



1-1-1988

Children in the Entertainment Industry: Are they Being Protected - An Analysis of the California and New York Approaches

Robert A. Martis

Follow this and additional works at: <https://digitalcommons.lmu.edu/elr>



Part of the [Law Commons](#)

Recommended Citation

Robert A. Martis, *Children in the Entertainment Industry: Are they Being Protected - An Analysis of the California and New York Approaches*, 8 Loy. L.A. Ent. L. Rev. 25 (1988).

Available at: <https://digitalcommons.lmu.edu/elr/vol8/iss1/2>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Entertainment Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

COMMENTS

CHILDREN IN THE ENTERTAINMENT INDUSTRY: ARE THEY BEING PROTECTED? AN ANALYSIS OF THE CALIFORNIA AND NEW YORK APPROACHES

I. INTRODUCTION

A Los Angeles jury recently acquitted director John Landis and four associates of involuntary manslaughter after a helicopter crashed, killing actor Vic Morrow and two Taiwanese children.¹ The case, labeled “ ‘The Twilight Zone’ case,” drew attention partly because the two children killed on the set of “Twilight Zone: The Movie” were hired illegally. The producers received permission from the children’s parents, but work permits required by the State of California were not obtained.² The closely watched case was the first in which a film director was prosecuted for deaths occurring on the set. The five defendants would have faced prison terms of up to five years had they been convicted.³

“The Twilight Zone” case put the spotlight on the entertainment industry, attracting harsh scrutiny not only of motion picture standards,⁴ but also raising serious doubts about the adequacy of existing labor laws for children. Legislation in the industry initially arose out of a concern for stability in the field and a need to uphold the validity of contracts with minors. Later, laws were enacted to protect the child performer,

1. Grove, “*Twilight Zone*” Trial Ends In Acquittal, Wash. Post, May 30, 1987, § A, at 1, col. 4. Fifty-three year old Morrow and seven year old Myca Dinh Lee were decapitated, and six year-old Renee Chen was crushed by the helicopter. “The verdict drew the curtain on one of the most celebrated trials in Hollywood history, a 10-month epic of tears, invective hand-wringing and grandstanding, as the movie industry painfully examined its quest for even more spectacular effects.” *Id.*

2. Gorney, *Risk and Reality: Hollywood on Trial*, Wash. Post, Mar. 18, 1987, § C, at 1, col. 1.

3. A Los Angeles radio station recently reported that an out-of-court settlement was reached in the wrongful death lawsuits filed by the two children’s families. Settlements are believed to involve a multimillion dollar sum to be paid by producers of the film. Wash. Post, June 3, 1987, § D, at 3, col. 4.

4. *Id.* The trial has already had some effects on motion picture safety standards. See *Safety Bulletins for the Motion Picture and Television Industry*. The *Bulletins* contain recommendations by an industry wide Labor-Management Safety Committee. For example, Safety Bulletin No. 3 is a set of guidelines for helicopter safety procedures.

rather than their employer. This comment discusses the regulatory approaches of California and New York to problems presented in the employment of minor performers. Special emphasis is placed on the judicial and legislative responses to those problems. California and New York were selected, because a majority of the transactions with child entertainers occur in either of these states or with reference to their laws.

First, an overview of the relevant law in California and New York will be presented. Next, this comment will review the regulation of child entertainers, specifically in the areas of work permits, education, and working hours. It will also address the issues of protection for those contracting with minors, safeguards for the child's interest in his or her earnings and the right to unemployment compensation. Finally, it will address the contractual rights and obligations of union membership and how they supplement the California and New York approaches to regulation of children in the entertainment industry.

The purpose of this comment is to present an overview of the issues that can arise for those contracting with a child performer or those representing them in business dealings. Where appropriate, this comment will address proposed changes in the law and highlight those aspects of current law which fail to recognize the changes that have occurred in the industry since legislation in this area was originally enacted.

II. SUMMARY OF CALIFORNIA LAW

In 1927, the California Legislature enacted California Civil Code section 36.⁵ Section 36 was a great departure from the common law rule which allowed a minor to disaffirm a contract which was at one time

5. CAL. CIV. CODE § 36 (West 1982) provides in part:

A. Contracts not disaffirmable. A contract not otherwise valid, entered into during minority, cannot be disaffirmed upon that ground either during the actual minority of the person entering into such contract, or at any time thereafter, in the following cases:

1. Necessaries. A contract to pay the reasonable value of things necessary for his support, or that of his family

2. Artistic or creative services: judicial approval.

(A) A contract or agreement pursuant to which such person is employed or agrees to render artistic or creative services, or agrees to purchase, or otherwise secure, sell, lease, license, or otherwise dispose of literary, musical or dramatic properties (either tangible or intangible) or any rights therein for use in motion pictures, television, the production of phonograph records, the legitimate or living stage, or otherwise in the entertainment field, if the contract or agreement has been approved by the superior court in the county in which such minor resides or is employed or, if the minor neither resides in or is employed in this state, if any party to the contract or agreement has its principal office in this state for the transaction of business.

(B) As used in this paragraph, "artistic or creative services" shall include, but not be limited to, services as an actor, actress, dancer, musician, comedian,

accepted or a contract executed by another on his or her behalf. This provision provided a mechanism by which the superior court could approve the minor's employment contract and make them disaffirmable by the minor. The provision was later upheld and extended to cover options under the original contract in the case of *Warner Bros. Pictures v. Brodel*.⁶ In 1939, section 36 was expanded to its present configuration. The legislature added Civil Code sections 36.1 and 36.2 as a result of the famous "Coogan Case."⁷ This case involved child actor Jackie Coogan (star of "The Kid" who later went on to play Uncle Fester in "The Adams Family") and his mother who spent her son's early film earnings.

Section 36.1 gives the court power to establish a trust fund or savings plan as a prerequisite to the court granting approval of the contract.⁸ Section 36.2 grants the court continuing jurisdiction over this fund.⁹ As mentioned above, these provisions have remained largely unchanged since their enactment.

At one time, *The Rules and Regulations Governing the Employment of Minors in the Entertainment Industry*,¹⁰ ("Blue Book") a booklet prepared by the Los Angeles Unified School District in cooperation with the Division of Labor Standards Enforcement, governed all employment practices in the industry. In 1980, the California Labor Commission held two rounds of hearings while promulgating a new set of regulations.

singer or other performer or entertainer, or as a writer, director, producer, production executive, choreographer, composer, conductor, or designer.

Id. See also *infra* note 91.

6. 31 Cal. 2d 766, 192 P.2d 949, *cert. denied*, 335 U.S. 873 (1948).

7. *Coogan v. Bernstein*, No. C426045 (Cal. Super. Ct. 1938). See also *The Work Of The California Legislature*, 13 So. CAL. L. REV. 1, 44 (1939).

8. CAL. CIV. CODE § 36.1 (West 1982) provides:

In any order made by the superior court approving a contract of a minor for the purposes mentioned in § 36 or this code, the court shall have power, notwithstanding the provisions of any other statute, to require the setting aside and preservation for the benefit of the minor, either in a trust fund or in such other savings plan as the court shall approve, of such portion of the net earnings of the minor, not exceeding one-half thereof, as the court may deem just and proper, and the court may withhold approval of such contract until the parent or parents or guardian, as the case may be, shall execute and file with the court his or their written consent to the making of such order. For the purposes of this section the net earnings of the minor shall be deemed to be the total sum received for the services of the minor pursuant to such contract less the following: All sums required by the law to be paid as taxes to any government or governmental agency; reasonable sums expended for the support, care, maintenance, education, and training of the minor; fees and expenses paid in connection with procuring such contract or maintaining the employment of the minor; and the fees of attorneys for services rendered in connection with the contract and other business of the minor.

9. See *supra* note 5 for text.

10. LOS ANGELES UNIFIED SCHOOL DIST. IN COOPERATION WITH THE DIVISION OF LABOR STANDARDS ENFORCEMENT, *THE RULES AND REGULATIONS GOVERNING THE EMPLOYMENT OF MINORS IN THE ENTERTAINMENT INDUSTRY* (1981) [hereinafter *Blue Book*].

During the first round, it was discovered that the *Blue Book* had not been properly adopted, and therefore, did not technically have the force of law. Most of the industry, however, continued to follow the *Blue Book* while awaiting a new set of guidelines. Today, the *Blue Book* is of little importance, because it has been totally replaced by the state's current regulatory scheme, Title 8 of the California Administrative Code.¹¹ The scope of Title 8 coincides with the Labor Code's definition of a minor as any person under the age of eighteen required to be in school.¹²

California's child labor laws and administrative regulations are applicable whenever minor residents, hired by a resident employer in the entertainment industry, are taken from California to work on location in another state, pursuant to contractual relations made in California.¹³ On April 3, 1986 proposals to relax the strict laws governing children working in California's entertainment industry went into effect.¹⁴ The most significant changes involved lengthening the number of hours a minor is able to work and eliminating the regulation requiring the presence of a studio teacher or welfare worker on the set when performers between the ages of sixteen to eighteen are performing on non-school days.¹⁵

The outdated Coogan Laws have recently come under attack by those wanting further relaxation of the contract approval provisions and those calling for greater protection for the child performer. California State Senator Hirschal Rosenthal's office is currently working on proposed legislation to revise the Coogan Laws. The backlog in the Los Angeles Superior Court and the breakdown of the "studio system"¹⁶ make existing approval procedures impractical. The most dramatic pro-

11. CAL. ADMIN. CODE tit. 8, § 11701-11785 (1986).

12. CAL. ADMIN. CODE tit. 8, § 11750(a) (1986):

For the purpose of these regulations the term "minors" shall be defined in accordance with § 1286(c) of the Labor Code; except that with respect to the number of hours a minor may be allowed to work, "minor" shall include those minors under six (6) years of age.

According to § 1286(c), a "minor" is any person under the age of eighteen years who is required to attend school.

13. This includes, but is not limited to, the requirement that a studio teacher be provided for the minor's instruction and supervision. CAL. ADMIN. CODE tit. 8, § 11756 (1986).

14. Robb, *California to Relax Child Labor Laws for Film Industry*, VARIETY, Mar. 12, 1986, vol. 332, at 2, col. 3.

15. *Id.*

16. See Note, *The Employment Contract With the Minor Under California Civil Code Section 36: Does the "Coogan Law" Adequately Protect the Minor?*, 7 JUV. J. L. 93 (1983) (authored by Randy Curry) [hereinafter "Curry Note"]. "[U]nder the 'Studio System,' major producers signed a multitude of young actors to contracts with renewal provisions. Studios nurtured young actors to contracts with renewal provisions. Studios nurtured young actors as long as potential for stardom existed In essence, actors were owned by a single studio which might sell or exchange rights to the young actor." *Id.* at 97.

posed change in section 36 is a provision calling for automatic approval of minors' contracts meeting certain reasonable requirements which will be specified in the new statute. The California Legislature had until May 22, 1987 in which to resolve current language disputes in order to keep this one year bill. However, since the guilds were not able to reach an agreement by that date, the proposals became part of a two year bill. The Legislature, it seems, does not want to rush this bill which will have a significant effect on how minors' contracts are approved.¹⁷ The process is moving very slowly as the varying approaches need to be sorted and the often conflicting goals of those involved need to be reconciled. An interim hearing that was supposed to be held during the summer 1987 recess of the Legislature never took place.

III. SUMMARY OF NEW YORK LAW

New York law on the abrogation of minors' disaffirmance rights is strikingly similar to that of California. In 1961, the New York Legislature modeled section 74 of its Domestic Relations Law after California Civil Code section 36. The provision was later recodified as section 3-105 of New York's General Obligation Law. In 1983, this provision was repealed and judicial approval for child employment contracts is now covered by section 35.03 of New York's Arts and Cultural Affairs Law.¹⁸

Court approval of an employment contract pursuant to section 35.03 prevents a minor from disaffirming the contract by reason of minority. This section also establishes a child savings plan for earnings under the contract. While judicial approval of the employment contract is not mandatory, it is illegal to employ any minor without a child performer permit.¹⁹

In addition to section 35.03, sections 3-101 and 3-107 of New York's General Obligation Law²⁰ also pertain to minors' contracts. Section 3-101 provides, that any person who has reached the age of eighteen may not disaffirm his or her contract on the grounds of infancy. Section 3-107 covers a parent's guarantee of performance for their child. These provi-

17. Telephone interview with Matthew Laveque, California Senator Herschel Rosenthal's office (May 29, 1987). The Screen Actors Guild, American Federation of Television and Radio Artists, Producers and Directors Guilds, and Association of Talent Agents are among those involved in drafting the new law aiming to keep the original intent of the Coogan laws—protection for the minor performer.

18. N.Y. ARTS & CULT. AFF. LAW § 35.03 (McKinney 1984). Section 35.03(d) further provides that a court may not approve any contract in which a child entertainer is to render services for a term longer than three years from the "date of approval." *Id.*

19. N.Y. ARTS & CULT. AFF. LAW § 35.01 (McKinney 1984).

20. N.Y. GEN. OBLIG. LAW §§ 3-101-107 (McKinney 1978).

sions, which are often of strong psychological value, do not prevent the child from disaffirming.²¹ Instead, the parents are potentially liable for large damages resulting from their child's breach. In New York, approval of the contract by the supreme court or surrogate court with jurisdiction pursuant to section 35.03 is a prerequisite to the liability of a parent or guardian as a party to the contract or as a guarantor of its performance.²²

A 1983 New York Court of Appeals case, *Shields v. Gross*,²³ is a recent addition to the state's law on the abrogation of children's disaffirmance rights. This case, addressed with greater detail below, holds that a child is not able to disaffirm a parent's written consent for purposes of New York's privacy law.²⁴

As mentioned above, many of the New York provisions governing children in the entertainment industry are modeled after a comparable California provision. If the proposed legislation does eventually amend the California Civil Code it is likely that substantially similar changes will be made in New York. Unfortunately, the New York Legislature has yet to adopt many of the more detailed regulations governing child performers that are contained in the California Administrative Code. This leaves minors covered by the New York law without many of the protections afforded their California counterparts.

IV. THE REGULATION OF CHILD PERFORMERS

Congress, in the Fair Labor Standards Act,²⁵ "prohibited the employment of children under sixteen in any occupation and the employment of any minor under eighteen in any occupation detrimental to the minor's health or well-being."²⁶ Although federal law provides an exception for children employed as actors or performers in motion pictures, television, radio or theatrical productions,²⁷ the states remain free to regulate for their children in the entertainment industry. A state legislature is able to enact laws protecting the health, safety, morals and welfare of

21. S. SHEMEL & M. W. KRASILOVSKY, THIS BUSINESS OF MUSIC 356 (1985) [hereinafter THIS BUSINESS OF MUSIC].

22. N.Y. GEN. OBLIG. LAW § 3-107 (McKinney 1978).

23. 58 N.Y.2d 338, 461 N.Y.S.2d 254, 448 N.E.2d 108 (N.Y. Ct. App. 1983).

24. *Id.* See N.Y. CIV. RIGHTS LAW §§ 50 and 51 (McKinney 1976)(requiring written consent for the use of one's name, portrait or picture).

25. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (1983).

26. See Solk, *Legal Rights and Obligations of Minors in the Entertainment Industry: The California Approach*, 4 JUV. J. LAW 78, 79-80 (1980) [hereinafter Solk] (1) citing 29 U.S.C. §§ 203(1), 221(c)(1).

27. 29 U.S.C. § 213(c)(3) (1983).

children pursuant to its police power as long as a rational basis for the regulation exists.²⁸

All jurisdictions have child labor laws for their residents. In some states, general child labor laws have been interpreted to include performers within their coverage. In others, like California and New York, special statutes for child entertainers have been enacted.²⁹ Child actors, however, are often exempt from these general state labor laws,³⁰ or exemption is conditioned upon obtaining a work permit or certificate.³¹ In the past, the states have assumed the role as protector of their children when parents fail as primary guardians of the minor's interests and welfare. When existing legislation can be avoided or is violated, however, the child is subject to the unchallenged judgment of his parents or employers, as was the case for the two children on the set of "The Twilight Zone." In the entertainment industry, mistakes in judgment can lead to harsh results, especially considering that the child's safety and financial interests are at stake. Therefore, the state legislatures need to be particu-

28. *State v. Miller*, 23 Conn. Supp. 121, 177 A.2d 478 (Conn. Cir. Ct. 1961). For an example of a state law that did not meet the rational basis test see *Farias v. City of New York*, 101 Misc. 2d 598, 421 N.Y.S.2d 753 (N.Y. Sup. Ct. 1979). In *Farias* the court held that a section of New York's Education Law was an unconstitutional and improper exercise of police power, insofar as it contained a blanket prohibition against children under sixteen performing as acrobats and gymnasts without regard to whether health, safety, or morals were involved. Section 3231(a) of New York's Education Law, repealed in 1983, enumerated those activities by children under sixteen which were unlawful under all circumstances. In this category were included engaging or acting:

- a. As a rope or wire walker, gymnast, wrestler, boxer, contortionist, rider upon a horse or other animal (except in a nonprofessional horse show), or as an acrobat; or upon any bicycle or other mechanical vehicle or contrivance; or
- b. In begging or receiving or soliciting alms in any matter or under any pretense, or in any mendicant occupation; or in gathering or picking rags, or collecting cigar stumps; or collecting bones or refuse from markets or streets; or in peddling; or
- c. In any illegal, indecent or immoral exhibition or practice; or in the exhibition of any such child when insane, idiotic, or when presenting the appearance of any deformity or unnatural physical formation or development; or
- d. In any practice or exhibition or place dangerous or injurious to the life, limb, health or morals of such child.

Id.

29. *Solk*, *supra* note 26, at 80.

30. See *Information Packet*, Screen Actors Guild Children's Committee (1983) [hereinafter *SAG Information Packet*]. For example, Arizona (child actors exempt from all Arizona laws governing employment of minor); Idaho (child actors are exempt from the Idaho child labor laws; school superintendent in charge of child's education has discretion to allow absence and/or require tutoring); Ohio (child actors exempt from Ohio child labor laws; individual school determines steps necessary to satisfy state's educational requirements).

31. See *Id.* For example, District of Columbia (child must obtain theatrical permit issued through board of education); Iowa (special permit may be obtained from the Bureau of Labor which will exempt child from Iowa child labor regulations); Vermont (if school is in session, minor must obtain employment certificate from Labor Commissioner).

larly diligent in monitoring their child performer labor provisions, aggressively making changes to coincide with changes in employment practices.

The following section will discuss the requirements with which an employer must comply in order to obtain a permit to employ minors for entertainment work. Next, the comment will highlight the more detailed provisions of the California Administrative Code regulating education and working hours for child performers.

A. Work Permits

Both California and New York have strict and specific statutory schemes for dealing with the employment of children in the entertainment industry. As mentioned above, until recently, the *Blue Book* governed the employment of child performers in California. The present regulatory scheme, Title 8 of the California Administrative Code, was amended to reflect many of the common sense provisions of the *Blue Book*. In fact, the Code now employs a definition of the "entertainment industry" very similar to that used in the *Blue Book*.³²

Any employer who wants to employ a minor for entertainment work which is not hazardous or detrimental to the child's health, safety, morals or education must file an application with the Division of Labor Standards Enforcement for a "Permit to Employ Minors."³³ In determining what is hazardous or detrimental to "morals," within the meaning of the regulations, reference is given to the acts proscribed by sections 311 through 314 of the California Penal Code.³⁴

A child who wants to be employed in the entertainment industry must obtain an "Entertainment Work Permit."³⁵ The permit application can be obtained at any of the Division District offices.³⁶ In addition, the minor must obtain verification in writing from the appropriate school

32. CAL. ADMIN. CODE tit. 8, § 11751(a) (1986) provides:

The Entertainment Industry, hereinafter referred to as the employer, shall be defined as any organization, or individual, using the services of any minor in: Motion pictures of any type (e.g. film, videotape, etc.), using any format (theatrical film, commercial, documentary, television program, etc.) by any medium (e.g. theater, television, videocassette, etc.); photography; recording; modeling; theatrical productions; publicity; rodeos; circuses; musical performances; and any other performances where minors perform to entertain the public.

33. CAL. ADMIN. CODE tit. 8, § 11751(b) (1986).

34. *Id.* The acts proscribed by these sections include obscene and harmful matters, indecent exposure, and other lewd or obscene conduct. CAL. PENAL CODE, §§ 311-14 (West 1970).

35. CAL. ADMIN. CODE tit. 8, § 11753(a) (1986).

36. *Id.* The minor must provide the information called for on the application: his or her name, age, birth date, address, sex, height, weight, and color of hair and eyes.

district, and must meet the requirements of that school district with respect to age, school record, attendance and health.³⁷ The school record verification must be filed concurrently with the filing of the permit application.³⁸ In certain cases the Division will require a physical examination of the minor to ensure that the child's physical condition permits him to perform the work or activity called for by the "Permit to Employ Minors" and the "Entertainment Work Permit."³⁹

The Division routinely issues an "Entertainment Work Permit" to child performers who satisfy the requirements for a completed application. The permit, however, allows the minor to work only under the conditions prescribed by the regulations and in conformity with all provisions of law governing the working hours, health, safety, morals and other conditions of employment of minors. The permit is valid for up to six months and an application for renewal must be made in the same manner and under the same conditions as the original permit.⁴⁰ In certain instances, employers of groups and organizations may obtain blanket permits, rather than individual permits for each performer.⁴¹

The misdemeanor violation of any Labor Code provision respecting child labor, or any violation of the Administrative Regulations constitutes grounds for denying, suspending or revoking the work permit.⁴² In addition, if the employer discharges or discriminates in any way against a studio teacher who files a complaint with the Division about the conditions on the set or takes action affecting the employment of the minor for reasons of health, safety or morals, the permit holder risks loss of privileges.⁴³ The Labor Code gives employers an opportunity to appeal directly to the Labor Commissioner before the denial, suspension or

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* § 11753(b).

41. *Id.* § 11754. A blanket permit is granted under the following conditions and/or limitations:

b. Blanket permits shall be valid only for the particular production for which issued and only for the periods of time limited therein.

c. Application for a blanket permit must be supported by satisfactory evidence that appropriate services of studio teachers will be provided. Special arrangements may be made for the number of studio teachers required with groups of minors numbering one hundred (100) or more.

d. An application for a blanket permit must be supported by proof that the minors covered by such permits are covered by workers' compensation insurance.

e. There must be a parent or guardian for every twenty (20) minors, or fraction thereof.

Id.

42. *Id.* § 11758.

43. *Id.* § 11758.1.

revocation of any permit.⁴⁴ The Labor Commissioner will then afford the applicant or permit holder an opportunity to request a hearing.⁴⁵

Under New York Arts and Cultural Affairs Law section 35.01 it is unlawful to employ or to exhibit any child under the age of sixteen years in various performance activities⁴⁶ unless a child performer permit has been issued.⁴⁷ A child performer permit can be obtained from the mayor or other chief executive officer of the city, town, or village where the exhibition, rehearsal or performance will take place.⁴⁸ The mayor may then seek enforcement assistance from the Society for the Prevention of Cruelty to Children.⁴⁹ Many public performances, usually educational or religious, are not unlawful and do not require a child performer permit.⁵⁰ However, once a permit has been issued, the scope of the employ-

44. *Id.* § 11758.2(a).

45. *Id.* § 11758.

46. N.Y. ARTS & CULT. AFF. LAW, § 35.01(1) (McKinney 1984). The use of a child under sixteen is prohibited in the following activities:

- a. In singing; or dancing; or playing upon a musical instrument; or acting, or in rehearsing for, or performing in a theatrical performance or appearing in a pageant; or as subject for use, in or for, or in connection with the making of a motion picture film; or
- b. In rehearsing for or performing in a radio or television broadcast or program.

Section 35.01 applies whether or not an admission fee is charged and whether or not the child or any other person is to be compensated. *Id.* See also N.Y. LAB. LAW, §§ 130(2)(a), 131(4)(b) (McKinney 1986) (generally prohibiting employment of minors under fourteen years of age).

47. N.Y. ARTS & CULT. AFF. LAW, § 35.01(3) (McKinney 1984). See also *Mack v. Metropolitan Opera Assoc., Inc.*, 54 A.D.2d 135, 388 N.Y.S.2d 52 (N.Y. App. Div. 1976) (failure of the Opera, which employed twelve-year-old claimant to appear in children's chorus for opera performance in New York City and on spring tour to other cities, to obtain consent of Michigan authorities for Detroit performance, did not constitute a violation of statutes governing employment of child performers; hence the child was not illegally employed so as to be entitled to double recovery in worker's compensation claim).

48. N.Y. ARTS & CULT. AFF. LAW § 35.01(4) (1984). The application must be made on a prescribed form and include the following information:

- a. The true and stage name and the age of the child, and the name and address of his parent or guardian;
- b. The written consent of the parent or guardian;
- c. The nature, time, duration, and number of performances, together with the place and nature of the exhibition;
- d. A detailed description of the entire part to be taken and each and every act and the thing to be done and performed, except that if the performance is in connection with a radio or television program, the application shall contain a general statement describing the part or parts to be taken by the child and the nature of the exhibition.

Id. § 35.01(5).

49. *Id.* § 35.01(6).

50. *Id.* § 35.01(2). This subdivision provides that § 35.01(1) does not apply to:

[T]he participation or employment, use or exhibition of any child in a church, academy or school, including a dancing or dramatic school, as part of the regular services or activities thereof respectively; or in the annual graduation exercises of any such academy or school; or in a private home; or in any place where such performance is

ment or performance is strictly limited to that described in the permit.⁵¹ As in California, a violation of this section is a misdemeanor.⁵²

B. Education

One of the features of California law that clearly distinguishes it from New York law is the California Administrative Code's clear and firm school requirement policies. Employers must provide⁵³ a studio teacher⁵⁴ on each call for minors from the age of fifteen days to sixteen years.⁵⁵ At one time, a studio teacher was required for all minors up to the age of eighteen. Recent amendments to the Administrative Code,⁵⁶ however, modified the rule such that a studio teacher need only be provided for sixteen to eighteen year-olds when "required for the education of the minor."⁵⁷

The changes are the result of the industry lobbyists who charge that the California Administrative Code is not flexible enough.⁵⁸ While most sixteen and seventeen year-olds are mature enough to make important decisions regarding their safety and welfare, many might not have the

under the direction, control or supervision of a department of education; or in the performance of radio or television programs in cases where the child or children broadcasting do so from a school, church, academy, museum, library or other religious, civic or educational institution, or for not more than two hours a week from the studios of a regularly licensed broadcasting company, where the performance of the child or children is of a nonprofessional character and occurs during hours when attendance for instruction is not required in accordance with the education law.

Id. § 35.01(2).

51. *Id.* § 35.01(7).

52. *Id.* § 35.01(8). The Commissioner of Labor is authorized to prosecute violations of § 35.01. N.Y. LAB. LAW § 140 (McKinney 1986).

53. See CAL. ADMIN. CODE tit. 8, § 11755.3 (1986)(employer must pay for studio teacher's remuneration).

54. CAL. ADMIN. CODE tit. 8, § 11755 (1986) provides:

A studio teacher within the meaning of these regulations is a certificated teacher who holds both a California Elementary and a California Secondary teaching credential which are valid and current, and who has been certified by the Labor Commissioner. Certification by the Labor Commissioner shall be for a three (3) year period. A written examination will be required of the studio teacher by the Labor Commissioner at the time of certification or renewal. Such examination shall be designed to ascertain the studio teacher's knowledge of the labor laws and regulations of State of California as they apply to the employment of minors in the entertainment industry.

55. *Id.* § 11755.1.

56. The amendments and new sections were filed on March 4, 1986 and became effective March 17, 1986 (Register 86, No. 10).

57. CAL. ADMIN. CODE tit. 8, § 11755.1 (1986). On school days, one studio teacher must be provided for each group of ten minors or fraction thereof. On Saturdays, Sundays, holidays, or during school vacation periods, one studio teacher must be provided for each group of twenty minors fifteen days to sixteen years old. *Id.*

58. Berg, *New Rules Said to Reduce Safety of Child Actors*, L.A. Daily J., June 12, 1987, § I, at 1, col. 6.

confidence to directly confront their employers about Code violations. Vindicating their rights can be especially difficult for teen performers since they know there are many others willing to take their place, at any price.

The studio teacher's role goes far beyond teaching.⁵⁹ They also have responsibility for caring and attending to the health, safety, and morals of the children for whom they have been hired. In discharging these responsibilities, the studio teacher is required to take cognizance of such factors as working conditions, physical surroundings, signs of the minor's mental and physical fatigue and the demands placed upon the minor in relation to the minor's age, agility, strength, and stamina.⁶⁰ If the studio teacher believes that conditions on a set or location present a danger to the child, the teacher may refuse to allow the engagement of a child under his or her care.⁶¹ If the studio takes any such action, their decision may be appealed immediately to the Labor Commissioner who may affirm or countermand such action.⁶²

If a child works frequently, working in the same production two or three days per week, or if a production extends for some length of time, there is reason for concern that alternating between regular school and the studio teacher may handicap the child educationally or emotionally. Children may find it difficult to strike the proper balance between work and school. The former *Blue Book* exhibited greater concern for this problem. One *Blue Book* provision expressly required continuity in the child's education.⁶³ Another gave parents the power to refuse or replace a specific teacher, by submitting a complaint to the Los Angeles Unified School District, if the child did not work well with that teacher.

The current Code does not contain similar provisions. Thus, it is the parent's duty to ensure continuous schooling for their children. If

59. The California Administrative Code contains provisions stipulating the amount of school time that must be provided for each child. CAL. ADMIN. CODE tit. 8, § 11760(d)-(f). See also *Blue Book* Rule II(J) (three hours of school time for minors must be provided between 8:00 a.m. and 4:00 p.m., and no period of less than twenty minutes duration accepted as school time).

60. CAL. ADMIN. CODE tit. 8, § 11760 (1986).

61. In her case against John Landis, Deputy District Attorney Lea Purwin D'Angostino tried to emphasize the danger to the children on the set of the "Twilight Zone." She called teacher-welfare worker Jack Tice to testify at the trial. He insisted that he was not told of the two children's presence on the set. Tice said he would have judged the scene involving a helicopter and explosives unsafe for child actors and would not have permitted the fatal scene to be shot. Deutsch, *'Twilight' Trial Dispute Focuses On Teacher; Prosecution Wants to Emphasize Danger to Children*, L.A. Daily J., Dec. 15, 1986, at 1, col. 3.

62. *Id.*

63. *Blue Book*, Rule II (C)(3).

the child works well with a specific teacher, parents should request that the teacher instruct the child throughout the child's career with the production company.⁶⁴ The child who works occasionally poses little threat to the established school system. If a child is working on a long-run television series, however, parents must consider alternatives to the traditional or private school. Professional children's school and correspondence school are the most popular alternatives.⁶⁵ One result of California's strict schooling requirements is that production companies tend to consider relocations in order to avoid runaway production costs when child actors are used.⁶⁶ As an example, New York does not have any special schooling regulations. Yet, children working outside of California do not have to go unprotected. Parents or their child's attorney should insist on a specific clause guaranteeing a tutor on the set.⁶⁷ The various performers' union contracts may also contain education provisions that supplement state law.

C. Working Hours

There are working hour limitations which restrict not only the amount of hours that a child can work in one day, but also the hours of employment within the day. In California children can begin work as early as five o'clock in the morning or work as late as ten o'clock in the evening on school nights.⁶⁸ On an evening preceding a non-school day children can work as late as twelve-thirty in the morning.⁶⁹ The amount of time minors are permitted at the place of employment within a twenty-four hour period is limited according to age by Title 8 of the California Administrative Code.⁷⁰

64. See *SAG Information Packet*, *supra* note 30, at 4.

65. Simon, *A Parent's Guide to Education on Location*, Back Stage, Apr. 4, at 31A, col. 3-5.

66. *Id.* at 37A.

67. *Id.*

68. CAL. LAB. LAW § 1391 (West 1971 Cum. Supp. 1988).

69. *Id.*

70. The rules are as follows:

BABIES (fifteen days to six months):

Babies who have reached the age of fifteen days but have not reached the age of six months may be permitted to remain at the place of employment for a maximum of two hours. The day's work shall not exceed twenty minutes and under no conditions shall the baby be exposed to light of greater than one hundred foot candlelight intensity for more than thirty seconds at a time. When babies between the age of fifteen days and six weeks of age are employed, a nurse and a studio teacher must be provided for each three or fewer babies. When infants from age six weeks to six months are employed, one nurse and one studio teacher must be provided for each ten or fewer infants.

CAL. ADMIN. CODE tit. 8, § 11760(a) (1986) (emphasis added); see also *id.* § 11764 (infants

Two different time periods are relevant: the amount of time a child is allowed to be at the place of employment and the number of hours that they can work while they are at the place of employment. To ensure compliance with the rigid guidelines, producers sometimes hire twins when a part calls for babies or small children.⁷¹

For children of all ages, twelve hours must elapse between their minor's dismissal and call time on the following day.⁷² If the child's regular school starts less than twelve hours after his or her dismissal time, the

under six months not to be given medical examinations except between the hours of 9:30 a.m. and 11:30 a.m. or between 2:30 p.m. and 4:30 p.m.; work time limited to one period of consecutive hours in any one day, either between 9:30 a.m. and 11:30 a.m. or between 2:30 p.m. and 4:30 p.m.).

MINORS (six months to two years):

Minors who have reached the age of six months but who have not attained the age of two years may be permitted at the place of employment for a maximum of four hours. Such four-hour period shall consist of not more than two hours of work; the balance of the four-hour period shall be rest and recreation.

Id. § 11760(b).

MINORS (two years to six years):

Minors who have reached the age of two years but who have not attained the age of six years may be permitted at the place of employment for a maximum of six hours. Such six-hour period shall consist of not more than three hours of work; the balance of the six-hour period shall be rest and recreation and/or education.

Id. § 11760(c).

MINORS (six years to nine years):

Minors who have reached the age of six years but have not attained the age of nine years may be permitted at the place of employment for a maximum of eight hours. Such eight-hour period shall consist of not more than four hours of work and at least three hours of schooling when the minor's school is in session. The studio teacher shall assure that the minor receives up to one hour of rest and recreation. On days when the minor's school is not in session, working hours may be increased to six hours, with one hour of rest and recreation.

Id. § 11760(d).

MINORS (nine years to sixteen years):

Minors who have reached the age of nine years but who have not attained the age of sixteen years may be permitted at the place of employment for a maximum of nine hours. Such nine-hour period shall consist of not more than five hours of work and at least three hours of schooling when the minor's school is in session. The studio teacher shall assure that the minor receives at least one hour of rest and recreation. On days when the minor's school is not in session, working hours may be increased to seven hours, with one hour of rest and recreation.

Id. § 11760(e).

MINORS (eighteen years):

Minors who have reached the age of eighteen years may be permitted at the place of employment for a maximum of ten hours. Such ten-hour period shall consist of not more than six hours of work and at least three hours of schooling when the minor's school is in session, and one hour of rest and recreation. On days when school is not in session, working hours may be increased to not more than eight hours, with one hour of rest and recreation.

Id. § 11760(f).

71. For example, twin sisters played Tabitha on "Bewitched" during the early 1970's and twins shared a role in last year's feature film "Baby Boom."

72. CAL. ADMIN. CODE tit. 8, § 11760(i).

minor must be given instruction the following day at work.⁷³ When children are dismissed early and are not to be picked up for several hours, they are to remain under the supervision of a teacher or welfare worker until picked up.⁷⁴ Finally, all hours for the minor at the place of employment are exclusive of a meal period and the working day may not be extended by a meal period longer than one-half hour.⁷⁵

There are few exceptions to these general rules. If emergency situations arise, for example, early morning or night live television or theatrical productions presented after the hours beyond which a minor may not work as prescribed by law, a request may be made to the Labor Commissioner for permission for the minor to work earlier or later.⁷⁶ A two day advance notice is required, however, which makes it impracticable for employers to obtain permission in true emergency situations. For this reason, the child's studio teacher should be empowered to grant exceptions to the working hour provisions. These teachers are familiar with the labor laws, and more importantly, will have worked with the child. They are in the best position to guard the child's safety. Since studio teachers are given broad authority throughout the child's employment it seems odd not to grant them the discretion to decide what is consistent with the child's welfare in a true emergency. Another exception allows children between the ages of fourteen and eighteen to miss two days of school if they obtain permission from school authorities. The performer's working hours during those two days may then be extended to eight hours each day.⁷⁷

Filming a motion picture or television program often involves a certain amount of travel time. The time spent traveling from a studio to a location or from a location to a studio counts as part of the minor's working day. If a child is working at a distant location which requires an overnight stay, the time spent in daily transit between living quarters and the place where the company is actually working will not count as work time, provided that the company does not spend more than forty-five minutes traveling each way and furnishes the necessary transportation.⁷⁸

73. *Id.*

74. *Id.* § 11765.

75. *Id.* § 11761.

76. *See id.* § 11760(g) (each request is considered individually by the Division and must be submitted in writing at least forty-eight hours prior to the time needed). The two children killed on the set of "Twilight Zone: The Movie" were hired illegally to work at night. The last and fatal scene was shot at 2:20 a.m., considerably past the curfew normally set for child performers. Gorney, *Risk and Reality: Hollywood on Trial*, Wash. Post, Mar. 18, 1987, § C, at 2, col. 4.

77. CAL. ADMIN. CODE tit. 8, § 11760(h) (1986).

78. *Id.* § 11759(b).

This rule is subject to reasonable changes by the studio teacher.⁷⁹

Finally, all time spent in the child's home with the assistance of makeup or hairdressing persons employed in connection with the production counts as work time.⁸⁰ No makeup person or hairdresser, however, is allowed to work on minors at their home before 8:30 a.m.⁸¹ In every case, twelve hours must elapse between the time the minor is dismissed on one day and the time makeup or hairdressing begins on the following day.⁸²

The California provisions governing child performers' working hours are, for the most part, reasonable and well developed. The interaction between the California Labor Code and the general labor laws does, however, produce one unanticipated result. The Code extends the labor law definition of "minor" to include children under age six.⁸³ Section 1391, which sets the time of day that children can work, does not differentiate based on age. Thus, a child of three or four could lawfully be working as late as twelve-thirty in the morning on a day preceding a non-school day. With the exception of better provisions providing for emergency situations and limiting the hours of the day that young children can work, the California provisions should remain intact. Further liberalization of the working hours for children in the entertainment industry should be avoided.

Like most jurisdictions, New York does not have a separate set of working hour limitations for child performers. But it is surprising to discover that child performers, whose employment is governed by section 35.01 of the Arts and Cultural Affairs Law, for example, those children with a child performer permit, are excepted from the working hour restrictions placed on other children their age.⁸⁴ Presumably, the amount of hours of the day that a child may work could be limited by the official granting the work permit pursuant to section 35.01. Nevertheless, the New York Legislature has drafted the laws in such a way to make the state attractive to entertainment industry employers.

V. PROTECTION OF PERSONS CONTRACTING WITH MINORS

When it was originally enacted in 1872, California's nondisaf-

79. The studio teacher will consider such factors as working and transportation conditions and ages of minors in making any such decision. *Id.*

80. *Id.* § 11763.

81. *Id.*

82. *Id.*

83. *Id.* § 11750.

84. N.Y. LAB. LAW §§ 130, 131, 170, 171 (McKinney 1977).

firmance statute, Civil Code section 36,⁸⁵ covered only contracts for necessities. Prior to 1927, minors were able to disaffirm their contracts. In an attempt to avoid disaffirmance, employers contracted with the child performer's parents. Several problems existed with this scheme.⁸⁶ Initially it was difficult to induce the minor to conform to the terms of the contract. Also, the contract would expire when the minor reached the age of majority⁸⁷ and the contract could not be specifically enforced.⁸⁸

In 1927, the California Legislature enacted a mechanism for making minors' contracts disaffirmable upon obtaining approval from the superior court.⁸⁹ Without such an amendment, it is unlikely that motion picture employers would have spent a substantial amount of time and money to work with underdeveloped talent.⁹⁰ A 1941 amendment extended the scope of section 36 to include employment contracts in professional sports.⁹¹

85. See *supra* note 5.

86. Curry Note, *supra* note 16, at 94.

87. CAL. CIV. CODE § 25.1 (West 1987).

The Legislature intends that any use of or reference to the words "age of majority," "adult," "minor," or words of similar intent in any instrument, order, transfer, or governmental communication whatsoever made in this state:

a. Before March 4, 1972, shall make reference to persons 21 years of age, and

b. On or after March 4, 1972 shall make reference to persons 18 years of age and older, or younger than 18 years of age.

Id.

88. Curry Note, *supra* note 16, at 94

89. CAL. CIV. CODE § 36(b) (West 1982) provides:

The approval of the superior court referred to in paragraphs (2) and (3) of subdivision (a) may be given upon the petition of either party to the contract or agreement after such reasonable notice to the other party thereto as may be fixed by said court, with opportunity to such other party to appear and be heard; and its approval when given shall extend to the whole of the contract or agreement, and all of the terms and provisions thereof, including, but without being limited to, any optional or conditional provisions contained therein for extension, prolongation, or termination of the term thereof.

Id.

90. Solk, *supra* note 26, at 89. See also *Matter of Prinze and Jonas*, 38 N.Y.2d 570, 345 N.E.2d 295, 381 N.Y.S.2d 824 (N.Y. 1976). The major reason for the enactment of New York's nondisaffirmance provision "was to provide a degree of certainty for parties contracting with infants in the entertainment industry so that the validity of such contracts would not be rendered doubtful or subject to subsequent litigation concerning reasonableness, after a considerable expenditure of effort in part or full performance of the contract." *Id.* at 575, 345 N.E.2d 295, 299, 381 N.Y.S.2d 824, 828.

91. CAL. CIV. CODE § 36(B)(3) (West 1982) now provides:

Professional sports contracts; judicial approval. A contract or agreement pursuant to which such person is employed or agrees to render services as a participant or player in professional sports, including, but without being limited to, professional boxers, professional wrestlers, and professional jockeys, if the contract or agreement has been approved by the superior court in the county in which such minor resides or is employed or, if the minor neither resides in or is employed in the state, if any party to

The leading case under section 36 is *Warner Bros. Pictures v. Brodel*.⁹² This case demonstrates the need for restrictions on the minor's right to disaffirm a contract. The defendant, Brodel, a seventeen year-old actress, entered into a one year exclusive performance contract with the plaintiff who possessed options to renew the contract for six one-year periods. The contract, including the options, was submitted and approved by the superior court in accordance with section 36. Upon attaining majority, the actress disaffirmed the contract. The motion picture company sought to enjoin the actress from working with any other company. The California Supreme Court granted the injunction.⁹³ The court noted that "section 36 confers upon the Superior Courts the power by their approval of contracts of minors to remove . . . the uncertainty that otherwise attends contract obligations of a minor because of his right of disaffirmance."⁹⁴ The entire policy behind section 36 would be thwarted if disaffirmance were merely postponed to majority.⁹⁵

California's disaffirmance legislation provided the model for New York legislation on the same subject. First enacted in 1961, New York's law abrogating minors' disaffirmance rights is currently codified in section 35.03 of New York's Arts and Cultural Affairs Law.⁹⁶

the contract or agreement has its principal office in the state for the transaction of business.

Id.

92. 31 Cal. 2d 766, 192 P.2d 949, *cert. denied*, 335 U.S. 844, *reh'g denied*, 335 U.S. 873 (1948).

93. An injunction preventing the minor from contracting elsewhere is the usual remedy under section 36. While the courts have the power to grant specific performance, in a case involving a personal service contract they are reluctant to do so because the child is not likely to perform to the fullest extent under forced conditions. Solk, *supra* note 26, at 90.

94. *Brodel*, 31 Cal. 2d at 771, 192 P.2d at 951.

95. Solk, *supra* note 26, at 90.

96. Section 35.03 provides in pertinent part as follows:

1. A contract made by an infant or made by a parent or guardian of an infant, or a contract proposed to be so made, under which (a) the infant is to perform or render services as an actor, actress, dancer, musician, vocalist or other performing artist, or as a participant or player in professional sports, or (b) a person is employed to render services to the infant in connection with such services of the infant or in connection with contracts therefore, may be approved by the supreme court or the surrogate's court as provided in this section where an infant is a resident of this state or the services or the infant are to be performed or rendered in this state. If the contract is so approved, the infant may not, either during his minority or upon reaching his majority, disaffirm the contract on the ground of infancy or assert that the parent or guardian lacked authority to make the contract. A contract modified, amended or assigned after its approval under this section shall be deemed a new contract.

2. (c) No contract shall be approved unless (i) the written acquiescence to such contract of the parent or parents having custody, or other person having custody of the infant, is filed in the proceeding or (ii) the court shall find that the infant is emancipated.

Id.

New York and California laws on the subject of abrogation of minor's disaffirmance rights, although similar, are different in two very important respects: (1) treatment of contracts for the conveyance of a child's intellectual property rights; and (2) limitations on the duration of contracts subject to nondisaffirmance through court approval.⁹⁷ New York's disaffirmance statute, unlike that of California, is silent on the treatment of minor's contracts transferring intellectual property rights. California law expressly covers the conveyance of this important bundle of rights, making contracts for their transfer nondisaffirmable.⁹⁸ New York's section 35.03, however, applies only to contracts where the child is to perform or render services. A commentator on child labor law, Melvin Simensky, has noted that "the potential for market instability over the ultimate ownership of intellectual property of minors under eighteen seems obvious."⁹⁹ He suggests, as a possible solution to the gap in New York's section 35.03, that California law and disaffirmance procedures should be binding on New York entertainment contracts executed by minors under eighteen who seek to transfer intellectual property rights.¹⁰⁰ The problem with this approach is that it lacks an effective enforcement mechanism. California's disaffirmance law might not be considered applicable to contracts by parties having insufficient California contacts.¹⁰¹ The most effective solution would be for the New York Legislature to expand the categories of contracts to which its nondisaffirmance law applies to include the transfer of intellectual property rights.

The two states' laws on minors' disaffirmance rights are also distinguishable in that New York, unlike California, places a limit on the term of the contract for which its courts will approve abrogation of disaffirmance rights. Under New York law, courts will recognize disaffirmance rights only as to contracts for three years or less.¹⁰² Any contract con-

97. Simensky, *The Right of Minors to Disaffirm Entertainment Contracts*, N.Y.L.J., July 12, 1986, at 5, col. 3 [hereinafter Simensky].

98. *Id.* CAL. CIV. CODE § 36(2)(a) (West 1985) (*see supra* note 85 for text).

99. Simensky, *supra* note 97, at 5, col. 3. Section 3-101 of New York's General Obligations Law nullifies disaffirmance rights of minors over eighteen as to all of their contracts. Presumably this provision would uphold the validity of contracts conveying intellectual property rights—but, only for those minors over the age of eighteen. *Id.*

100. *Id.*

101. Significant contacts for choice-of-law purposes include: minors who reside in the state, are employed in the state, or any party having their principle office in the state. CAL. CIV. CODE § 36(a)(2) (West 1985).

102. N.Y. ARTS & CULT. AFF. LAW § 35.03(2)(d) (McKinney 1987) provides in part:

No contract shall be approved if the term during which the infant is to perform or render services or during which a person is employed to render services to the infant,

taining a covenant or condition purporting to extend beyond three years may still be approved if the court finds the duration of such covenant or condition to be reasonable.¹⁰³ The court in *Bright Tunes Productions v. Lee* explains the rationale for the enactment of New York's three year period as follows:

The purpose of this provision, as expressed by the Law Revision Commission, is to limit the contract "to a period in which the infant's development and his future needs and capabilities are reasonably foreseeable." (citation omitted). To bind a talented infant beyond the above period may, in effect, create the opportunity to exploit him by limiting his earnings, not to his capacity but to the term of a contract entered into when his capabilities were not too apparent. Such contracts, under the circumstances would not be reasonable and provident.¹⁰⁴

In *Bright Tunes*, the court was faced with an exclusive one-year recording contract with four options to renew the contract for an additional one-year term.¹⁰⁵ Options are used much more frequently in music and sports contracts and are, thus, much more likely to violate the three-year provision than other contracts. Today, long term contracts for acting services of minors are uncommon. Most of the work now available to child actors is short term, such as commercials.¹⁰⁶

The 1983 case of *Shields v. Gross*¹⁰⁷ completed New York's law on the abrogation of minors' disaffirmance rights. In *Shields*, the court held that New York's privacy law,¹⁰⁸ which requires written consent for the use of one's name, portrait or picture, can be satisfied by children through means of parental consent.¹⁰⁹ The strict interpretation of sec-

including any extensions thereof by option or otherwise, extends for a period of more than three years from the date of approval of the contract.

Id.

The California law does not contain the three-year limit found in the New York statute, and there may be approval of a term of employment up to seven years. *This Business of Music*, *supra* note 20, at 355.

103. N.Y. ARTS & CULT. AFF. LAW § 35.03(2)(d) (McKinney 1987).

104. 43 Misc.2d 21, 23, 249 N.Y.S.2d 632, 634 (Sup. Ct. 1964) (citing N.Y. LEG. DOC. NO. 65[I], at 257 (1961)).

105. *Id.* at 22, 249 N.Y.S.2d at 633.

106. Curry Note, *supra* note 16, at 93.

107. 461 N.Y.S.2d 254, 58 N.Y.2d 338, 488 N.E.2d 108 (N.Y. App. Div. 1983).

108. N.Y. CIV. RIGHTS LAW § 51 (McKinney 1984).

109. Shields' consent provided in pertinent part:

I hereby give the photographer, his legal representatives, and assigns, those for whom the photographer is acting, and those acting with his permission, or his employees, the right and permission to copyright and/or use, reuse and/or publish, and republish photographic pictures or portraits of me, or in which I may be distorted in character, or form, in conjunction with my own or a fictitious name, on reproduc-

tion 51 of New York's Civil Rights Law stands in sharp contrast to section 35.03 of the New York's Art and Cultural Affairs Law, under which parental consent, without judicial approval, cannot prevent disaffirmance.

In *Shields*, actress model Brooke Shields sought to disaffirm a prior unrestricted consent executed on her behalf by her mother and to enjoin photographer Garry Gross from using photos taken of her when she was ten years old, some of which were taken when plaintiff was posed nude in a bathtub.¹¹⁰ The New York Court of Appeals held that Brooke Shields could not maintain her action against the photographer where her mother had previously given effective, unrestricted consent to future use of the photographs.¹¹¹ The court refused to void the consent because the parties failed to comply with prior approval procedures for infant's contracts outlined in former section 3-105 of the General Obligations Law.¹¹² The court decided that section 3-105 did not apply to child models.¹¹³ The court reasoned that the sporadic nature of assignments and small fees from short term employment distinguished child models from child actors and athletes, thus making judicial approval inappropriate for modeling contracts.¹¹⁴ The court erred in failing to recognize the common law right to disaffirm, absent legislative intent to the contrary. The absence of any reference in section 51 to a child's right to disaffirm strongly indicates that the state legislature did not intend to affect that right.¹¹⁵ This was the position taken by the dissent in *Shields*:

I do not believe that the Legislature's intent in enacting sections 50 and 51 of the Civil Rights Law was to elevate the interests of business and commercialism above the State's interest in protecting its children The failure of the Legislature to cover child models in this provision indicates to me that they in-

tions thereof in color, or black and white made through any media by the photographer at his studio or elsewhere, for any purpose whatsoever; including the use of any printed matter in conjunction therewith. I hereby waive any right to inspect or approve the finished photograph or advertising copy or printed matter that may be used in conjunction therewith or to the eventual use that it might be applied.

58 N.Y.2d at 339, 448 N.E.2d at 109, 461 N.Y.S.2d at 255 (1983).

110. *Id.*

111. *See id.* at 345, 448 N.E.2d at 111, 461 N.Y.S.2d at 257 (under § 51, parent's consent binding on child and no words prohibiting disaffirmance are necessary to effectuate legislative intent).

112. *See id.* (N.Y. CIVIL RIGHTS LAW § 51 was repealed and its provisions are now codified in N.Y. ARTS & CULT. AFF. LAW, § 35.03 (McKinney 1984)).

113. *Id.*

114. Note, *Legislative and Judicial Approaches to Minors' Contractual Rights in the Entertainment Industry*, 1 ENT. & SPORTS L. J. 145, 151 (1984) [hereinafter *Contractual Rights*].

115. Simensky, *supra* note 97, at 5, col. 5.

tended child models to retain the protections afforded by the common-law right to disaffirm a contract.¹¹⁶

The analysis of the dissent would have reached a better result. The majority leaves the child bound by the parent's decision even if in retrospect that choice turns out to be exploitive or detrimental to the child's best interests.¹¹⁷ "Furthermore the child is absolutely and completely precluded from exercising any self-determination or free will to disaffirm, even after he or she reaches majority."¹¹⁸ The emphasis placed on court approval makes it wise for the employer to include a provision giving him the option to terminate the contract if court approval is not obtained.¹¹⁹ This procedure not only prevents disaffirmance, but also demonstrates the employer's good faith should other problems develop. Yet the fact that a contract was not approved does not render it unreasonable as a matter of law.¹²⁰ "The duration, together with the other provisions, is relevant in determining the reasonableness of the contract. It is not necessarily conclusive."¹²¹ Failure to obtain approval does not render the contract null and void. Rather, the determination of its validity is postponed until attempted disaffirmance.¹²² Currently, most short term contracts are not approved. The importance of this will be discussed in the next section.

VI. EARNINGS

A. Children's Savings Plan

Under sections 197¹²³ and 5118¹²⁴ of the California Civil Code, parents are entitled to the earnings and services of their minor children. The California rule is similar to the rules of many other states. The general basis for the rule entitling parents to their child's earnings is a perceived

116. *Shields*, 58 N.Y.2d at 352-53, 448 N.E.2d at 115, 461 N.Y.S.2d 261 (Jasen, Fuchsberg and Meyer, J.J. dissenting).

117. *Contractual Rights*, *supra* note 114, at 152.

118. *Id.*

119. *Solk*, *supra* note 26, at 92. Even when the contract has been approved by the court, the court is more likely to relax enforcement of the particular provisions in the contract when a child is alleged to be the breaching party. *See e.g.* *Mason v. Lyl Prods.*, 69 Cal.2d 79, 443 P.2d 193, 69 Cal. Rptr. 769 (1968) (producer's discharge of a minor actress because she was unable to return in time for the beginning of afternoon shooting was considered unreasonable in light of fact that minor became emotionally upset and, at the insistence of her mother, went home for lunch break).

120. *In re Prinze and Jonas*, 38 N.Y.2d 570, 345 N.E.2d 295, 381 N.Y.S.2d 824 (1976).

121. *Id.* at 576, 345 N.E.2d 299, 381 N.Y.S.2d 829.

122. *Id.*

123. CAL. CIV. CODE § 197 (West 1982).

124. *Id.* § 5118.

reciprocal obligation of the parents to support their child.¹²⁵ In 1938, it was recognized that this policy could lead to inequitable results in the entertainment industry,¹²⁶ when a minor's earnings frequently far exceeded their parents' outlay for support. It was in large part due to the controversy surrounding the earnings of Jackie Coogan¹²⁷ that sections 36.1¹²⁸ and 36.2¹²⁹ were added to the Civil Code. Section 36.1 gives the court the power to set aside up to one-half of the child's net earnings. Section 36.2 gives the superior court power to terminate or amend the trust or savings account upon a showing of good cause.

In New York, section 35.03 of its Arts and Cultural Affairs Law sets out a similar framework for establishing a child savings plan. The court can withhold section 35.03(1) nondisaffirmance approval under section 35.03(3)(a) until the parents consent to a savings plan.¹³⁰ Section 35.03(3)(b) allows the court to set aside up to one-half of the child's net earnings.¹³¹ Finally, section 35.03(3)(c) defines net earnings for the pur-

125. Barnett and Spradling, *Enslavement in the Twentieth Century: The Right of Parents to Retain Their Children's Earnings*, 5 PEPPERDINE L. REV. 673, 677 (1978) [hereinafter *Enslavement*]. "The philosophy underlying §§ 197 and 5118 of the Civil Code provided the basis for the California courts to disallow the minor's interest in a series of early cases." *Id.*

126. Note, *Recent California Legislation in the Law of Persons, Industrial Relations, and Social Welfare*, 15 ENT. SP. L. J. 442, 449-50 (1984). Some commentators question the parent's right to child earnings in areas beyond the field of dramatic art. "In view of the possibilities of the earnings of child prodigies in the modern world it would seem that a readjustment of the whole question of parental right to all the earnings of a minor child is in order." *Id.*

127. *Coogan v. Bernstein*, No. C426045 (Cal. Super. Ct. 1938) (child actor Jackie Coogan's earnings were claimed in full by his mother).

128. *See supra* note 8.

129. CAL. CIV. CODE § 36.2 (West 1982) provides:

The superior court shall have continuing jurisdiction over any trust or other savings plan established pursuant to section 36.1 and shall have power at any time, upon good cause shown, to order that any such trust or other savings plan shall be amended or terminated, notwithstanding the provisions of any declaration of trust or other savings plan. Such order shall be made only after such reasonable notice to the beneficiary and to the parent or parents or guardian, if any, as may be fixed by the court, with opportunity to all such parties to appear and be heard.

130. N.Y. ARTS & CULT. AFF. LAW § 35.03(3)(a) (McKinney 1984) provides:

The court may withhold its approval of the contract until the filing of consent by the parent or parents entitled to the earnings of the infant, or of the infant if he is entitled to his own earnings, that a part of the infant's net earnings for services performed or rendered during the term of the contract be set aside and saved for the infant pursuant to the order of the court and under guardianship as provided in this section, until he attains his majority or until further order of the court. Such consent shall not be deemed to constitute an emancipation of the infant.

131. *Id.* § 35.03(3)(b) provides:

The court shall fix the amount or proportion of net earnings to be set aside as it deems for the best interests of the infant, and the amount or proportion so fixed may, upon subsequent application, be modified in the discretion of the court, within the limits of the consent given at the time the contract was approved. In fixing such amount or proportion, consideration shall be given to the financial circumstances of the parent or parents entitled to the earnings of the infant and to the needs of their

poses of the subdivision.¹³² Basically, a child's net earnings are the child's gross earnings minus deductions for taxes, support, professional training and reasonable expenses incurred in connection with the contract.

There are several problems common to both the Coogan Laws and the New York savings plans in their present configuration. For example, the superior court is granted jurisdiction under section 36.1 only when the minor's contract is submitted to the court for approval.¹³³ While it is pragmatic to submit a contract to the superior court in order to obtain protection from the minor's disaffirmance rights, it is not required. In fact, because the nature of the entertainment industry has changed, fewer contracts are being approved.¹³⁴ The business practices of the old studio system which initially triggered legislation abrogating minor's disaffirmance rights have long since passed. As one commentator noted:

The major studios no longer play father, mother, guardian, and nursemaid to child actors by signing them to multi-year contracts and grooming them for stardom. While long term contracts were prevalent, the studios made tremendous investments in training and publicizing these actors. The studios could not risk disaffirmance when these minors learned they were valuable commodities and could disaffirm and sign with other studios for more money. Today [because] [t]he majority of work now available to child actors is short term . . . producers do not fear disaffirmance. There is little chance of disaffirmance because the actors want media exposure. If one does not want the work, another does.¹³⁵

other children, or if the infant is entitled to his own earnings and is married, to the needs of his family. Unless the infant is at the time thereof entitled to his own earnings and has no dependents, the court shall not condition its approval of the contract upon consent to the setting aside of an amount or proportion in excess of one-half of the net earnings.

132. *Id.* § 35.03(3)(c) provides:

For the purposes of this subdivision, net earnings shall mean the gross earnings received for services performed or rendered by the infant during the term of the contract, less (i) all sums required by law to be paid as taxes to any government or subdivision thereof with respect to or by reason of such earnings; (ii) reasonable sums to be expended for the support, care, education, training and professional management of the infant; and (iii) reasonable fees and expenses paid or to be paid in connection with the proceeding, the contract and its performance.

133. By their terms the Coogan Laws do not apply to contracts executed by the child himself, a contract executed by a parent for the child's services, or contracts executed by the child not submitted to the superior court. In these instances absolute parental power over the child's earnings remain. CAL. CIV. CODE §§ 36 and 36.1 (West 1982).

134. Curry Note, *supra* note 16, at 93.

135. *Id.*

When contracts are not submitted for court approval, there is no requirement that a portion of the child's earnings be set aside. Therefore, fewer children today can be assured that their earnings will be protected. Even if their contracts are approved and a trust plan is established, however, there is a surprising lack of ability to enforce the law.¹³⁶ Furthermore, even if the maximum fifty percent of the child's earnings are set aside, that portion of the child's wages not set aside by the court remains subject to the complete control of the parents without accountability.¹³⁷ The importance of court approval, however, often puts pressure on the parties, employers and parents to adopt a savings plan which is fair to the minor performer. "Courts prefer to be presented with a contract already providing a satisfactory program so that their function is limited to approval of a prepacked arrangement. That approval is frequently based entirely on the expression of satisfaction of all the parties."¹³⁸

If the proposed legislation in California is adopted, entertainment contracts will *automatically* be approved if certain "reasonable" contract terms are included. The result of such legislation is to increase the number of approved contracts. This benefits both the employer, who obtains protection from disaffirmance without having to obtain judicial approval, and the child performer whose earnings will be set aside in a savings plan.

The new legislation also revises how the amount of earnings subject to the trust is determined. A percentage of the child's gross earnings will be set aside, rather than a percentage of the net earnings. While this change will make the savings plan determination easier, it may lead to inequitable results. If a child is not earning much money and the parents are spending a great amount to obtain employment for the child, setting aside fifty percent of the gross may not leave enough to compensate the parents for support. If the child is successful, the parents' share may be disproportionate to the amount they actually spend for support. It does not matter what percentage of the gross is used because it will never accurately reflect the parents' expenses. Furthermore, requiring a judicial determination would undermine the advantages of automatic approval. The best way to protect the child's interest in his or her earnings would be to endorse a straight net going to the parents. If taxes, support,

136. *Enslavement, supra* note 125, at 682. The California codes prescribe no penalties for failure to obey the court order setting aside a portion of the minor's interest in a trust.

137. In some instances the court can determine not to establish any sort of savings plan. This may occur where the minor already possesses an adequate estate or where the minor's earnings do not exceed the parent's outlay for support of family need.

138. *Solk, supra* note 26, at 86.

training, and contract-related expenses are covered first, the parents should not have a claim on any of the child's additional earnings.

B. Unemployment Compensation

Unemployment compensation is one area of the law in which children are not the beneficiaries of special legislation. Minors are eligible for unemployment if they meet the same qualifications as adult actors.¹³⁹ Initially, children must show an "attachment to the workforce" by having an agent, going on interviews or working. It is important to note, however, that the Screen Actor's Guild or agents are never considered to be employers.¹⁴⁰ The child must also be available for work¹⁴¹ and must not refuse suitable employment.¹⁴²

The issue of availability was addressed by the court in *Ashdown v. Department of Employment*.¹⁴³ There, an eight year-old actress was denied unemployment benefits because the girl's mother did not register her with Central Casting. The primary function of Central Casting is to find extra work for individuals in the motion picture industry. Although Central Casting had work available, the child's mother testified that extra work was not suitable employment for her daughter, whose work in pictures involved "acting" and "[a]ll spoken parts."¹⁴⁴ The mother further stated that the child would not have taken the standard daily price for extra work, "if there was no other work to be had, but they never called her on that."¹⁴⁵ The court found that by not registering the young actress with Central Casting, the mother practically assured herself that her daughter would not be called for extra work.¹⁴⁶ In addition, the court held that extra work was not substantially different from the child's past work, and therefore, the child was ineligible for unemployment.¹⁴⁷

The California and New York Legislatures have not provided child performers with unemployment compensation laws which account for the performer's unique situation. The child performer, in addition to fac-

139. First, an actor's residuals will be credited against unemployment benefits in the week the residual payment was received by the actor. Also, for unemployment insurance purposes, residual, rerun, reuse and holding fees are the same. They are fees generated by the use of the commercial product and are wages within the meaning of the code. *SAG Information Packet*, *supra* note 30, at 4, § 2.

140. *Id.*

141. CAL. UNEMP. INS. CODE § 1253(a) (West 1986).

142. *Id.* § 1257(b).

143. 135 Cal. App. 2d 291, 287 P.2d 176 (1955).

144. *Id.* at 294, 287 P.2d at 178.

145. *Id.*

146. *Id.* at 297-98, 287 P.2d at 181.

147. *Id.*

ing the risks of infrequent employment in the entertainment industry, is subject to regulations restricting his or her working hours, especially when school is in session. Thus, it is almost impossible for child actors to obtain the attachment to the workforce necessary to receive unemployment benefits.

The unemployment compensation requirements for child performers should be relaxed. The laws require a parent or guardian to accompany the child to work each day.¹⁴⁸ Helping the child performer find work, going to auditions and screen tests and overseeing the child's actual performance is a full time job for one parent. It may be difficult to comprehend why a parent would sacrifice the income from a paying full time job in order to assist a child actor whose only work is an occasional commercial or bit part. Nevertheless, parents frequently have forgone their own job opportunities in exchange for less income and the chance that their child will become a star. In cases where the child has been successful in the past, but has since become unemployed and unable to receive unemployment compensation, the family suffers a severe economic loss.

VII. MINORS IN THEATRICAL UNIONS

Performers' unions play an important role in the entertainment industry because it is difficult for performers to obtain employment unless they are union members.¹⁴⁹ Both SAG and AFTRA use a standard contract for the employment of minors. The contract terms are intended to supplement existing regulations for child performers in states such as California and New York.¹⁵⁰ In many other states, the standard union

148. CAL. ADMIN. CODE tit. 8, § 11757 (1986). "A parent or guardian of a minor under sixteen (16) years of age must be present with and accompany such minor on the set or on location and be within sight or sound of said minor at all times." *Id.*

149. See Solk, *supra* note 26, at 86-87 (1980). Every actor performing under the jurisdiction of the Screen Actor's Guild [hereinafter SAG] must join the organization within thirty days after the first performance under its jurisdiction. This includes all minor performers; except children under four years of age. On the other hand, the American Federation of Television and Radio Artists [hereinafter AFTRA], requires that every actor performing under the jurisdiction of AFTRA must join or pay dues and fees to the organization within thirty days of his or her first performance. Unlike the Guild, this union covers all minors, regardless of age. *Id.*

150. AFTRA NATIONAL CODE OF FAIR PRACTICE FOR NETWORK TELEVISION BROADCASTING, Para. 110.A (1985-1987) [hereinafter AFTRA Code]. The AFTRA Code provides in part:

(B)(10) Producer will comply with all applicable child labor laws governing the employment of the minor in broadcasting, and, will keep a summary of said laws in the production office, if such summary is readily available.

Any provision of this Section which is inconsistent and less restrictive than any other child labor law or regulation in applicable state or other jurisdiction is deemed modified to comply with such laws or regulations.

contract is the only set of guidelines that exists for those who employ children in the entertainment fields.

The guidelines were promulgated to ensure that the performance environment is proper for the minor and the conditions of employment are not detrimental to the minor's health, education, and morals. The primary concern of the parent and the adults in charge of the production is to act in the best interest of the minor with due regard to the child's age.¹⁵¹ The term "minor," as used in the standard performer's contracts, refers to any principal performer defined as a minor under the employment laws of the state governing his or her employment, and in all cases includes any principal performer fourteen years old or younger.¹⁵² Calls for interviews and individual voice and photographic tests, fittings, wardrobe tests, makeup tests, production conferences, publicity and the like, for school-aged children are to be held after hours and completed prior to eight o'clock in the evening.¹⁵³ Actual production calls, however, are not subject to those limitations.¹⁵⁴

Producers are required to advise the minor's parents of the terms and conditions of the employment at the time of the hiring, to the extent they are known.¹⁵⁵ Prior to the first date of the engagement, the parents must obtain, complete, and submit to the producer, the appropriate documents relating to the employment of the minor, as required by state and local law.¹⁵⁶

Under union contracts, like many of the existing child labor regulations, the parent or guardian¹⁵⁷ plays a major supervisory role. These union contracts require that a "parent or guardian must be present at all times while a minor is working, and has the right, subject to production requirements, to be within sight and sound of the minor."¹⁵⁸ A parent is also to accompany his or her child to wardrobe, makeup, hairdressing and dressing room facilities.¹⁵⁹ They are not, however, to interfere with

Id. The AFTRA Code's Guidelines for the Employment of Minors are very similar to the guidelines used in the corresponding SAG agreement.

151. *Id.*

152. *Id.*

153. *Id.* at ¶ 100.A(A). Two adults must be present at and during any call involving a child performer.

154. *Id.*

155. *Id.* at ¶ 100.A(B)(1).

156. *Id.* at ¶ 100.A(B)(2).

157. *See id.* at ¶ 100.A(B)(9) (guardian must be at least eighteen years old and be the child's legal guardian or have the written permission of the minor's parent(s) to act as guardian).

158. *Id.* at ¶ 100.A(B)(3).

159. *See id.* at ¶ 100.A(B)(4) (no dressing room shall be occupied simultaneously by a mi-

the actual production.¹⁶⁰ For example, parents should not bring other children not employed in the same production to the studio or location.¹⁶¹ When a minor is required to travel to a location, the producer will usually provide the child's parents with the same transportation, lodging and meal allowance provided to the minor.

When a producer hires a minor, the producer must designate one individual on each set to coordinate all matters relating to the child's welfare and must notify the parent, of the individual's name.¹⁶² Occasionally, federal, state or local laws require a qualified child care professional to be present on the set during the work day. If the minor is asked to perform unusual physical, athletic or acrobatic activity or stunts, the child and the parent must represent that the minor is fully capable of performing the activity, and the parent must grant prior written consent.¹⁶³ If the nature of the activity so requires, a person trained in the involved activity must be present at the time of production.¹⁶⁴ The producer must also supply any equipment needed or requested for safety reasons.¹⁶⁵ No minor is required to work in a situation which places the child in clear and present danger. If, after having discussed the scene with the stunt coordinator and parent, the child believes that he or she is in danger, then the child is not required to perform in such a situation, regardless of the validity of his or her belief.¹⁶⁶ Finally, the producer must provide a safe and secure place for minor performers to rest and play.¹⁶⁷

The union contract emphasizes that employment is not to interfere with education.¹⁶⁸ The employer is required to comply with all state education laws and use its best efforts to ensure that employment does not interfere with education.¹⁶⁹ Some union contracts contain provisions which specifically address working hours and rest time.¹⁷⁰ The number of hours that a child is allowed to work varies according to age and

nor and an adult performer or by minors of the opposite sex, but this provision does not apply to children under three).

160. *Id.* at ¶ 100.A(B)(3).

161. *Id.*

162. *Id.*

163. See e.g. Screen Actors Guild, *Commercial Contract*, Schedule AA(9) [hereinafter *SAG Commercial Contract*].

164. *Id.*

165. *Id.*

166. See AFTRA Code, *supra* note 150, at ¶ 100.A(B)(6).

167. *Id.* at ¶ 100.A(B)(5).

168. *Id.* at ¶ 100.A(C).

169. *Id.*

170. See *SAG Commercial Contract*, *supra* note 163.

whether or not the work day precedes a school day.¹⁷¹

Enforcement of the union contract provisions depends primarily on voluntary compliance. Prospective employers, however, do not always follow the guidelines.¹⁷² For example, although interviews and auditions may not be held during school hours, prospective employers frequently violate the guidelines. Unfortunately, the performers' unions are usually not informed about violations until much later. Furthermore, parents are not likely to complain about violations until after they learn whether or not their child was hired.

VIII. CONCLUSION

Federal regulation of child labor expressly excludes those minors working in the entertainment industry, leaving the state legislatures free to enact their own regulations. In the two major entertainment markets, California and New York, child actors are exempt from the general state labor laws upon obtaining a special entertainment work permit. While both states place limits on the use of children in the entertainment field, California's regulatory scheme is much more protective of the child's best interests, particularly in the areas of working hours and education requirements.

Rather than setting an example for other states to follow, the Code provisions are under constant attack by those seeking to liberalize the strict requirements. Unfortunately, the California legislature is faced with the choice of further relaxing the state's child performer labor laws or continuing to lose entertainment production work to other states and countries. The competing interests of the directors, producers, talent agencies, parents and others calling for heightened protection of the child performer have produced a political "tug-of-war" in the state that will not be reconciled in the near future.

*Robert A. Martis **

171. See *SAG Commercial Contract*, *supra* note 163, at schedule AA(8).

172. Informal interview with Don Gaynor and Sue Braden of AFTRA/SAG, Chevy Chase, Md. (Mar. 1987).

* B.A., Arizona State University, 1985; J.D. Candidate, Georgetown University Law Center, 1988. Author will begin working at the law firm of Paul, Hastings, Janofsky & Walker of Los Angeles in Fall 1988.