SEPARATE REPRESENTATION IN CUSTODY CASES

The basic principle in custody cases has long been that the interests of the child are paramount.[1] Recent developments relate not to the status of the welfare principle (as it will be termed), but to its application. In this comment one such development, the provision of separate representation for children in custody cases, will be discussed.

Separate representation is thought to be required because issues of custody in Australia have long been,[2] and continue to be, resolved under the adversary system.[3] Arguably, one effect of this is that the welfare principle has not been applied with any consistency. It used to be cited when equating the child's interests with those of his father[4] and more recently has been used to justify assimilating the child's interests with the mother's under the "children of tender years" doctrine. Conclusions in particular cases have been elevated to the status of legal presumptions, in some cases barely rebuttable.[5] Decisions have too often revolved around the capacity, behaviour and merits of the parents, without clearly establishing what relation those qualities have to the child's welfare, or simply assuming their effects on the child without actual enquiry.[6] This has been reflected in the procedure adopted to decide custody matters: the courts have too readily declined to consult the child in any way,[7] and there has often been no provision for children to be separately represented. Hall attributes the movement towards a more child-oriented approach to a reduced emphasis on parental rights when these rights conflict with the child's welfare.[8] Psychiatrists and psychologists are unanimous: the human psyche is extremely frail in its infant years. It is then especially vulnerable to irreparable damage, predominantly through violation of love and trust relationships with adults and also with children, particularly siblings.[9] Custody is the question which above all affects these relationships. The problem for the court cannot

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1. Despite the apparent clarity of the principle as embodied in the Guardianship of Infants Act, 1940 (S.A.), s.11(1), it took many years to settle that the welfare principle really did apply in all custody proceedings, including those involving non-parents (*J.* v. *C.* [1970] A.C. 668) and those involving illegitimate children (*Re E.* [1964] ⌜W.L.R. 51). See also Hall, "The Waning of Parental Rights", [1972] *Camb. L.J.* 248, 249.
2. *Sampson* v. *Sampson* (1977) F.L.C. 90-253, 76, 362.
3. Even though the courts have realised that strict application of adversary procedures could be highly counterproductive in custody disputes, custody hearings remain adversarial rather than inquisitorial: *cf. Todd* v. *Todd* (1976) 8 A.L.R. 602, 605. And in general, Family Court proceedings are still regarded as strictly adversary in nature: *cf. Re Watson; ex parte Armstrong* (1976) 50 A.L.J.R. 778, 783 *per* Barwick C.J., Gibbs, Stephen and Mason JJ.
4. *E.g., Re Agar-Ellis* (1883) 24 Ch. D., 317, 337-338 *per* Bowen L.J.
5. The "children of tender years" doctrine carried, and continues to carry considerable weight despite occasional assertions that it is really only a commonsense view, or more recently, that it represents community acceptance of the conclusions of behavioural science: *Lovell* v. *Lovell* (1950) 81 C.L.R. 513, 523 *per* Latham C.J.; *Kades* v. *Kades* (1961) 35 A.L.J.R. 251, 254; *Todd* v. *Todd* (1976) 8 A.L.R. 602, 605. See further Michaels, "The Dangers of a Change of Parentage in Custody and Adoption Cases", (1967) 83 *L.Q.R.* 547, and for a discussion of the "mother-deprivation syndrome", Goldstein, Solnit & Freud, *Beyond the Best Interests of the Child* (1973).
6. See Wheeler, *No-Fault Divorce* (1974), 77.
7. See *e.g., Boyt* v. *Boyt* [1948] 2 All E.R. 436 where the Court of Appeal declined to consult the child on the ground that the Court was concerned with the welfare and not with the "mere desires" of the child.
8. Hall, *loc. cit.* (*supra,* n.1), 248.
9. See Goldstein, Solnit & Freud, *op. cit.* (*supra,* n.5), *passim*; Michaels, *loc. cit.* (*supra,* n.5), 550.

be to determine an ideal environment for the child; it can only choose the least harmful environment available. Hence, when courts accept the admonitions of the behavioural sciences, the main problem is to adduce reliable evidence upon which to base the decision.

Separate representation of children as a means of implementing the welfare principle has been a product of this recent emphasis on the child as an independent but highly vulnerable individual. Further impetus has been gained from ideas of "individualised justice" which have come to influence juvenile court proceedings. In the United States, for example, *In re Gault*[10] laid down the basic elements of due process of law for juveniles. As a result both family lawyers and social workers began to draw analogies with child custody cases, arguing that in view of the substantial impact of a custody decision upon the child, "due process" ought to require that his independent status in the proceedings be recognised, and that where appropriate he be separately represented. Even where a child does not understand the nature of the proceedings this ought to lead not to a denial of his status as a party to the proceedings, but to the appointment of counsel to speak for him.

2. *Inadequacies of the Traditional Adversary Hearing*

Arguably, a major disadvantage of a largely adversary hearing, where the contending parents are both represented, is that it cannot always be relied upon to place the child's best interests before the court, particularly when the child's interests may not neatly overlap with those of either parent.

Although lawyers are "officers of the court" with a duty to a court committed to promotion of family solidarity,[11] each counsel has a tangible and immediate duty to argue his own client's case, even though this may conflict with what may appear to counsel personally to be the child's best interests.[12] If counsel "is somewhat struck by the unprepossessing character of his own client",[13] or even convinced that his client is the less desirable parent, it is inconceivable that he would say so in court, and unlikely that he would raise the matter with his client in private, even though the central concern of the proceedings is to be the welfare of the child. Also, despite a "no fault" system, a good deal of matrimonial acrimony can be introduced in an adversary custody hearing under the guise of proving the opposing parent unfit, without real concern for the child's welfare.

> " . . . drawing up a custody agreement in separation or divorce cases opens a scene of action for intensifying old disharmonies, justifying one's claim of innocence in the marriage breakdown, rewarding the less guilty party and punishing the more guilty, and proving to one's self, to the other person, and to the immediate community the worth of the one parent in contrast to the other."[14]

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10. 387 U.S. 1 (1967) (S.C.).
11. Family Law Act, 1975 (Cth.), s.43(b).
12. See Broun & Fowler, *Australian Family Law and Practice* (CCH) I, 22,100 *et seq.* On the role of separate representation in resolving these apparently conflicting duties placed upon each parent's advocate see *Demetriou* v. *Demetriou* (1976) F.L.C. 90-102, 75, 467.
13. *Id.*, 22,100, 18,002.
14. Wilkerson and Kroeker, "The Role of the Social Worker in Family Court Decision-Making", in Wilkerson, ed., *The Rights of Children* (1973), 274, 282.

3. *A Radical Alternative*

Kubie has advocated abolition, not only of the adversary system in custody disputes, but of the court itself, and its replacement by a consultative committee. His main criticism of the traditional system of trial is its inflexibility.[15] The custody situation cannot be changed to suit the child's needs without a further court order, which is unlikely to be sought because of the time and cost involved. He suggests that courts should simply order joint custody of the child, and that the parents should then appoint a committee to decide conclusively all the usual custody questions whenever the parents cannot agree. The presumably voluntary appointees to the committee would normally include a paediatrician, a child psychiatrist or analyst, a teacher, and an impartial lawyer or clergyman, all of whom the parents know and trust. This is to render the committee's role that of an "externalised conscience", before which parents will be ashamed to admit that they cannot agree; this will encourage them to agree amicably, and will be cheaper and more expeditious than a court. The child is to have his own "adult ally", a child psychiatrist or analyst outside the family whom the child trusts, and in whom the child can confide without fear of being disloyal to either parent. Thus the emphasis is on discovering a child's changing needs, and upon the child retaining active contact with both parents.

These proposals may appear ideal, but are open to criticism on several grounds. First, the scheme assumes that a child's need for parent-figures is best served by biological parents, even though he may need to alternate between them to satisfy his more predominant need at any given time; and not by a more stable arrangement, *e.g.*, with one parent and that parent's new spouse.[16] The entire scheme depends upon the parents' agreement to be bound by the committee. As Wheeler points out, those parents who will accept the commitee's decision without resentment are least likely to need the committee in the first place.[17] Furthermore, the system depends upon the ability of the parent who has care and control of the child at any given time to perceive and admit that the child's needs have changed. Again, parents capable of such dispassionate perception and honesty are unlikely ever to fight over custody before the courts.

For a lawyer, however, the most glaring omission is the scheme's failure to provide for enforcement of the committee's decision. When a heated argument is decided the "losing" parent will often need more than shame to comply. This would particularly be the case where the decision required that parent to relinquish care and control of the child. Without the powers of a court the committee has only the enforceability of a "conscience". In bitterly fought custody disputes the consciences of parents are at a

15. Kubie, "Provisions for the Care of Children of Divorced Parents: A New Legal Instrument", in *The Rights of Children* (*supra,* n.14), 212, 213.
16. Lurking behind this idea is the old "blood is thicker than water" maxim, which has been demonstrated to be valid only for adults, for whom conception of a child normally implies responsibility and emotional ties (see *Re C. (M.A.)* [1966] 1 W.L.R. 646). A child can only respond to a real, stable relationship: see Coyne, "Who Will Speak For the Child?" in *The Rights of Children* (*supra,* n.14), 193, 196; Foster & Freed, "Child Custody", (1964) 39 *N.Y.U.L.R.* 423, 437; Oster, "Custody Proceedings: A Study of Vague and Indefinite Standards", (1965) 5 *J. Fam. L.* 21, 26, 28. But note Baskin's persuasive argument that the child derives psychological advantages from parents rather than outsiders making major decisions concerning the child: "State Intrusion into Family Affairs: Justifications and Limitations", (1974) 26 *Stan. L. R.* 1383, 1385-1386.
17. Wheeler, *op. cit.* (*supra,* n.6), 90.

notoriously low ebb. If the committee were to obtain enforcement powers by being given in each case a court order to effect its decision, the practical result would be rubber-stamping of the decisions reached by a group of social scientists. In Australia, quite apart from the constitutional difficulties involved in such a delegation, the courts have been singularly averse to domination by experts of any kind.[18]

What we need, then, is a system retaining the benefits of consultation with social and behavioural scientists, but which also has the backing of court enforcement. It is to this problem that the notion of separate representation provides a solution.

4. *The Separate Representation Alternative—Development and Present Status*

The growing concern for the implications of the welfare principle has been reflected in changes to procedural provisions regarding separate representation of children. Almost as an afterthought such provision was made in Rule 115A under the Matrimonial Causes Act, 1959-1966 (Cth.). But resort to Rule 115A created many difficulties.[19] It was necessary, for example, to appoint a guardian *ad litem* before any arrangement for separate representation could be made, a requirement expressly dispensed with by the successor to Rule 115A, s.65 of the Family Law Act, 1975-1976 (Cth.).[20] Also, Rule 115A did not specify who should take the initiative of arranging legal representation, nor did it provide for funding. Presumably the father was intended to pay, but as he often paid all the costs of the litigation this would have been an added discouragement to use of the Rule. It may also have tended to affect the independence of counsel when appointed. Under the Family Law Regulations, representation is now arranged by the Australian Legal Aid Office.[21]

According to s.65 of the Family Law Act, the court may order separate representation of its own motion, or upon the application of the child,[22] of a welfare officer or organization, or of any other person. However, s.65 provides no criteria by which the court is to decide whether or not a child ought to be separately represented, apart from, presumably, the overriding general consideration of the child's welfare in s.64(1).[23] On the one hand, this may make for flexibility and for use of the power whenever appropriate; on the other, an application for separate representation could

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18. See *Lynch* v. *Lynch* (1965) 8 F.L.R. 433, 434 *per* Begg J.
19. See Note, (1973) 47 *A.L.J.* 548; Asche, "Changes in the Rights of Women and Children under Family Law Legislation", (1975) 49 *A.L.J.* 387, 398: Harrison, "Separate Representation of Children", (1977) 51 *Law Inst. J.* 357; *Demetriou* v. *Demetriou* (1976) F.L.C. 90-102 *per* Asche J.
20. The Legal Representation of Infants Act, 1977 (W.A.), deals with separate representation of children in all State Courts concerned with children or with their interests (including the Western Australian Family Court in the exercise of State jurisdiction). However, under s.5 of the Act the requirement of a guardian *ad litem* is retained.
21. Reg. 112 made pursuant to Family Law Act, 1975-1976 (Cth.), s.123. However, as Harrison points out, if the A.L.A.O. officer allocated forms no rapport with the child, much of the value of s.65 will be lost, or at least the solicitor's job will be very much more difficult: Harrison, *loc. cit.* (*supra,* n.19), 359.
22. The value of this provision is doubtful, seeing that no one appears to have any duty to inform the child of it. So far as relevant s.65 reads:
    > "Where . . . it appears to the court that the child ought to be separately represented, the court may . . . on the application of the child . . . order that the child be separately represented . . ."

    In *Lyons* v. *Bosely* (1978) F.L.C. 90-423 the Full Court envisaged that the Court would normally apply s.65 of its own motion: *id.*, 77,138, *per* Wood J.

prima facie be refused on the very general ground that the child's welfare did not require it. This possibility should however be kept in perspective, for if the parents separate without seeking divorce and do not contest custody, but agree to some arrangement between themselves, the child's best interests are not reviewed. Non-intervention does have its strong supporters:

> " . . . otherwise the door is open for an unlimited redistribution of children to those homes where they might be believed, according to the psychological theories or cultural preferences of the time, to be best advantaged. It would make of the State *parens patriae* with a vengeance."[24]

One must also remember how notoriously low the standards of child-care may be without community intervention. Anxiety over whether a court reviews custody arrangements, and whether it appoints separate counsel may thus appear exaggerated. Even if parents eventually seek divorce, uncontested custody arrangements are unlikely to be reviewed under s.63(1)(b) unless they appear unreasonable upon their face. In fact the Family Court may make a decree *nisi* absolute even though it is not satisfied that proper arrangements have been made for children under the age of 18.[25]

Only in a few cases was separate representation ordered in custody hearings under the Matrimonial Causes Act, 1959-1966 (Cth.). However, the few precedents reflect the spirit of the subsequent Family Law Act. In *Dewis* v. *Dewis*,[26] Selby C.J. in D., in ordering separate representation under s.85(1)(b), said:

> " . . . the court should give the widest possible interpretation to the relevant sections. It should do everything in its power, unique though the application may be, unusual though it may be . . . to allow the widest possible investigation and ventilation of matters concerning the children's welfare."[27]

This was followed and extended in *Rosen* v. *Rosen*,[28] where Allen J. in making an order for separate representation, interpreted the relevant provisions as permitting interviews of qualified social workers with the children to be ordered, reduced to affidavits and used as evidence. Only with the advent of s.65 of the Family Law Act has such a course been explicity sanctioned.

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23. *Cf.* Legal Representation of Infants Act, 1977 (W.A.), s.5 of which provides as follows:
    "(1) Where in any legal proceedings it appears to the Court—
    (a) that the interests of a person who is an infant are or may be affected by those proceedings and that the infant is not a party to those proceedings; and
    (b) that the infant ought to be separately represented,
    the court may . . . [appoint a guardian *ad litem* for the purposes of separate representation]."
    The conjunctive "and" indicates that the factors in s.5(1)(a) are not sufficient to show that an infant "ought" to be separately represented. It is this elusive "ought" in s.5(1)(b) which provides the central unanswered question: *when* "ought" a child to be separately represented?
24. Keith-Lucas, " 'Speaking for the Child': A Role-Analysis and Some Cautions", in *The Rights of Children* (*supra,* n.14), 218, 223.
25. Family Law Act, 1975-1976 (Cth.), s.63(1)(b)(ii).
26. 12th June, 1973 (unreported). See Note, (1973) 47 *A.L.J.* 548.
27. *Id.*, 549.
28. Unreported; see Note, (1976) 50 *A.L.J.* 145.

Partly because of the relatively short period since the passing of the Family Law Act, not many orders for separate representation of children in custody disputes have been made and only very few of these have been reported.[29] In *Todd* v. *Todd*[30] Watson J. referred to his own experience of having made three such orders.[31] Nonetheless a positive attitude appears to prevail. Ashe J. went so far as to say:

> "The result has been a *significant* number of orders, made by the Family Court under s.65 and I am emboldened to say that it is right that this should be so."[32]

Harrison suggests that the paucity of reported cases may be deceptive.[33] The child's counsel's enquiries will normally support the application of one or the other parent, as the enquiry usually goes no further afield. Even though the court may in theory award joint custody or award custody to a person other than a party to the marriage, in practice almost all hearings are confined to the merits of the competing parents.[34] In most cases where custody is seriously disputed a compulsory conference of the parties is ordered.[35] Various means of persuasion are then available to encourage the parties to settle custody before trial. First, the conference provides a *prima facie* weighing of the evidence. If the evidence clearly favours one party it will be indicated that further litigation would not be in the child's best interests. Secondly, there are pecuniary discouragements to further litigation. Insistence by the disfavoured party upon going to trial, and a subsequent decision against that party at trial may induce the court to award costs against that party contrary to the general rule that each party bears its own costs.[36] In many cases the Australian Legal Aid Office (A.L.A.O.) funds the application of one or both parties. Reports are required by

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29. The total number of separate representation orders made is difficult to establish. Neither the Family Court of Australia nor the Family Law Council collects these statistics (letter of Chief Judge of Family Court to the writer, 6th July, 1978). This is a surprising deficiency, in view of the Family Law Council's task of monitoring the administration of family law in Australia (Family Law Act, 1975-76 (Cth.), s.115(3)). By contrast the Attorney-General (letter dated 26th July, 1978) provided a survey of case records of the Australian Legal Aid Office. The following information was collated on the number of separate representation orders made:
    A.L.A.O. Sydney—104 orders made since the Family Law Act came into operation.
    A.L.A.O. Melbourne—11 orders made in 1976;
    45 orders made in 1977;
    11 orders made to 30th June, 1978.
    A.L.A.O. Adelaide—26 orders made to date.
    A.L.A.O. Brisbane—No statistics available.
    A.L.A.O. Hobart—No statistics available.
    A.L.A.O. Darwin—No statistics available.
    A.L.A.O. has ceased to operate in Western Australia and the A.C.T., having been absorbed by local statutory Commissions outside the Commonwealth Attorney-General's jurisdiction.
30. (1976) 8 A.L.R. 602.
31. *Id.*, 606.
32. *Demetriou* v. *Demetriou* (1976) F.L.C. 90-102, 75,467 (emphasis added). *Cf.* *Harris* v. *Harris* (1977) F.L.C. 90-276, 76,477 *per* Fogarty J.
33. Harrison, *loc. cit.* (*supra*, n.19), 357-358.
34. Family Law Act 1975-1976 (Cth.), s.64(2).
35. Family Law Reg. 96. An order for such a conference requires the parties to "make a *bona fide* endeavour to reach agreement on matters in issue between them". Although the regulation provides that the conference may be held in the presence of the Registrar or of an officer of the Court, at present these conferences are presided over by a judge, though not by the judge eventually hearing the case if it proceeds to trial. It is proposed, however, to use more non-judicial officers in these conferences: (1977) *Commonwealth Record* 613, 1312 (Ellicott).

A.L.A.O. at numerous stages from counsel briefed by the Office, to ensure that the client continues to qualify for legal aid under the dual tests of means and merits.[37] A preponderance of the evidence against an A.L.A.O. client at the conference stage may indicate that the case no longer has the reasonable prospects of success required for funding to continue.[38] The child's counsel can thus exercise a strong influence on the disposition of the case at this stage.

As yet, no clear criteria have been established to determine when the court will act under s.65. No reported cases have been located where separate representation was refused despite application by any of the relevant persons or bodies. Statistics indicating upon whose motion separate representation orders have been made are not available. As a matter of general principle it appears appropriate that separate representation be ordered, at the very least, in all cases where the child's welfare does not appear to coincide with the interests or desires of either parent.[39] This may be due, for example, to such hostility between the parents[40] that their partisan pursuits make it quite impossible for them to regard custody of their children with any impartiality. It could also be due to the possibility of custody being awarded to a third party to the exclusion of both parents[41] or to the needs of several children differing even though they are siblings. It has even been suggested that a child's counsel may make suggestions which both parents welcome but which they could not make themselves without "losing face".[42] The comprehensive procedures for separate representation and the enthusiastic, though general, statements of judges on the use to be made of the new provisions point to a policy of ordering separate representation where a *prima facie* case exists. Expressed negatively, something in the nature of fairly clearly defined special circumstances ought to be required in such a case to justify refusing an application by any of the relevant persons for separate representation.

A second important question concerns the proper role of counsel for a child in custody disputes. In *Todd* v. *Todd*, Watson J. chose the Official Solicitor of the Chancery Division of the High Court in England as an appropriate model:

> "The object is to ensure that the ward's interests and point of view may be represented by an objective outsider and to insulate the child so far as possible from the effects of any conflict between the parents and to ensure that decisions are taken in the child's interest."[43]

However enlightened this formula may appear, the Official Solicitor's role has now been rejected as a model for child's advocates in the Family Court.

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36. Family Law Act, 1975-1976 (Cth.), s.117.
37. Disney *et al.*, *Lawyers* (1977), 407 *et seq.*
38. In practice, apparently, legal aid is not discontinued in such circumstances. However, the possibility for discontinuance of aid exists, and appeals against discontinuance are hardly ever made. See Disney, *op. cit.* (*supra*, n.37), 415.
39. See, *e.g.*, *Todd* v. *Todd* (1968) 8 A.L.R. 602, where a 14 year old girl filed affidavits which were critical of her mother (with whom she lived) alleging some violence.
40. See, *e.g.*, *Pailas* v. *Pailas* (1976) 11 A.L.R. 493.
41. See Family Law Act, 1975-1976 (Cth.), s.64(2).
42. *Demetriou* v. *Demetriou* (1976) F.L.C. 90-102, 75,467 *per* Ashe J.
43. (1976) 8 A.L.R. 602, 606 quoting from Cretney, *Principles of Family Law* (1974), 283-284; *cf. Findlay* v. *Findlay* 240 N.Y. 429, 433-434; 148 N.E. 624, 626 (1925) *per* Cardozo J.

Watson J. envisaged that the formula was to be implemented by a confidential research report prepared by the child's counsel enlisting the help of outside child experts, and submitted for the judge's perusal only.[44] In later cases both the analogy with the Official Solicitor and the use of confidential reports have been disapproved,[45] the latter for the strong policy reasons against admitting what is "unchallenged and unchallengeable but yet perhaps decisive of the issue",[46] with the concomitant feeling that justice has not been seen to be done. Perhaps a more useful analogy would be the role of *amicus curiae* in family proceedings. In one case under the Matrimonial Causes Act, the Attorney-General was asked by the judge hearing a petition for divorce and ancillary relief to appoint counsel as *amicus curiae*.[47] The reason was that the respondent wife adamantly refused legal assistance even though the Judge had formed the opinion that she was unable to present her own case. During the trial, Sangster J. invited the *amicus curiae* to raise any issues which he thought should be the subject of questions to be asked of the witnesses. Sangster J. then asked those questions. At the end of the case he again invited the *amicus curiae* to raise any issues of fact or law which he thought should be brought to the Judge's attention. The reason was to enable Sangster J. "to consider the case as a Judge, freed from the additional task of endeavouring to consider the case from the point of view of one of the parties whose viewpoint might otherwise have been overlooked."[48] In no case to date has the role of child's counsel been directly in issue. However, in *Lyons* v. *Bosely*[49] the Full Court expressed tentative views on child advocacy in the Family Court emphasising, however, the importance of retaining flexibility of approach.[50] In a joint judgment, Evatt C.J. and Pawley S.J. outlined the main functions of child's counsel in the following terms:

> "(a) To cross-examine the parties and their witnesses.
> (b) To present direct evidence to the Court about the child and matters relevant to the child's welfare.
> (c) To present, in appropriate cases, evidence of the child's wishes."[51]

Wood J. substantially agreed and provided a further, more personal outline of counsel's functions:

> "Not infrequently . . . only a small proportion of the evidence is devoted towards any attempt at creating for the Court a picture of the child and its personality, its hopes, its fears and how it interprets its own future relationships with parents and the surrogate parents.

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44. This is not the law in England: *Re K.* [1975] A.C. 201. Cretney, *op. cit.* (*supra,* n.43), appears to be wrong here. Confidential reports are only submitted in exceptional cases, where disclosure of information may harm the child.
45. *Demetriou* v. *Demetriou* (1976) F.L.C. 90-102, 75, 468; *Harris* v. *Harris* (1977) F.L.C. 90-276, 76, 467; *Sampson* v. *Sampson* (1977) F.L.C. 90-253, 76, 362.
46. *Harris* v. *Harris* (1977) F.L.C. 90-276, 76, 473. The strong policy that justice must be seen to be done was emphasised in *Mulcahy* v. *Mulcahy* (1978) F.L.C. 90-425 *per* Asche J.: in particular as his Honour pointed out (77,158) the parties will have to maintain future contact with each other and with their children. *Cf.* Teitelbaum, "The Use of Social Reports in Juvenile Court Adjudications", (1967) 7 *J. Fam. L.* 425 for arguments for and against this practice in the context of juvenile courts.
47. See *Johnson* v. *Sammon* (1974) 7 S.A.S.R. 431.
48. *Id.,* 435.
49. (1978) F.L.C. 90-423.
50. *Id.,* 77,136 *per* Evatt C.J. and Pawley S.J.; 77,139 *per* Wood J.
51. *Id.,* 77, 136.

> It is in this area that the legal representative for the child has a very large contribution to make."[52]

In discussing the role of a child's counsel it is worth noting some limitations upon the normal role of counsel which are peculiar to child advocacy. Here counsel is not appointed and may not be dismissed by the party he represents. His function is not necessarily to advance what the "client" wants, but rather what is in the best interests of the "client".[53] But to say that a child's counsel advances what is in the best interests of the child suggests that he simply elucidates an existing concept which may be dispassionately identified.[54] In fact there is room for a child's counsel to present information to the court in a consciously subjective manner if, for example he felt strongly in favour of one or the other parent. The extent to which this is possible is however limited by the means available. One source of information is a welfare report. Child's counsel has no influence over this whatever: it can be ordered by the court without formal application by anyone. In addition the parties have no choice of welfare officer, for the order is sent straight to the Director of Court Counselling, who delegates it to one of his officers.[55] However, in seeking other sources of information such as psychiatric reports or the testimony of other, normally lay witnesses, it might be thought that child's counsel could "hawk about" until he had found, say, a psychiatrist to support his views. In practice, child's counsel depends upon approval from the Australian Legal Aid Office, which briefs him, for each additional step of this nature undertaken. Psychiatric reports are not usually thought to be warranted, and it would be extraordinary for A.L.A.O. to approve more than one. Shopping about for expert support is thus also controlled by A.L.A.O. purse strings. Of course child's counsel may choose which lay witnesses to call; these are usually friends or relatives of the parties, or perhaps teachers of the child. It is possible that some of these witnesses may be strongly partisan, but it must be remembered that both parents can and usually will call their own witnesses to balance any prejudicial witnesses called by the child's counsel. It is in the case where the child's counsel calls no witnesses himself but relies on the information which has emerged from other witnesses that the clearest opportunity for counsel's subjectivity arises, but even then any subjectivity in the drawing together of the evidence is balanced against the contents of the welfare report which is apparently ordered as a matter of course, and upon which considerable weight is placed.

The reason why the role of counsel for the child is not merely to express the child's preferences for him is that s.43 of the Family Law Act makes it clear that the overriding concern of the court is to "protect the rights of children and to promote their welfare". Only in the special case of children over 14 years are the child's wishes *prima facie* conclusive. However, articulation of the child's preferences will remain an important aspect of counsel's task if the child is confused, intimidated or afraid of being disloyal to either parent by expressing preference for one over the

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52. *Id.*, 77, 139.
53. See *Harris* v. *Harris* (1977) F.L.C. 90-276, 76,476 *per* Fogarty J.
54. In *Lyons* v. *Bosely* (1978) F.L.C. 90-423, 77,137 Evatt C.J. and Pawley S.J. refer to counsel's objective understanding of the child's interests, based upon material before the Court.
55. S.62; para. (a) of the definition of "welfare officer" in s.4(1) Family Law Act, 1975-1976 (Cth.); Family Law Reg. 81 (2).

other in their presence in court.[56] The Family Law Act makes it clear that the child's presence in court during proceedings, or the calling of the child as a witness, are to be exceptional.[57] Either course requires an order of the court which . . .

> "would need a considerable amount of persuasion before [it] allowed any child to be called as a witness or to be used in any way as a witness in a court in which there is a dispute between that child's parents . . . [N]othing [could be] more counter-productive to the relationship between parent and child for the future than allowing such a course to take place."[58]

Counsel's role most clearly goes beyond articulating a child's preference where there appears to be a discrepancy between the child's wishes and his best interests. In such a situation it is argued that counsel should not attempt to resolve the conflict by offering an "expert" opinion himself.[59] Unless a lawyer is trained in child welfare practice he is unlikely to be any more expert than any reasonably well-informed citizen, and is just as likely to accept unquestioningly popular ideas about the effect of environment, discipline and other influences upon the child.[60] To remedy the ordinary family lawyer's inadequacy in this respect, there are several alternatives. The first is educational. Provision should be made for post-graduate courses including "an introduction to marriage guidance procedures and to basic psychology and behavioural science."[61] This is not to make lawyers into child analysts themselves, but to place them in a better position to perceive conflicts between the child's preferences and his welfare, and to identify possible resolutions of the conflicts in the evidence which is before the court.

Further, lawyers ought to overcome any remaining professional rivalry they feel *vis-à-vis* expert witnesses (here child psychologists and psychiatrists) and ought to be more willing to co-operate with social workers. Admittedly we have come a long way since the ignorance of the psychological impact upon a child inherent in custody changes, shown for example by Eve J.

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56. The Court in *Lyons* v. *Bosely* stressed that counsel should normally establish the child's wishes by personal interview (*id.*, 77,137, 77,138) and from the welfare report (*id.*, 77,136). The undesirability of the child being called as a witness and the disadvantages of private judicial interview were also referred to (*id.*, 77,137). However, these means should not be exhaustive and "[t]he options should not be closed off in too sweeping a fashion", (*id.*, 77,137). Finally, Wood J. pointed out the usefulness of counsel in relieving parental pressures on the child and allaying the child's fears as trial draws closer (*id.*, 77,140).
57. Family Law Reg. 116(5).
58. *Todd* v. *Todd* (1976) 8 A.L.R. 602, 606 *per* Watson J. See also Note, "Judges' Use of Extra-Record Inquiry In Child Custody Cases", (1970) 34 *Albany L.R.* 473.
59. Procedurally such a course would alter his role from counsel to witness, with great inconvenience. See *Demetriou* v. *Demetriou* (1976) F.L.C. 90-102, 75, 467 *per* Asche J.; *Lyons* v. *Bosely* (1978) F.L.C. 90-423, 77, 137; Isaac, "The Family Lawyer and Extra-Legal Resources", (1967) 1 *Fam. L.Q.* 13. A purported "expert" report prepared by counsel himself is unlikely to have any evidentiary status: see *Lyons* v. *Bosely* (1978) F.L.C. 90-423, 77,138 *per* Wood J.
60. Keith-Lucas, *loc. cit.* (*supra*, n.24), 225; Isaacs, "The Role of the Lawyer in Representing Minors in the New Family Court", (1962-63) 12 *Buffalo L.R.* 501, 507.
61. Bates, (1975) 49 *A.L.J.* 133; Finlay, "Family Courts — Gimmick or Panacea?", (1969) 43 *A.L.J.* 602, 608. For the substantial advantages in learning counselling skills see Watson, "The Lawyer as Counsellor", (1965) 5 *J. Fam. L.* 7; Zukerman, "Cultivating Social Perspectives in the Lawyer", (1965) 5 *J. Fam. L.* 1; Freeman, *Legal Interviewing and Counselling* (1964). A "Workshop for Family Lawyers" was held at the Australian National University, Canberra, 17th-20th March, 1978, with these aims in mind.

in *Re Thain*[62] and since earlier fears of usurpation of the judge's position by "experts".[63] This is not to advocate unquestioning deference to expert evidence, as will be indicated below.[64] The three professions mentioned all have a different expertise to supplement that of the child's counsel, and could probably be consulted without procedural difficulty under ss.62(4) and 63(2) as well as under the general terms of s.65 of the Family Law Act.

According to Keith-Lucas, himself a Professor of Social Work, the role of the child psychiatrist or psychologist is to individualise the needs of the child in question.[65] He is best able to assess the damage done to the child and the child's potential to behave differently or to withstand shock or separation, and can identify the influences which the particular child needs. Thus it is desirable for psychiatrists to interview not only the child but claimants for custody and their spouses, legal or *de facto*.[66] If one accepts this ability to assess future damage, it is beside the point to refuse to obtain psychiatric advice on the ground that a child has previously been mentally healthy.[67] This is not, however, to advocate the other extreme where children are "hawked about" from one psychiatrist to another in search of one who will support the parent responsible.[68] Separate representation may help guard against this practice or at least enable the court to be informed that many more psychiatrists were consulted by the parents than were asked to give evidence. In fact child's counsel ought to consider himself under an ethical duty so to inform the court, particularly where psychiatric examination is clearly excessive and thus contrary to the child's welfare.

Lawyers' attitudes to the role of the social worker are far more strongly polarised. The social worker's basic role is to assess the practicality of parents' alternative plans and parental attitudes, and arguably to represent the community's concern for child welfare in a tangible way.[69] Lawyers' assessments of the social worker's ability to fulfil his role vary from respect[70] to something bordering on contempt. It is said that apart from paucity of training,[71] social work is largely based upon theories which have a disturbingly high turnover.[72] Perhaps the most serious attack on the reliability of social worker's evidence is the argument that however well trained, they can only make highly subjective and biased judgments of disturbing events, and yet that they try to pass them off as scientific truth. Part of the problem is that social workers' evidence is so often prejudiced by their notoriously poor and overly defensive performance in court.

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62. [1926] Ch. 676, 684.
63. *Lynch* v. *Lynch* (1965) 8 F.L.R. 433, 434 *per* Begg J.
64. This has been a lesser concern, but *cf.* Wheeler, *op. cit.* (*supra*, n.6), 93.
65. This is desirable as the courts have rather tended to reject psychiatric evidence out of hand unless it is particular to the child in question: Michaels, *loc. cit* (*supra*, n.5), 563.
66. *Epperson* v. *Dampney* (1976) F.L.C. 90-061.
67. See *supra*, n.57. For a balanced approach to psychiatric reports in the context of a criminal trial, see *R.* v. *Lucky* (1974) 12 S.A.S.R. 136, 139 *per* Bray C.J.
68. See *Harris* v. *Harris* (1977) *F.L.C.* 90-276, 76,474-5, 76,477. The intensity of psychiatric examination must remain appropriate to the child's welfare.
69. Wilkerson & Kroeker, *loc. cit.* (*supra*, n.14), 276.
70. *E.g.*, Comment, "Use of Extra-Record Information in Custody Cases", (1957) 24 *U. Chicago L.R.* 349, 357.
71. Levine, "Caveat Parents: A De-mystification of the Child Protection System", (1973) 35 *U. Pitt L.R.* 1, 13-15.
72. Schultz, "The Adversary Process, the Juvenile Court and the Social Worker", (1968) 36 *Uni. of Missouri at Kansas City L.R.* 288, 294-297 (in the context of juvenile courts). Child custody theory has been rather more constant.

> "When tested by lawyers in an adversary proceeding, the reaction is one of affront and personal injury and they tend to become polarised in the belief that they are protectors of the child against legal charlatanism."[73]

Psychiatrists have on the whole come to terms with the same accusations of subjectivity by greater frankness about their clinical methods. They admit that even in controlled clinical research it is the psychiatrist's own ability to observe and interact which remains his main instrument of research, and which must be coloured by his personality and experience, and which must in turn colour his analysis. A more realistic aim is set, for

> "the usefulness of psychiatric evidence is not determined by the exactness or infallibility of the witness's science. Rather, it is measured by the probability that what he has to say offers more information and better comprehension of the human behaviour which the law wishes to understand."[74]

When professional viewpoint and not impartial expertise is aimed at [75] there is not the same revelation in court of failure to reach the unattainable which social workers find so humiliating, and the "heat generated by the clash and friction between two experts . . . produce(s) light".[76] The social worker could use his counselling and interviewing skills more fruitfully to describe the actual living conditions of the child and parental attitudes thereto and could thus suggest reasonable custody and access arrangements to the court.[77]

In considering whether the introduction of separate representation into the traditional adversary hearing balances the desirable attributes of social science expertise with a court's preservation of the parties' rights and court enforcement of orders, a final question remains: how best to integrate expert opinion into the modified tripartite hearing? Should expert witnesses simply submit reports for the judge's perusal only, or for the persual of all parties, or should the authors be subjected to cross-examination in court? Family Law Regulation 117 allows copies of welfare reports to be furnished to the parties or to their counsel[78] or to a child's counsel, to be received in evidence, or to be dealt with as the Court sees fit, and allows oral examination of the author, without preferring any one course of action.

Foster and Freed support the first alternative of submission to the judge only, on the ground that it reduces court hearings and the defamatory accusations and cross-accusations that may well be made.[79] They also attempt to counter what they perceive as the main argument against confi-

73. Tamilia, "Neglect Proceedings and the Conflict Between Law and Social Work", (1971) 9 *Duquesne L.R.* 579, 585; McRae & Linde, "Lawyer and Social Workers", (1965) 48 *Am. Jud. Soc. J.* 231. As the Family Court is a closed court, actual observation of social workers in court is not possible except by practitioners.
74. Diamond & Louisell, "The Psychiatrist as an Expert Witness: Some Ruminations and Speculations", (1965) 62 *Mich. L.R.* 1335, 1342.
75. Schultz, *loc. cit.* (*supra*, n.72), 293; Teitelbaum, *loc. cit.* (*supra*, n.46), 436.
76. Schultz, *loc. cit.* (*supra*, n.72), 291.
77. Mozur & Rose, "The 'Adversary' Process in Child Custody Proceedings", (1967) 18 *West. Res. L.R.* 1731, 1745.
78. In *Mulcahy* v. *Mulcahy* (1978) F.L.C. 90-425, 77,158 Asche S.J. emphasized that to furnish counsel with reports in the absence of the parties was a serious step to be regarded by the Court with the greatest caution as it runs counter to the "trite expression, but a very important expression, that justice must not only be done, but be seen to be done".
79. Foster and Freed, *loc. cit.* (*supra*, n.16), 615-616, 619.

dential reports, namely, that they contain hearsay. Wariness of hearsay, it is maintained, derives from jury trials, juries presumably being more easily mislead than single judges. The flaw in the argument is that we are concerned here with the objectivity of the welfare worker, not of the judge. Cross-examination of the welfare worker is required in order to test that objectivity, and to enable the judge to assess the soundness of the reasoning on which the welfare worker's conclusions are based.

In *Rosen* v. *Rosen*[80] Allen J. received the welfare reports in evidence. Those arguing against this procedure maintain that it has the effect of deepening rifts between the parents, and of intensifying the bitterness of the "losing" parent. In addition, this procedure is said to intimidate or embarrass welfare officers into modifying their true opinions of the respective parents because of the prospect of possibly having to repeat and justify those opinions under cross-examination and in the presence of the parties. The present writer remains unconvinced. Welfare workers, particularly those attached to the Family Court who are used to giving evidence are unlikely to be quite so easily intimidated.[81] In addition, it cannot be assumed that parents themselves would prefer welfare reports to be perused only by the judge. Despite the resentment they may feel at an unfavourable report, it is a tangible phenomenon. To attend a court hearing only to gain the distinct impression that everything has been decided by anonymous forces beforehand is surely worse.[82] Moreover, the overriding policy direction in s.43 of the Family Law Act is to protect the family particularly where there are children. Presumably s.43 would preclude confidential reports if the family relationship suffered as a consequence of them.

Those who argue for receiving welfare reports in evidence and for cross-examination of their authors[83] unfortunately also do so for unflattering reasons.[84] They usually show the scepticism of social workers' impartiality already referred to. The seriousness of the aspersions they cast upon the psychological motivations, conscious or otherwise, in the behaviour of social workers *vis-à-vis* parents[85] causes them to feel that the only adequate safeguard is cross-examination. Particularly in this area, it is argued, assessment of credibility, bias and experience is accomplished by observation of the witness' demeanour in court far more accurately than through analysis of a written report. If social workers could realise the essential impersonality of cross-examination[86] there would be less objection to this procedure, which does appear to combine the unique skills of the professions involved while accommodating the policy of allowing justice to be seen to be done. One is in the last instance thrown upon the discretion

80. *Supra,* n.28.
81. The "neutral position" of Court counsellors was emphasized in *M.* v. *M.* (1978) F.L.C. 90-429, 77, 182 *per* Marshall S.J.
82. Teitelbaum, *loc. cit.* (*supra,* n.46), 429.
83. *E.g., Harris* v. *Harris* (1977) F.L.C. 90-276, 76,473 *per* Fogarty J.; *M.* v. *M.* (1978) F.L.C. 90-429, 77,182 *per* Marshall S.J.
84. Although some judges are primarily concerned to protect the Court itself from "the criticism of conducting a trial 'by report' rather than on the whole of the evidence": *M.* v. *M.* (1978) F.L.C. 90-429, 77, 182 *per* Marshall S.J.
85. See especially Levine, *loc. cit.* (*supra,* n.71), 16-17; *cf.* Levine, "Access to 'Confidential' Welfare Records in the Course of Child Protection Proceedings", (1975-76) 14 *J. Fam. L.* 535, 537.
86. This is not to deny a need for some lawyers to develop if not humility then at least graciousness in their consultation with other professions: see American Bar Association Police Statements, "Lawyer-Social Worker Relationships in the Family Court Intake Process", (1967) 1 *Fam. L.Q.* 81.

and good sense of the court and of counsel[87] in the use of the power of examination to prevent the degeneration of custody hearings to a parental battle.

> "Solomon was lucky when he had to decide which of the two women was the child's real mother—if he had been a judge in a divorce court, the contesting parents might have called his bluff and forced him to slice the baby in two."[88]

*Sibylle Kobienia**

87. Isaacs is one of the few writers who have stressed the need for counsel to understand the objectives and problems of a Family Court, and to co-operate rather than to seek loopholes: *loc. cit.* (*supra,* n.60), 521.
88. Wheeler, *op. cit.* (*supra,* n.14), 74.

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