Custody and Access:
are children's interests being protected?

by J. Neville Turner

All who work with broken families know that disputes as to custody and access of children are the most difficult of all cases to resolve and often create great bitterness. Yet the law relating to them is exceedingly simple. It can be expressed in nine words: "The welfare of the child is the paramount consideration."[1]

Despite its apparent simplicity though, the law and practices relating to custody and access are undergoing a great deal of heart-searching. If legal periodical literature of other countries is an accurate reflection of concern, it seems that very radical re-thinking is occurring abroad. Some of this is likely to rub off on this country. For, whether we like it or not, the world is getting smaller and the welfare of children is becoming more and more an international concern. The ratification by Australia of the UN Convention on the Rights of the Child is a timely reminder of this. The incidence of child abduction, kidnapping and inter-country marriages, and of course, inter-country adoption, surely testifies to the fact that we should now be looking at the care and well-being of children as a global issue.

The National Children's Bureau of Australia clearly will have a role to play in this re-thinking. One of the initiatives that should be carefully studied is the UK Children Act 1989, which has virtually established a Children's Charter. The merit of this legislation, is that it is applicable to all types of children's issues. Such a development in this country has been blighted by the fragmentation caused by the constitutional division of power. A most remarkable development in England is the abolition of the terms "custody" and "access" and their replacement by a series of flexible orders. This will be considered later.

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CUSTODY AND ACCESS IN AUSTRALIA

It is salutary to reflect that, when the *Family Law Act* was passed in 1975, it contained one hundred and twenty three sections, and was written in comparatively simple English. It has since been amended some nineteen times, and is over twice its original length. It contains a host of obscure sub-sections, such as s.667B(10). Regrettably, the language of the statute is reading more and more like legalese. Perhaps, sadly, this complexity is paralleled by a retraction from the original concept of the Family Court as a helping, informal tribunal. The opening of the court and the re-introduction of wigs and gowns, and the recent introduction of formal pleadings, suggest that the wonderful experiment of a truly helping court has been perceived as a failure, and that informality will ultimately be abandoned. It is a pity.

THE LAW OF CUSTODY

The law is, on the face of it, straightforward. In any guardianship, custody or access case, the judge must bear in mind two principles:-

a) The welfare of the child is the paramount consideration;
b) The positions of the father and mother are equal.[2]

As for the first, there has been a good deal of sterile academic argument as to whether "first" consideration and "paramount" consideration are somehow different,[3] and whether either term leaves room for the other consideration to be taken into account. Suffice it to say that, in my opinion, the Family Court has interpreted the mandate to mean that the welfare of the child is the sole consideration.[4] True, other factors may be relevant to be considered, but only insofar as they bear on the welfare of the child. This is clear from the cases on conduct of the parties[5]. It used to be the law that a parent who had been deserted by the other had some sort of greater claim in justice to the children. It was monstrous, so it was said, where the wife left the husband and took the children with her, that the father should be dealt a double injustice - losing his wife and his children.[6]

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But the case of *Schenk and Schenk*[7] clearly states that justice as between parents must be subordinated to the interest of the child. In that case a Norwegian mother, whose Australian husband had brought the children to Australia, was deprived of custody.

A father who has been left by the mother may be beyond reproach in a personal sense, but he may be remote or insensitive towards the child. He may be unable to cope emotionally with his loss, which will make him a less appropriate custodian of his children. On the other hand, a so-called "guilty" mother may be sensitive, kindly and affectionate and able to adapt to changed family circumstances. In these circumstances, justice will be denied the innocent party, if he or she is seen to be the less appropriate custodian. On the other hand, leaving of the home can be a factor, if it is tantamount to abandonment of the child. But this is

not necessarily so. In *Chandler and Chandler*[8] the wife left the home and her children, but Nygh J. said that this did not necessarily mean that she was uncaring. Indeed, there is evidence that suggests that up to 50% of children do in fact leave the home when a marriage breaks up.[9]

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Each custody case depends on its own facts. In a sense, therefore, there are no precedents in this branch of law. Each case is a fresh case, and yet it is worth considering previous cases. Lawyers love to argue from authority, and the cases do help a practitioner in arguing on these points at least:-

1. The orders that a court can make
2. The relationship of a court of first instance and the appellate court
3. The limits of the discretion of the court.

In other words, legal practitioners may derive benefit from previous cases. They may be able to make use of fashionable theories, to assess the importance that a particular judge may attach to certain factors.

APPEALS

Essentially, an appeal in a custody case can only succeed if there is fundamental error in the exercise of the trial judge's discretion. It is not enough for the appellate court to have a different view.[10] The original decision can be overturned only if the judge made a decision on insufficient facts or incorrect facts. A recent English case provides an example of the latter. A re-trial was ordered where a father had been awarded custody despite having a drink problem and a criminal record.[11]

The appellate court is very reluctant to allow new evidence to be introduced. This, on the surface, appears to be giving judges a complete *carte blanche*. It is this high degree of discretion in Family Law, which has been much criticized - especially by Continental European jurists, who are horrified by the apparent lack of principle in our Family Law. It should be remembered that in Europe, "judgeship" is a professional career. Judges are civil servants. Here, judges are especially chosen for their experience in Family Law and their humanity and wisdom.[12] There is no satisfactory alternative to the Australian position, unless perhaps the position observed in the Malaysian juvenile court is adopted - ie a judge sitting with two non-legal observers.[13]

The criticism of the great width of discretion given to judges led to an apparent change in custody law in 1983. The *Family Law Act* was amended to include a list of factors to be taken into account (s.64[1] (bb)).[14]

In the opinion of this writer, the inclusion of these factors has made not an iota of difference, for the law still does not specify the amount of importance to be paid to each. What is more, there was added a "catch-all" factor - any other circumstance which in the opinion of the court is of significance.

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And yet, despite the oft-repeated statement that there are no "rules of thumb,"[15] judges simply do not make up their minds arbitrarily. They do want to be provided with pegs on which to hang their decisions! In practice, it is necessary for practitioners to be able to produce substantial arguments based on factors that have been known to be significant in previous cases - and not necessarily confined to the list in s.64[1] (bb). May I suggest some of these:-

1. Siblings ought to stay together, if possible, for they particularly need each other's society and support when their parents' marriage has broken down. It is seen as preferable to keep the family together as a unit.[16]

2. The parent with existing care and control is likely to be in a strong position. The courts are reluctant to disturb the status quo - despite the Full Court's edict that a satisfactory status quo has no special significance over other matters.[17] But of course, it depends on the quality of the existing arrangement.[18] Regrettably, this rule prejudices the parent who does not have custody when the proceedings are delayed or long drawn out, and sometimes interim custody awards may assume great significance.[19] It is disturbing that interim custody awards are often made in Magistrates' Courts.[20]

3. A small child needs a parent who is for most of the time available. This preference usually works in favour of the mother because the father is more likely to be in full-time employment. In the case of the pre-school child, it seems that the Court will favour a parent who is prepared to stay at home all day. In the case of a primary school child, this is not so important a factor, provided that the child, on coming home from school, finds a parent at home.

Thus, where there are small children, a father will stand less chance of obtaining custody if he does not offer a satisfactory "mother-substitute" or is not prepared to assume most of the day to day care himself, and this despite the High Court's condemnation of the "mother-preferred" rule.[21]

4. The wishes of the child may be important.[22] There is a statutory precept requiring the judge to take into account the wishes of the child - the weight of importance depending on age and maturity.[23] Judges differ in their attitude to the desirability of obtaining the child's wishes personally. A few will do so in almost every case, but the majority consider that it is odious to require a child to express a preference for one parent over other. Court Counsellors have noted the extra burden placed on a child who is forced to take responsibility for choosing to reject a loved parent and this fact is undoubtedly appreciated by most judges.

There have been a number of cases on how a judge should ascertain the wishes of the child. In *Reynolds v. Reynolds*[24] the High Court said that it was not desirable to receive evidence

from third parties. In *Ahmad and Ahmad*[25] the Full Court of the Family Court deplored the practice of having children give evidence themselves. Even private interviews by a judge have been condemned as dangerous.[26] Quite the most satisfactory way of producing such evidence is by a welfare report, but this puts an onus on the welfare officer not to accept the wishes of the child superficially.[27] The duty of the welfare officer is to probe whether the child is really expressing a bona fide wish or has been seduced or even coached by one of the parties.

The weight attached to the wish of the child depends, of course, on his or her age and maturity and, since *Gillick's* case,[28] there is no magic in a particular age. Indeed, there is a recent case where an appeal was allowed because the judge had failed to ascertain the wishes of children aged between four and eight.[29]

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Sometimes an expressed wish will not be acted upon. There is always the danger that the child will express a preference for the more colourful, not necessarily the more responsible, parent, as occurred in *Nicholson and Crans.*[30]

Sometimes, the wish of the child conflicts with another "rule of thumb" as in *Brennan* (No.2)[31] where the wife was awarded custody of the two children, despite the wish of the elder to be with the husband.

5. The performance of a parent in Court may have a telling effect. The parent who makes an hysterical or abusive scene in court should not be surprised if the judge forms an unfavourable impression of his or her emotional stability. Likewise, a parent who threatens to be unco-operative on matters such as schooling or access is likely to make an unfavourable impression. In *Mills and Mills*[32] the husband's smear tactics, in making unsubstantiated innuendos of lesbianism, were condemned.

6. It is usually in the interest of a child to be with a parent or parents, rather than strangers,[33] but other relatives may be awarded custody. It is possible for a grandparent or even a sister to apply for custody or access, if he or she brings the matter before the court. This preference for the blood tie has been confirmed in *Allen and Allen.*[34]

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7. Economic factors do not play a particularly large role, provided that the child has a roof and a bed, food and clothes. A socio-economic status is not particularly important provided that moral and psychological factors favour the less well-off parent as a caretaker.

8. Housing may be a crucial factor in cases where the accommodation by one parent may expose the child to risk of some sort or another. Thus, if one parent is the licensee of a public house, this will count against him or her, unless the living accommodation is separate from the drinking rooms.[35]

9. Relationships with other adults - such as step-parents, de facto spouses and their children - are important.[36]

10. Parents who are psychologically dependent on their children are less favoured than those who are capable of discerning the child's needs as separate from their own.

Putting the above "principles" into practice is a difficult and delicate task, especially where some may appear to favour one parent, and others favour the other parent. There is no order of priority. Rather, all these considerations are taken into account.

THE LAWYER'S ROLE

What is the lawyer's role in custody issues? The first problem is to determine whether he is a counsellor or an advocate. It is not easy to give a categorical answer. He or she is under a legal duty to assist conciliation,[37] and he or she is, as any other helping professional, under a moral duty at least, to facilitate harmonious co-operation and communication between the spouses.

To this extent, he or she is a counsellor - and must see himself or herself as part of a team working towards the future well-being of a child. It is therefore imperative for a lawyer in this area to be cognizant of the role and respectful of the aims and values of other helping professionals. Co-operation and understanding of other disciplines is absolutely essential.[38]

If, however, all attempts at conciliation fail, then he takes over the role of an advocate. It is well established that disputed custody cases are adversary, not inquisitorial, in character[39]. This, however, does not mean that his role is aggressively to demean or disparage the other party. As Watson J. put it in one case,[40] each parent's self-respect should be unviolated. The lawyer should stress the positive side of his client's case - the client's profession, health, accommodation, education and the availability of schools and other local facilities. A male applicant has a special difficulty. He must show that he has adequate capacity to look after the child's health and food needs.

Religious and moral factors could be important, and while there is avowedly no preference for one religion, there is no doubt that extreme religions are highly disfavoured[41]. A recent attempt by a member of the Exclusive Brethren to have this distaste for the dictates of that religion declared void under s.116 of the Constitution (which prohibits religious discrimination) failed.[42] On the other hand, some judges definitely favour a religious upbringing over a non-religious environment.

ALL PARENTS ARE EQUAL.....BUT SOME ARE MORE EQUAL THAN OTHERS.....

ACCESS

One of the most pleasing developments in Family Law in the past few years has been the increased attention given to access. Originally, access was seen as a right of the non-custodial parent - a sort of automatic consolation prize. Then it became to be seen as the right of a child, but very rarely indeed was access denied. The radical view of Goldstein, Freud & Solnit, in their highly influential book, *Beyond the Best Interests of the Child*,[43] that access was fundamentally detrimental to a child's interest, and disruptive of the custodian's position, never caught on in this country. Nevertheless, access was most often seen as of secondary importance - and usually granted after cursory consideration of the merits. Often courts were content to make an order of "reasonable access", leaving the parties to work out their own arrangements.

A recent outstanding book by Jill F. Burrett, of the Counselling Service of the Family Court of Australia in Sydney,[44] has, I think, brought to the attention of the helping professions the subtle, delicate problems and issues involved in access decisions. The Family Law Council's Report on the same subject[45] is also highly commendable. Yet, in the view of the writer, these reports have not yet been adequately translated into practice. Too often, automatic orders are made.

The advantages of access seem to me to be as follows:-

1. It provides a continuity of attachment.
2. It provides for the retention of genetic identity.
3. It may provide a balanced influence of both sexes.
4. There may be some material advantages.
5. It provides respite for the custodian.

The main disadvantages are the disruption of the child's life, the possibility of divided loyalties, the possible trauma at surrendering the child, and in some cases, undue restrictions on the custodian's movements, especially if he or she wishes to live in another State or country.

There is, however, no doubt that Australian courts regard access by the non-custodial parent (if married) as *prima facie* desirable.[46] But in some cases it has been denied - for example, in *Starling v. Starling*,[47] a father left the mother while she was pregnant. He sought access some months after the child was born. The court refused the order on the ground that it would not be of benefit to the child.

It has been held that the non-custodial parent has no right of access even though the custodian agrees to it.[48] The true principle is that there is a generally accepted perception that it is good for the child - but it is not a question of contact for contact's sake.[49] Access is not quite so dependent on economic circumstances, but, on the whole, the factors relevant to custody are equally important.

If there is now a tendency to grant defined access, it still tends to be characterized by certain formulae - eg

- each second weekend from 9am (Sat) to 6pm (Sun)
- half of the summer school holidays
- Christmas each alternate year
- an alternate winter holiday.

Whether these orders are always in the best interest of the child is questionable. Of course, the custodian should do all in his or her power to facilitate smooth access arrangements. In one case the custodian was told that she had a duty to deliver the child dressed and in a reasonable emotional state.[50]

As with custody, the wishes of the child are important. But it has been held that it is not necessarily in the best interest of the child to deny access even in accordance with the child's wishes.[51] It is difficult, however, to see how it can be in a child's interest to force access on an unwilling child. Access may, however be denied, properly in this writer's view, where the non-custodian is residing in an unsuitable place, such as a prison.[52] On the whole, even when there are dangers, courts have preferred to grant limited or conditional access rather than to refuse it altogether. But an access order was discharged when the husband had refused to return the child on occasions.[53] Difficulties arise where there are suggestions of child or sexual abuse. While it is difficult, if not impossible, to prove sexual abuse in the criminal court, the Full Court of the Family Court has held that such a conviction is not necessary for the denial of access. It is sufficient if there is, on the balance of probabilities, a serious risk of child abuse. Access was suspended in two such recent cases.[54] In one case, it was held that access should be refused where the child had nightmares just prior to access.[55]

There seems to be evidence that access orders are often flouted and, perhaps more tragically, fall into disuse. It seems to be very sad that a hard-won access order can, after a few months, prove so irksome to the non-custodial parent that it simply lapses, but it seems to happen. Perhaps, however, non-custodial fathers will be more adamant about winning and maintaining access as a result of the Child Support Scheme. The courts have repeatedly said that the duty of maintenance and the so-called right of access are matters for independent consideration.[56] But, human nature being what it is, fathers

who have been denied access have often refused to pay maintenance – and mothers who have not received maintenance have, conversely, denied fathers access.

There are two recent developments that perhaps will militate against this attitude.

1. Fathers will henceforth be unable to avoid maintenance responsibilities, and will, as a corollary, seek compliance with access.
2. On the other hand, the new *Family Law Amendment Bill* 1989 has introduced more severe sanctions against abuse of access orders – including, as a last resort, imprisonment. Perhaps this will give some peace of mind to custodian mothers who fear for the abduction of their children during access.

An intriguing development in some countries has been the appreciation of different types of access. More imaginative use of these types of orders should be made. The *Family Law Act* also permits the courts to grant access to third parties.[57] This, I believe, should be used to ensure that grandparents, and perhaps other members of the extended family, maintain contact with the child. It is also worth emphasizing that the court has power to make an order of supervised access.[58] Such orders are, seemingly, unpopular – probably because welfare officers are too busy making reports to spend time at weekends observing access in action. Yet, in the writer's view, access is so fraught with potential difficulties that it is dangerous in many cases to allow it to be unsupervised. One imaginative suggestion involves the establishment of access centres.[59]

REFORM OF CUSTODY AND ACCESS

The above illustrates that the range of orders in the Family Court is sufficiently flexible to enable the interest of each child to be catered for. Yet, there is a long way to go before provision for the children's interests are satisfactorily provided.

First, it must be readily apparent that the law in Australia relating to children is hopelessly fragmented. While issues of guardianship, custody and access of children of divorced couples vest almost exclusively in the Family Court, there is a great deal of family law that remains the province of the States. To some extent, constitutional problems of demarcation were obviated from the start in Western Australia, which had the good sense to establish a Family Court with jurisdiction over both Federal and State matters. But in the rest of the country, confusion prevails. True, the recent reference of powers and the cross-vesting legislation has allowed the Family Court a greater jurisdiction, with the chance of greater uniformity. But it has resulted in a maze of complexity, with three different types of children within the jurisdiction of the Family Court – children of the marriage, children of the family, and children in Western Australia and Queensland. It is still not readily clear whether the Family Court has the wardship jurisdiction traditionally exercised by State Supreme Courts as *parens patriae* – a jurisdiction which has assumed a high importance in England, and which offers great potential in this country too. Children in care are, for the most part, exempt from the jurisdiction of the Family Court of Australia.[60] and the position of ex-nuptial children is far from clear. While a jurisdiction over them is vested in the Family Court of Australia, it is not clear whether the same principles should apply as those which are appropriate to children born within marriage.

Does a so-called putative father of an ex-nuptial child have the same rights to custody and access as if he were the father of a legitimate child? The Status of Children Acts of the States have not been repealed. They are still applicable, even if a case is brought in a federal court. These Acts, while purporting to equalize the rights of all children, do not do so uniformly.[61] After all, if access is the "right" of a child, then surely every ex-nuptial child should have the same right of access to his unmarried father. But in practice, the courts do not grant it. Nor do they automatically grant the father of an ex-nuptial child the right to veto an adoption. Should they? Should the rapist be in the same legal position as the de facto husband of fifteen years' standing?

The fragmentation is even more apparent in matters of child welfare law. It is usual for the Family Court, in custody matters, to rely on a precept of non-splitting of children.[62] Yet Children's Courts regularly split children of parents who neglect them.[63] On the other hand, in most States now, there is regular review of State wardship. In Victoria and South Australia, the situation of children in care is reviewed annually. No such safeguard against inappropriate placement occurs in custody cases. Should there be an annual review of custody and access orders?

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The law is not clear on whether custody orders should be perceived as long-term or short-term solutions. On the one hand, a custody order is never final,[64] it may always be varied. In *Archibald and Archibald*,[65] a limited duration order was made, where wife's future was uncertain. On the other hand, some courts have said that they prefer to make an order which will give the child long-term stability. They do not want parents constantly returning to litigate. A clear break is desirable. Indeed, the *Family Law Act* enjoins the court to make an order that is least likely to lead to the institution of further proceedings.[66]

The time seems to be ripe to undertake a thorough investigation of children's law, with a view to legislating a Children's Charter applicable in all courts dealing with children's issues. This has been done in England, largely as a result of a Law Commission Report[67] which coincided with the rather timely child abuse sensation in the north-eastern town of Cleveland. The report of Mrs. Justice Butler-Sloss[68] that followed,

roused the conscience of the English nation. Hence, it was opportune for the enactment of the new, revolutionary Children Act.[69]

The writer suggests that the ratification by Australia of the UN Convention on the Rights of the Child presents the opportunity for the same process in Australia. Before looking at the English reforms, however, consideration should be given to a few areas where, in this writer's opinion, the law has been making strides in this country.

First there is a need to clarify the terms, "guardianship" and "custody" in the *Family Law Act* 1983,[70] "Guardianship" refers to the bundle of rights - or rather responsibilities - incumbent on both parents of a child born in marriage. "Custody" refers to day-to-day control, and the decisions involved. Accordingly, all parents of legitimate children are joint guardians and custodians of their children, unless they are deprived by a court. Now this seems clearly to mean that the usual custody order, vesting custody in one parent with access in the other, does not terminate the guardianship of the non-custodian. Therefore he or she still retains the right to make long-term decisions.

Unfortunately, despite many attempts by jurists and others to specify what are guardianship rights and responsibilities, there is no statutory definition. The demarcation is unclear. What it does seem in practice to mean is that a parent with custody does not have the right to change a child's surname, and this is abundantly borne out by court decisions.[71] On the other hand, the custodian will probably have the right/responsibility to decide whether a child should go on a particular excursion.

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The dividing line is unclear. However, an issue of greater importance has arisen in the English Courts - whether the guardian of a child has the right to consent to a serious medical treatment of a child of under eighteen years (or even under sixteen). In *Gillick's* case,[72] the House of Lords, by a majority, held that a medical practitioner, with the consent of a fifteen-year-old girl, could provide her with contraceptive devices, despite the objection of her parents. The wider issue of the House of Lords decision (see especially Lord Scarman's judgment) is that a custody order is a dwindling right which becomes more and more attenuated as the child gets older. It is a flexible concept. This important case gives credence to a "mature minor" conception, which, while perhaps creating difficulty of classification in individual instances, is certainly strong ammunition for the affirmation of the appreciation of a child as an individual human being, rather than a clone of its parents!

Yet in Australia recently, several cases have denied an intellectually handicapped young woman (of fifteen or so) the right to prevent compulsory sterilization, but rather have acceded to the parents' requests.[73] But these cases can perhaps be reconciled on the basis that it is the court which is the final arbiter of the child's welfare - and in the sterilization cases, the court perceived sterilization to be in the best interest of the girls. (That the parents happened to agree was mere coincidence!) It should be observed that now a child, and any person with an interest in the child, including foster-parents and indeed a welfare organization, has a right under the *Family Law Act* (s.63(1)) to institute independent actions for custody/access.[74] Once again, this suggests that there is a strong need for the establishment of organizations to be available to advise young persons, and those who care for them, about their independent rights.[75]

The terminological differences between Australia and the USA may perhaps explain why "joint custody" orders are not popular here. More and more, joint custody is being ordered in American jurisdictions, and indeed in England, as an alternative to custody/access orders. But it must be remembered that in the USA, a joint custody order may really mean a sharing of long-term responsibilities. Nevertheless, some query must now be made about the conventional wisdom about the sharing of custody (as well as guardianship) - ie to dividing custody between parents. Is it desirable to allocate custody (ie physical care and control) say six months of the year to the mother, six months to the father? The Australian courts have been very reluctant to do this, even when the ex-husband and wife live close to each other. But they have the power to divide both temporarily[76] or successively.[77]

Longitudinal research into this, and other aspects of the custody awards, is urgently required to assist in deciding whether joint custody really works.

EFFECT OF DIVORCE ON CHILDREN

The research on effects of divorce on children in other countries seems to suggest that its detrimental effects have been underestimated. There are differing views on this - but the research of Wallerstein & Kelly in the USA[78] and Ann Mitchell in England[79] suggests that a divorce has different effects on children of different ages. If the child is under six months, the effect is negligible. From six months to five years, it can affect the care and nurture of a child. From five to eleven years the effect can be dramatic - especially from about nine onwards. If parents split, the child is pitched into an adolescent mode of functioning. An exterior calm can belie the child's emotional distress. Early adolescents, on the other hand, tend to be scornful. And sarcasm is the hallmark of later adolescents, who tend to slip back into early adolescent behaviour patterns.

It is this almost universal distress that, in the view of the writer, obliges the State to intervene in the lives of

children whose parents divorce. The provisions of the *Family Law Act*, requiring a judge to approve the arrangements for children,[80] still do not guarantee more than a cursory inspection of the parents' arrangements. Indeed, the new provisions for child agreements[81] may tend again to suggest that, provided the parents themselves can come to some reasonable agreement, the courts will do little to intervene. The writer challenges this view. These arrangements should be stringently policed, and welfare officers should look very carefully into them. Should the arrangements be annually scrutinized?

This whole area challenges the notion of parental authority. Some critics see the role of welfare officers as potentially divisive and, indeed, class-conscious. In a challenging article,[82] M. Haynes argues that welfare officers tend to have biases against one-parent families, and indeed against working class values. He argues against the over-use of welfare officers and their inquisitorial rights.

Yet the writer believes that welfare officers in this country have performed their difficult role admirably. It may indeed be a criticism that their recommendations are usually followed unhesitatingly by judges.[83] Yet their role is not to usurp the judges' power of decision, but to give an impartial report. Such a report should, in the writer's view, contain the following:-

1. the names, addresses, ages of the parties and children
2. the brief details of any disputed issues
3. the present arrangements
4. the results of any investigations undertaken
5. any agreed or rival proposals
6. the welfare officer's assessment of the best interest of the child.

A welfare report need not be neutral. It can, and indeed, in many cases should, contain a positive recommendation.

The great difficulty that seems to confront welfare officers is where conciliation ends and reporting begins. While the two functions are formally separated in the *Family Law Act*, every counsellor worth his or her salt will appreciate that it is impossible to separate the two roles in practice. For surely, if the reporting officer sees a glimmer of hope for conciliating the parties, while investigating the conditions for his or her report, he or she will feel at least a moral obligation to assist the parties to do so. Yet the courts have consistently held that the roles should not be undertaken simultaneously. Is this a counsel of perfection?

The problems of confidentiality are very great. Social workers and counsellors should be aware of the extreme flexibility of the law of confidentiality in communications, and in admissibility of evidence. There are several instances where confidentiality would be subservient to some higher value, an important topic too lengthy to discuss in detail here. Suffice it to say that it is very unwise for a welfare officer to promise confidentiality to any person, especially a child.

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While the writer believes that the welfare officers have performed an invaluable service to judges, the same cannot be said about separate legal representatives who have, it appears, been greatly under used. In the *Victorian Adoption Act* 1984, legal representation is available as of right to any child who is put up for adoption.[84] But in the *Family Law Act*, the "right" is discretionary.[85] The role of the legal representative has been very clearly and explicitly set out in guidelines drafted by Chief Justice Evatt.[86] Though difficult in practice, separate legal representation should be available at an early stage to all children whose parents split, and not merely restricted to court proceedings.

CONCLUSION

In this long overview of custody and access, one cannot be too critical of Australian law and practice. There seems to be a wide variation in practices, and perhaps we need more longitudinal research into the effect of orders. But, on the whole, our judges perform conscientiously and with considerable skill this extraordinarily complex task of adjudicating in these issues.

But has the time come for a complex re-thinking on custody and access, and perhaps an abandonment of those hallowed terms? One is tempted to these views by a consideration of the intractable issues raised by a recent court case in Melbourne on the custody of embryos. The courts have consistently held that a foetus has no legal rights until it is born.[87] What then can happen to those embryos? Are they the property of either spouse, to be allocated under *Family Law Act*, s.79? Are they not entitled to legal representation? They could be in West Germany, where unborn children are perceived to have rights worth legal protection. Does the de facto husband of the biological mother have a right of ownership?

These issues are here to stay. It is perhaps very unfortunate that artificial creation of children has been permitted at all. The whole process - whether it be by artificial insemination, in vitro fertilization, embryo transfer or surrogate motherhood - has been permitted to continue in an aura of sentimental sympathy for the infertile, and a fair degree of "ego-tripping" for the medical profession. How can it be consistent with the interest of the child to be born without knowing who his or her biological father is?

The new UK *Children Act 1989* bears close examination. This Act follows the Law Commission's Review of Child Law, emphasizing that parenthood is a matter of responsibility, rather than rights. In all family proceedings, instead of custody/access, the following orders can be made:

1. A residence order (ie, care and control);
2. A contract order (ie, equivalent to access);
3. A specific issues order;
4. A prohibited steps order.

The whole Act purports to be an attempt to get parents to no longer regard custody of children as first

prize, with access a consolation prize. The orders can also be made to protect grandparents and siblings.

The time is now truly ripe for a thorough and complete national review of child law and practice in Australia, and a realization that children are entitled to the full acceptance and protection of their rights as individual human beings. This is what the National Children's Bureau is aiming to do. And nothing less can be good enough for a civilized community! Let us try to make the 1990s the DECADE OF THE CHILD.

REFERENCES

[1] *Family Law Act* 1975, s60D. (Hereafter the Family Law Act will be referred to as "F.L.A.").

[2] Ibid.

[3] See, eg H.A. Finlay, ""First" or "Paramount", The Interests of the Child in Matrimonial Proceedings (1968) 42 *Australian Law Journal* 96.

[4] Kress and Kress, (1976) F.L.C. 90-126.

[5] Eg Schenck and Schenck (1981) FLC 91-023.

[6] See In re L (Infants) [1962] 1 WLR 886.

[7] (1981) FLC 91-023.

[8] (1981) FLC 91-008.

[9] See, eg *Parents and Children After Divorce* (Australian Institute of Family Studies).

[10] G v G [1985] 1 FLR 894. See also Williams and Williams (1988) FLC 91-980.

[11] Re R (1986) 16 Fam.L.R. 15.

[12] FLA, s22(2).

[13] J. Neville Turner, Malaysia: Some Problems of Child and Family Law in a Progressive Pluralist Society, 13 *Australian Child and Family Welfare* 9 (1989).

[14] They are as follows:-

i) the nature of the relationship of the child with each of the parents and with other persons;

ii) the effect on the child of any separation from -

(a) either parent of the child; or

(b) any child, or other person, with whom the child has been living;

iii) the desirability of, and the effect of, any change in the existing arrangements for the love of the child;

iv) the attitude to the child and to the responsibilities and duties of parenthood, demonstrated by each parent of the child;

v) the capacity of each parent, or of any other person, to provide adequately for the needs of the child, including the emotional and intellectual needs of the child,

vi) any other fact or circumstance (including the education and upbringing of the child) that, in the opinion of the court, the welfare of the child requires to be taken into account.

[15] See, e.g. Wood J in Edwards and Edwards [1986] 1 FLR 107.

[16] See Stiffle and Stiffle (1988) FLC 91-977. But this is not an absolute rule. For an interesting case where the children were split, see Wellington and Wellington (1977) FLC 90-277.

[17] F and N (1987) FLC 91-813. See also Power and Power (1988) FLC 91-911.

[18] Cilento and Cilento (1980) FLC 90-847.

[19] Ibid.

[20] For a criticism of the Magistrates Court as a forum for Family Law cases, see J. Neville Turner, Family Law and Magistrates, 4 Legal Service Bulletin 88 (1979).

[21] Gronow v Gronow (1979) 144 CLR 513.

[22] But they are not determinative. See eg G v G (1988) FLC 91-939, where a lesbian mother was awarded custody of three children (aged 11, 10 and 6) in preference to sexually abused them. Ellis J in that case said that the children's wishes were of no significant weight. See also Keaton and Keaton (1986) FLC 91-745.

[23] FLA, s64(1)(b).

[24] (1973) 47 ALJR 499.

[25] (1979) FLC 90-633.

[26] H v H [1974] 1 All ER 145

[27] The expertise of the welfare officer may properly be the subject of cross-examination: B.B.T. and J.M.T. (1980) FLC 90-809.

[28] Gillick v West Norfolk and Wisbech Area Health Authority [1985] 1 All ER 533. In this important House of Lords case, it was held that a minor's capacity to make decisions was dependent on his or her individual maturity. See M v M (1987) 17 Fam. Law 237. For an excellent commentary on Gillick's case, see P.N. Parkinson 16 Family Law 11.

[29] Joannous and Joannous (1985) FLC 90-144.

[30] (1976) FLC 90-025.

[31] (1981) FLC 91-077.

[32] (1978) FLC 91-404.

[33] See J v C [1970] AC 668, where, however, it was emphasized that the quality of parenthood was all-important.

[34] (1984) FLC 91-531.

[35] See, e.g., Priest v Priest (1963) 9 FLR 384.

[36] FLA, s64(1)(bb).

[37] FLA, ss14(1), 61B.

[38] The writer is joint author of a recent book which emphasizes the inter-disciplinary nature of Family Law: S. Charlesworth, J. Neville Turner and L. Foreman, *Lawyers, Social Workers and Families* (Federation Press, 1990).

[39] Watson ex parete Armstrong (1976) FLC 90-059.

[40] Lythow and Lythow (1976) FLC 90-007.

[41] See Plows and Plows (No.2) (1979) 40 FLR 339. For two contrasting views on the virtue of religion, see E. Goodman, The Relevance of Religion in Custody Adjudication under the Family Law Act, 7 *Monash U.L.R.* 217 (1981) and F. Bates, Child Law and Religious Extremists: Some Recent Developments, 10 *Ottawa Law R.* 299 (1978).

[41] Firth and Firth (1988) FLC 91-971.

[42] Free Press, New York, new edition, 1980.

[43] Jill F. Burrett, *Child Access and Modern Family Law,* Law Book Co Ltd, 1988.

[44] *Access, Report of the Family Law Council* (1988).

[45] Mazur and Mazur (1976) 27 FLR 102.

[46] (1983) 4 FLR 135.

[47] D'Agostino and D'Agostino (1976) FLC 90-130, per McCall J.

[48] Cotton and Cotton (1983) FLC 91-330, per Nygh J.

[49] Stavros and Stavros (1984) FLC 91-562.

[50] Keaton and Keaton (1986) FLC 91-745.

[52] Eg. L.A.B. and C.J.B. (1984) FLC 91-591.

[53] Hughes and Hughes (1980) FLC 90-869.

[54] See B and B (1988) FLC 91-978; M and M (1988) FLC 91-929.

[55] Litchfield and Litchfield (1987) D.F.C. 95-049.

[56] See Brennan and Smith (1987) D.F.C. 95-049.

[57] FLA, s64(2)(c).

[58] FLA, s64(5).

[59] See S. Charlesworth, J. Neville Turner and L. Foreman, op. cit., Chapter 4.

[60] FLA, s60H.

[61] See J. Neville Turner, A Campaign to Reduce Ex-nuptial Births? 12 *Australian Child and Family Welfare* 12 (1987).

[62] See above.

[63] For the jurisdiction of Children's Courts over neglected children, see S. Charlesworth, J. Neville Turner and L. Foreman, op. cit., Chapter 6.

[64] See Raby and Raby (1976) FLC 90-104.

[65] (1984) FLC 91-533.

[66] FLA, s64(1)(ba).

[67] Law Commission, *Review of Child Law,* Guardianship and Custody (Report No.172, 1988).

[68] *Report of the Inquiry into Child Abuse in Cleveland 1987,* Cmnd. 412 (1988).

[69] For an excellent compendium of papers on the objects of this Act, see Volume 19, June part, of the journal, *Family Law* (1989).

[70] FLA, s63E.

[71] See, e.g. Putrino and Jackson (1978) FLC 90-441, Chapman and Palmer (1978) FLC 90-510 and the recent case, Skrabl and Leach (1989) FLC 92-016.

[72] See above, fn. 28.

[73] In re a Teenager (1989) FLC 92-006, In re Jane (1980) FLC 92-007. Contrast In re Elizabeth (1989) FLC 92-023.

[74] FLA, S63(1)

[75] One such excellent organization is the Children's Interest Bureau of South Australia.

[76] See Plows and Plows (1979) FLC 90-712.

[77] Cf. Murphy J, in Vitzdamn-Jones and Vitzdamn-Jones (1981) FLC 91-012.

[78] See J. Wallerstein and J. Kelly. The longitudinal research of these two scholars has resulted in many further publications.

[79] See A. Mitchell, Children's experiences of divorce, 18 Fam. Law 460 (Dec. 1988). See also Y. Wzatlezak and S Burns, Divorce, the child's point of view (Harper and Row, 1984).

[80] FLA, s55A.

[81] M. Haynes, State intervention in divorce, 18 Family Law 174 (1988).

[82] It has been held welfare reports are compulsory unless impracticable. Greenfield and Parson (1984) FLC 91-504.

[83] Adoption Act 1984 (Vic), s106.

[84] FLA, s65.

[85] These are set out in F. Bates and J. Neville Turner, *The Family Law Casebook* (Law Book Co. Ltd., 1985) at pages 296-299.

[86] See F and F (1989) FLC 91-031.

[87] See above.