The child's best interests ... or near enough?

A lawyer's perspective

Ferdinand Zito

The 'best interests of the child' is rhetoric often applied and to an obscure legal concept. Nevertheless, it remains one of the most important standards, if not the most important, to be applied when attempting to determine what might be the interests of children at law. But as might be the case with other supposedly fundamental principles, there is much ambiguity in the meaning and uncertainty in the application of this principle and the standard it presumes to impose. Not surprisingly, many questions remain unanswered. Firstly, what exactly is the paramount *status of the best interests standard? Secondly, in deciding the best interests of the child, does the ultimate responsibility lie with the judge or does it require some judicial deference to community values, as presumably expressed in the legislation? Lastly, does the standard, as it stands today, run the risk of being so general that its application can easily be distorted? Indeed, given the inherent difficulties in articulation and application of the standard, it might be unrealistic to expect mere legal provisions to ease social and emotional tensions that exist in the realm of child welfare today. As children themselves generally do not make applications to the court, their interests inevitably will be dependent on those of* other *parties, such as parents and the various professionals who assist them. As long as these principles are sought to be upheld in a system which is philosophically and practically adversarial, our ability to promote, maintain and protect the best interests of children will be inhibited. Is near enough good enough ... or is it just the* best *we can do?*

This is a difficult paper to write because the area of the law in which I am involved carries substantially greater and more emotional potential for conflict between the various practitioners than does perhaps any other area of the law.

Recently, I have been involved in a case which settled on the twelfth day after a second court ordered mediation. Thankfully the pressures that were brought to bear upon the parties, both strongly emotional and of course financial pressures, resulted in a resolution of the issues. It was not a case in the Family Court but it did involve parents and children, the parents well into their 80s and the son who was taking his parents to court in his early 60s. My interests professionally (and at times it got pretty personal!) were focussed on the welfare of my elderly clients.

I have also just completed a case in which the welfare of other elderly clients was an issue, strictly speaking in a commercial sense. In both of these instances, some consideration might have been given by the Court to the welfare of these elders.

Our topic today is 'The Standard of the Best Interests of the Child', which might be considered by some a more worthwhile project than the welfare of the elderly. These recent experiences have caused me to adopt a slightly more pragmatic approach and perhaps a more personal one – because to hold that in these situations we are wholly objective is to not acknowledge fully the nature of human beings.

When we speak of 'standards', we must consider 'varying' standards somewhere on a scale from ten down to one and, with various standards and their many applications, this range can be very broad. When we speak of 'best interest' or particularly 'best', we are necessarily speaking of an extreme, a superlative – the best and nothing less. We then speak of 'the child', and this description of the target for these standards and superlatives does not of itself include, but should so include, the child's parents, biological, adoptive, the child's siblings, half-siblings, siblings by adoption and the extended families that necessarily are involved both from the adoptive side and the relinquishing side.

We then find that other words are inserted in these definitions, words such as 'paramount', again invoking standards of excellence, 'paramount' being 'the one and only'.

Is any of this realistic?

These standards are applied daily in a variety of circumstances. In the Family Court the target is the children of married or defacto couples; in the Children's Court the children are often the victims of violence and abuse; in the Supreme and County Courts the children are, have been or will be the subject of adoption orders. As a lawyer, I must look at the Court as a forum of last resort, a forum which is resorted to when all else has failed, when the system has failed, when despite our best attempts, all of us as adoption practitioners to some extent have failed, and so these issues

are taken out of our care of control (although control is possibly an inappropriate word in this context).

There is much debate on these issues amongst academic lawyers. Professor Richard Chisholm, a Justice of the Family Court, has written extensively about the rights of the child. In an article titled '"The paramount consideration": Children's interests in family law', Chisholm argues that the principle of paramountcy has two versions, the strong view and the weak view (Chisholm 2002). Grammatically this is incongruous, as it is also in practice. In the 'strong' version, the principle of paramountcy requires the court to identify what orders will most likely promote the child's best interests and then to make those orders. In the 'weak' version, the paramountcy principle does not necessarily require the Court to make an order it considers best for the child without taking into consideration other factors.

In a response to Professor Chisholm, Patrick Parkinson asks whether judges are entitled to decide cases according to their own, often deeply held, views about what is good for children. In his judgement:

> The judicial role requires deference to community values as expressed in the enactments of parliament even when these differ from the judge's own views and sympathies (Parkinson 2007:1).

This passage serves to remind me that regardless of my own personal and professional views, ultimately I am not the judge, nor do I want to be!

A judge must determine each case on the basis of the evidence properly introduced and must apply the law to its circumstances. Of course a judge will be influenced by views and conceptions and understandings of what is good for children generally. So two different judges might well reach different decisions in a very similar set of circumstances.

Can we ever hope, or would we ever want, to codify to a set of rules the standards in relation to children's best interests, where we as adoption practitioners and the Courts might just tick the boxes and make a decision based on some kind of scoring system. As Chisholm said in another article:

> Reflecting on my own experience, when preparing to determine such cases, I would agonise over the various factors, sometimes write down lists of matters favouring each outcome, pace up and down, try to imagine the likeliest outcome of particular orders, go back over the evidence again and again, sometimes, even, write a draft judgment for each of the two outcomes and read them over to see which was more persuasive ... and at the end of all this I would arrive at a conclusion -- a belief, really -- that one outcome or the other was likely to be best for the child: and order accordingly (Chisholm 2007:17).

Chisholm also stated that best interests are treated as if they were facts, not values (or) predictions about the future based on alternative scenarios, and treated as if the predictions would inevitably come to pass (Chisholm 2004). This brings me to the 'target', or sometimes the 'victim', of these decisions as contemplated by the legislation – the child.

Are we, by focusing almost exclusively on the child, restricting or inhibiting the meaning and/or the impact of these principles so as to make them virtually impossible to apply? We have the word 'best', we have the word 'paramount', and then we refer to 'the child'. 'Best' might be amplified by 'best in the circumstances' and reference to 'the child' might be amplified to include all those others I mentioned before, such as parents, relinquishing parents, carers, siblings and all those related persons who will be affected by any decision relating to the child. Throw in the word 'paramount' and the task is made even more difficult, if not impossible.

Of course a judge will be influenced by views and conceptions and understandings of what is good for children generally. So two different judges might well reach different decisions in a very similar set of circumstances.

The principle of the best interests of the child is set out in the United Nation Convention on the Rights of the Child (CRC), as adopted in 1989 and ratified by Australia in 1990 (UNCRC 1990). It makes the best interests of the child 'a *primary* consideration' and sometimes paramount in actions and decisions concerning children. This fundamental statement of the principle also takes into consideration issues such as child protection and custody, continuing contact with one or both parents, adoption and parental decision making. This allows decision makers to balance the best interests of the child against equally weighty primary considerations of their own choosing, such as religious or economic considerations.

The Australian Human Rights Commission has published a very helpful 'Human Rights Brief' considering 'the best interests of the child' in the context of the UN Convention of the Rights of the Child (Australian Human Rights Commission 1999). It makes the point that the UNCRC establishes minimum standards but does not deny the existence or the applicability of higher standards such as the parmountcy consideration. 'Where Australian domestic law sets a higher standard it must not be diluted'. The brief provides the practitioner with a useful check list to apply in considering how the 'best interests of the child' may bear upon particular cases:

1. **Concerning a child?**
   Does the action or decision complained of affect a child or children (e.g. denial of Parenting Payment)?
2. **Whose actions?**
   a. If a child is affected, list the relevant actions and decisions and, for each, identify the decision-maker.
   b. Is the decision-maker covered by the CRC (e.g. Centrelink, police, education department, department of families, community services and indigenous affairs)?
3. **Best interests considered?**
   a. If the decision-maker is covered by the CRC, did it take the child's best interests into account?
   b. How were best interests defined? Were the child's views taken into account (if the child is capable of forming a view)? Were the parents' views taken into account?
   c. Were the child's best interests made a primary consideration or the paramount consideration as relevant?
   d. If you are unable to judge, consider how you might find out.

It makes it all sound so simple ... and we know that it is not ... and that it is never going to be!

I do not believe that we will ever be able to create a standard, a test, a rule of practice or of law that will be able definitively to establish what is or is not in the best interests of a child.

It is interesting to note in terms of the CRC's foregrounding of the child's 'views' that the 2006 amendments to the *Family Law Act* in this particular instance changed the list of factors to be considered by the Court (known as Section 658 F (2)); factors which used to be 'any wishes expressed by the children', to 'any views expressed by the children including the weight to be given to those views'.

The judges themselves often hedge their bets in a situation such as this. One might ask, 'If they can't make a decision one way or another, then why are they there?' Would we prefer that they err on one side or another rather than trying to obtain a balance?

Justice Kirby, in a 1999 decision which involved a relocation matter, provided support for the two views. On the one hand he stated,

> A touch stone for the ultimate decision must remain the welfare or best interests of the child and not, as such, the wishes and interests of the parents (Kirby 1999a).

This is an example of the 'strong view' identified above by Richard Chisholm. In other judgements, Justice Kirby noted that 'the "paramount" consideration is not the same as the "sole" or "only" consideration'(Kirby 1997) and that the 'consideration does not expel every other relevant interest from receiving its due weight' (Kirby 1999b). Should this be described as the 'weak view' or the proper view, or the balanced view?

Which standard should we apply? High, medium or low? Is there ever any situation which would have us seek to apply anything but the highest standard? I would argue that there is not. But perhaps we should not think of this standard as the highest, the paramount, the best, but rather as that which more properly, (judiciously) judicially, conscientiously may be applied to the particular circumstances of the case.

Chisholm also stated that there are inherent difficulties in the articulation of the test and there always will be, because we can't make it just a 'ticking of the boxes' and expect mere legal provisions to fix the problem. There is obvious merit in retaining the courts, but only as the venue of last resort.

Reaching that particular forum, we can seek to have the court:

- either to make whatever order it considers most likely to advance the best interests of the child,
- or to make whatever order is most appropriate in all the circumstances having regard primarily, but not solely, to the best interests of the child.

A couple of recent events struck me as relevant to these issues. Firstly there is the decision made in a case before the Victorian Civil and Administrative Tribunal, relating to two Ethiopian siblings in respect of whom the Department of Human Services had made a recommendation not approving the applicant as suitable to adopt. VCAT in reviewing the matter as from the beginning reversed that Department's decision, being persuaded that the Applicant was a fit and proper person to adopt. Part of the decision was made with particular reference to the consideration that 'in considering the welfare of the Ethiopian children (the Court was) mindful that the process of relinquishment and adoptability has not been completed in their county and there still may be barriers to their eventual adoption'.

The circumstances to some extent are unique, but here we have a case where the rules have not been followed, the boxes haven't been ticked overseas, and the Department rightly ticked all the (available) boxes. Comment was made that even though the principles of the Hague Convention (1993) were designed to ensure that wherever possible children should stay with their birth or extended family, the fact that there are other siblings here in Australia was considered more relevant in this case. The best interests of these two children were undoubtedly of primary consideration, though not necessarily the paramount

consideration. The Department had certainly not erred in coming to its conclusion, as the Applicant might not have been deemed 'suitable' according to their criteria. It would appear that the Tribunal saw it as most desirable to have these two children remain in Australia, and that it couched its decision in a manner that would facilitate this, applying the criteria which best suited that final outcome as opposed to reaching the final outcome by applying criteria that might otherwise have applied.

I believe that the child's best interests should always be a primary consideration and only in some circumstances paramount to all others, as a child's life necessarily involves many other people whose interests must also be considered.

The other situation which will undoubtedly take up a lot of our time in the very near future results from the passing into Legislation of the *Assisted Reproductive Treatment Act* 2008, which hopes to finally answer the question of parentage for children born via 'altruistic surrogacy arrangements'. The use of the word 'altruistic', though grammatically correct, may be problematic. For our purposes, the interesting issue is raised in Section 5 of the Act:

> The welfare and interests of persons born or to be born as a result of treatment procedures are paramount.

Now here's a situation where paramountcy of welfare and interest consideration might be appropriately applied. Here 'the person' whose interests are to be paramount has not yet been born, and a legal decision has to be made as to whether or not people should be allowed to 'create' that person (their own biological issue) and thereafter be the subject of a substitute parentage order. This can only happen if the surrogacy arrangement was 'commissioned' with the assistance of a Registered Assisted Reproductive Treatment Provider and that the surrogacy arrangement was approved by the Patient Review Panel ... or perhaps not, because an order might be applied for without the use of a Registered Assisted Reproductive Treatment Provider. It's all a little bit scary (very frightening).

(It is to be noted that the Substitute Parentage Order is not an Adoption Order but has the same effect).

I have benefited here from reading the notes made by a colleague who recently presented a paper on surrogacy in Australia. He spurred my interest in the subject, which is just as well because only last week I was consulted on a particularly delicate surrogacy issue in which one of the commissioning parties does not necessarily have a long life expectancy. Is this an altruistic family surrogacy?

I digress, or do I?

I am not a prophet of doom and gloom. I do not believe that we will ever be able to create a standard, a test, a rule of practice or of law that will be able definitively to establish what is or is not in the best interests of a child. I believe that the child's best interests should always be a primary consideration and only in some circumstances paramount to all others, as a child's life necessarily involves many other people whose interests must also be considered.

Let us ask ourselves, 'Do we just aim for near enough and hope that it is good enough, or do we continue to strive for the best we can do in the circumstances?' ■

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