REDEFINING THE PARENT/CHILD RELATIONSHIP: A BLUEPRINT

INTRODUCTION

In 1938, the sociologist William F. Ogburn posited[1] seven major activities performed by the family for its individual members, for the family group itself and for society. These were: the production of economic goods and services, status giving, education of the young, religious training of the young, recreation, protection and affection. Ogburn's formulation has been regarded[2] as being of particular importance for sociologists as it has provided a list of categories into which most of the activities performed by the family can be placed. More recently, however, commentators have adopted a more limited view of the functions performed by the family. Thus, the anthropologist Linton[3] and the sociologists Parsons and Bales[4] see the family now as performing only two functions—the socialization[5] of children and the provision of psychological and emotional security for adults. There can be no doubt that the function of child socialization is a basic, if not the basic, function of the family even from the earliest times. In the words of Edward Westermarck,[6] ' . . . it is originally for the benefit of the young that males and females continue to live together . . . Indeed among many peoples true married life does not begin for persons who are formally married or betrothed, or a marriage does not become definite, until a child is born or there are signs of pregnancy; whilst in other cases sexual relations which happened to lead to pregnancy or the birth of a child are, as a rule, followed by marriage or make marriage compulsory'. As will be observed,[7] the law's response to changing attitudes and developments as regards the position of the

---

1 *The Changing Family* (1938) 19 The Family 139 at 139-143.

2 See F I Nye and F M Berardo, THE FAMILY: ITS STRUCTURE AND INTERACTION (1974) at 8.

3 R Linton, *The Natural History of the Family* in THE FAMILY: ITS FUNCTION AND DESTINY (1959 ed Ashen) at 43.

4 T Parson and R F Bales, FAMILY, SOCIALIZATION AND INTERACTION PROCESS (1955) at 9.

5 Referred to by Ogburn as 'Education of the young' *supra* text at n 1.

6 THE HISTORY OF HUMAN MARRIAGE (1921) at 72.

7 Infra text at n 82 ff.

child in the family has been somewhat vague. Accordingly, it is the purpose of this article to consider the attitude of the law to the crucial relationship of parent and child and to suggest a realistic and humane solution to, at least, some of the problems and a way in which that solution can be reached.

Whatever deficiencies may exist in the legal response to the parent/child relationship today, there can be no doubt that judicial attitudes have undergone a profound change since mid-way through the last century. The history has already been traced by J C Hall, in a valuable article,[8] and by Lord Guest, Lord MacDermott and Lord Upjohn, in the important case of *J v C*,[9] but is worth noting certain particular landmark decisions. Perhaps the best known case in which the Nineteenth Century approach was enunciated was the decision of the English Court of Appeal in the case of *In re Agar-Ellis*.[10] In that case, Bowen LJ stated,[11] 'Then we must regard the benefit of the infant; but then it must be remembered that if the words "benefit of the infant" are used in any but the accurate sense it would be a fallacious test to apply to the way the court exercises its jurisdiction over the infant by way of interference with the father. It is not the benefit of the infant as conceived by the court, but it must be the benefit of the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a court of justice can.'

Just ten years later, however, a somewhat different judicial approach may be observed from the judgment of Lindley LJ in *In re McGrath (Infants)*,[12] where it was said, 'The dominant matter for the consideration of the court is the welfare of the child. But the welfare of the child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well being. Nor can the ties of affection be disregarded.' Little authority exists, in England, between *In re McGrath (Infants)* and the cases surrounding s 1 of the *Guardianship of Infants Act* 1925, which required the courts to regard the welfare, ' . . . of the infant as the first and paramount consideration.' However, that the courts were already taking this view can be seen from the decision of the House

8 *The Waning of Parental Rights* (1972) 31 Camb LJ 248.
9 [1970] AC 668.
10 (1883) 24 Ch D 317.
11 Ibid at p 337.
12 [1893] 1 Ch 143 at 148. See also the Irish case of In re O'Hara [1900] 2 IR 232.

of Lords in *Ward v Laverty*,[13] which was decided shortly before the passing of the Act and was on appeal from Northern Ireland, where the Act did not apply. There, Viscount Cave stated[14] that, ' . . . if there is no other matter to be taken into account, then, according to the practice of our courts, the wishes of the father prevail. But that rule is subject to this condition, that the wishes of the father only prevail if they are not displaced by considerations relating to the welfare of the children themselves. It is the welfare of the children, which, according to rules which are now well accepted, forms the paramount consideration in these cases.' More recently, Danckwerts LJ, in the case of *In re Adoption Application 41/61*,[15] commented that, 'The mere desire of a parent to have his child must be subordinate to the consideration of the welfare of the child, and can be effective only if it coincides with the welfare of the child. Consequently, it cannot be correct to talk of the pre-eminent position of parents, or of their exclusive right to the custody of their children, when the future welfare of those children is being considered by the court.'

Just how subordinate the English Courts now regard parental claims of right may be illustrated by three modern cases: one, *J v C*,[16] on wardship and two, *Re W (An Infant)*[17] and *O'Connor and Another v A and B*,[18] on adoption. The facts *in J v C* are well known: a ten year old Spanish boy, who had not seen his natural parents since he was three, was in the foster care of a solicitor and wife. He had spent seventeen months with his parents in Madrid, but could not stand the heat and his parents asked the foster parents to take him back. The boy had become English in his ways and enjoyed a good relationship with the son of his foster parents. The natural parents, who were not in any way unsuitable, sought the boy's return. At first instance, Ungoed-Thomas J was of the view that the boy should not be returned to his parents in Spain because he considered that the boy might well have problems in adjusting to life there and directed that the foster parents should have care and control.[19] Ungoed-Thomas J's decision was upheld by both the Court of Appeal and the House of Lords.

---

13 [1925] AC 101.

14 Ibid at 108.

15 [1963] Ch 315 at 329.

16 Supra n 9.

17 [1971] AC 682.

18 [1971] 2 All ER 1230. For a note on these latter cases see L Blom-Cooper, *Adoption and the Unreasonable Parent* (1971) 34 MLR 681.

19 He also directed that the boy should be brought up a Roman Catholic, even though the foster parents were Anglicans, in an attempt to ease acceptance of his Spanish past.

Of particular interest is the attitude which was demonstrated towards s 1 of the *Guardianship of Infants Act* 1925 by Lord MacDermott, Lord Guest and Lord Pearson, who seemed to regard the welfare of the child as being the only relevant consideration. The words of the section, said Lord MacDermott[20] must mean more than, '. . . that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare . . . That is the first consideration because it is of first importance and the paramount consideration because it rules on or determines the course to be followed.' It is suggested that this is a particularly significant statement of judicial policy, even though it was not shared by Lord Upjohn and Lord Donovan, who took an altogether more traditional view. Thus, Lord Upjohn commented,[21] 'The natural parents have a strong claim to have their wishes considered; first and principally, no doubt, because normally it is part of the paramount consideration of the welfare of the child that he should be with them, but also because as natural parents they themselves have a strong claim to have their wishes considered as normally the proper persons to have the upbringing of the child they have brought into the world.' Thus, quite apart from the fact that *J v C* strengthened the hand of foster parents,[22] the remarks of Lord MacDermott mark an appreciable departure from previous approaches to the parent/child relationship and, although Freeman[23] does not consider Lord MacDermott's approach to be a legitimate interpretation of the words of the Act, it will be later submitted that they are in accord[24] with a proper approach to the difficulties which are involved in any consideration of the issues.

The two relevant adoption cases demonstrate the application of similar standards. In *Re W,* an illegitimate boy, then aged three, had been put out for adoption very shortly after his birth and not seen by his natural mother until the adoption came up for hearing, by which time he was seventeen months old. At this point, the mother changed her mind and sought to reclaim the child from the adoptive parents,

20 [1970] AC 668 at 710.

21 Ibid at 724.

22 For other cases where foster parents have been similarly successful see Re O (1972) The Times Dec 5 and Re E O (1973) The Times Feb 16.

23 M D A Freeman, *Child Law at the Crossroads* (1974) CLP 165 at 184.

24 Infra text at n 100.

who were the only parents he knew. The mother's personal circumstances were scarcely satisfactory: she already had two illegitimate children, her prospects of marriage would be diminished by the presence of a third and she was unemployed. The County Court Judge, at first instance, held that the mother's consent had been unreasonably withheld[25] and dispensed with the need for it. The Court of Appeal reversed the decision but it was restored by the House of Lords. First of all, Lord Hailsham LC refuted the suggestion that the test of reasonableness presupposed an element of culpability. '[I]t is clear', he said,[26] 'that the test is reasonableness and not anything else. It is not culpability. It is not indifference. It is not failure to discharge parental duties. It is reasonableness and reasonableness in the totality of the circumstances. But, although welfare per se is not the test, the fact that a reasonable parent does pay regard to the welfare of his child must enter into the question of reasonableness as a relevant factor. It is relevant in all cases if and to the extent that a reasonable parent would take it into account. It is decisive in those cases where a reasonable parent must so regard it.' The Lord Chancellor went on to state[27] that, in his opinion, ' . . . unreasonableness can include anything which can objectively be adjudged to be unreasonable. It is not confined to culpability or callous indifference. It can include, where carried to excess, sentimentality, romanticism, bigotry, wild prejudice, caprice, fatuousness or excessive lack of commonsense.' It further seems, from the judgment of Lord Hailsham LC, that the test to be applied in such cases was objective as,[28] 'Two reasonable parents can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable. The question in any given case is whether a parental veto comes within the band of possible reasonable decisions and not whether it is right or mistaken. Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable.' Thus, it would seem, from the decision in *Re W*, that the parental right to withhold consent will be strictly supervised by the courts to ensure that it is not at odds with the welfare of the child.

O'Connor and Another v A and B takes this approach a stage further. In that case, the boy in question, who was aged three at the relevant time, had been born when his parents were not married to

25 See Adoption Act 1958 s 5 (1).
26 [1971] AC at 699.
27 Ibid at 699-700.
28 Ibid at 700.

one another. A year after the child was born, the father was divorced and the parents were married, thus legitimating the boy, who had been put out for adoption when four months old. He was in a 'highly nervous state'[29] and had, a month later, been placed with the proposed adopters. The sheriff-substitute dispensed with the consent of both the parents on the ground that it had been withheld unreasonably and his decision was upheld by the House of Lords. The basic rule of practice was enunciated by Lord Guest who said that,[30] ' . . . strong reasons have to be shown for dispensing with consent where the parents are married, wish to have the child and have suitable accommodation for the child'. However, Lord Guest was of the view that these strong reasons had been made out because of the general instability of the parents and because[31] of, ' . . . the disruptive element which must occur in the life of a child now over three years of age by removing him from the home of the adopters who have had him under their care for close on two and a half years to the home of his parents who are really strangers to him.' Thus, for the first time, in English law, the consent of both parents was dispensed with in the light of factors which, when objectively viewed, militate against the continuing welfare of the child.[32]

Development in Australia has been on similar, though less spectacular, lines. An early statement may be found in the judgment of Lilley CJ, of the Queensland Supreme Court, in the case of *Re Ewing and Ewing*,[33] where it was said that, 'There is no question as to the legal right of the father to the custody of his children. The law makes the father the absolute lord of both wife and children—under certain conditions with respect to nurture—he could take the children from his wife so long as he did not commit a breach of the peace.' Similarly, in the subsequent Queensland case of *Teppa v Teppa*,[34] Griffith CJ enunciated the principles which should be taken into account when deciding questions of custody. 'A father,' he said, 'cannot be deprived of the custody of his infant child unless it appears that he is unfit to be the custodian of it, or that his so remaining would be an injury to the child. Where the wife is innocent, the Court, on an application for an order for the custody of children must exercise a wider discre-

29 [1971] 2 All ER 1230 at 1235 per Lord Simon.
30 Ibid at 1233.
31 Ibid at 1233.
32 Generally, the approach adopted in Re W and the O'Connor case has been followed, but see Re D [1973] Fam D 209.
33 (1881) 1 QLJ 15 at 15.
34 (1898) 8 QLJ (NC) 109.

tion, bearing in mind first of all the parental right, secondly the marital duty, and thirdly the interests of the children.' However, even in the absence of legislation requiring that the interests of the child be the paramount consideration, by the turn of the century a somewhat different judicial attitude was becoming apparent.

In *Goldsmith v Sands*,[35] the father of a five year old child, the child's mother being dead, had placed her in the custody of her maternal grandparents and had left her in their custody till she was nine years old. In the opinion of a majority of the High Court, the father had, by certain acts, indicated an intention of abandoning his right to custody in favour of the grandparents, but had not otherwise disentitled himself. Shortly after the death of the child's natural mother, the father remarried and had four other children by his second wife. The grandparents were suitable guardians of the child, who was happy with them. The High Court held, by a majority, that it would be injurious to the child to remove her from her present situation and, thus, the action by the father to recover custody of the child failed. Griffith CJ was of the view[36] that, 'Where the case made in opposition to a father's application to take his child out of its existing custody after a lapse of many years is that it would be contrary to the child's welfare to do so, I think that his natural right is only one of many circumstances to be taken into consideration. It throws the burden of proof on the other side, but it cannot be regraded as raising anything more than a rebuttable presumption, which may be rebutted in the same way as any other such presumption.'[37] Both Griffith CJ[38] and O'Connor J[39] regarded the happiness of the child as a consideration to which considerable attention should be paid. That older attitudes die hard,[40] however, can be demonstrated by the strong dissenting judgment of Higgins J who was of the opinion[41] that the test to be applied in such cases was, ' . . . not which course is more advisable for the child on the balance of convenience or probability, but it is this: will the child be seriously prejudiced by the giving of effect to the father's claim?'

---

35 (1907) 4 CLR 1648.

36 Ibid at 1654.

37 For another decision on the matter of burden of proof see R v Boyd; Ex p MacPherson [1919] VLR 538.

38 (1907) 4 CLR 1648 at 1654.

39 Ibid at 1660.

40 Sometimes very hard. See the decision of Blackburn J in Ex p P (1967) 11 FLR 25.

41 (1907) 4 CLR 1648 at 1664.

With the advent of legislation requiring that the child's interests be the paramount consideration (which, in Australia, includes, unlike England, the various State *Adoption of Children Acts*)[42] Australian developments were likewise predictable. Thus, despite the statutory injunction, other factors were still regarded as being of more than passing significance. In the case of *Storie v Storie*,[43] which concerned the operation of s 136 of the Victorian *Marriage Act* 1928-1942, Dixon J commented[44] that, '. . . prima facie it is for the welfare of the child that it should enjoy the affection and care of parents and be brought up under their guidance and influence. Where, because of the separation of the parents or for other reasons, the child is deprived of the advantage of the combined parental responsibility, the courts do not find in that fact a reason for preferring a stranger.' In a slightly later High Court decision, *Lovell v Lovell*,[45] Latham CJ said it was, ' . . . relevant to regard the conduct of the parents . . . as a separate subject from that of the welfare of the infant'. However, in 1960, the High Court adopted a somewhat different standpoint in the case of *Anderson v Anderson*,[46] which involved s 17 of the New South Wales *Infants' Custody and Settlements Acts* 1899-1934. In a joint judgment, the court were of the view[47] that, ' . . . it is for the Court to give weight to particular matters such as the merits, demerits or attitudes of those seeking the custody of a child or those with whom the child will in one event or the other have to live as matters bearing upon the welfare of the child rather than as independent considerations competing with that of the welfare of the child'. Still more recently, Hutley JA, of the New South Wales Court of Appeal, in the case of *Barnett v Barnett*[48] has emphasised the overriding nature of the requirement of the child's welfare. First, he stated that,[49] 'As the welfare of the child is the paramount consideration, the welfare of the child will prevail over parental rights. Parenthood enters

42 Now including Western Australia. See Adoption of Children Act 1896-1964 s 2A cf H A Finlay and A Bissett-Johnson FAMILY LAW IN AUSTRALIA (1972) at 214.

43 (1950) 80 CLR 597.

44 Ibid at 612.

45 (1950) 81 CLR 513 at 522.

46 (1960) 34 ALJR 65.

47 Ibid at 66.

48 [1973] 2 NSWLR 403. It is the present writer's view that Barnett v Barnett is probably the most important custody case to be decided in Australia since the war. For more detailed comment see F Bates, *Custody of Children: Towards a New Approach* (1975) 49 ALJ 129.

49 [1973] 2 NSWLR 403 at 411.

into consideration as one of the factors, in certain circumstances the dominant factor, in considering the welfare of the child, but not as a dominating factor if it is in conflict with the welfare of the child'. Next, Hutley JA considered[50] that objections to the conduct of parents had no weight except insofar as they cast light on the parents' fitness to have charge of the child.

TOWARDS A REDEFINITION

In any attempt at a redefinition of the parent/child relationship, the first point to be made is that, as Foster and Freed have pointed out,[51] '. . . the law presumed that children in the home received love and affection and that child abuse and emotional deprivation were rare'. We now know that this is not the case. Although the phenomenon of child abuse had been noted in 1955,[52] it was not until C H Kempe's epoch-making study in 1962[53] that the extent and nature of the problem was truly brought to public notice. The extent of the problem is appalling, the more so as the rate of detection is slight. One of the reasons for this failure to detect is that the victims are generally under the age of five and, within that group, predominantly under three and, hence, can rarely speak.[54] Despite this fact, however, De Francis[55] has estimated that the incidence, in the United States, is in the order of 10,000 cases annually and, in England, pathologist Keith Simpson has suggested[56] an annual figure of 200-300 in Greater London alone.

---

50 Ibid at 411.

51 H H Foster and D J Freed, *A Bill of Rights for Children* (1972) 6 Fam LQ 343 at 348.

52 P V Woolley and W A Evans, *Significance of Skeletal Lesions in Infants resembling those of Traumatic Origin* (1955) 158 Journal of the American Medical Association 539.

53 C H Kempe et al, *The Battered-Child Syndrome* (1962) 181 Journal of the American Medical Association 17 where it was said that 'The battered-child syndrome is a term used by us to characterise a clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent. The condition has also been described as "unrecognised trauma" by radiologists, orthopedists, pediatricians and social service workers. It is a significant cause of childhood disability and death'.

54 See J Stark, *The Battered Child—Does Britain Need a Reporting Law?* (1969) Public Law 48 at 50.

55 V De Francis, CHILD ABUSE LEGISLATION—ANALYSIS OF REPORTING LAW IN UNITED STATES (1966).

56 K Simpson, *The Battered Baby Problem* (1967) 3 Royal Society of Health Journal 168. He based his estimate on the number of cases coming to mortuaries in the area.

In January 1973, the English public was confronted by the shocking case of Maria Colwell which, perhaps more than any other single instance, raises the issues involved in the problem of child abuse.[57] Maria was born in March 1965, the fifth child of Mr Colwell and his wife Pauline. When Maria was a few weeks old, Mrs Colwell left her husband who, shortly after, died. In August 1965, Maria was placed, by her mother, in the care of her mother's sister in law and her husband, Mr and Mrs Cooper, where she remained, more or less continuously, until October 1971. The Coopers were formally approved as foster parents by the local authority in 1966, but it was clear that the local authority intended to return her to her mother's care. In October 1971, she was returned to her mother, who had, meanwhile, married William Kepple. After fifteen months of continuous ill-treatment, Maria was battered to death by Kepple, who was subsequently convicted of her manslaugher. One particularly disturbing feature of the case was that, even after her return, she remained under the supervision of the local authority which had received complaints from neighbours regarding the treatment Maria received from her mother. Furthermore, complaints had been made to the Police, the National Society for the Prevention of Cruelty to Children, the Housing Department and various other agencies but no effective action was taken. Subsequently, in July 1973, a committee under the chairmanship of Mr T G Field-Fisher QC was set up, '. . . to inquire into and report upon the care and supervision provided by the local authorities and other agencies in relation to Maria Colwell and the coordination between them'. The conclusion reached by the majority[58] of the committee was that: 'What has clearly emerged, at least to us, is a failure of system compounded of several factors, of which the greatest and most obvious must be that of the lack of, or effectiveness of, communication and liaison.'[59] Elsewhere, the present writer has suggested[60] that, in Australia, the new Family Court of Australia which has been created by Part IV of the *Family Law Act* 1975 ought to operate as a

---

57 For more detailed comment see O M Stone, *Hard Cases and New Law for Children in England and Wales* (1974) 8 Fam L Q 351 at 368-371, also J G Howells, REMEMBER MARIA (1974).

58 Miss Olive Stephenson dissented from the other two members as to the facts of the case and the conclusions to be drawn from them.

59 Stone (*loc cit* at 369) has described the report of the Field-Fisher Committee as, ' . . . a horrifying document—far more spine chilling than accounts in the press. It can be compared only with the findings of the great Royal Commissions in the middle of the last century on the employment of young children in factories and coalmines'.

focal point for the activities of the multiplicity of welfare organizations, both public and private, which take an interest in this sphere.

Yet, disturbing as was the failure of the social welfare agencies to to cope with the case, there is an even more fundamental issue raised by the death of Maria Colwell. In the words of the Field-Fisher Committee, 'There is no doubt that it was generally believed that natural parents had the "right" to have their child back from care once they had established that they were fit to receive it, and that this thinking influenced magistrates courts'. Quite apart from the obvious fact that, by any reasonable standards, the Kepples could scarcely be said to be fit to receive the child, the basic assumption is, it is suggested, totally fallacious. Stone considers[61] the idea to be unjustifiable and responsible for Maria's last miserable fifteen months and ultimate violent death and a similar opinion is held by Howells.[62] That an entirely different view of the relationship between parent and child is possible can be illustrated by the thesis expounded by Goldstein, Freud and Solnit in their important work BEYOND THE BEST INTERESTS OF THE CHILD[63] who emphasise the concept of the *psychological parent.* This role, they state,[64] ' . . . can be filled either by a biological parent or by an adoptive parent or by any other caring adult—but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be'. Howells, too, entirely refutes[65] the notion of any 'mystical bond' existing between natural parent and child and suggests[66] that the bond between parent and child is of the same essential nature as any bond between two people.

What, then, ought the law's response to be? Despite the fact, noted by Freeman,[67] that correspondence in the English *Sunday Times* advocated hanging and sterilisation for battering parents, it is suggested that the criminal law[68] is likely to be of little use. In the United States,

---

60 F Bates, *A Family Court in Australia—its Implications for Lawyers and Legal Education* (1975) 9 The Law Teacher 18 at 20.

61 Loc cit at 368.

62 Op cit at 15.

63 J Goldstein, A Freud and A J Solnit, BEYOND THE BEST INTERESTS OF THE CHILD (1973).

64 Ibid at 19.

65 Op cit at 18.

66 Op cit at 30.

67 Loc cit at 180.

68 Compulsory sterilization, of course, causes its own problems. See the remarks of Douglas J of the United States Supreme Court in Skinner v Oklahoma (1942) 316 US 535 at 541.

all jurisdictions[69] have legislation providing for the reporting of incidents of child abuse. In Australia, the only legislature which has made any such provision is Tasmania, where s 8 (1) of the *Child Protection Act* 1974 provides that, 'Any person who suspects upon reasonable grounds that a child who has not attained the age of 8 years has suffered injury through cruel treatment is entitled to report the fact to an authorized officer, and the report may be made orally or in writing'.[70] In such cases, the person making the report is given certain protection from legal action and his report is privileged.[71] Yet legislation of this kind can only achieve so much, the more so as the American experience suggests that medical practitioners, in particular, are often unwilling to report cases which come to their notice.[72] More positively, the Tasmanian legislation provides[73] that a Magistrate, on application by the Child Protection Assessment Board,[74] may order that a child be kept in hospital for a period not exceeding 30 days, with a power to order hospitalisation for another such period if he is satisfied that it is in the interests of the child to do so.[75]

This Act marks a great step forward in Australian Child Law, but one is forced to wonder how much it will actually achieve, as, by its very nature, it is confined to cases actually discovered. Apart from the protection of informants, which they might arguably have had in any event, the *Child Protection Act* does not create any new machinery for the discovery of instances of child abuse. Thus, we may ask whether social workers and probation officers have the correct approach and, indeed, have sufficient powers. Freeman has said[76] of English social workers, 'The impression is given of their being over-protective of battering parents, obsessed with preventing breakdown of the family unit, concerned with rehabilitation. It has been suggested that children are used as therapeutic agents for their parents. Other critics claim that social workers are over-concerned with preserving a viable working

69 See M Paulsen, G Parker and L Adelman, *Child Abuse Reporting Laws—Some Legislative History* (1966) 34 George Washington L R 482.

70 The Child Protection Act 1974 s 8 (2) also makes a more specific provision relating to people in particular occupations.

71 Child Protection Act 1974 s 8 (3).

72 See Stark loc cit at 51-52.

73 Child Protection Act 1974 s 10 (1).

74 Created by s 3 of the Child Protection Act 1974, consisting of not more than five members, the Chairman of the Board being a legal practitioner and, of the other members, one shall be a paediatrician, one a psychiatrist and one experienced in social work.

75 Child Protection Act 1974 s 10 (2).

76 Loc cit at 179.

relationship with the families in their care, the warmth and continuity of which would not withstand a court action.' That wider powers may be desirable is illustrated by the case, again referred to by Freeman,[77] of the two year old boy who starved to death while strapped in his pram. He was discovered by police who had broken in to feed a starving dog, but probation officers had no right of entry even though the boy's mother was on probation and had not been seen by officers for four months.

Other suggestions made include that of Bevan[78] who advocates the introduction of parental training centre orders which would provide, ' . . . either for the rehabilitation of the family through compulsory residential training and care or, in less serious cases, for compulsory attendance of the parent on a specified number of occasions at a training centre to receive education in parenthood'. There would appear to be some merit in this proposal in that parents guilty of child abuse are likely to have more children—Mrs. Kepple had ten children by four different fathers[79]—and such a course might lessen the chance of injury to future children. Another possibility is the *crisis-nursery,* where potentially violent parents may leave their children for a period of time whenever a crisis develops.[80] In the United States, the Louisiana legislature plans[81] to establish Child Protection Centres throughout the state which will provide for the care and protection of abused children, therapeutic programmes for such children and their parents and will attempt to devise long-range solutions to the problem of child abuse. In more general terms, it is suggested that greater state intervention in family matters is both necessary and inevitable if the appalling problem of child abuse is to be tackled squarely: considerations of privacy and parental right are surely, in this context, of very secondary importance. But, at the heart of the matter, lies the need for a more realistic appraisal by the law, and by people who administer it, of the actual nature of the parent/child relationship.

The second major difficulty which faces any commentator on the legal aspects of the parent/child relationship is its vagueness; in the words of Freeman,[82] 'The whole adult-child relationship is obfuscated

77 Ibid.

78 H K Bevan, CHILD PROTECTION AND THE LAW (1970) at 10.

79 Howells op cit at 2.

80 See the comments of B G Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse* (1974) 12 Am Crim L Rev 103 at 124.

81 See Louisiana Revised Statutes Ann (1973) para 46:52.

82 Loc cit at 168.

in tangled terminology'. In a particularly important article, Eekelaar[83] attempted to analyse certain aspects of parental authority which might be regarded as 'rights' in the Hohfeldian sense.[84] He considered eleven such aspects—possession, visitation, determination of education, determination of religious upbringing, discipline, choice of medical treatment, naming the child, consenting to the child's marriage, right to the child's services, determination of nationality and domicile and appointment of guardians and consent to adoption[85]—and concluded that,[86] ' . . . it is no easy matter to determine with precision what rights pertain to parenthood and what happens to them when other persons acquire guardianship or custody of the child'. The problem is exacerbated by the fact that a child's relationship with his parent changes with his age: hence, Lord Denning's comment in *Hewer v Bryant*[87] that a parent's right to custody ended when the child reached the age of eighteen and, ' . . . even up till then it is a dwindling right which the courts will hesitate to enforce against the wishes of the child. It starts with a right of control and ends with little more than advice'. A further difficulty is that the present writer is somewhat doubtful of the application of the Hohfeldian analysis to child law as Hohfeld nowhere considered family law in his work, being more concerned with contractual and property matters, and Eekelaar, similarly, made no attempt to justify the application of the analysis to parental authority. It may, indeed, be that a whole new scheme for the classification of rights, duties and related concepts as they apply to family law will prove to be necessary.

The consequence of the vagueness which surrounds the scope of parental authority is that it becomes proportionately more difficult to delineate the scope of any rights which children might possess. Eekelaar has said that,[88] hitherto, the proclamation of children's rights has taken the form of a propagandist exercise.[89] However, in the United

---

83 J M Eekelaar, *What are Parental Rights?* (1973) 89 LQR 210.

84 See W N Hohfeld, FUNDAMENTAL LEGAL CONCEPTIONS: AS APPLIED IN JUDICIAL REASONING (1919).

85 A similar breakdown may be found in S M Cretney, PRINCIPLES OF FAMILY LAW (1974) at 248-250.

86 Loc cit at 234.

87 [1970] 1 QB 357 at 369.

88 Loc cit at 211.

89 This is generally true in England. See, for example, *Children's Rights* (1972) a symposium containing contributions by Paul Adams, Leila Berg, Nan Berger, Michael Duane, A S Neill and Robert Ollendorff.

States, Drinan[90] has attempted to specify the rights possessed by children there and has said[91] that a child within a family has inherent moral and legal rights to economic, educational and emotional security. It is obvious that Drinan's formulation is very widely drawn and, in fact, so widely drawn as to be almost valueless. A more constructive development, though criticised[92] by Hall as 'bizarre', has been the idea of a *Bill of Rights for Children*, of which H H Foster has been a notable protagonist.[93] The basis of the suggestion is that children should be regarded as *persons* under the law[94] and great emphasis is laid on the implications of the United States Supreme Court decision in the case of *In re Gault*,[95] which decided that a case against a child accused must be conducted in accordance with the requirements of due process. Accordingly, Foster and Freed set out[96] ten areas where they consider that a child has a moral right and should have a corresponding legal right. They are:

1. To receive parental love and affection, discipline and guidance, and to grow to maturity in a home environment which enables him to develop into a mature and responsible adult;
2. To be supported, maintained and educated to the best of parental ability, in return for which he has the moral duty to honour his father and mother;
3. To be regarded as a *person*, within the family, at school and before the law;
4. To receive fair treatment from all in authority;
5. To be heard and listened to;
6. To earn and keep his own earnings;
7. To seek and obtain medical care and treatment and counselling;
8. To emancipation from the parent-child relationship when that relationship has broken down and where the child's best interests would be served by termination of such relationship;
9. To be free of legal disabilities except where they are shown to be necessary for the protection of the child's best interests;

90 R F Drinan, *The Rights of Children in Modern American Family Law* (1962) 2 J Fam L 101.

91 Ibid at 104. But he is chiefly concerned with protecting those rights where the child's parents have divorced.

92 Loc cit at 265.

93 See H H Foster and D J Freed, *A Bill of Rights for Children* (1973) 6 Fam L Q 343 and H H Foster, A 'BILL OF RIGHTS' FOR CHILDREN (1974).

94 For which proposition, suggest Foster and Freed (loc cit at 345), there is a paucity of legal authority.

95 (1967) 387 US 1.

96 Loc cit at 347.

10. To receive special consideration and protection in the administration of the law so that the child's interests are always a paramount consideration.

Although there may be problems in the implementation of such a Bill, it is suggested, with Hall,[97] that a statutory reformulation of parental rights, duties and responsibilities, and the correlative rights of children, would be a desirable development. Although it is not proposed in this article to draft such a reformulation, the present writer would venture to suggest a philosophical basis for such a measure. Foster and Freed say,[98] of the *Gault* decision, that its spirit, ' . . . is that we must have regard for reality—for pragmatic consequences—and pious hopes or good intentions are not enough'. In a different context, the late Peter Brett has written[99] that, ' . . . the role of a contemporary jurisprudence is to survey the knowledge which has been accumulated in other fields (particularly those of the life and behavioural sciences); and to reconsider in its light our existing legal theory and legal doctrines. Only thus can legal reform be successfully accomplished and the law thereby kept in touch with the community which it serves'. Although Brett was not concerned with family law matters, it is suggested that his comments are of major relevance to child law. The key to the problem lies in a proper application of what we know of children's needs and development to situations which require legal intervention. As regards the needs of children, Dr Mic Kellmer Pringle, in a recent book[1] has pointed out four basic emotional needs which must be met. They are, the need for love and security, for new experiences, for praise and recognition and for responsibility. In making decisions which will affect the future of children, the courts must continously keep these needs in mind. Fortunately in recent years it seems, from cases such as *J v C, Re W* and *Barnett,* that the courts are adopting an approach which is more in accord with those needs and are taking the experience of experts in other disciplines, who are aware of them, into account. But, hitherto, the process has been piecemeal and sporadic: if the chances of tragedies, such as that of Maria Colwell, are to be avoided then the vagueness and uncertainty which has characterized both the law and its practice in the past must give way to precision and realism.

---

97 Loc cit at 265.
98 Loc cit at 345.
99 AN ESSAY ON A CONTEMPORARY JURISPRUDENCE (1975) at 87.
1 THE NEEDS OF CHILDREN (1974) at 148-151.

CONCLUSION

We may, therefore, draw the following tentative conclusions which, it is suggested, may be used as a basis for a redefinition of the parent/child relationship:

1. The lawyer must be aware of the present realities of the parent/child relationship, which are not as benign as was once considered.
2. In order to protect the lives and health of children (as well as their rights) a greater degree of state intervention in that relationship may well be necessary.
3. In order to dispel the present state of unsatisfactory vagueness surrounding the relationship, a statutory formulation of respective rights and responsibilities would be a desirable development.
4. That formulation must be based on the real needs of children as they are ascertained by development in relevant disciplines.

FRANK BATES*

* Senior Lecturer in Law, University of Tasmania.