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Civ. Rights Law § 51: An Infant May Not Disaffirm Prior Parental Consent to the Commercial Publication of Her Photograph

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is a disturbing indication of its desire to construe the CPLR narrowly[31] and to sanction such a restrictive approach by the lower courts.

Jane M. Knight

CIVIL RIGHTS LAW

Civ. Rights Law § 51: An infant may not disaffirm prior parental consent to the commercial publication of her photograph

Sections 50 and 51 of the New York Civil Rights Law[32] establish the right of any living person to prevent the nonconsensual commercial exploitation of his or her name or likeness.[33] The pro-

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Div. 2d 772, 772, 296 N.Y.S.2d 274, 275 (3d Dep't 1969); *see also In re* Berent, 86 App. Div. 2d 764, 766, 448 N.Y.S.2d 282, 285 (4th Dep't 1982) (section 675 of the Insurance Law held controlling).

Section 3394 of the Public Health Law, the statute at issue in *Fiedelman*, provides that review must be made "within sixty days after service of the order" of the Commissioner. N.Y. PUB. HEALTH LAW § 3394(2) (McKinney 1977). There is no mention of the type of service to be made. *See id.* It is submitted that the lack of specificity of this statute distinguishes *Fiedelman* from other decisions holding CPLR 2103 inapplicable to administrative proceedings. Moreover, in light of the lack of clarity in the Public Health Law, it is suggested that consistency with the purposes of the CPLR and administrative law militates in favor of granting a petitioner the benefit of the time extension.

[31] The narrow construction contravenes the CPLR's mandate to construe provisions liberally. *See* CPLR 104 (1972).

[32] N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976). Section 50 of the Civil Rights Law provides:

> A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guility of a misdemeanor.

Id. § 50.

Civil remedies for invasion of privacy are provided for in section 51 of the Civil Rights Law:

> Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action . . . against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by section fifty . . . the jury, in its discretion, may award exemplary damages.

Id. § 51 (McKinney Supp. 1982-1983).

[33] A common-law right of privacy was rejected in New York in Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 556, 64 N.E. 442, 447 (1902). *See* Kiss v. County of Putnam,

tection afforded by these statutes extends only to persons who have not consented in writing to such utilization.[34] In the case of a minor, permission may be obtained through a parent or legal

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59 App. Div. 2d 773, 773, 398 N.Y.S.2d 729, 729 (2d Dep't 1977); Blair v. Union Free School Dist. No. 6, 67 Misc. 2d 248, 248, 324 N.Y.S.2d 222, 223 (Dist. Ct. Suffolk County 1971).

In *Roberson*, a manufacturer printed and distributed 25,000 copies of an advertisement containing a girl's picture which had been appropriated without her consent. 171 N.Y. at 542, 64 N.E. at 442. Alleging both physical and mental "distress" due to the unsolicited commercialization of her photograph, the young woman sought an injunction. *Id.* at 542-43, 64 N.E. at 442. The Court of Appeals denied her relief, holding that "the so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided." *Id.* at 556, 64 N.E. at 447.

In direct response to *Roberson* the legislature created a right to privacy in New York by statute. Ch. 132, § 1 [1903] N.Y. Laws 308; *see* Arrington v. New York Times Co., 55 N.Y.2d 433, 439, 434 N.E.2d 1319, 1321, 449 N.Y.S.2d 941, 943 (1982), *cert. denied*, 103 S. Ct. 787 (1983); Flores v. Mosler Safe Co., 7 N.Y.2d 276, 280, 164 N.E.2d 853, 855, 196 N.Y.S.2d 975, 978 (1959); S. HOFSTADTER, THE DEVELOPMENT OF THE RIGHT OF PRIVACY IN NEW YORK 11-12 (1954); W. ZELERMYER, INVASION OF PRIVACY 41 (1959); Greenawalt, *New York's Right to Privacy—The Need for Change*, 42 BROOKLYN L. REV. 159, 161 (1975); *supra* note 32. If, however, an individual is deemed to be a public figure or is involved in a newsworthy event, his statutory protections are abrogated. *See, e.g.*, Bass v. Straight Arrow Publishers, Inc., 59 App. Div. 2d 684, 685, 398 N.Y.S.2d 669, 670 (1st Dep't 1977); Rosemont Enters. v. Random House, Inc., 58 Misc. 2d 1, 6, 294 N.Y.S.2d 122, 128-29 (Sup. Ct. N.Y. County 1968), *aff'd mem.*, 32 App. Div. 2d 892, 301 N.Y.S.2d 948 (1st Dep't 1969); *see also* Namath v. Sports Illustrated, 48 App. Div. 2d 487, 487, 371 N.Y.S.2d 10, 11 (1st Dep't 1975) (incidental utilization of photograph in commercial advertising not prohibited), *aff'd*, 39 N.Y.2d 897, 352 N.E.2d 584, 386 N.Y.S.2d 397 (1976).

Since these statutes create a right that was not known at common law and contain penal sanctions, they have been construed narrowly. *See, e.g.*, McGraw v. Watkins, 49 App. Div. 2d 958, 959, 373 N.Y.S.2d 663, 665 (3d Dep't 1975); Callas v. Whisper, Inc., 198 Misc. 829, 831, 101 N.Y.S.2d 532, 534 (Sup. Ct. Spec. T. Kings County 1950), *aff'd*, 278 App. Div. 974, 105 N.Y.S.2d 1001 (2d Dep't 1951), *aff'd*, 303 N.Y. 759, 103 N.E.2d 543 (1952). In *McGraw*, the plaintiff alleged that she had validly rescinded a release on a nude film that the defendant had taken of her and that he intended to display at the Cannes Film Festival. 49 App. Div. 2d at 958-59, 373 N.Y.S.2d at 664. The Third Department dismissed her complaint because the plaintiff had failed to allege any commercial exploitation of the movie. *Id.* at 959, 373 N.Y.S.2d at 665. The strict interpretation and conservative application of these statutes have generated much criticism. *See* S. HOFSTADTER, *supra*, at 44; M. MAYER, RIGHTS OF PRIVACY 173-74 (1972); Greenawalt, *supra*, at 169-88.

[34] N.Y. CIV. RIGHTS LAW § 50 (McKinney 1976); Schneiderman v. New York Post Corp., 31 Misc. 2d 697, 698, 220 N.Y.S.2d 1008, 1009 (Sup. Ct. Spec. T. Kings County 1961) (citing Hammond v. Crowell Publishing Co., 253 App. Div. 205, 206, 1 N.Y.S.2d 728, 729 (1st Dep't 1938)); *see also* Yameta Co. v. Capitol Records, Inc., 279 F. Supp. 582, 585 (S.D.N.Y.) ("New York courts have always applied the requirements of written consent strictly"), *rev'd on other grounds*, 393 F.2d 91 (2d Cir. 1968); Lomax v. New Broadcasting Co., 18 App. Div. 2d 229, 229, 238 N.Y.S.2d 781, 782 (1st Dep't 1963) (estoppel or oral consent will not satisfy statutory requirements but merely mitigate damages); Selsman v. Universal Photo Books, Inc., 18 App. Div. 2d 151, 152-53, 238 N.Y.S.2d 686, 687-88 (1st Dep't 1963) (commercial use of name or photograph without written authorization violative of statute).

guardian.[35] In such a situation, however, the qualified right of a minor to disaffirm contracts is implicated.[36] Recently, in *Shields v.*

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[35] N.Y. CIV. RIGHTS LAW § 50 (McKinney 1976); *see supra* note 32; *see also* Buscelle v. Conde Nast Publications, Inc., 173 Misc. 674, 674, 19 N.Y.S.2d 129, 129-30 (Sup. Ct. Spec. T. N.Y. County 1940) (oral parental consent is partial defense); Semler v. Ultem Publications, Inc., 170 Misc. 551, 552, 9 N.Y.S.2d 319, 320 (N.Y.C. City Ct. Queens County 1938) (publication of infant photographs requires parental consent).

[36] *See* Kaufman v. American Youth Hostels, Inc., 13 Misc. 2d 8, 15, 174 N.Y.S.2d 580, 589 (Sup. Ct. Westchester County 1957), *modified on other grounds*, 6 App. Div. 2d 223, 229, 177 N.Y.S.2d 587, 593 (2d Dep't 1958), *modified*, 5 N.Y.2d 1016, 158 N.E.2d 128, 185 N.Y.S.2d 268 (1959); Goldfinger v. Doherty, 153 Misc. 826, 828, 276 N.Y.S. 289, 292-93 (Sup. Ct. App. T. 1st Dep't 1934), *aff'd mem.*, 244 App. Div. 779, 280 N.Y.S. 778 (1st Dep't 1935); *see also* Lustig v. Schoonover, 51 N.Y.S.2d 156, 156-57 (Sup. Ct. N.Y. County 1944) (generally no liability on infant after disaffirmance of contract), *aff'd mem.*, 269 App. Div. 830, 56 N.Y.S.2d 415 (1st Dep't 1945).

The ability of an infant to avoid contractual responsibilities was established early at common law. *See* 2 S. WILLISTON, WILLISTON ON CONTRACTS § 223, at 2 (W. Jaeger 3d ed. 1957). This concept was recognized in the United States in the 19th century. *See* Note, *Infant Contracts—Beneficial Aspect*, 4 WASHBURN L.J. 257, 257-58 (1965). Under New York law, an infant's contracts are not void, but voidable. *See, e.g.*, CBS, Inc. v. Tucker, 412 F. Supp. 1222, 1226 (S.D.N.Y. 1976); Sternlieb v. Normandie Nat'l Sec. Corp., 263 N.Y. 245, 247, 188 N.E. 726, 726-27 (1934); Beardsley v. Hotchkiss, 96 N.Y. 201, 211 (1884); *In re* Yonnone, 72 Misc. 2d 579, 580, 339 N.Y.S.2d 212, 214 (Sur. Ct. Orange County 1972); Fisher v. Cattani, 53 Misc. 2d 221, 222, 278 N.Y.S.2d 420, 421 (Dist. Ct. Nassau County 1966); L. MAYERS, LAW OF BUSINESS CONTRACTS § 163, at 104 (1939). The voidability concept emerged in response to the desire to protect a minor from his lack of commercial acumen and to prevent the business community from capitalizing on a child's naivete. *See, e.g.*, Green v. Green, 69 N.Y. 553, 556-57 (1877); General Motors Acceptance Corp. v. Stotsky, 60 Misc. 2d 451, 455, 303 N.Y.S.2d 463, 468 (Sup. Ct. Spec. T. Suffolk County 1969); Whitmarsh v. Hall, 3 Denio 375, 376 (Sup. Ct. 1846); Wilcox, *Legal Rights of Children*, in THE LEGAL RIGHTS OF CHILDREN 9-10 (1974); R. MNOOKIN, CHILD, FAMILY AND STATE 681-83 (1978); Edge, *Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy*, 1 GA. L. REV. 205, 205 (1967); Note, *Infant's Disaffirmance of a Contract: Methods of Handling the Resulting Injustice*, 43 N.D.L. REV. 89, 89 (1966-1967) [hereinafter cited as Note, *Infant's Disaffirmance*].

A minor's right of disaffirmance is not applicable to contracts for "necessaries," thus making the right a qualified one. *E.g.*, CBS, Inc. v. Tucker, 412 F. Supp. 1222, 1226 n.6 (S.D.N.Y. 1976); Fisher v. Cattani, 53 Misc. 2d 221, 223, 278 N.Y.S.2d 420, 422 (Dist. Ct. Nassau County 1966); *see* 2 S. WILLISTON, *supra*, § 240, at 49 ("infant may make himself liable for goods that are necessary, considering his position and station in life"). The ability to disaffirm has been abrogated further by statutory enactments. *See, e.g.*, GOL § 3-101(1) (1978) (contracts may not be disaffirmed on ground of infancy after age 18); *see id.* § 3-103 (infants eligible for G.I. Bill loans may not disaffirm); *see also id.* § 3-105(1) (performing arts and sports contracts with minors are unavoidable if judicial approval is granted); N.Y. JUD. LAW § 474 (McKinney 1983) (judicial approval of attorney's fees on award to infant). *See generally* Current Legislation, *Enforceability of Business Contracts of Minors Eighteen Years and Over*, 16 ST. JOHN'S L. REV. 154, 154-60 (1941). A minor may not exercise the right of disaffirmance if such action would result in receiving a windfall. *E.g.*, Casey v. Kastel, 237 N.Y. 305, 314-15, 142 N.E. 671, 674-75 (1924); Rice v. Butler, 160 N.Y. 578, 583, 55 N.E. 275, 276 (1899). The *Rice* Court concluded that while a minor could disaffirm an installment contract and return the merchandise, she would be liable for its depreciation. 160

Gross,[37] the Court of Appeals held that the privilege of a minor to disaffirm a contract was abrogated in agreements pertaining to the republication of photographs of a minor where an unrestricted consent of the parent or guardian had been obtained.[38]

In *Shields*, the plaintiff, at age 10, had posed for a series of nude photographs.[39] Two releases had been executed by her mother before the pictures were taken.[40] For a number of years the photographs were reproduced in various publications and utilized by the photographer at his discretion.[41] Disturbed over the type of magazines in which the pictures might appear, and unsuccessful in her attempt to purchase the negatives, the 16-year-old plaintiff, now a world-renowned model and actress, initiated a suit to enjoin further commercial use of the pictures by the defendant-photogra-

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N.Y. at 583, 55 N.E. at 276. In that case, "she would be making use of the privilege of infancy as a sword, and not as a shield." *Id.* The ability of infants to profit from their power of rescission, thereby causing a loss of profits and unstable and untrustworthy business relations, has been the source of the vast majority of criticism concerning this doctrine. *See infra* note 63.

[37] 58 N.Y.2d 338, 448 N.E.2d 108, 461 N.Y.S.2d 254 (1983).

[38] *Id.* at 341, 448 N.E.2d at 109, 461 N.Y.S.2d at 255.

[39] *See id.* at 341-42, 448 N.E.2d at 109, 461 N.Y.S.2d at 255. The plaintiff was shown nude in a bathtub scene for a pictorial financed by Playboy Press. *Id.* This was one of a series of modeling assignments arranged by the Ford Model Agency, in which the plaintiff was photographed by the respondent. *Id.* at 341, 448 N.E.2d at 109, 461 N.Y.S.2d at 255.

[40] *Id.* at 342, 448 N.E.2d at 109, 461 N.Y.S.2d at 255. The consent form executed by the plaintiff's mother stated, in 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 reproductions 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.

Id. at 342 n.*, 448 N.E.2d at 109 n.*, 461 N.Y.S.2d at 255 n.*.

The infant-plaintiff's signature on a similar form was deemed by the trial court to have no effect. Shields v. Gross, N.Y.L.J., Nov. 16, 1981, at 13, col. 3 (Sup. Ct. N.Y. County 1981). The plaintiff's mother admitted that she had not read the "voucher-release form" before she signed it, nor had she discussed the form with the defendant. *Id.*

[41] 58 N.Y.2d at 342, 448 N.E.2d at 109, 461 N.Y.S.2d at 255. The photographs were reprinted in magazines and reproduced in an enlargement which was displayed in a New York City store window. *Id.* Both the plaintiff and her mother were aware of the use of the photographs and, in fact, subsequently obtained the defendant's consent to publish the pictures in the plaintiff's own book. *Id.*

pher.[42] The plaintiff, asserting a common-law right to disaffirm a contract entered into during her infancy, contended that revocation of her legal guardian's consent triggered the statutory proscriptions of section 51 of the Civil Rights Law.[43] The trial court, after an initial determination that the contract was not for the production of pornography,[44] and thus not violative of public policy, deemed the executed releases to be valid and binding on the plaintiff.[45] Although the complaint was ultimately dismissed, the court granted, on the defendant's stipulation, an injunction prohibiting the sale of the prints to pornographic publications.[46] On appeal the Appellate Division, First Department, found that the Civil Rights Law does not limit the common-law privilege of an infant to disaffirm and modified the judgment by extending the scope of the injunction to include any commercial utilization of the photographs.[47]

On appeal, a divided Court of Appeals further modified the injunction by eliminating the trade restrictions added by the Appellate Division.[48] Writing for the majority,[49] Judge Simons observed initially that while an infant enjoys a common-law right to disaffirm contractual liabilities, this privilege can be circumscribed

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[42] *See id.* The plaintiff sought compensatory and punitive damages as well as injunctive relief. *Id.*

[43] *See id.* at 341, 448 N.E.2d at 109, 461 N.Y.S.2d at 255; N.Y. CIV. RIGHTS LAW § 51 (McKinney 1976).

[44] *See* Shields v. Gross, N.Y.L.J., Nov. 16, 1981, at 13, col. 2 (Sup. Ct. N.Y. County 1981).

[45] 58 N.Y.2d at 343, 448 N.E.2d at 109-10, 461 N.Y.S.2d at 255-56.

[46] *Id.* Special Term held that section 51 abrogated infant disaffirmance, ordered a preliminary injunction, and remanded the case for a determination on the validity and scope of the releases. *Id.* at 342-43, 448 N.E.2d at 109-10, 461 N.Y.S.2d at 255-56. On remand, the trial court, sitting without a jury, determined that no limitations had been placed on the releases. *Id.*, 448 N.E.2d at 109, 461 N.Y.S.2d at 255.

[47] *Id.* at 343, 448 N.E.2d at 110, 461 N.Y.S.2d at 256. Presiding Justice Kupferman concurred, along with Justices Sandler and Silverman, confirming the plaintiff's common-law privilege, as an infant, to rescind a parental consent. 88 App. Div. 2d 846, 847-48, 451 N.Y.S.2d 420, 419-21 (1st Dep't 1982). Justice Kupferman, in a separate concurrence, stated that GOL § 3-105 was applicable in this situation. 58 N.Y.2d at 343, 448 N.E.2d at 110, 461 N.Y.S.2d at 256; *see* GOL § 3-105 (1978). Justice Asch concurred in a separate opinion, determining that the consents were unconscionable and therefore unenforceable under sections 2-102 and 2-302 of the Uniform Commercial Code. 58 N.Y.2d at 343, 448 N.E.2d at 110, 461 N.Y.S.2d at 256; *see* N.Y.U.C.C. §§ 2-102, 2-302 (McKinney 1964). Justice Carro, in the lone dissent, agreed with the trial court's judgment. 58 N.Y.2d at 343, 448 N.E.2d at 110, 461 N.Y.S.2d at 256.

[48] 58 N.Y.2d at 347, 448 N.E.2d at 112, 461 N.Y.S.2d at 258.

[49] Judge Simons was joined in his opinion by Chief Judge Cooke and Judges Wachtler and Jones. Judges Meyer and Fuchsberg joined in Judge Jasen's dissent.

by legislative proscription.[50] By enacting a statute which attaches legal significance to a parent's authorization of a minor's contract, the majority reasoned, the legislature must have intended contracts of this kind to be enforceable.[51] Strictly construing Civil Rights Law section 51, the Court held that a guardian's consent is binding on the minor, and thus, irrevocable.[52] Moreover, the Court concluded that in light of the need for contractual stability in the modelling industry,[53] it is the parent's or guardian's responsibility to limit the scope of consent so that the best interests of the infant may be served.[54]

In a lengthy dissent, Judge Jasen stressed the state's role of *parens patriae* and the established policy of affording child welfare priority over commercial interests.[55] Judge Jasen noted that the right of infants to disaffirm contractual responsibilities is necessary because of their inexperience and potential susceptibility to adult coercion.[56] After examining the statutory language of section 51 and the circumstances surrounding its enactment, Judge Jasen concluded that the right to disaffirm contracts "should exist coextensively" with the statutory right of privacy.[57]

It is submitted that sections 50 and 51 of the Civil Rights Law, which predicate the use of an infant's name or picture upon

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[50] 58 N.Y.2d at 344-45, 448 N.E.2d at 110-11, 461 N.Y.S.2d at 256-57.

[51] *Id.*

[52] *Id.* at 345, 448 N.E.2d at 111, 461 N.Y.S.2d at 257.

[53] *See id.* at 346, 448 N.E.2d at 111, 461 N.Y.S.2d at 257. The Court compared sections 50 and 51 of the Civil Rights Law with section 3-105 of the General Obligations Law and observed that sections 50 and 51 were intended to promote business stability. 58 N.Y.2d at 345-46, 448 N.E.2d at 111-12, 461 N.Y.S.2d at 257-58; *see* N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976); GOL § 3-105 (1976).

[54] 58 N.Y.2d at 347, 448 N.E.2d at 112, 461 N.Y.S.2d at 258.

[55] *Id.* at 348-49, 448 N.E.2d at 113, 461 N.Y.S.2d at 259 (Jasen, J., dissenting). Judge Jasen emphasized that the state's role of *parens patriae* requires the state to protect the interests of children when parents fail to do so. *Id.* (Jasen, J., dissenting). Judge Jasen also noted that if the lower courts had found the photographs to be obscene, the contract would have been held void *ab initio* on public policy grounds, and the applicability of the infant's power to disaffirm would not have been reached. *Id.* at 351 n.*, 448 N.E.2d at 114 n.*, 461 N.Y.S.2d at 260 n.* (Jasen, J., dissenting).

[56] *Id.* at 348-49, 448 N.E.2d at 113, 461 N.Y.S.2d at 259 (Jasen, J., dissenting).

[57] *Id.* at 349, 448 N.E.2d at 114, 461 N.Y.S.2d at 260 (Jasen, J., dissenting). Although the State had abrogated the infant's power to avoid contractual responsibilities "in those situations in which it has determined that the damage incurred by the minor will be minimal and the cost to the contracting party or society would be great," *id.* at 351, 448 N.E.2d at 114, 461 N.Y.S.2d at 260 (Jasen, J., dissenting), Judge Jasen concluded that this design had been expressed clearly in the resultant statutes, *id.* at 351-52, 448 N.E.2d at 114-15, 461 N.Y.S.2d at 260-61 (Jasen, J., dissenting).

the consent of a parent or guardian, are premised upon the legislature's recognition that minors should be accorded special protection when they assume contractual responsibilities. In light of the legislature's inclination to afford minors such protection, it seems unlikely that the statutes were intended to impinge upon the right of minors to disaffirm contracts as the majority concluded.[58] Furthermore, the history surrounding the legislative enactments suggests that the privacy rights of minors were intended to be held paramount to the business community's interest in binding minors to contractual terms.[59] Moreover, the possibility that an infant may be exploited by his parent[60] supports a rule under which minors would retain some right to disaffirm contracts executed with parental consent pursuant to sections 50 and 51 of the Civil Rights Law.[61]

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[58] *See infra* note 59. The Court of Appeals' inquiry into the intention of the legislature began shortly after the enactment of sections 50 and 51. *See, e.g.*, Rhodes v. Sperry & Hutchinson Co., 193 N.Y. 223, 226-32, 85 N.E. 1097, 1098-1100 (1908), *aff'd*, 220 U.S. 502 (1911). While all cases involving these statutes recognize that sections 50 and 51 of the Civil Rights Laws created a right that did not exist at common law, only in the *Shields* decision has the Court of Appeals found those statutes to have abrogated an existing common-law right—infant disaffirmance. *See* 58 N.Y.2d at 344-45, 448 N.E.2d at 110-11, 461 N.Y.S.2d at 256-57.

[59] *See supra* note 33. The appellate division has stated that the primary goal of the legislature in enacting sections 50 and 51 was to prevent the use of a person's name or portrait for advertising purposes or for the purposes of trade. *See* Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 472, 178 N.Y.S. 752, 756 (1st Dep't 1919).

The New York Court of Appeals and the United States Supreme Court reviewed the constitutionality of sections 50 and 51 in Rhodes v. Sperry & Hutchinson Co., 193 N.Y. 223, 85 N.E. 1097 (1908), *aff'd*, 220 U.S. 502 (1911). The Court of Appeals noted:

> The power of the legislature in the absence of any constitutional restriction to declare that a particular act shall constitute a crime or be actionable as a tort cannot be questioned, where the right established or recognized and sought to be protected is based upon an ethical sanction. Such is the character of the right of privacy preserved by legislation protecting persons against the unauthorized use of their names or portraits in the form of advertisements or trade notices. It is a recognition by the law-making power of the very general sentiment which prevailed throughout the community against permitting advertisers to promote the sale of their wares by this method, regardless of the wishes of the persons thereby affected. There was a natural and widespread feeling that such use of their names and portraits in the absence of consent was indefensible in morals and ought to be prevented by law. Hence the enactment of this statute.

Id. at 228, 85 N.E. at 1099.

[60] *See* Shields v. Gross, N.Y.L.J., Nov. 16, 1981, at 13, col. 3 (Sup. Ct. N.Y. County).

[61] *See* De Forte v. Liggett & Myers Tobacco Co., 42 Misc. 2d 721, 723, 248 N.Y.S.2d 764, 766 (Sup. Ct. Kings County 1964) ("rights of an infant cannot and should not be lost through the obdurate, unreasonable and uninformed conduct and opinion of the guardian ad litem"); Kaufman v. American Youth Hostels, Inc., 13 Misc. 2d at 15, 174 N.Y.S.2d at 589 (Sup. Ct. Westchester County 1957) ("approval by a parent of his infant child's contract

Clearly, the Court of Appeals' emphasis on the need for contractual stability was not totally misplaced.[62] Indeed, the increased sophistication of today's youth has eroded part of the reasoning underlying the doctrine of infant disaffirmance.[63] It is therefore suggested that allowing a minor a qualified right to disaffirm in those instances in which a palpable injury can be demonstrated would represent a more equitable balance between the two conflicting interests. If, however, as in the *Shields* case, no such harm is sustained,[64] a minor should not be able to avail himself of a con-

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[of release] does not validate it"), *modified on other grounds*, 6 App. Div. 2d 223, 177 N.Y.S.2d 587 (2d Dep't 1958), *modified*, 5 N.Y.2d 1016, 158 N.E.2d 128, 185 N.Y.S.2d 268 (1959).

[62] *See* Sternlieb v. Normandie Nat'l Sec. Corp., 263 N.Y. 245, 250-51, 188 N.E. 726, 728 (1934); Goldfinger v. Doherty, 153 Misc. 826, 830-31, 276 N.Y.S. 289, 295-96 (Sup. Ct. App. T. 1st Dep't 1934) (Lydon, J., dissenting), *aff'd mem.*, 244 App. Div. 779, 280 N.Y.S. 778 (1st Dep't 1935).

Although the *Sternlieb* decision upheld an infant's right of disaffirmance, Judge Crane, writing for a unanimous Court, described the issue as a "troublesome question arising from the repudiation by a young gentleman, just under twenty-one, of his contract of purchase." 263 N.Y. at 246, 188 N.E. at 726. Judge Crane noted that as long as infants possess the power to disaffirm, merchants will be forced to contract with minors "at their peril." *Id.* at 251, 188 N.E. at 728. In conclusion, however, Judge Crane resigned himself to the fact that "the law is as it is, and the duty of this court is to give force and effect to the decisions as we find them." *Id.*

In *Goldfinger*, Judge Lydon, writing in dissent, expressed dissatisfaction because under the majority's decision a businessman has no recourse against the rescinding infant, nor is the minor's representative liable if his agency is not also disaffirmed. 153 Misc. at 830, 276 N.Y.S. at 295 (Lydon, J., dissenting). Judge Lydon espoused the belief that "[s]ubstantial rights of third persons ought not to be made to depend on the caprice of the infant." *Id.* at 830-31, 276 N.Y.S. at 295 (Lydon, J., dissenting).

[63] The need for reform in the area of infant rescissionary power has been voiced in many quarters. *See, e.g.*, Edge, *supra* note 36, at 227 (study of modern contract law shows that protection of infants from "cunning adults" is, in reality, "misplaced zeal"); Mehler, *Infant Contractual Responsibility: A Time for Reappraisal and Realistic Adjustment?*, 11 U. KAN. L. REV. 361, 373 (1963) (today's young people have a higher level of maturity and no need for the "ancient timeworn cloak of protection"); Navin, *The Contracts of Minors Viewed From the Perspective of Fair Exchange*, 50 N.C.L. REV. 517, 518-19 (1972) (the resulting injustice of infant disaffirmance to the business community would be ameliorated if this policy were construed as a disability similar to mental incapacity); Note, *Infant Disaffirmance*, *supra* note 36, at 98 (disaffirmance is in contravention of a fundamental societal interest: the development of a responsible citizenry); Recent Decisions, *Contracts: Infant's Disaffirmance; Infant's Right to Void*, 52 MARQ. L. REV. 437, 442-43 (1969) (businessmen faced with doctrine of infant disaffirmance will simply terminate contractual relations with minors altogether). *See generally*, R. FARSON, BIRTHRIGHTS 166-69 (1974) ("protective legislation" relegates children to an inferior position in society); F. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 17-18 (1982) (children are more mature at a younger age in today's world).

[64] In determining the type of injury that would justify the avoidance of a minor's contractual responsibilities, it should be considered that the objective of section 51 is to "[pro-

tractual disability to circumvent valid business agreements. To be sure, such a solution would adequately safeguard the businessman's interests while guaranteeing minors the right to control their own exposure to commercial exploitation so that a child will not be left to the caprice of his guardian in the labyrinth of privacy law in New York.[65]

Bernard W. Hylan

COURT OF CLAIMS ACT

Ct. Cl. Act § 8: In the absence of a special relationship imposing a duty of care upon the municipality to a particular plaintiff, the

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tect] a person's feelings and right to be let alone." Bi-Rite Enters. v. Button Master, 555 F. Supp. 1188, 1198 (S.D.N.Y. 1983) (citations omitted); *see* N.Y. CIV. RIGHTS LAW § 51 (McKinney 1976). It is submitted that a celebrity such as Shields, who has affirmatively sought public recognition, would not have been able to demonstrate injury in the present situation. Thus, it is suggested that the right of disaffirmance would not have been available to her had a qualified right of disaffirmance been adopted by the Court. Indeed, in Shields v. Gross, 563 F. Supp. 1253 (S.D.N.Y. 1983), a case brought by the same plaintiff subsequent to the Court of Appeals' decision, Shields sought a preliminary injunction in federal court to restrain the defendant from publishing the same nude prints. *Id.* at 1253. In refusing to issue an injunction, Judge Leval held that "[p]laintiff's claim of harm is . . . undermined to a substantial extent by the development of her career projecting a sexually provocative image." *Id.* at 1257. The court also noted that the plaintiff's strategy of filing consecutive claims rather than concurrent suits was inequitable to the defendant who had already been restrained for over 2 years during the pendency of the state action. *Id.* at 1255.

[65] *See* Recent Decisions, *Civil Rights Law—Invasion of Privacy—Use of Photograph*—Murray v. New York Magazine Co., 35 ALB. L. REV. 790, 798 (1971) (describing the difficulties of separating privacy rights of the individual from the public's right to a free flow of information as a "quagmire"). *Compare* Bi-Rite Enters. v. Button Master, 555 F. Supp. 1188, 1198 (S.D.N.Y. 1983) (celebrity musicians garner no protection from section 51 since their "likenesses" are in the public domain) *and* Ann-Margret v. High Soc'y Magazine, Inc., 498 F. Supp. 401, 404-06 (S.D.N.Y. 1980) (famous actress cannot control faithful reproduction of scene from public performance) *with* Brinkley v. Casablancas, 80 App. Div. 2d 428, 440-42, 438 N.Y.S.2d 1004, 1012-13 (1st Dep't 1981) (poster photograph taken during cable television taping requires model's written consent for publication). The dearth of any logical development or systematic approach to the right of privacy in New York has been described as " 'still that of a haystack in a hurricane.' " *Brinkley*, 80 App. Div. 2d at 436, 438 N.Y.S.2d at 1010 (quoting Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481, 485 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956)). It is submitted that in the resulting morass that is contemporary privacy law in this state, the infant-plaintiff's heretofore unquestioned right of disaffirmance has been lost. *See generally* Huff, *Thinking Clearly About Privacy*, 55 WASH. L. REV. 777, 777-78 (1980) (analysis of lack of clarity in development of constitutional right of privacy); Comment, *Privacy Tort Law in New York: Some Existing Routes to Recovery*, 31 BUFFALO L. REV. 255, 256 (1982) (study of the confusion in New York privacy law).