Family Conflict and the Rights of the Child— Statutory Recognition— Policy and Practice

by

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In this the International Year of the Child the law relating to children's rights has come very much under scrutiny. I do not propose in this article to canvass the rights of the child under the Criminal Law but to examine the rights of the child in that area of the civil law which in these days of increasing marital breakdown, (at a rate from between 1 in 7 to 1 in 5 of every marriage in Australia) is most likely to affect him, namely under the Family Law Act.

I then want to postulate as to how those rights can be extended and improved both by statutory recognition as well as policy administration.

The most recently available statistics show that in 1977 in Australia 57,875 children were affected by divorce. This compares favourably with the figure of about 80,000 in the year 1976, the first year of operation of the Family Law Act which dealt with a huge accumulation of divorces.

The introduction of the Family Law Act in that year ushered in a new era for the civil rights of children of Australia in so far as custody and access disputes are concerned. Section 64(1)(b) for example, gives the child who has attained the age of 14 years the right to determine his custodian as well as the visiting right of his non-custodial parent, a right which can be overridden by the Court only if the Court is satisfied that there are special circumstances which warrant it in so doing.

Section 65 gives the court of its own motion, or on the application of a child, or of an organisation concerned with the welfare of children, or of any other person for that matter, the right to order independent legal representation for the child which thereby enables the voice of the child to be heard as an individual in its own right, not through the mouths of its warring parents. This right of a child to independent representation has been a most valuable step forward and has been very frequently used by the Family Court. Gradually guidelines for "child advocacy", as it may most conveniently be called, have been laid down in such cases as **Pailas and Pailas** (1976) FLC 90-083, **Demetriou and Demetriou** (1976) FLC 90-102, and **Lyons and Boseley** (1978) FLC 90-423. One interesting aspect to be noted is, that although one or both parents may ask the Court to appoint independent representation there are few instances, so far as I am aware, of "an organization concerned with the welfare of children" so applying. There is no technical reason either why a Court Counsellor cannot apply under Section 85 although there are good practical reasons why he should not and in most cases need not. Firstly, to apply under Section 85 he would need to apply under Section 92 for leave to intervene, as, apart from applications under Section 92, only parties may apply under the Act. Once he has been granted leave to intervene, he has of course the attendant rights and responsibilities of a party. He is an officer of the Court and his role is that of Counsellor and reporter (in the sense of preparing Family Reports to aid the Court in the adjudication of custody and access disputes) not that of litigant. Once he becomes a party to a Court action his usefulness as a Court Counsellor is nullified. In most cases however, there is no need for this. If a Counsellor recommends in a Family Report to the Court that separate representation be appointed for the child, the Court is most likely to give serious consideration to that recommendation and order the appointment on its own motion.

The right of the child to be heard is further enhanced by the provisions of Regulation 116 of the Family Law Act which enables a Judge or Magistrate to interview in his Chambers or elsewhere any child who is the subject of access or custody for the proceedings.

Evidence of anything said at that interview is not admissible in any court. There is one very proper exception to that right, namely that under Sub-Section (4) where a child is separately represented he may not be interviewed unless his counsel or solicitor consents.

My own view is that as the law stands at present, the appointment of a separate representative is the most satisfactory way to protect a child's rights in the Family Court — because that independent representative has the opportunity of looking at the child's needs in depth and communicating those needs to the Court. At the same time he has the somewhat unusual distinction of being a counsel who is not bound, quite properly in my view, by the instructions of his client, although at all times he must act as the champion of the child in the Court proceedings. It is vital that the child's voice should be heard by the Court but it is quite a different matter to say that the Court should accede to every wish of the child. Whether the **wishes** of a child should be acceded to is a matter to be decided in the light of the whole of the evidence which will in most cases involve the Judge in a careful assessment of characters and personalities, keeping in mind the requirement of the Act that the welfare of the child is the paramount consideration.

As I have already said, Section 65 gives a child the right to apply for independent representation. This right however, is not easy of implementation unless the child knows something of this right and how to go about it. As in 99.9% of cases this right will only concern children under the age of 14 years (if Section 64 of the Act remains as it is), there ought to be some procedure which any child can easily take; some authority to whom the child can appeal to take steps on its behalf if all the other avenues have been closed.

Take for example a case where the parents are bitterly hostile towards each other, using the child simply as a weapon against each other, not really caring about its welfare. Proceedings are commenced in the Family Court for custody. The child may be interviewed by a Court Counsellor and a Family Report submitted to the Court by that Counsellor. Then there may be an incident of child abuse by one or both parents. The child may know only the Court Counsellor as a person to whom to turn and may communicate the incident to him. The Court Counsellor may feel very reluctant in the circumstances to communicate with either parent and yet cannot communicate this information privately to the Judge. As the majority of the Full Court of the Family Court said in **Ahmad & Ahmad** (1979) FLC 78,297:-

> "There should not be a situation in which it would appear that a communication has been made (by a Court Counsellor) to a Judge in the absence of the parties."

So who then is the champion of the child?

This is where there is a deficiency in the Act — and indeed a deficiency in our social system. There ought to be in every State a public authority whose existence is well publicised — a Children's Ombudsman if you like, who can act as the champion of a child when the occasion requires — someone who can be approached by the Court Counsellor or the child itself, who has the statutory authority to go straight to the Court and without the necessity to apply for leave to intervene, can apply for separate representation for the child. A Children's Ombudsman could of course fill a great need in other areas of child welfare as well, but I limit these remarks to the importance of the special role he could play under the Family Law Act.

A child has the right too, not to have his settled existence disturbed by the intrusion of a non-custodial parent who, during a considerable period of time has failed to exercise rights of access but then decides to resurrect them. These applications for access (sometimes accompanying an application for custody as an alternative) are not infrequent in the Courts, and the unexpected reappearance of a virtually forgotten parent can have a disturbing effect upon a child, particularly on those younger children whose sense of time can be quite different from that say, of early teenagers. It is suggested therefore that the Family Law Act should provide that where a non-custodial parent has voluntarily refrained from exercising access to a child for a period of not less than 2 years, that person should not be able to institute proceedings for access or custody without leave of the Court. After all Section 44(3) provides that a party shall not institute proceedings for maintenance or settlement of property after the lapse of one year from the date of the decree nisi without leave of the Court, so why should not a similar limitation be imposed on a neglectful non-custodial parent to prevent disturbance to a child who has adjusted to a new life. The onus would then be thrown on the shoulders of the non-custodial parent to prove to the Court that it would be in the best interests of the child for that party to appear once again in the child's life. The trauma of prospective access by a comparative stranger would not be entirely removed, but at least the preliminary hearing should help to screen out those applications which are spurious and potentially damaging to the child, from those where the introduction of a newly motivated parent will be beneficial.

This is not a proposal which easily rides sidesaddle with the concept of the proprietorial rights of parents, but proprietorial rights of parents have for too long excessively influenced our thinking. It is understandable that parents see their children in the sense of property — it is part of the possessory nature of mankind — it is also part of that egoism sometimes conscious

and sometimes not so, to leave some small part of ourselves for posterity. In this the Year of the Child it is time for us to be prepared to diminish those proprietorial rights and to look at children as having importance in their own right. I believe we are advancing steadily along this road but we still have further to go. For example, I will look forward to the day when legislation throughout Australia provides that a child, who has been so abused by its parents that an adequate parenting bond is incapable of being formed, can have its parental ties utterly severed by order of the Court so as to enable it to be placed out for adoption with persons who can be its loving psychological parents. Every child has that right, too, and it is one which is easy of legislative formulation.

There are, however, other rights which are not so easily defined by statute and which, if so defined, may lead to rigidity in interpretation or be distorted in their application. Too close a definition of every right of a child is unwise. Parliamentary draftsmen are not ordinarily endowed with divine prescience, (to paraphrase Lord Denning). Not every circumstance can be foreseen.

The child for example has a right not to express any view and not to have to choose between parents. To have to do so can be very traumatic to children in particular circumstances, and in any event it is foolish to expect children (even those over the age of 14 years) to be sufficiently mature to evaluate their situation and their parents in an objective and wise manner. This right — not to choose, not to make decisions — is not one however that I would like to see expressed in the Family Law Act. It could impose inhibitions on the judiciary, court counsellors, and the profession alike, where inhibitions in some circumstances are quite unnecessary. Nevertheless, it is a right which needs to be kept very much in mind. The Court has already pointed the way, e.g. the Full Court of the Family Court in **Lyons and Boseley** (supra) said at 77,136 of its majority judgment.

> "In putting the child's wishes to the Court, two factors should be kept in mind: first, that the child should remain free to abstain from expressing any view; and secondly (relevant to evidence given by a party, or a Counsellor about the child's wishes being capable of testing by cross-examination.)"

Arrangements to have the child interviewed in Chambers by a Judge are usually made without consulting the child. I am of the view that a child has the right to refuse an interview with the Judge in Chambers even if that course is thought desirable by the parties. But I would not like to see that right incorporated in the Act for the same reason as I have set out in relation to the child's right not to choose. If the child takes that stance however, counsel should not so compel the child but should bring the attention of the Judge to the child's attitude. It might then be appropriate for an independent representative to be appointed for the child — someone who can gain the trust and the confidence of the child and fight for that child's best interests.

Equally the child should have the right not to be interviewed by numbers of people who are trying to ascertain his wishes. Once again this is a right which is not capable of easy translation into statute but is a matter of sensitive practice by solicitors and counsel. The Family Court has also expressed concern in this area. For example in the case of **Harris and Harris** (1977) FLC 90-276 at 76,474 Fogarty J. said:-

> " . . . the children have been so subjected to psychological and psychiatric assessments . . . It is nowhere suggested that the children have any psychological or other similar disorder which require them to be examined for evidence to be given in this Court. In fact they were seen by two psychiatrists, two psychologists and one social worker on well over 20 occasions per child, many of those occasions lasting for several hours, in addition to seeing the Welfare Officer several times. They were put through a variety of intellectual and behavioural tests all of which demonstrated that despite all of these testings the children were decidedly normal. It appeared that the children protested at continually being subjected to these tests and I must say that I protest on their behalf as well."

In the case of **LePlaistrier and LePlaistrier** (M4332 of 1976 — unreported-delivered 15 December 1976) Frederico J. criticised a psychologist who at the request of the father interviewed two children on 12 or more occasions during a period of less than 6 months despite the emotional distress caused to the children by the interviews.

Similar concern was expressed by the Full Court of the Supreme Court of New South Wales in **Epperson v Dampney** 1976 FLC 90-061.

Summary

Considerable advances have been made in the recognition of children's rights within the framework of the Family Law Act. It is suggested with respect that several further legislative steps can be taken to extend those rights, and doubtless there are many other rights which others may consider worthy of recognition by amendment. There are other rights however, which, as pointed out, are not easy to express in legislative terms, but really rely on the sensitivity of the Court, the legal profession and experts, including social workers, working within the framework of that law. This article is intended to provoke discussion in both areas — that of improved statutory recognition and improved policy practice.