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"THE PARAMOUNT CONSIDERATION"

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1. INTRODUCTION

This paper explores the meaning and application of the most fundamental principle of all in children's matters: that the child's best interests must be regarded as the paramount consideration.

Does the principle mean that the court makes whatever orders it thinks will be best for the child? I will argue that the cases speak with a forked tongue. Two distinct views can be identified, which I will call the strong and the weak views. I will examine the extent to which one or other view can be preferred having regard to (i) the language of the principle; (ii) the relevant High Court decisions, or (iii) the nature of the decision to be made. I will then consider the application of the principle since the 1995 Act, which provides that it specifically applies to some decisions and not to others.

If the paramount consideration principle is regarded as the ground on which children's law is built, the strong and the weak views may be seen as tectonic plates: mostly unnoticed, but at times, and in some situations, tending to cause eruptions and wreak havoc with the structures built on them. As will be seen, relocation cases can perhaps be seen as the San Andreas Fault of children's law.

The origins and nature of the paramount consideration principle

A very brief comment on the origins and nature of the principle is necessary. In 1925 Viscount Cave said: "It is the welfare of the children, which, according to rules which are now well accepted, forms the paramount consideration in these cases".[2] The rule was repeated and developed in early English decisions, and picked up in legislation dating from the 1920s.[3] In slightly different forms, it was to be found in early state legislation dealing with custody, guardianship and access. For example, in the Infants Custody and Settlements Act 1899 (NSW) the welfare of the child was to be

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1 BA, LLB, BCL; Judge of the Family Court of Australia. This paper has been slightly revised since its presentation. It draws to some extent on previous papers, the Butterworths Family Law Service, and on work with the Family Law Council.

2 See *A v Liverpool City Council* [1981] 2 All ER 385 at 387; *Re A and B (Infants)* [1897] 1 Ch 786 at 792 per Lopes LJ.

3 The early English case law and legislation is set out in detail in *J v C* [1970] AC 668. See generally, A Dickey, *Family Law*, 2nd ed, 1990, pp 319–24.

the "first and paramount" consideration. Most cases treat the difference as immaterial, and some authorities treat decisions under differently worded legislation as applicable, disregarding the difference in the formulation of the principle.[4]

It was carried through to the Matrimonial Causes Act 1959 (Cth), which governed custody proceedings that were ancillary to a marriage. It has dominated what used to be called "custody" law in Australia and numerous other common law countries for many years.

It has always been part of the Family Law Act 1975 (Cth). That Act first covered custody proceedings relating to "children of a marriage", but since the late 1980s, as a result of a reference of power by the states to the Commonwealth, it has covered such proceedings relating to all children, whether or not children of a marriage.[5]

"Welfare"

Many judicial statements stress that the word "welfare" covers a wide range of matters. It "is not to be measured by money only, nor by physical comfort only … The moral and religious welfare of the child must be considered as well as its (sic) physical well-being. Nor can the ties of affection be disregarded".[6] It has been said to include "all factors which will affect the future of the child;[7] including the child's happiness,[8] the immediate well-being of the child and matters relevant to the child's healthy development.[9] Since 1996 the term has been replaced by the phrase "best interests", although this involves no change of significance.

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4 See generally A Dickey, Family Law, 2nd ed, 1990, pp 340–1, agreeing with H Finlay that the varying terminology involves "a distinction without a difference": "First" or "Paramount"? The Interests of the Child in Matrimonial Proceedings (1968) ALJ 96 at 103.

5 Exceptionally, Western Australia did not refer power, and proceedings relating to ex-nuptional children are dealt with under state laws. However, as a result of the establishment of the Family Court of Western Australia, and the enactment of state law that are in relevant ways identical to the provisions of the Family Law Act (Cth), the principles in Western Australia are identical to those under the Family Law Act. Accordingly it is not necessary to complicate the text by repeated references to the equivalent provisions of the Western Australia legislation.

6 *Re McGrath (Infants)* [1893] 1 Ch 143 at 148 per Lindley LJ. To similar effect see *W v W* [1926] P 111 at 114–5 per Lord Merrivale.

7 *O'Conner v A and B* [1971] 1 WLR 1227 at 1237 per Lord Simon of Glaisdale.

8 *In the Marriage of K and Z* (1997) 22 Fam LR 382; FLC 92–783; *In the Marriage of Bishop* (1981) 6 Fam LR 882 at 888; FLC 91–016 at 76,193 per Treyvaud J.

9 Thus it is relevant that a situation causes a child real distress, whether or not it can be shown to cause long-term harm to the child, although it may be argued that immediate distress is outweighed by long-term developmental advantages, an argument that is often advanced in favour of returning children from a caregiver to a natural parent: see for example *Tull v McGuire* (1981) 7 Fam LR 326; FLC 91–098.

2. THE STRONG AND THE WEAK: TWO VERSIONS OF THE PARAMOUNTCY PRINCIPLE

We know what a child is: a person between birth[10] and 18. We also know what the child's "welfare", or "best interests" means, despite the difficulty of determining what actually is best for a child in particular cases. But what does it mean to say that the court must treat the child's best interests (or welfare) as paramount?

As is commonly the case with fundamental principles in law, there is room for uncertainty, or ambiguity, in the understanding and application of the principle. In order to analyse the large body of case law and secondary material on the meaning and application of the principle, I think it is helpful to distinguish between two approaches. I will call them the "strong view" and the "weak view". I will in this section illustrate these views and cite some of the relevant cases.

The strong view

On what I call the "strong view", the principle simply means that the court's task in children's cases is twofold:

(i) to identify what orders will be most likely to promote the child's best interests, and

(ii), to make those orders.

The point is that the court does not balance the child's interests against competing interests of other people, but treats the child's interests as determinative.

Much of the language of leading decisions on children's matters, at least in recent years, seems to support the strong view. For example, in the leading decision in *B and B; Family Law Reform Act 1995* (1997),[11] at a number of points in the judgment the Court used emphatic language consistent with the strong view; for example (emphasis added):-[12]

> *"9.51 In our view, the essential inquiry is clear. The best interests of the particular children in the particular circumstances of that case remain the paramount consideration. A court which is determining issues under Pt VII of the type to which we have referred, starts from that essential premise and* ***it remains the final determinant****.*

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10 *Attorney-General (Qld) (Ex rel Kerr) v T (No 2)* (1983) 8 Fam LR 875.

11 *B and B; Family Law Reform Act 1995* (1997) 22 Fam LR 676.

12 *B and B; Family Law Reform Act 1995* (1997) 22 Fam LR 676 at 733–4 (Nicholson CJ, Fogarty and Lindenmayer JJ). This decision was referred to with apparent approval in the later High Court decision of *AMS*, although the present issue was not discussed by the High Court.

Many Family Court decisions could be seen as supporting the "strong view" as the correct approach prior to 1996. Two leading cases, *Marriage of Schenck*[13] and *Marriage of Smythe*,[14] illustrate the point. In *Schenck*, the Full Court considered the relevance of findings that the husband had kidnapped a child, concealed his whereabouts, and actively sought to avoid compliance with orders of the Family Court. In a joint judgment the Full Court expressly rejected an argument advanced by the wife that the "paramount consideration" principle did not exclude other relevant considerations, and that in such a case the court should "visit its displeasure" on the husband, and award him custody only if the mother was found to be unfit. The Full Court said:-

> *"There is to be no departure from the basic principle that the welfare of the child is the paramount consideration ... [I]f it were a question of justice as between parties, [the wife] would have a genuine grievance at being deprived of custody by the court. But the court's concern is with the child and its welfare, and to that principle the 'justice' of the case must be subordinated ... In a sense, it could be said that [the husband] has profited by his own wrongdoing. Nevertheless, we are required to consider the case from the point of view of the child and the welfare of the child ..."*

Similarly in *Smythe* the Full Court held that notions of justice between the parties cannot be taken into account, even when the child's welfare is said to be evenly balanced.

The trial judge had said:

> *In short, if parents have separated in circumstances where the court does not have before it evidence which would reasonably explain and justify a withdrawal from cohabitation, then it would be unjust not to take that fact into account against the party who withdrew from cohabitation without any demonstrable cause being shown. This does not derogate from the principle enshrined in the Act that the welfare of the children is the paramount consideration, but where competing claims and proposals are finely balanced, the court should not ignore the circumstances which caused the children to be at the centre of a custody dispute."*
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> *"...the competing claims of the parents are rather similar, and this therefore becomes one of those cases where the court must in justice have regard to the reason why the parties separated and thus deprived these children of their former united household with both parents."*

The majority (Evatt CJ and Asche SJ) in the Full Court said (citations omitted)-[15]

> *The Act requires the court to "regard the welfare of the child as the paramount consideration" (s 64(1)(a)). The meaning of this guiding principle has been considered in a number of cases...*
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> *...there is in our view no justification for saying that if the factors relevant to the children's welfare are evenly balanced some other factor must be decisive of the issue.... There may be*

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13 *In the Marriage of Schenck* (1981) 7 Fam LR 170; FLC 91–023.
14 *Marriage of Smythe* (1983) 48 ALR 677; 8 Fam LR 1029; FLC 91–337.
15 *Marriage of Smythe* (1981) 8 Fam LR 1029 at 1035ff.

cases where parties seek to rely on factors which have little or no bearing on the welfare of the particular children whose custody or access is in issue… Such factors should be treated as of minor or no significance when set alongside the child's welfare. They cannot be decisive of the issue, or be relied on to determine what order will best promote the welfare of the child.

In each case there will be a number of factors which have some bearing upon the welfare of the children. Those most relevant to the children's welfare are given the most weight, those less significant are given less weight. It would not promote the welfare of the children to reach a conclusion that all factors relevant to the children's welfare weight evenly in the balance and then determine the issue by calling in some extraneous factor with no relevance to that welfare. When matters are said to weigh evenly or to be finely balanced all that has occurred is that the court has not yet determined which of the factors of most relevance to welfare should be given pre-eminence over the others. Nor can the court resolve its dilemma by falling back on presumptions…

… we cannot agree with what was said.. by his Honour in the present case to the extent that they suggest that matters other than those relevant to welfare may be decisive of the custody issue.

Turning now to the question of matrimonial conduct, there is, again, numerous authority for the proposition that matrimonial fault or conduct is relevant in relation to custody or access only if it has some bearing on the fitness of the person as a parent, and as a consequence on the welfare of the children… This principle applies not only to issues of fault, such as adultery, cruelty or desertion, but also to other aspects of a party's behaviour which may have a bearing on the justice of the situation…

…The overriding principle is whether the evidence and the conduct are relevant to the welfare of the child…

Mr Foster's submission that in evenly divided cases, misconduct may be a decisive factor must be rejected…

In the ordinary run of parenting cases, the issue does not arise. Typically, cases are simply conducted on which proposal is most likely to benefit the children, and the evidence and argument is usually solely preoccupied with this question. It is difficult to think of a recent parenting case (apart from the authorities discussed in this paper) where anyone even suggests that any other consideration, or any competing interests, should get a look in.[16] This is true even of some recent High Court cases, such as *Gronow v Gronow* (1979).[17]

The strong view does not ignore matters indirectly relevant to the child's interests

Before leaving this topic it is necessary to stress that a wide range of matters may be *indirectly* relevant to the best interests of the child. A parent who wishes to relocate to join a new partner and

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16 It used to be a fine subject for controversy. See for example the argument that the substituting "the paramount consideration" for the former "first and paramount" consideration was intended to make the child's interests "the supreme and unqualified and uttermost", and was a deliberate decision to exclude competing factors: *Cuartero v Cuartero* (1967) 11 FLR 472 (Barry J).

17 *Gronow v Gronow* (1979) 144 CLR 513; 5 Fam LR 719; FLC 90–716 (HC).

find new employment in another country may, if trapped in Australia, be unhappy and poverty stricken. As a consequence, that parent may be less able to care for the child. Similarly, a parent who truly believes that child is at risk of sexual abuse from the other parent may be so preoccupied with this perception, and so distressed about it, that she will be unable to cope with the situation in which that parent has contact with the child. The consequence might be that orders for contact will in fact not promote the best interests of the child because the child's interests will be harmed by being in the care of a mother so preoccupied with this perception that she cannot function properly as a parent.

A court that takes such matters into account may nevertheless be applying the strong view of the principle. These are simply matters which are relevant, albeit indirectly, to the child's best interests. Ultimately the court will make the orders which, in the light of all relevant matters, it thinks are most likely to advance the child's best interests. In doing so, it gives effect to the strong view of the principle. It does not give any separate weight to the interests of the relocating parent to freedom of movement, or to the wishes of the fearful parent, as interests of those parents competing with the interests of the child.

An analogy may be seen in safety instructions given on aircraft. Passengers with young children are advised to fix their own oxygen masks before fixing the masks for their children. This can easily be seen as consistent with putting the children's interests first: a parent who has passed out from lack of oxygen will be unable to assist the child.

I would argue that this is clear in principle, and capable of logical and consistent application. However, its application requires the court to be intellectually honest. The court must avoid speaking of these matters as factors relevant to the interests of the child, when the true intention of the judge is to take them into account as factors in their own right. It is possible, for example, in a relocation case, that a judge who feels very strongly that it would be wrong to prevent a parent from relocating might be tempted to overstate the extent to which the parents capacities to care for the child would be disabled by an order that effectively prevented the parent from relocating. This issue is not confined to what I have called intellectual honesty. Our perceptions of the world are often influenced by our values and feelings, and it would not be surprising if a judge who felt sympathetic towards the relocating parent might hold a perception of the extent that the parent would be disabled by being attacked in Australia which, while honestly held, went somewhat beyond the evidence.

While applying the principle requires care, I think there is a clear and workable distinction between giving effect to such matters as factors in their own right (separate from and perhaps competing

with the best interests of the child) and taking them into account as matters indirectly affecting the child. The latter is consistent with the strong view, the former is not.

Child's interests prevail over competing interests of parents and others

It is useful to spell out the implications of the "strong" view. Firstly, the interests of the child necessarily prevail over the interests of any other person. Most obviously, they prevail over the interests of parents. Let me give some illustrations of this.

Suppose the parents of a young child separate. Parent A is clearly better able to provide for the child's developmental needs than is Parent B. However, Parent A has many interests and life satisfactions, and family support, and will only suffer ordinary disappointment if the child goes to the other parent. Parent B, by contrast, would suffer considerably if the child went to Parent A. If the court came to the conclusion that it would be best for the child to be placed with Parent A, the principle would prevent it from nevertheless placing the child with Parent B in order to reduce that parent's suffering or distress.

Another way of looking at this example is to say that utilitarian principles would not apply. Assume that the child would be *slightly* better off with Parent A, but that Parent B would suffer *greatly* if Parent A had residence. Under the paramountcy principle, according to the strong view, the child would go to Parent A, *even if the unhappiness suffered by Parent B would outweigh the happiness of Parent A combined with happiness of the child*.

I take as a second illustration the practice, in some communities, of placing a later-born child with a childless relative, to be raised by that relative. Nevertheless, In this practice, at least one objective, and perhaps the main objective, is to satisfy the needs of the childless relative, and, perhaps, to benefit the community indirectly. Those responsible for the placement would not normally claim that the child would be *better off* in the care of the childless relative. This could not be done under the paramountcy principle: it would preclude a court from transferring a child to the childless relative for such purposes. If the question arose in court whether the child should grow up with the parents or the childless relative, applying the principle, the court *would not allow the needs or interests of the childless relative to prevail against the interests of the child*.

A third example of the operation of the principle is that the interests of the child who is the subject of proceedings must prevail over the interests of *other children* who are not the subject of the proceedings.[18]

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[18] I think there is Australian authority for this, but I have not been able to locate it.

Child's interests prevail over implementation of public policies

Secondly, under the strong view the interests of the child prevail over the implementation of public policies. A example is that where a parent has alientated the child from the other parent, no matter how much the first parent's behaviour might be condemned, if the court took the view that in the resulting situation the child's best interests would be promoted by an order in favour of the alienating parent, it would be obliged to make that order. It could not, for example, make an order in favour of the other parent on the basis that doing so would be an example to others, or promote the interests of children in general by discouraging such conduct. The same would apply, as *Schenck* illustrates, if one parent had abducted the child: the court could not make the decision on the basis of discouraging such conduct, if to do so would mean that it would make an order other than the orders it considered most likely to benefit the child.[19]

The point can also be illustrated from the law of adoption. Assume that foster parents apply to adopt a child, in circumstances where they have avoided the requirements of local adoption laws. If the child has been with the foster parents for a long time and is attached to them and doing well, the child's welfare may well be promoted by the adoption. If the court finds this to be the case, the court must make the adoption order. It could not refuse to do so on the basis that to do so would encourage other people to avoid the requirements of adoption laws, to the detriment of children in general (whose interests are assumed to be promoted by adherence to adoption procedures).

The weak view

The second view, which I will call the "weak view", is more difficult to state. It is best expressed negatively: that the paramount consideration does *not* necessarily require the court to make whatever order it thinks best for the child regardless of other things.

If the weak view is correct, giving an account of the content of the legal principle becomes a rather complicated matter. What other circumstances, interests or policies can be taken into account? What weight should be given to them? Can other interests or policies ever justify a result that places children at risk of serious harm? Can they justify a result that is less than optimal for the child, or can they only play a part helping the court to choose between two or more outcomes, each of which is equally good or bad for the child? Among those who favour the weak view, there could be large differences as to what circumstances provide a proper basis for compromising the child's interests.

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[19] There is a striking contrast in this respect with the law implementing the Hague Convention on the Abduction of Children, which does implement an anti-abduction policy, and in which the child's best interest are not the paramount consideration.

Different positions may be taken about two basic matters. The first is *what* competing matters are eligible to be taken into account. They might include some aspects of the interests of a parent, as in the case of a decision giving residence to a parent who wants to relocate with the child, in order to respect that parent's freedom of movement, or a decision that a child should have the father's surname, in order to protect the father's right to pass on his inheritance. They might include the interests of *other* children, as in the case of a decision favouring a non-abducting parent over one who abducts the child, in order to protect the interests of other children by discouraging kidnapping. Turning to procedural matters, they might include a decision not to expedite a particular children's case, because to do so would be unfair to other cases, including children's cases, which would be delayed by allowing the applicant for expedition to jump the queue.

The first question, then, is to identify *what* competing interests should be taken into account. The previous examples illustrate possible candidates.

The second question is more obvious: *to what extent* should the competing interests be taken into account? A robust version would be that the paramount consideration principle means no more than that the court should treat the child's interests as an important matter. This would be similar, perhaps, to the subtly different language of the Convention on the Rights of the Child, which refers to the child's interests being treated as "*a primary consideration*". A more cautious answer to this might be that the competing interest could not be taken into account where it would seriously compromise the child's interests, or expose the child to danger; but it could be taken into account even though it might lead to a less than optimal result for the child. An even more cautious answer could be that the competing interest could come into play only if the court considered that the child's interests would be equally served by either of the possible orders before it, or that it was unable to conclude that one order would favour the child more than the other.[20]

To sum up, then, the "weak view" encompasses a range of approaches, which could potentially take different positions on the identification of matters capable of competing with the child's interests, and on the degree to which the child's interests are to be given special weight in competing with the other interests.

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[20] As noted, this approach was firmly resisted in *Smythe*, above.

Older cases – notably Re L (1962)

If you're looking for decisions that embody the weak view, here is a suggestion. Look for older cases rather than recent ones.[21] And among recent ones, look for cases that involve unusual or peripheral issues rather than the making of final parenting orders. I'll take these categories in turn.

I start with *Re L*,[22] a 1962 decision of the English Court of Appeal, starring, inevitably, Lord Justice Denning.[23] It is a famous decision,[24] but is perhaps not so well known today. In a contest for custody between a husband and a deserting wife, the Court of Appeal gave a decision favouring the husband. The wife had left the home and gone with the two daughters, aged 6 and 4, to live with her new partner. The trial judge found the marriage breakdown was solely due to the mother's behaviour: she had "gone from home because of her interest in another man, without any justification whatever". The father retook the girls, and at the time of the trial they were being looked after by his unmarried sister. The trial judge awarded custody to the mother, but the Court of Appeal allowed the appeal and awarded custody to the father.

As always with Lord Denning, the reasoning is illuminating, and the competing (and unresolved) pressures are very apparent. At one point, he expressed "the greatest sympathy" for the father, but said it was his "duty to put any considerations of that sort to one side and simply to look at this thing from the point of view of what is best for these two children". He then said, however, that the trial judge fell into error. While he was right to give "great weight" to the welfare of the children, and to make it as the statute said, the first and paramount consideration, "he must nevertheless remember that, whilst it is the paramount consideration, it is not the sole consideration." He went on to say that in so far as the mother broke up the home, she was "not a good mother". A little later he said:

> *It would be an exceedingly bad example if it were thought that a mother could go off with another man and then claimed as of right to say: "I'll well, they are my two little girls and I am entitled to take them with the. I could not only leave my home and break it up and leave their father, but I can take the children with me and the law will not say me nay." It seems to me that a mother must realise that if she leaves and breaks up her home in this way she cannot as of right demand to take the children from the father. If the mother in this case were to be entitled to the children, it would follow that every guilty mother (who was otherwise a good mother) would always be entitled to them: for no stronger case for the father could be found. He has a good home for the children. Here is ready to forgive his wife and have her*

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21 For Australia, see, eg the unfortunately named *Chisholm v Chisholm* (1966) 7 FLR 347; *Powell v Anderson* (1977) 1 Fam LN 38; FLC 90–235; *Tabe v Tabe* (1984) 9 Fam LR 730 at 732 per Bollen J).

22 *In re L (Infants)* [1962] 1 WLR 886 (CA).

23 *In re L (Infants)* [1962] 1 WLR 886 (CA).

24 It is extracted and discussed in that fine early Australian text, Hambly and Turner, *Cases and Materials on Australian Family Law* (Law Book Co, 1971), and discussed in (1964) 1 NZULR 310; [1962] Cambridge LJ 169; and (1963) 79 LQR 13.

back. All that he wishes is for her return. It is a matter of simple justice between them that he should have the care and control. Whilst the welfare of the children is the first and paramount consideration, the claims of justice cannot be overlooked.

In the course of a concurring judgment, Harmon LJ said that when he was a young man at the bar, the idea "that you gave access, except under the most stringent conditions, to the adulterous spouse, was rejected with indignation".

What is going on here? To some extent, the decision can be see as determining what is best for the children in the light of the then current social values. But I don't think this is the whole story. I suggest that this case also shows a court putting into effect something other than its view about the interests of these particular children, whether the "something other" is regarded as doing what is best for society, or achieving justice between the parties, or something else.[25] Because of this, I think the decision embodies what I call the "weak version" of the principle.

Recent decisions

Re L has been discredited for some time.[26] Nevertheless, it is possible to find quite a number of examples of the weak version in recent decisions. One set of decisions relates to the admission of evidence. Because of the impact of the evidence act 1995, and the amendments to the family law act of 1995, these decisions probably no longer represent the law. But they illustrate very well the application of the "weak version" where the court was applying the paramount consideration principle in deciding questions about admitting evidence.

Some cases involve a matter of procedure or evidence, or a question whether the court should exercise jurisdiction. Or it may be a question whether the court should prevent some person from taking a particular action that would have an impact on a child, such as publishing a book about a child's parent. In such cases, interests other than those of the child seem to play some part in the decision. In general, these are more recent decisions, in which the paramount consideration principle is considered in relation to issues other than making final orders about residence and contact.

There is a considerable body of English law in this area. In some cases, the courts maintain principles about the right of free speech, or rules restricting publication of sensitive information,

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25 John Eekelaar identifies four reasons. First, a wish to discourage other women from breaking up their homes. Second, justice between the parties, the husband being "unimpeachable". Third, as an attempt to encourage reconciliation. Fourth, that the wife had shown herself to be a bad mother. See John, Eekelaar, *Family Law and Social Policy* (2nd ed) 77.

26 *Re K (Minors)(Wardship: Care and Control)* [1977] Fam 179 (CA); *S (BD) v S (DJ)(Infants: care and contact)* [1977] Fam 109 (CA).

about the identity of children or people who report suspected child abuse.[27] The cases include those in which an application is made to make use of confidential materials in wardship proceedings for other purposes, such as defending a criminal charge or participating in other separate litigation.[28] The English courts have also resisted attempts to use the wardship jurisdiction to circumvent the operation of immigration laws, and have upheld the policy of those laws, though the paramount consideration principle applied.[29] In another case a local authority unsuccessfully sought to require a school to educate a child.[30] These English authorities show that there is a class of decisions in which the child's welfare is *relevant but not decisive*, even though the proceedings are governed by the paramount consideration principle.

The leading Australian case in this area is (or was, before the 1995 Act) the decision of the Full Court in *Hutchings v Clarke* (1993).[31] In that case it was held that evidence could be given of the contents of negotiations between parties in custody proceedings. The ordinary principle that such communications were privileged gave way, in the circumstances of that case, to the child's welfare, which required that evidence could be given of the particular communication. That decision has been considered in a number of others. These authorities hold that in such matters the child's welfare may not be the paramount consideration, but rather a consideration that should be weighed against other considerations in what has been called a "balancing exercise".[32] In the context of decisions about the applicability of rules of evidence, the welfare of the child before the court is likely to be advanced by the admission of the evidence. This must be balanced against the policies underlying the exclusionary rule of evidence involved, which policies might serve other important public interests, such as allowing parties to negotiate towards a settlement without the fear that their offers and counter-offers will be used as evidence against them. The interests protected by such policies may include the interests of children generally (as distinct from the welfare of the child before the court), for their welfare is likely to be promoted by a legal system which facilitates the settlement of disputes about their welfare.[33]

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27 *Re X (a minor) (wardship) (restriction on publication)* [1975] 1 All ER 697 (CA); *Re M and N (Minors) (Wardship: Publication of Information)* (1990) 1 FLR 149; *Re H-S (Minors: protection of identity)* [1994] 3 All ER 390 (CA) (in which the balancing exercise was carried out even though the injunction was directed to a parent); *X County Council v A* [1985] 1 All ER 53; *Re C (A Minor) (Medical Treatment) (No 2)* [1989] 2 All ER 791 (CA).

28 *Re X Y and Z (Wardship: disclosure of material)* [1992] 1 FLR 84; *Re K and ors (minors) (disclosure of privileged material)* [1994] 1 FLR 377.

29 *Re Mohamed Arif (An Infant)* [1968] Ch 643; *Re F (A Minor)* [1990] Fam 125; *Re A (A Minor) (Wardship: Immigration)* [1992] 1 FLR 427; *Re K and S (Minors) (Wardship: Immigration)* [1992] 1 FLR 324.

30 *Re C (A Minor) (Wardship: Jurisdiction)* [1991] 2 FLR 168 (CA).

31 *Hutchings v Clarke* (1993) FLC ¶92-373; (1993) 16 Fam LR 452.

32 For a detailed account see *Benson v Hughes* (1994) 17 Fam LR 761 at 770-776; (1994) FLC ¶92-483.

33 Similar approaches have been taken in England: see eg *Re E (SA) (A Minor)* [1984] 1 WLR 156 (HL); *Re R (A Minor) (Disclosure of privileged material)* [1993] 4 All ER 702.

Other matters raise similar issues.[34] One view of the rule in *Rice v Asplund*[35] is that the basis of the rule is to protect the public interest, and the interests of children in general, by preventing frequent applications for parenting orders in relation to a particular child. Similarly, the practice of deciding interim matters "on the papers" seems to be based on the public interest in avoiding court delays, rather than the interests of the particular child in a particular case. Arguably at least, these procedural approaches are inconsistent with the strong view of the paramount consideration principle.[36]

3. THREE ATTEMPTS TO RESOLVE THE CONFLICT BETWEEN THE TWO VIEWS

Can the tension between the two views be resolved? In what follows I will consider a number of possibilities. Firstly, can it be argued from the meaning of the words that one or other of the two views is correct? Secondly, can it be said that the High Court has embraced one view or the other? Thirdly, does the strong view apply in some sorts of cases and the weak view in others? I will consider these possibilities in turn.

THE MEANING OF THE WORDS: AMBIGUOUS

I should deal briefly with the possibility that the problem can be resolved by a careful examination of the words themselves. It has long ceased to be fashionable to examine this area.[37]

Proponents of both the strong view and the weak view have referred to the precise language in which the principle is expressed. For example, Goldstein J. equated the word "paramount" with the word "overriding", and said that the expression "does not mean that one should view the matter of the child's welfare as first of a list of factors to consider, but rather that it must be the overriding consideration".[38] The Privy Council has said, with a fine flourish, "to this paramount consideration all others yield".[39] In the leading decision of the House of Lords, Lord McDermott said:[40]

> *Reading these words in their ordinary significance, and relating them to the various classes of proceedings which the section has already mentioned, it seems to me that they must mean*

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34 See the discussion of s 65E in the Butterworths Family Law Service.

35 *Rice v Asplund* (1978) 6 Fam LR 570.

36 In *Flanagan v Handcock* (Transcripts, S5/2001; 20 November 2001) Gummo J, refusing special leave, said: "The only ground of general importance which would attract the intervention of this Court in an appropriate case is the challenge to the correctness of *Cowling v Cowling* (1998) FLC 92-801 and the reconciliation between section 60B and the other provisions of the *Family Law Act*. In an appropriate case this Court may well wish to consider the correctness of *Cowling v Cowling*...

37 The last article I can think of on the subject is H. A Finlay, "First or paramount? The interests of the child in matrimonial proceedings" (1968) 42 ALJ 96.

38 *Marriage of Kress* [1976] FLC 90-126.

39 *McKee v McKee* [1951] AC 352.

40 *J v C* [1970] AC 668, 710-711.

more than that the child's welfare is to be treated as the top item in a list of item is relevant to the matter in question. I think they, connote the process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks choices and other circumstances are taken into account and way, the course to be followed will be that which is most in the interests of the child's welfare as the term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed."

Despite such apparently forceful comments, others have referred to the language to support the weak view. The argument is that the strong view is equivalent to saying that the child's interests are the *sole* consideration. However if the legislators had meant to say that, they would have done so. For those who take this view, the word paramount "necessarily contemplates the existence of other considerations".[41]

Dr Anthony Dickie has proposed a solution to the problem in the following terms:[42]

The solution to the problem just posed lies not with the word "paramount" but with the word "consideration", and in particular the fact that the word "consideration" can mean two quite different things in the present context. On the one hand, it can mean simply a fact or circumstance that may pertain to the welfare of the child. It is in this sense that courts use this term when they say that the welfare of the child is not the only consideration and that other considerations can also be taken into account. They then mean that in custody and related cases the court may take into account any fact or circumstance that may have some bearing upon the welfare of the child.

On the other hand, "consideration" can also mean the basis upon which the court will make its final decision after it has reviewed all the facts and circumstances of the case. It is in this sense that the courts regard the welfare of the child is the paramount consideration. Thus, in deciding cases concerning parental responsibility, a court may take into account any fact or circumstance that pertains to the interests of the child. For example, they may take into account such matters as the age, sex and wishes of the child… In taking these matters into account, however, the court's decision must be based solely upon what will best promote the interests of the child. To this extent, the welfare of the child is indeed the only consideration.

This analysis ultimately supports what I have called the strong view. The test is the answer to this question: if the court concluded that they particular order will be best for the child, *must* it make that order? Dicky would answer the question in the affirmative.

I agree with Dr Dicky that the word "consideration" is important. I suspect that there is a conceptual problem in the traditional wording of the principle. I suspect that the language is appropriate for a different kind of decision to the decision than courts have to make in children's cases. Suppose you are choosing a home. You might draw up a list of relevant considerations

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41 *Re Thain (an Infant)* [1926] Ch 676.

42 Anthony Dickey, *Family Law* (3rd ed, 1997), 382.

including perhaps, three bedrooms, near public transport, and near to the shops, or the pub. It might say that of those considerations, three bedrooms was paramount, and that it was slightly more important for the home to be near public transport than to be near the shops. In this decision, however, the ultimate objective would be, say, to enhance the pleasantness of your life. The various matters on the list would be there because they were relevant to that ultimate objective.

In deciding children's cases, however, there is no self-evident ultimate objective. The law could in principle require the court to make a decision intended to promote the interests of the child. It could, alternatively require the court to make a decision intended for some other purpose or combination of purposes, for example to discourage child abduction; or to do justice between the parties. The basic question is, what is the court making the orders *for*? It is confusing, I think, to speak of "considerations", paramount or otherwise, to answer this question.

If it were clear that the ultimate objective of the court is to advance the child's best interests, it would be possible, for example, to say that the wishes of the child is a factor of particular importance, perhaps even paramount, in the same way as one might say that proximity to public transport, or having three bedrooms, is the paramount consideration inducing a place to live. But referring to "considerations", or their relative importance, is no substitute for identifying what the court is intended to achieve. Only when that goal is known is it useful to talk of considerations. I suggest that this problem is partly responsible for the odd phenomenon that the words seem to lend themselves to two separate interpretations.

Whether or not this analysis is correct, I suggest that the words of the principle cannot be said to provide unequivocal support for either the strong or the weak view.

THE HIGH COURT DECISIONS: EQUIVOCAL

Early cases

There are a few pre-Family Law Act custody cases in the High Court.[43] In the main, they are about the process of working out what is best for the child. They involve, for example, considering whether there are advantages for a child to be with a birth parent, or with the mother rather than the father. With a few qualifications, the decisions do not explore the issue that is the subject of this paper.

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[43] *Storie v Storie* (1945) 80 CLR 597, *Lovell v Lovell* (1950) 81 CLR 513; *Kades v Kades* (1962) 35 ALJR 251.

There are, however, some suggestions to the effect that matters other than the child's welfare might play a part, notably in *Storie v Storie*.[44] To some extent, these suggestions turn on earlier legislation and are of limited relevance to the Family Law Act. In fact, from the vantage of the present, *Storie* looks like a completely orthodox custody (parenting) case. It was a competition for custody between a husband and wife. The husband had taken the child, a girl then aged seven, and placed her with a married woman living in the country, and access by the wife was difficult and expensive. The wife proposed that she and the child, nine at the time of the trial, would board with a friend, a married woman with no children, who would look after the child while the wife was at work. The High Court allowed an appeal by the wife essentially on the ground that it was likely to be best for the girl to be in the care of a parent. The court below had opted for the status quo, the child having been with the other woman for two years. Despite the language of some of the judges about the words "first and paramount" not excluding other factors, so far as I can see the case is essentially an entirely unremarkable decision about what was best for the child. No competing considerations seem to have been advanced or embraced by the High Court.

M v M (1988)

The first High Court decision of significance since the Family Law Act is the well known decision *M v M*.[45] This decision is the High Court's definitive analysis of the where there are allegations that a child has been abused. The trial judge had ruled that the father (against whom there were allegations of sexually abusing the child) should have no access. By a majority, the Full Court dismissed the appeal, and the High Court also dismissed the appeal. In a unanimous judgment, the High Court said:-[46]

> *The basic flaw in the appellant's argument is to identify the allegation of sexual abuse as the paramount issue for determination by the court. In proceedings under Pt VII of the Act in relation to a child, the court is enjoined to "regard the welfare of the child as the paramount consideration" (s 60D). The paramountcy of this consideration in proceedings for custody or access is preserved by s 64(1). The consequence is that* ***the ultimate and paramount issue to be decided in proceedings for custody of, or access to, a child is whether the making of the order sought is in the interests of the welfare of the child.*** *The fact that the proceedings involve an allegation that the child has been sexually abused by the parent who seeks custody or access does not alter the paramount and ultimate issue which the court has to determine, though the court's findings on the disputed allegation of sexual abuse will naturally have an important, perhaps a decisive, impact on the resolution of that issue.*
>
> *But it is a mistake to think that the Family Court is under the same duty to resolve in a definitive way the disputed allegation of sexual abuse as a court exercising criminal*

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44 *Storie v Storie* (1945) 80 CLR 597.

45 *M v M* (1988) 166 CLR 69. I can find nothing relevant in *Gronow* or *Douglas v Longano* (1981) 6 Fam LR 802.

46 *M v M* (1988) 166 CLR 69 at 75–6 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ).

> *jurisdiction would be if it were trying the party for a criminal offence… [the] court is not enforcing a parental right of custody or right to access. The court is* ***concerned to make such an order for custody or access which will in the opinion of the court best promote and protect the interests of the child****...*

The passages I have emphasised support the "strong view". They do not seem to be consistent with any suggestion that the child's welfare could be compromised by countervailing considerations.

***ZP v PS* (1994)**

In *ZP v PS* (1994),[47] the High Court held that in custody proceedings the question whether to proceed to a full hearing or to make some other order, such as an order for summary removal of the child to another country, is governed by the principle then in s 64(1)(a), namely that the child's welfare must be regarded as the paramount consideration. The "clearly inappropriate forum" test, established in *Voth v Manildra Flour Mills* (1990)[48] had no application in proceedings relating to custody and guardianship, because it was effectively displaced by the requirement of s 64(1)(a) that the court must regard the welfare of the child as the paramount consideration. Thus Mason CJ, Toohey and McHugh JJ said:-[49]

> *``... [the court's] duty is to make such order as will "best promote and protect the interests of the child" ... It follows that, when a child is within the jurisdiction of the Family Court, the doctrine of forum non conveniens has no application to a dispute concerning the custody of the child ... Injustice to one or other of the parties, expense, inconvenience and legitimate advantage, which are always relevant issues in a forum non conveniens case, ...* ***are not relevant issues in a custody application****. In some cases, those matters may bear on issues which touch the welfare of the child but they are* ***not themselves relevant issues when the question arises whether the welfare of the child requires the making of an order that the issue of custody be determined in a foreign forum****."*

Again, the passages that I have highlighted appear to support the "strong view". Whether this conclusion can be drawn from the decision as a whole, however, is problematical.

There was some discussion in *ZP v PS* relevant to the extent to which other policies or interests can be taken into account in applying the "paramount consideration" principle. The issue as it arose in *ZP and PS* was whether the decision to exercise or not exercise jurisdiction should be based solely on whether doing so would benefit the child (the consequence of the strong view) or whether the court could take into account, in competition with the interests of the particular child involved in the proceedings, the general policy of discouraging international child abduction.

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47 *ZP v PS; Re PS; Ex parte ZP* (1994) FLC ¶92-480; (1994) 17 Fam LR 600 (HC).

48 *Voth v Manildra Flour Mills Proprietary Limited & Anor* (1990) 171 CLR 538, 97 ALR 124.

49 At (1994) FLC p 80,999; CLR 604-5. For similar statements, see at CLR 616-18, 621.

The quoted passage from the joint judgment of Mason CJ, Toohey and McHugh JJ, while emphasising the paramountcy of the child's welfare, does not expressly say to what extent, if at all, the anti-abduction policy might properly play a part in the determination of the case. The other two joint judgments do not appear to accord on the point.

Brennan and Dawson JJ said this:-

> *"The policy of the Convention is not a factor which can displace the paramount consideration of welfare. It is* ***only if welfare factors be evenly balanced*** *that secondary considerations such as the policy of discouraging the abduction of children across national borders or the desirability of the determination of permanent custody being made in the child's ordinary place of residence can have any weight in guiding the exercise of the Family Court's powers."*

This passage appears to adopt what is perhaps the most tentative version of the "weak view". On this version, other considerations cannot compete with the child's interests but can only come into play when the court is choosing between two possibilities, neither of which is demonstrably preferable for the child.

Deane and Gaudron JJ, however, took what might be regarded as a different approach (at (1994) FLC p 81,012; Fam LR 621):

> *"... as Mason C.J., Toohey and McHugh JJ. point out,* ***the issue is whether the welfare of the child requires speedy repatriation*** *to the country from which he or she was taken, with the courts of that country determining custody and other matters relating to the child's upbringing. We would add, however, that in determining what is in the interests of the welfare of the particular child, a court is* ***entitled to take account of considerations of public policy reflecting and protecting the interests of all children****. Among those considerations of public policy is the prima facie importance, in the interests of all children, of discouraging the taking of a child from his or her homeland and familial environment, in breach of the law of that homeland, for the purpose of obtaining standing or some forensic advantage in a dispute about custody, access or financial support in the courts of some other place. Such abduction of children across national boundaries, if encouraged by being treated as an accepted means of attracting the jurisdiction of, or obtaining some procedural advantage in, the desired forum, pose a threat to the security of any child subject to competing national claims or loyalties."*

In this passage, do Deane and Gaudron JJ say that the court could take into account the anti-abduction policy *only as a factor relating to the interests of the child* who is the subject of proceedings? If so, it would ask whether this child be better off if the court were to exercise jurisdiction. Or do they say that the *protection of children in general* could play some independent part in the factors that led the court to arrive at a result? The first sentence seems to suggest the first interpretation, while the second sentence provides at least some support for the second.

As a result of these passages, it seems that some support can be found in the High Court's judgments for any of three positions: the strong view, the weak view, and what might be seen as the minimalist version of the weak view, namely that other considerations can play a part only if they do not adversely affect the child's interests to any degree at all. The best that could be said for the weak view is that two of the seven justices adopted it.

If one were to engage in an orthodox analysis, the *ratio decidendi* would appear to be that where the court concludes that the interests of the child would be promoted by exercising or not exercising jurisdiction, it should make an order accordingly; although where the factors were evenly balanced so far as the child's welfare was concerned, it would then take into account other considerations, neither outcome being contrary to the child's interests.

How significant is this decision for the general analysis of the paramount consideration principle? Obviously it is relevant, and no doubt people will quote those passages that they see as supporting the view they wish to advance. However the main point of the judgments was that because of the paramount consideration principle, the ordinary approach to determining the question of forum did not apply. It is not clear that the subtle differences discussed above would have made any difference to the final outcome. Furthermore, there is no discussion in the judgments of other authorities dealing with the correct interpretation of the principle. For these reasons, I think it would be wrong to treat this decision as decisive in relation to the matters discussed in this paper.

***CDJ v VAJ* (1998)**[50]

This case mainly involved the admission of further evidence on appeal. Section 93A(2) relevantly provided that "... in an appeal the Family Court … has power to… receive further evidence…" For our purposes, it is enough to say that the case deals with the relationship between the principle and ancillary decisions. On this aspect the Full Court had said:-

> *Is an appellate court when deciding whether to admit fresh evidence in the course of hearing an appeal against an order concerning the person with whom a child is to live deciding whether to make an order as to the person with whom a child is to live? It seems to us that we would be required to find significant elasticity in the language to achieve a positive answer to that question. Assuming that we cannot stretch the language that far, then, in our view, the constant shadow of the paramountcy principle in child welfare cases is such that at the very least, the best interest considerations are powerful matters to be weighed up against a competing principle such as finality.*

The High Court agreed with this analysis. McHugh, Gummow, and Callinan JJ said, for example, that the interests of the child was "a factor of great weight. It will be one of the most important

discretionary considerations to which the Full Court must have regard." Kirby J specifically agreed with the "constant shadow" metaphor (although he was later to consider it somewhat gloomy).

N T v GPAO and others (1999)[51]

I do not think it necessary to discuss this decision in the present context. The present relevance of the case is about the relationship between the principle and ancillary decisions, such as the admission of evidence. The references to the paramount consideration principle are broadly consistent with those indicated above in *CDJ*. Thus Gleeson CJ and Gummow J, with whom Hayne J agreed, said at [68]:[52]

> *Section 65E identifies the issue in the case. In any kind of litigation, the formulation of the ultimate issue may have an important influence upon the practical operation of the adjectival rules which apply to such litigation. It has long been recognised that the paramountcy principle has such an influence in proceedings concerning the welfare of children.*

***AMS v AIF* (1998)**[53]

This is by far the most important and revealing High Court decision for present purposes. It involved a "relocation" decision. Again, it is a familiar case and I will go straight to the parts that are of present relevance.

Gleeson CJ, McHugh and Gummow JJ. said:-

> *We agree with Kirby J that the State Family Court erroneously exercised its discretion by requiring the demonstration by the mother of "compelling reasons" to the contrary of the proposition that the welfare of the child would be better promoted by him continuing to reside in the metropolitan area of Perth.*

Gaudron J said (emphasis added):-

> *The mother's case was one which permitted of two possible outcomes. The first was that she should have custody regardless of where she lived. The second was that she should have custody only for so long as she resided in Perth. Each of those possibilities had to be assessed against the alternative for which the father contended, namely, that the child live with him and his new family. A decision then had to be made as to which of those possibilities was preferable,* ***the welfare of J being the paramount but not the only consideration to which regard was to be had*** *in making that decision.*[54]

It is necessary to quote Kirby J at greater length. He said (emphasis added):-

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50 *CDJ v VAJ* (1998) 23 Fam LR 755.

51 Northern Territory of Australia v GPAO and others (1999) 24 Fam LR 253.

52 A similar approach was taken by the other members of the court: see Kirby J at [233], Gaudron J at [139] and McHugh and Callinan JJ at [198].

53 *AMS v AIF* (1998) 24 Fam LR 746.

54 *Storie v Storie* (1945) 80 CLR 597 at 611 per Dixon J, 620 per Williams J. See also *B and B: Family Law Reform Act 1995* [1997] FLC 92-755 at 84,198.

It is necessary for a court, making decisions affecting the child's place of residence, to attempt a resolution of often irreconcilable considerations[55]*. Statute may, and commonly does, instruct that the "welfare" (or "best interests") of the child should be the paramount consideration*[56]*. It may provide a list of considerations or "principles" to be applied in the exercise of the court's powers*[57]*. However, the "paramount" consideration is not the same as the "sole" or "only" consideration. The relevance of enumerated statutory principles will depend upon the circumstances of the particular case*[58]*. Preconceived notions as to the weight which must be given to particular factors are incompatible with the exercise of an individualised judicial discretion such as is mandated by Australian legislation*[59]*.*

Thirdly, a statutory instruction to treat the welfare or best interests of the child as the paramount consideration does not oblige a court, making the decision, to ignore the legitimate interests and desires of the parents. If there is conflict between these considerations, priority must be accorded to the child's welfare and rights. However, the latter cannot be viewed in the abstract, separate from the circumstances of the parent with whom the child resides[60]*. If it were otherwise, a universal rule would be established whereby the custodial or residence parent (usually the mother) would virtually always be obliged to reside in close proximity to the other parent (usually the father) so as to facilitate contact between the latter and the child. There is no such universal rule*[61]*.*

Fourthly, the applicable legislation is enacted, and the relevant discretions exercised, for a society which attaches high importance to freedom of movement and the right of adults to decide where they will live. That is doubtless why courts have expressed themselves as reluctant to make orders which interfere in the freedom of custodial (or residence) parents to reside with the child where they wish, at least where such parent is the unchallenged custodian[62] *or has been designated the sole guardian*[63] *of the child. One of the objects of modern family law statutes (including FLA 1975 and FCA 1975) is to enable parties to a broken relationship to start a new life for themselves*[64]*, to control their own future destinies*[65] *and, where desired, to form new relationships*[66]*, free from unnecessary interference from a former spouse or partner or from a court. Courts recognise that unwarranted interference in the life of a custodial parent may itself occasion bitterness towards the former spouse or partner which may be transmitted to the child or otherwise impinge on the happiness of the custodial (or residence) parent* ***in a way likely to affect the welfare or best interests of the child***[67]***. This said, the touchstone for the ultimate decision must remain the welfare or best interests of the child and not, as such, the wishes and interests of the parents. To the extent***

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55 Butler-Sloss, "Children Crossing Frontiers - the Perspective of the English Courts", Paper for the Eleventh Commonwealth Law Conference, Vancouver, (1996) cited in *B and B* [1997] FLC ¶92-755 at 84,205.

56 FCA 1975, s 28(2).

57 FCA 1975, s 28(1).

58 *B and B* [1997] FLC ¶92-755 at 84,239; Young, "Are Primary Residence Parents as Free to Move as Custodial Parents Were?" (1996) 11(3) *Australian Family Lawyer* 31 at 35.

59 cf *Stadniczenko v Stadniczenko* [1995] NZFLR 493 at 500.

60 *B and B* [1997] FLC ¶92-755 at 84,237.

61 *In the Marriage of E and E* [1979] FLC ¶90-645 at 78,395.

62 *Poel v Poel* [1970] 1 WLR 1469 at 1473 per Sachs LJ; *P v P* [1970] 3 All ER 659 at 662.

63 *In the Marriage of I and I* [1995] FLC ¶92-604 at 82,025.

64 cf *In the Marriage of Cullen* [1981] FLC ¶91-113 at 76,848.

65 *In the Marriage of Craven* [1976] FLC ¶90-049; *Poel v Poel* [1970] 1 WLR 1469; *P v P* [1970] 3 All ER 659.

66 *In the Marriage of I and I* [1995] FLC ¶92-604 at 82,025.

67 *Poel v Poel* [1970] 1 WLR 1469 at 1473; *P v P* [1970] 3 All ER 659 at 662.

that earlier authority may have suggested the contrary, it has now, properly, been rejected[68].

Fifthly, whilst legislative reform[69] *sometimes reflecting international law*[70]*, has laid increased emphasis upon the rights of the child who is separated from one or both parents to maintain personal relations and direct contact with each of them on a regular basis, the rule is not an absolute one. Courts recognise the implications of the application of that right for the custodial (or residence) parent, and particularly because most of them are women*[71]*. To avoid unnecessary derogations from women's equality or the "feminisation of poverty" resulting from the effective immobilisation of a custodial (or residence) parent*[72]*, some Canadian judges have lately proposed a presumptive deference in favour of the right of the custodial (or residence) parent to reside where she or he decides unless good reason, relevant to the welfare or best interests of the child, is demonstrated to the contrary*[73]*. Although this presumption was supported by a minority in the Supreme Court of Canada in* Gordon v Goertz[74]*, it was* ***rejected by the majority as incompatible with the individualised assessment required by the statute, addressed as it is to the best interests of the child***[75]*. The objective of the minority was understandable. However,* ***the reasoning of the majority is preferable****, at least so far as the applicable Australian legislation is concerned…*

Seventhly, just as, depending upon the legislation, conditions may be placed upon a custodial (or residence) parent as to where the child may reside according to its best interests[76]*, when it is proposed that residence arrangements change, the very fact of disturbing them (particularly if likely in practice to alter access to, and contact with, the other parent) will present a consideration that must be taken into account in judging whether new arrangements should be approved*[77]*. If a parent seeks to change arrangements affecting the residence of, access to or contact with the child, he or she must demonstrate that the proposed new arrangement is for the welfare of, or in the best interests of, the child*[78]*. Because the child's access to, and contact with, the other parent will necessarily be diminished to the extent that relocation of its residence disturbs a physical proximity which has hitherto existed, it will*

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68 *In the Marriage of Holmes* [1988] FLC ¶91-918 at 76,664; *B and B* [1997] FLC ¶92-755 at 84,197. Most earlier authority was addressed to the correct question: see eg *Re Davis & Councillor* (1981) 7 Fam LR 619; *Thorpe v McCosker* (1983) 8 Fam LR 964.

69 See eg FLA 1975, s 60B(2). "The principles underlying these objects are that, except when it is or would be contrary to a child's best interests: (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development".

70 Convention on the Rights of the Child, Arts 2.1, 3.1, 3.2, 7, 9.3. Article 9.3 provides: "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests." See now FCA 1997, s 114; cf Fortin, *Children's Rights and the Developing Law*, (1998) at 327-328.

71 Bodeker, "The Freedom of Movement of Residential Parents (and others) subsequent to the *Family Law Reform Act* 1995 (Cth)", unpublished thesis (1997) at 67.

72 *Moge v Moge* (1992) 43 RFL (3rd) 345.

73 *McGuyver v Richards* (1995) 11 RFL (4th) 433 at 435 per Abella J; cf *Carter v Brookes* (1990) 30 RFL (3rd) 53.

74 (1996) 134 DLR (4th) 321. See esp L'Heureux-Dubé J at 370-371.

75 *Gordon v Goertz* (1996) 134 DLR (4th) 321 at 338-340 per McLachlin J.

76 *In the Marriage of Skeates-Udy and Skeates* [1995] FLC ¶92-626.

77 FCA 1975, s 39A(b)(iii) required the Court to take into account "the desirability of, and the effect of, any change in the existing arrangements for the care of the child". See discussion *Gordon v Goertz* (1996) 134 DLR (4th) 321 at 341.

78 cf *In the Marriage of Skeates-Udy and Skeates* [1995] FLC ¶92-626.

often be necessary to adjust orders as to access. This will be done to offer new and different facilities of access and contact such as longer periods of residence with the other parent during school holidays and at other times[79].

Later in the judgment, the following passage appears:-

Secondly, it is important to remember that in Australia, whilst the welfare (or best interests) of the child are, by statute, the "paramount" consideration in the exercise of jurisdiction such as was invoked here, they are not the sole consideration. In this respect, the position in this country is different from that in Canada[80]*. It more closely conforms to the language of the Convention on the Rights of the Child*[81]*. Statutory instructions as to the paramountcy that is to be accorded to the child's welfare or best interests are to be understood as they apply to a child living in Australian society, normally in relationship with both parents and other members of its family. Whilst the legislation considered in this case, and later statutory reforms, give the highest priority to the child's welfare and best interests, that consideration does not expel every other relevant interest from receiving its due weight. In part, this is because (as the English courts recognised long ago) the enjoyment by parents of their freedoms necessarily impinges on the happiness of the child*[82]*. But, in part, it is also because legislation such as FLA 1975 and FCA 1975 is enacted to take effect within a society of a particular character whose members enjoy a high measure of personal freedom, diminished only to the extent that the law obliges.*

Those seeking support for the strong view might perhaps find some comfort in the passages I have rendered in bold, and those supporting the weak view might find comfort in the passages I have underlined. It is not clear, at least to me, whether Gleeson CJ, McHugh and Gummow JJ agreed with all of Kirby J's judgment.[83]

The High Court decisions, in my view, do not resolve the fundamental difficulties identified in this paper. The two decisions that most closely analyse and apply the principle do not, I think, give a clear answer to the question whether what I have called the strong view or the week view is correct.

THE TYPE OF DECISION

The third possible way of resolving the tension between the two views is to say that the strong view applies in some types of cases and the weak view in others. Before the 1995 amending Act, I think this was true to a considerable extent. I have already referred to examples of the weak view. They typically involve the court doing something other than making final decisions about residence and

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79 cf *In the Marriage of I and I* [1995] FLC ¶92-604 at 82,028.

80 *Divorce Act*, RSC 1985 c 3 (2nd Supp), s 16(8).

81 Convention on the Rights of the Child, Art 3.1: "In all actions concerning children, whether undertaken by … courts of law … the best interests of the child shall be a primary consideration."

82 *Poel v Poel* [1970] 1 WLR 1469; *P v P* [1970] 3 All ER 659.

83 The Full Court's decision in *A v A (Relocation Approach)* (2001) 26 Fam LR 382, in my view, faithfully reflects the uncertainties in the High Court decision. Because there is a separate discussion of relocation cases, I will not pursue this.

contact. At that time, the paramount consideration principle was expressed to apply "in proceedings under this Part". In relation to a number of decisions that had to be made *in connection with* what were then called custody cases, but were not decisions about the final outcome, it seemed that the weak view was applied. *Hutchings v Clarke* is the best example. However since the 1995 Act, as will be seen, the principle is not expressed to apply to many of these decisions.

Does it make sense that the principle should apply in a strong form to final decisions on residence and contact, but in a weak form to other decisions involving children?

Perhaps it does. The High Court has said that parental rights are given for the benefit of the children.[84] This may illuminate the distinction between the cases in which the child's welfare is paramount and those in which it is relevant but not paramount. Perhaps the child's welfare takes on an overriding force when the Court is in effect making *decisions of the kind that parents normally make* but, because they are unable to agree, must be made by the court. It seems appropriate, then, that in making parenting orders, the Court should similarly be totally concerned with the welfare of the child. Where the proceedings cannot be easily characterised in this way, however, and there is some clear and important other conflicting interest, it might be right for the law to to take into account the child's welfare, but balance it against the other interest or policy.[85] Consistently with this approach, the English legislation provides that the paramountcy principle applies "When a court determines any question with respect to – (a) the upbringing of a child…"[86]

This point leads us seamlessly into the 1995 Act, which limited the application of the principle...

4. THE APPLICATION OF THE PARAMOUNTCY PRINCIPLE SINCE 1996

The legislative changes

In this part I consider the changes resulting from the Family Law Reform Act 1995, which came into force on 11 June 1996.

Section 65E compared to old s 64(1)(a)

Before June 1996, s 64(1)(a) provided (emphasis added):

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84 *Secretary, Department of Health and Community Services v JWB and SMB* (1992) FLC ¶92-293 (Marion's case); (1992) 106 ALR 385; (1992) 15 Fam LR 392.

85 Such an analysis has been advanced by some commentators, eg Bromley and Lowe, *Bromley's Family Law* (8th ed, 1992) 476.

86 Children Act 1989 s 1 (UK).

64(1) *In proceedings in relation to the custody, guardianship or welfare of, or access to, a child — the court must regard the welfare of the child as the paramount consideration."*

Section 65E now provides (emphasis added):-

65E *In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.*

The emphasised words point up the big change. The application of the provision has been drastically narrowed. The earlier formulation suggested that the principle applied to all aspects of the proceedings. The present formulation limits the application of the principle to the situation where the court is considering whether to make a particular parenting order.

A couple of quick points. First, it is clear that the provision applies to interim as well as final proceedings, there being no indication to the contrary. Second, in my view the section should be interpreted to apply also to the question whether the court should make a parenting order at all.[87]

Provisions applying the paramountcy principle to certain other decisions

Other sections make the same principle applicable to certain other areas of jurisdiction:

- s 63H(2) (setting aside parenting plan under s 63H(1)(c);
- s 65L(2) (assistance or supervision of parenting orders);
- s 67L (location orders);
- s 67V (recovery orders);
- s 67ZC(2) (welfare orders).

Provisions mentioning the child's best interests

Other sections *mention* the best interests of the child without expressly making those interests paramount. These are as follows:-

- Section s 60B(2) (principles "except when it is or would be contrary to the child's best interests");
- s 63E(3) (court to register parenting plan if it considers it appropriate to do so "having regard to the best interests of the child to which [sic] the plan relates");

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87 See the Butterworths Family Law Service, commentary to s 65E.

- s 63F(2) and (6) (varying child welfare provisions of parenting plan, enforcing parenting plan);
- s 60G(2) (court to consider whether granting leave for adoption proceedings to be commenced would be in child's best interests);
- s 68B (court may "make such order or grant such injunction as it considers appropriate for the welfare of the child");
- s 68Q(c)(ii) (reference to child's best interests);
- s 68T(2)(b) (varying contact orders in family violence proceedings — court to have regard to purposes, and to the best interests of the child).

The Act's silence in relation to many decisions

The above lists do not cover all the matters on which the court can make orders that have something to do with children. A simple example is the decision whether to appoint a child representative in a particular case (s 68L). The Act is silent on the principles to be applied in making that decision. The paramount consideration principle does not apply. Is the child's best interests a *relevant* matter? Of course: the court would not dream of making an appointment if it did not think that doing so would benefit the child. Is the child's interests the *decisive* factor? Of course not: it may be one of the many cases in which a representative would benefit the child, but the available limited resources should be directed to more difficult cases.

In relation to all decisions to which the child's best interests is not stated to be the paramount consideration, in my view there is a general answer to the question what principles apply. It is that the court should take into account the context and the purpose of the relevant rule.[88] In *CJD*, Gaudron J said:-

> *It is well settled that if a discretionary power is conferred by a statute which is silent as to the matters which govern its exercise, the discretion is confined only by the subject-matter with which the legislation is concerned*[89]*. At least that is so if the discretion is conferred on an administrative tribunal. Where a general and unconfined discretion is conferred on a court, it is also governed by the requirement that it be exercised judicially and consistently with the judicial process*[90]*. It is also well settled that, where a power is granted to a court, it*

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88 For an example of the High Court considering the exercise of discretion on a matter where the interests of the child were relevant but not paramount (the Hague child abduction regulations) see *DP v Commonwealth Central Authority* (2001) 27 Fam LR 569.

89 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504-505 per Dixon J; *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 49.

90 See *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205 per Gaudron J; *PMT Partners Pty Ltd (In Liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313 per Brennan CJ, Gaudron and

is not to be confined by reference to matters which are not required by the terms of the statutory provision by which it is conferred or the context in which it appears[91].

… An order made on appeal is not a parenting order under Pt VII[92] *and is, thus, not governed by s 65E or what is commonly referred to as "the paramountcy principle". Even so, the fact that the paramountcy principle informed the decision and order of Baker J was necessarily relevant to the question whether, by reason of further evidence, that order should be set aside.*

Thus, the relevance of the child's interests may vary from one context to another. Often it will be very important, and in some cases it may in effect be the only real matter to be considered.

Determining the child's best interests

The Act contains a number of provisions relevant to determining the best interests of children. In particular, s 68F sets out a list of relevant matters, and is of particular importance, since it is often appropriate to present cases in a way that expressly deals with each listed matter. Judgments often follow the same pattern. Other relevant sections include ss 60B, 43, and 68K. I do not wish to discuss these provisions in this paper.

Significance of the changes

The authorities now make confirm what was always clear from the 1995 Act,[93] namely that under the new provisions the principle does not have a general application to all aspects of parenting proceedings, but applies *only to those decisions to which is expressed to apply*, including the making of parenting orders.

What about other decisions made in the course of parenting cases, such as exercising discretions on matter of procedure and evidence, or other decisions relating to children, though not strictly made in parenting proceedings (for example, in applications for injunctions)?

McHugh JJ; *Oshlack v Richmond River Council* (1998) 72 ALJR 578 at 582 per Gaudron and Gummow JJ, 591 per McHugh J (with whom Brennan CJ agreed on this point); 152 ALR 83 at 89, 101.

91 See *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 420-421; *PMT Partners Pty Ltd (In Liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313 per Brennan CJ, Gaudron and McHugh JJ, 316 per Toohey and Gummow JJ; *Oshlack v Richmond River Council* (1998) 72 ALJR 578 at 582 per Gaudron and Gummow JJ; 152 ALR 83 at 89; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 72 ALJR 873 at 900 per Gaudron J; 153 ALR 643 at 678.

92 Section 94(2) sets out the powers of the Full Court on appeal. It provides: "Upon such an appeal, the Full Court may affirm, reverse or vary the decree or decision the subject of the appeal and may make such decree or decision as, in the opinion of the court, ought to have been made in the first instance, or may, if [it] considers appropriate, order a re-hearing, on such terms and conditions, if any, as it considers appropriate."

93 See the discussion in *Monticelli v McTiernan* (1995) 19 Fam LR 108 (FC).

Again, I think the answer is that the principle does not apply.[94] Therefore it cannot be said as a matter of law that the child's best interests must be regarded as the paramount consideration. On the other hand, the child's best interests will usually be relevant. Indeed, in most situations they may be of enormous relevance, and often there may be no evident competing interest at all.

The point may be illustrated by *Flanagan v Handcock*.[95] The father applied for orders preventing the mother from using a surname other than Flanagan for the children. The application could plausibly have been considered under more than one provision of the Act. It could have been seen, for example, as an application for an injunction under s 68B, or as an application for a parenting order. If it was an injunction application the paramount consideration principle does not expressly apply to it, and – as I have argued – it does not in fact apply. If the proceedings are considered to be proceedings for parenting orders, the principle does apply: s 65E. The question of categorisation was thus, in principle, important.

Was it important *in practice* in *Flanagan v Handcock*? No. The reason is that nobody ever advanced an argument that any matter other than the children's best interests was to be taken into account. For that reason alone, in my view it was not a suitable vehicle for the High Court to explore the important issues relating to the scope and application of the principle. Thus the Court was right, in my view, to revoke special leave.[96] The issues addressed in this paper would be much better tackled in a case in which there was a real argument that some competing interest or policy should be taken into account. As it happens, the issue might arise in a case in which the High Court has granted special leave: a relocation case.[97]

5. CONCLUSIONS

The present position

There are some persistently troublesome tensions and uncertainties contained in the principle that the child's bests interests are to be regarded as the paramount consideration. Nevertheless, a number of matters relating to the scope and application of the principle under the present legislation are fairly clear. I attempt to summarise the position as follows:-

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94 I agree with Kay and Holden JJ in *Flanagan v Handcock* (2000) 27 Fam LR 615, at [18]; cf Finn J at [48] – [49]. In my view the wording of s 68B provides that it is a *necessary* condition for the granting of an injunction that it is appropriate for the child's welfare, but not that it is a *sufficient* condition.

95 *Flanagan v Handcock* (2000) 27 Fam LR 615 (FC).

96 *Flanagan v Handcock* S43/2000 (13 October 2000).

97 *U v U* (No S249 of 2000) (Special leave granted to appeal from Full Court decision [2000] FamCA 1144; 13/09/2000.

1. The paramount consideration principle now applies only to decisions about which the Act expressly says it applies.

2. In general, the principle does not apply to various procedural matters that arise prior to and in the course of parenting proceedings. However the child's interests will normally be a relevant matter in exercising discretion on such matters, and may in many situations be the most important matter.

3. The principle applies to the making of parenting orders: s 65E.

4. In connection with the making of parenting orders, the principle is routinely taken to mean that the sole task of the court is to make whatever parenting orders it thinks are most likely to promote the best interests of the child. In that sense, the "strong view" is a useful guide to the ordinary application of the principle. Indeed, it seems impossible to find any recent decision in which a court has, in determining custody or parenting matters actually held that it would make certain orders although some other orders would be more in the child's interests.

5. It is difficult to assert with absolute confidence, however, that the "strong view" represents the law. The recent references in some High Court judgments to "paramount" not meaning "sole" may indicate a lingering desire to leave open the possibility of taking into account some policies or interests other than the interests of the child. In relation to "relocation cases", the language of the authorities appears to leave open the possibility that there is some scope for the court to consider, as a separate matter, the right of the relocating parent to freedom of movement.

What *should* the law be?

I will end with some brief and unorganised thoughts about what law *should* be. The tension between the strong view and the weak view may reflect a fundamental question about the appropriate principles for children's law: should the law say that in deciding matters of residence and contact the court must do whatever is best for the child who is the subject of the proceedings? The question can be set out in an uncompromising form by imagining that we are the legislator, and we have to choose between the following two principles to govern the decision in parenting cases:

Version 1: the court must make whatever parent in order it considers is most likely to advance the best interests of the children who are the subject of the proceedings.

Version 2: the court must make whatever parenting orders are most appropriate in all the circumstances, having regard in particular to the best interests of the children who are subject of the proceedings.

Which should we choose? Let me rehearse some arguments briefly.

The idea that comes from *Re Marion* is that since parents should exercise their parental responsibilities to advance the interests of their children, the court should do the same when it is doing the job that they would do if they were not in dispute. The basis for this argument, however, seems rather fragile. In practice, in making family decisions such as with the family should live, where the children should go to school, how the family budget should be spent, parents generally take into account the interests of all members of the family. Last, for example, the family might move to a new country when the parent has a new job opportunity there. The move might be somewhat disruptive for the children. The parents will not pretend that the move will necessarily be the best for the children. The decision is based on the interests of all family members. It is quite wrong, I think, to suggest that in making decisions about the upbringing of children parents necessarily give no weight to any other person's interest. No doubt the analysis of family decision-making is a complex matter. But I doubt whether the paramount consideration principle, in its strong view, reflects what ordinarily happens in ordinary families.

Even so, those favouring Version 1 might defend it as the appropriate basis for decision *by the courts*. Unlike parents in making family decisions, the court is a stranger to the children. It makes a decision and that, broadly speaking, is intended to provide a final resolution to the dispute. By contrast, parents live with the decision on a day-to-day basis. They experience the children's reaction to the decision. They are in a position to modify it, or make other decisions, as things develop. But while a fluid and responsive type of decision-making may work well within *families*, it is preferable to have a clear and simple rule for the *court* to act. Version 1 provides a clear focus for all the evidence and argument, and is a workable and satisfactory basis for what is, on the face of it, a very peculiar kind of decision-making, in which a complete stranger, having heard evidence and argument for a day or so, makes a decision of great importance to the child, and to the family.

What can be said for Version 2? I would summarise the argument as follows. Treating the child's interests as the only focus is wrong in principle. There is no proper basis for treating the interests of certain individuals, even children, as having *absolute* priority over the interests of any other individuals. For example, the principle may lead to an inappropriate result where the court treats the interests of the children who happen to be the subject of proceedings as the sole focus of attention and completely disregards the interests of any other children, such as step-siblings or other

relatives, who might be much affected by the decision.[98] Again, it could be said that there is no proper reason why the court should give the interests of the children absolute priority over the needs of parents. Relocation cases provide a good example of situations in which there is an uncomfortable tension between the ordinary process of family decision-making, which takes into account the interests of all family members, and the highly artificial basis for decision contained in the strong version of the paramount consideration principle.

Another argument could be developed about the practical result in terms of the effect of the principle on judicial decision-making. This argument is that in practice the courts would not (and do not) truly give effect to the principle. The reason is that to do so would violate the judge's sense of what is right. I have suggested in this paper that logically, it does not make very much sense to say, as judges have so often said, that the word "paramount" implies that there must be other (competing) considerations. The reluctance of the courts to embrace the strong version of the paramount consideration principle would, on the present argument, be attributed not so much to a failure of logic as to a reluctance to accept the consequences of a single minded focus on the interests of the child.

It might also be arguable that the relocation cases illustrate the same phenomenon. Arguably, the anguish and complexity associated with them has little to do with the factual complexity of the problem or with the labyrinthine reasoning of some of the authorities. Perhaps it has more to do with judges' feelings or sense of fairness. In short, on this argument, disregarding the legitimate interests of the relocating parent goes so much "against the grain" that the judge will tend to interpret the law, and perhaps analyse the facts, in a way that does, in the end, gives some effect to the feeling that it is cruel and contrast to prevent a parent from relocating, even if doing so would be marginally advantageous for the child. This is a complex issue, and goes to the heart of judicial decision making. No doubt there would be considerable debate about the argument I have outlined, but it is time for me to make a graceful exit...

I will leave you with the fundamental choice between Version 1 and Version 2. To answer it would require much more work, and the focus of this session is not what the law *should* be but, what it *is* and how it operates. However, I believe that many of the "practical" issues in applying the law, and many of the debates about the meaning of words and the application of particular provisions, reflect to some extent the fact that we have never quite resolved the underlying choice which is reflected in

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98 On the problem of competing interests of children, see *Birmingham City Council v H (A Minor)* [1994 2 AC 212; *F v Leeds City Council* [1994] 2 FLR CA; *Re T and E (Proceedings: conflicting interests)* [1995] 1 FLR

the Version 1 and Version 2 set out above. Perhaps we never will. But if my argument is correct, an appreciation of the underlying ambivalence in the basic principle of children's law might help us understand and deal intelligently with the day to day problems we encounter in administering this endlessly fascinating and important part of the law.

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851. The Law Commission (UK) recommended that the interests of the subject children should not in principle prevail over the interests of other children likely to be affected by the decision.

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