedings, obviously would be necessities." ¹⁶⁸

A bastardy proceeding, though held to be a civil action, can only be sustained upon the grounds that the defendant has committed a criminal offence. His good name is at stake as well as his property, if he has any or ever acquires any,—for a judgment rendered against him will be valid, whether he is or is not liable to pay his attorney . . . ¹⁶⁹

"If an infant has no authority to pledge his credit to an attorney when arraigned as the putative father of a bastard child, he may sometimes be prevented from getting one or from making a successful defense." ¹⁷⁰ The court then went on to hold that the consequences of holding that the infant lacked such authority would more likely be prejudicial than beneficial to his best interests.

He will only be liable for services and expenses which it was reasonable to render and incur . . . any express promise he may make to pay exorbitant fees to his attorney will be void. He will only be liable upon an implied promise to pay a reasonable sum . . . [C]harges incurred in making or attempting to make a defense, which there was no good reason to believe it was for the interest of the infant to make, will not be recoverable. ¹⁷¹

Is it not time already, the case having been mentioned and cited herein so frequently, that we have some discussion of *Munson v. Washband*? ¹⁷²

Procedurally the case reached the Supreme Court of Errors of Connecticut on questions of admission of evidence and charge to the jury. It was an action against a married couple in which the plaintiff sought recovery for services and disbursements in commencing on behalf of the wife, an action against the husband while she was single, and an infant, for breach of promise of marriage. The action had resulted in the matrimony of the parties. The traditional "necessaries" were reviewed by the court; and the analogy between necessities for an infant abandoned by its parents and necessities for a married woman aban-

168. *Barker v. Hibbard*, *supra* note 149, at 541.

169. *Id.* at 542.

170. *Ibid.*

171. *Id.* at 542-543.

172. *Munson v. Washband*, *supra* note 63.

doned by her husband was drawn. ". . . it appears to be well settled that any expense necessary for her personal security may properly be recovered of her husband on this ground."¹⁷³ The case of *Shelton v. Pendleton*¹⁷⁴ was distinguished in

that in the latter case there was no charge or claim of cruelty on the part of the husband, and the case was put on the grounds that the expenses were not incurred to secure the wife's present necessities, but only to provide for her future comfort as a divorced woman.

In this case, said the court, "the personal security of the wife, then, is legally a necessary, and the expense of securing it is a proper charge against the husband."

The opinion then went on to say that under the circumstances of the case the wife's suit against "the author of her calamity" came within the rule permitting her to contract for necessities; and even if not within the rule, it should be extended, or an exception should be made to it,¹⁷⁵ as it could never be for the benefit of an infant to be unable to contract to be rescued from her plight, and be enabled to employ counsel to enforce her valid claims. The holding then was¹⁷⁶

in substance, that such services, where requisite for the personal relief, protection and support of the infant, might be lawfully contracted for by the infant, and that he would be bound in law to pay for them . . . This is a very reasonable rule, which will operate for the benefit of minors, and therefore comes within the principle on which they are allowed in certain cases to make contracts, and in others are not authorized to do so.¹⁷⁷

173. *Id.* at 306.

174. *Shelton v. Pendleton*, 18 Conn. 417 (1847).

175. Compare this liberality of view with the New York court's commendable language in *Siegel & Hodges v. Hodges*, notes 37-40 *supra*.

176. *Munson v. Washband*, *supra* note 63, at 308.

177. *I.e.*, where there is a guardian to employ counsel to protect the infant's property rights.

In *Petrie v. Williams*, 23 N.Y. Supp. 237, 68 Hun. 589, 52 N.Y. 587 (1893), a case factually on all fours with *Munson v. Washband*, the claim was made that the lawyer's services were so far necessary that the infant could make a valid contract therefor, and her infancy was not a defense to such a contract. The court distinguished the *Munson* case as follows (p. 240): "There is a clear distinction between that case and the case at bar. In the *Munson* Case, which was an action similar to this, it was held that an action could be maintained to recover the value of the services of an attorney when they were necessary to protect the rights of an infant. That proposition is not disputed here. But the [infant] claims that, although

In a case similar to *Munson*, the Iowa court had the following situation to deal with in *Hickman & Wells v. McDonald*.¹⁷⁸ The plaintiffs, a firm of attorneys, on a contingent fee arrangement settled a case on behalf of the defendant, a minor at the time, against her seducer,¹⁷⁹ the settlement being one of which she approved. On the day following the attainment of her majority, the defendant served a notice of disaffirmance of her contract on the ground of her minority.

Iowa at the time had a code provision as follows:

A minor is bound not only by contract for necessities, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money or property received by him by virtue of the contract, and remaining within his control at any time after his attaining his majority, except as otherwise provided.

The defendant conceded the legal proposition that legal service and advice in seduction is a necessity within the meaning of the statute. The court accepted "this concession as sufficient for our present purposes," the judge in accord with the view taken by the parties.¹⁸⁰

The minor's claim was that the plaintiffs acted merely as her agents, rather than as her attorneys in making the settlement. The court answered this by saying,

[A]n attorney is necessarily an agent. Agency inheres in his relationship to his client. The plaintiffs were not divested of their character as attorneys, nor did they terminate their relationship as such, by reason of their attempt to accomplish a settlement.¹⁸¹

she was liable for services performed for her by an attorney when necessary for her protection, or the protection of her estate, yet that she was liable only for the actual value of the services rendered, and she was not bound by any contract she made as to the amount. There is nothing in the case cited inconsistent with this claim. While an infant may bind himself for the value of necessities purchased or furnished, he is not bound by the agreed price, if it is in excess of the actual value."

178. *Hickman & Wells v. McDonald*, 164 Iowa 50, 145 N.W. 322 (1914).

179. One cannot refrain from noting that the Supreme Court of Iowa, with rare poetic delicacy in juridical coincidence, handed down its decision in the case under discussion on Saturday, February 14th—St. Valentine's Day.

180. By way of *obiter dictum* the court observes this concession to be in accordance with the law in Connecticut, Mississippi, New Hampshire and Rhode Island, citing *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 15 (1863); *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434 (1879); *Anding v. Levy*, 57 Miss. 51, 55, 34 Am. Rep. 435 (1879); and *Crafts v. Carr*, 24 R.I. 397, 53 Atl. 275, 60 L.R.A. 128, 96 Am. St. Rep. 721 (1902). All except *Anding* (which relates to the law of accounts stated) are discussed elsewhere in this paper.

181. *Hickman & Wells v. McDonald*, *supra* note 178, at 53.

With the defendant's claim that even though a minor might be bound for the services of her attorneys as for necessities, she is required to pay only the reasonable value of such services, not the contract price, the court was in accord. "As an abstract proposition, there is much to be said in support of this contention," and then dismissed the young lady, saying, "in this case, however, the undisputed evidence shows the reasonable value of the services to be the same amount as that determined by the contract."¹⁸²

*State v. Cosby*¹⁸³ has the following syllabus by the Court:

The mother of an illegitimate child may contract with a lawyer to prosecute a claim against the father for support money for said child and make a legitimate charge against the fund recovered therefor. The District Court has the authority to fix the recovery of such attorney in a reasonable amount and order payment thereof out of funds deposited with the court clerk for the payment of such support.¹⁸⁴

The case was an ancillary proceeding to a criminal prosecution for wife and child abandonment. The protagonists were the bastard daughter and the attorney.¹⁸⁵

There was no dispute as to the reasonableness of the fee. The record disclosed legal representation of the mother—concomitantly, of the infant—extending over many years in many courts, which

would at once convince any practicing lawyer with experience in such matters, that the fee arrangement was not only reasonable, but also modest.¹⁸⁶ By the diligent and constant efforts of the attorney in a capable manner, a fund was created and a source of income provided to help maintain the child, where otherwise there had been nothing.¹⁸⁷

The court referred to *Costigan v. Steward*,¹⁸⁸ which also was a bastardy proceeding.

182. *Id.* at 54. See holding in *Hanlon v. Wheeler*, *supra* note 130.

183. *State v. Cosby*, *supra* note 86.

184. *Id.* at 211. See text relating to *Roberts v. Vaughn*, *supra* note 129, and note in *In re Mikasinovich*, *supra* note 86.

185. Compare *Schulgasser v. Marion*, 163 N.Y.S.2d 814, 815, 7 N.Y. Misc.2d 950 (1957), where services rendered in securing a non-support conviction of a husband, resulting in an order for periodic payments to the wife, were held necessities, and the "civil" lawyer hired by her to prosecute the criminal proceedings, under a peculiarity of a little used part of the New York law—CODE CRIM. PROC. § 899, subd. 1—was held entitled to payment.

186. One-third.

187. *State v. Cosby*, *supra* note 183, at 212.

188. *Costigan v. Steward*, 76 Kan. 353, 91 Pac. 83, 84, 11 L.R.A. (N.S.) 630 (1907).

There as here, the contention was made that, without the appointment of a guardian for the minor and the approval of the attorney's employment, there was no "liability of an infant for attorney fees as necessities furnished in actions brought in his behalf." The court there pointed out that, "it is beside the whole question to contend that because the judgment is in theory to be used for the support and maintenance of the child, the mother cannot out of the amount recovered pay to an attorney his fee for prosecuting the action." Also, "there is nothing analogous in the doctrine of the cases which refuses an attorney a lien upon money paid for alimony as his fees for procuring the allowance" because "public policy will not uphold a contract which tends toward the separation of husband and wife and which seeks to prevent the adjustment of marital difficulties."¹⁸⁹

Holding in *Askey v. Williams*¹⁹⁰ "that an infant may make an express written contract for necessities upon which he may be sued, but that by showing the price agreed to be paid was unreasonable he can reduce the recovery to a just compensation for the necessities received by him," the court so held the infant liable, the services having been rendered in the defense of a prosecution on an indictment for theft of cattle.

The contracts of an infant for necessities are neither void nor voidable, and we are of opinion that the services of an attorney should be held necessary to an infant when he is charged by an indictment with crime. His life or his liberty and reputation are at stake and it would be unreasonable to deny him the power to secure the means of defending himself. He may contract for food and raiment suitable to his condition in life, though they be such as are not demanded by

189. *State v. Cosby*, *supra* note 183, at 212-213. The Oklahoma court then tells us why it likes Kansas's doctrine:

"The view of the Kansas court is wholesome. A mother, in a destitute condition with an infant, who has been abandoned by its father who has few worldly goods if not completely judgment proof, is in dire need of the services of a competent attorney. The representation is far from attractive, involving as it does the prospects of prolonged and harassing litigation of distasteful factual situations with little prospect of even a meager fee. Although an attorney accepts such employment only because of a charitable inclination and a devotion to public service, he should not be forever barred from sharing reasonably in a possible recovery resulting from his tireless and patient efforts. To so hold would be tantamount to destroying all possibility the infant has of securing the services of a lawyer when its needs for such services is greatest. The fund which is created by the attorney's successful efforts is in a court with power to control its distribution in an equitable and just manner. It could serve no good purpose to require the approval of another court before undertaking to help the child by litigation aimed at creating the fund." *Id.* at 213.

190. *Askey v. Williams*, *supra* note 63.

his absolute wants,¹⁹¹ and it is not to be questioned that the immunity from punishment and disgrace is a matter of far more importance to his welfare. . . It follows that by his contract [the defendant] was bound to pay plaintiff the reasonable value of his services.¹⁹²

An analogy between necessities supplied to an infant and those supplied to a *feme sole* may be found in the case of *Conant v. Burnham*.¹⁹³ There the attorney's services for defending a woman in a criminal prosecution instituted by her husband were allowed; disallowed were the attorney's services in connection with the prosecution of an assault and battery case (criminal) against her husband. The charge for the latter services was remitted, as she could have sworn out a complaint before a magistrate on her own, the court holding that the services rendered in the defense of her own criminal prosecution were necessary. The

191. Compare this concept with the quotation from *Conant v. Burnham*, 133 Mass. (37 Lathr.) 503, 43 Am. Rep. 532 (1882), text at note 194 *infra*.

192. Askey v. Williams, *supra* note 190, at 297. In *Lutcher & Moore Cypress Co. v. Schexnaydre*, 11 La. App. 72, 122 So. 911 (1929), a civil action wherein a minor defendant was seeking attorney's fees in a motion on his part to dissolve an injunction previously entered against him for trespass, the court said, "Since the minor may be held for the result of his trespass, it is manifest that the services of an attorney to defend him are necessary, and under [the Code], he may contract for necessities if his tutor neglects or fails to supply them."

193. *Conant v. Burnham*, *supra* note 191. Apparently New Hampshire is in accord with Massachusetts on the question whether a husband, against whom a complaint is made by the wife for breach of the peace, is liable for costs. The court only went so far as to allow the plaintiff the costs advanced in the breach of peace charges; but not for compensation for attorney's fees. *Morris v. Palmer*, 39 N.H. 123 (1859).

Morris v. Palmer is cited by the Wisconsin court as part of its discussion of the English case of *Shepherd v. Mackoul*, 3 Campb. 326, N.P. (1813), which was said to be "an action on an attorney's bill for business done on the retainer of the defendant's wife. It appeared that the defendant, without just cause, had turned his wife out of doors with circumstances of great violence, and that she exhibited articles of the peace against him prepared by the plaintiff. The first part of the plaintiff's bill was for his services in preparing such articles. Lord Ellenborough said: 'The defendant's liability for the first part of the charge will depend upon the necessity of exhibiting articles of the peace against him . . . but if she was turned out of doors in the manner stated, she carried along with her a credit for whatever her preservation and safety required. She had a right to appeal to the law for protection, and she must have the means of appealing effectually. She might, therefore, charge her husband with the necessary expense of this proceeding, as much as for necessary food and raiment.'"

"Now if the husband is liable, on the retainer of the wife, to an attorney for professional services rendered by him in exhibiting articles of the peace against the husband (there being sufficient grounds therefor), it seems to us that he must be liable, in like manner, in a case where he exhibits similar articles against her and

court eschewed an exact enumeration of what may be included in the meaning of the term "necessaries," and did "not think it desirable to attempt to prescribe a universal rule or formula for the specific determination of this question in every case."

"In a general way," the court stated,

it may be said that whatever naturally and reasonably tends to relieve distress or materially and in essential particular to promote comfort, either of body or mind, may be deemed to be a necessary. . . something which it is reasonable that she should enjoy.¹⁹⁴

By way of dictum the court said that habeas corpus proceedings, to relieve a wife from unjust or illegal punishment, or to regain possession of her child, might constitute "strong necessity."

causes her arrest on a groundless charge. If the services of the attorney *are necessities* in the one case, we think that their character is the same in the other case." *Warner & Ryan v. Heiden*, 28 Wis. 517, 519-520, 9 Am. Rep. 515 (1871).

See also, for other British holdings, 28 ENG. & EMP. DIG. 514, *Infants and children*, cases 295, 296 (1959).

The typical American reaction is best exemplified in the case of *Shelton v. Pendleton*, 18 Conn. 417 (1847), authority for the proposition that an attorney cannot collect his fee from the husband of the plaintiff wife prosecuting an action for divorce. "Necessaries are to be provided, by a husband for his wife, to sustain her as his wife, and not to provide for her future condition as a single woman, or perhaps as the wife of another man" (p. 423). The holding is consistent with modern Connecticut divorce principles, in that an allowance to prosecute will be ordered by the trial court upon a showing that the wife is without (*i.e.*, has *necessity* for) funds to pay for her attorney's services. See Gordon, *Alimony and Allowances (Part B)*, 27 CONN. B. J. 282ff (1953).

194. *Id.* at 504-505. A test applied by the court was that since she would not be "competent to defend herself properly on her trial before a jury," not to allow her counsel's aid would be tantamount to a declaration "that the law considers the assistance of attorneys of no value."

The common-law *feme-sole* analogy has its counterpart in situations other than infancy, where the parties are not *sui juris*, and the same arguments, pro and con the question of necessity for legal services, seem equally applicable in those cases as well. For example, *Penney v. Pritchard & McCall*, 255 Ala. 13, 49 So.2d 782, 22 A.L.R.2d 1430 (1950), *rehearing denied*, where an attorney's fee was sustained in a lunacy proceeding on the theory that it was a "necessary" to the interest of the non compos mentis under the statute; and also because it created a trust fund for administration by the court under the "Doctrine of Trustees v. Greenough, 105 U.S. 527 [Internal Imp. Fund Trustees of Fla. v. Greenough, 1881] otherwise called costs as between solicitor and client . . ." This case was an inquisition of lunacy wherein the attorney's fees of the petitioner were involved. No question of infancy was presented to the court. It is cited here only to show that Alabama, amongst other like-holding jurisdictions, has accorded such services the stature of a "necessary." See annotation referred to in note 44 *supra*.

The case *Shelton v. Hoadley*¹⁹⁵ has interest, not only for the relevancy of the decision, but as reflecting on charges for the professional services of a century and a quarter ago. For "several consultations" with the defendant's wife, while she was in jail awaiting sureties of the peace or other disposition of the cause (the defendant having caused her to be arrested), representing her at the trial, and attending hearing on the further order of the court, the plaintiff charged \$21.00. The defendant "knew of his wife's arrest, commitment and confinement . . . never employed any counsel . . . to act in her behalf;" and the employment of the plaintiff was without his knowledge, consent or ratification. The judgment of the lower court was allowed to stand, purely on procedural bases, the Supreme Court making it plain, however, that there was error and the lawyer should have collected.¹⁹⁶

The general rule is, that the husband is not liable, without his assent, express or implied.

This assent, however, may be inferred from circumstances; such as the necessity the wife stood in for them and the relative situation of the parties as connected with the treatment of each other. Here, as well as in the case of infancy, the question of necessities is a relative fact, depending upon the standing and circumstances of the party.¹⁹⁷

E. REPUDIATION AND DISAFFIRMANCE

In Part B, Some Statutory Considerations,¹⁹⁸ examples of some of the state laws dealing with infants' contracts were set forth, some of them with provisions relating to the disaffirmance of a contract by the minor upon reaching his majority,¹⁹⁹ and mention has been made of some of the decisions where this principle has come into play.²⁰⁰

Again, one must confess to, and apologize for, the overlapping of material from the other sub-topics into this category. Yet, to the extent that an infant may *not* disaffirm his contract, to that extent has the

195. *Shelton v. Hoadley*, 15 Conn. 535 (1843).

196. "It would have been a proper question upon all the facts for the jury to decide had it been submitted to them. . ." *Id.* at 538.

197. *Ibid.*

198. Page 107 ff, *supra*.

199. *E.g.*, Georgia, Montana, Iowa, Utah, *supra* note 5; Idaho, Montana, Kansas, *supra* note 7; North Dakota, South Dakota, Oklahoma, *supra* note 9; Missouri, Mississippi, Maine, *supra* note 10.

200. *E.g.*, *Plummer v. N. P. R. Co.*, *supra* note 67; *Englebert v. Troxell*, *supra* note 100; *Hickman & Wells v. McDonald*, *supra* note 178.

court been persuaded that the services contracted for were necessities; and vice versa. Thus, the question of repudiation becomes relevant to the entire field, for this act of the infant may take place after the services have been rendered by the lawyer in any one of the categories covered above, whether in personal injury actions, or whether dealing with property or personal rights.

Of course, as a prerequisite to recovery the attorney must assume and carry the burden of proof that services were actually rendered.²⁰¹

On the other hand, a written contract including mutual obligations presumably beneficial to both sides, an attorney and clients, of whom one of the latter was a minor, in the absence of fraud, accident or mistake, payment thereunder, accepting all the benefits engendered by the attorney pursuant to the contract for services, will not entitle the infant to claim back any of the money previously paid his attorney, it being a further fact that the infant accepted the benefits of this contract after coming of age, and remaining silent as to his minority, or that the same was an excuse for rescinding the original agreement.²⁰²

In *Hall v. Butterfield*,²⁰³ which contains an excellent historical review of the development of the doctrine of repudiation of his contracts by an infant, it was held that the plaintiff could recover to the extent of the benefit received by the defendant, "not exceeding the price he agreed to pay for the goods." As this doctrine is seemingly followed in all jurisdictions, then of course the contract price fixes the ceiling beyond which the "reasonable value" of the services rendered could not go.²⁰⁴

The basic law has been well and succinctly expressed in *Saccavino v. Gambardella*,²⁰⁵ wherein the court stated:

201. *Charles v. Whitt*, 187 Ky. 77, 84, 218 S.W. 994 (1920); "[H]e was, then, an infant, only seventeen years of age, and has, in no way, ratified [the agreement to pay for legal services] since that time, and is not bound upon it, and it was error to adjudge a recovery of him because of it. If he executed or made the contract sued on, he repudiated it very soon after becoming twenty-one years of age and before receiving any benefits of the contract. [Emphasis supplied.] While legal services of value, rendered for an infant, are treated as necessities, for which he may be required to pay a reasonable compensation, he is not competent to make a contract for same, and the pleading and issues, in the instant case, were not such as to permit the court to render a judgment against him in the nature of a *quantum meruit*."

202. See *Jones v. Jones*, 141 Ga. 727, 729, 82 S.E. 451 (1914), *rehearing denied*.

203. *Hall v. Butterfield*, 59 N.H. 354, 47 Am. Rep. 209 (1879).

204. This is a reasonable limitation, and should answer the question (negatively) whether, once the lawyer realizes his express contract will be thrown out by the court, he might seek recovery of an amount larger than the expressed contract price, as "reasonable value."

205. *Saccavino v. Gambardella*, 22 Conn. Supp. 167, 164 A.2d 304 (Conn. Super. 1960).

[T]his objection is not well taken. The contract is not void, but may well be voidable. The law does not forbid an infant to contract but gives him for his protection the privilege of avoiding contracts which are injurious to him and rescinding all others, whether fair or not and whether executed or executory, excepting from the operation of the privilege only contracts for necessities, contracts which he may be compelled in equity to execute and, in some cases, executed contracts, where he has enjoyed the benefit of them and cannot restore the other party to his original position.²⁰⁶

The same considerations which bind an infant to his own contract for services rendered by him, as in the Arkansas case of *Robinson v. Van Vleet*,²⁰⁷ applied to the other side of the coin. Quoting Judge Cooley in *Spicer v. Earle*,²⁰⁸

. . . it is essential to the protection of infants that they should be bound by contracts of this kind after they have been executed; and this idea of protection lies at the basis of the whole law of infancy. Should the law recognize the right of repudiation in such cases, no man could furnish an infant with the necessities of life in compensation for his services without the risk of a law suit . . .²⁰⁹

As a common-law consideration, the court, in *Hall v. Butterfield*,²¹⁰ and without reference to any statutory authority in the various jurisdictions it cites to bolster its position, says that

. . . where the consideration cannot be restored, the infant, before he can be allowed to rescind, must place the adult in as good condition as though he had returned the consideration, or he must account for the value of it . . . This is especially the case in contracts for services, where the infant seeks to avoid his contract . . .²¹¹

206. *Id.* at 169, citing *Shutter v. Fudge*, 108 Conn. 528, 530, 143 Atl. 896 (1928); *Riley v. Mallory*, 33 Conn. 201, 206 (1866).

207. *Robinson v. Van Vleet*, 91 Ark. 262, 121 S.W. 288 (1909).

208. *Spicer v. Earle*, 41 Mich. 191, 1 N.W. 923, 37 Am. Rep. 152 (1879).

209. "The privilege of avoiding his contracts . . . is for the protection of the infant, and there is no reason to relieve him from his contracts for necessities. On the contrary, it might be a great hardship if he could not pledge his credit for necessities." COOLEY, PERSONS AND DOM. REL. 481 (3d ed. 1921).

While *Spicer* did not involve an attorney's fee, a principle would nevertheless emerge clearly, at least in Arkansas, that if in a particular case the attorney's services were regarded as necessities, their rendition could be employed as a setoff to an infant's claim against the attorney.

210. *Hall v. Butterfield*, *supra* note 203.

211. *Id.* at 358. *Accord*, *Saccavino v. Gambardella*, text to note 206 *supra*.

In contrast to the New Hampshire view, the Nebraska court requires the infant, upon disaffirmance, to make restitution just of so much of the consideration as may be still retained by him at the time of attainment of his majority or election to disaffirm.

The law which is designed to protect the young and inexperienced would be ineffectual for the purpose if an infant was required as a condition to relief, to return an equivalent for property wasted or squandered.²¹²

The same conflict in view as appears from the foregoing common-law decisions of New Hampshire and Nebraska—each, by the way, replete with logic, morality and suasion—is mirrored in the difference between statutory enactments in Montana and California, respectively. It will be recalled that a pleading technicality in *Downey v. Northern Pac. R. Co.*²¹³ permitted the court to avoid deciding the question whether the prosecution of an action for a false imprisonment was essential to the protection of the good name and fame of the minor defendant or that counsel fees incurred in that connection should be classed as necessities.

On page 184 of the *Downey* case the case of *Spencer v. Collins*²¹⁴ was distinguished. This was because of a difference in the repudiation statute for properly executed contracts. In the California Code, a minor could disaffirm a contract “upon restoring the consideration to the party from whom it was received, or paying its equivalent.” The California court held that

all the minor is obliged to restore is what he received from the other side. That, in this case, consisted of [attorney's] services. The services themselves not being capable of restoration, the minor was required to return their equivalent, which consisted of the reasonable value of such services.”

The Montana statute does not contain the italicized clause, *supra*.

Manifestly it was impossible for [the infant] to restore to the plaintiffs the time and effort expended or the skill exercised by them in preparation of the various proceedings . . . “the law never requires

212. *Bloomer v. Nolan*, 36 Neb. 51, 53, 53 N.W. 1039, 38 Am. St. Rep. 690 (1893).

213. *Supra* note 60.

214. *Spencer v. Collins*, 156 Cal. 298, 104 Pac. 320, 20 Am. Cas. 49 (1909).

impossibilities." and where, by the very nature or character of the consideration received by a minor, it cannot be returned by him, his right to disaffirm a contract will not be defeated by his inability to return it.²¹⁵

A compelling argument in favor of the upholding of a completed contract, and particularly where the contract is for services rendered, and which cannot any longer be recalled, was made in *Breed v. Judd*: "Men of business want to know beforehand what they have got to pay, and also to know that when an agreement for labor, reasonable and just, has been justly made and fully executed, and the price paid there is an end of the matter."²¹⁶

215. The *Downey* case, *supra* note 213, at 185, *Accord*, *Lahey v. Caldwell*, 72 Idaho 52, 237 P.2d 610 (1951).

216. *Breed v. Judd*, 67 Mass. (1 Gray) 455, 460 (1854).