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(1994) FLC ¶92-461

Other publishers' citations: (1994) 17 FamLR 537 (1994) 117 FLR 63

Full Court of the Family Court of Australia at Melbourne

Judgment delivered 10 March 1994

Family law — Practice and procedure — Stay of Proceedings — Pending criminal proceedings against party.

Custody — Welfare of child — Appropriateness of finding as to husband's involvement in death of wife.

Custody — Welfare of child — Prejudice — Over-emphasis of conduct of husband.

Children — Separate representation — Criteria for appointment.

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On 11 December 1992 the wife died and the husband was subsequently charged with her murder. He was awaiting trial at the time of the hearing before the trial Judge. Those proceedings concerned applications by the maternal aunt on the one side and the paternal grandparents and aunt on the other side for custody of the only child of the marriage, aged three at the time of the trial. The husband was also an applicant and unrepresented in proceedings before the trial Judge. He did not put forward any positive claim for custody, but rather indicated to the trial Judge that he supported the application of the grandparents and paternal aunt that they be granted custody of the child. The trial Judge made orders granting sole guardianship and custody of the child to the maternal aunt and permission for her to remove the child from Australia to the United States where she resided. In his reasons for judgment the trial Judge made a finding that on a balance of probabilities the husband shot the wife. The husband, grandparents and paternal aunt appealed against those orders.

1. The husband's grounds of appeal

As the husband was unrepresented and awaiting trial on the charge of murder, the trial Judge should have made interim rather than final orders. That is, having regard to those criminal charges and the husband's ``right of silence'' in the proceedings in this Court, there was a risk of injustice in the presentation of his case and consequently the trial Judge should have exercised his discretion to stay or adjourn the proceedings, or at least adjourn their final determination until the conclusion of the criminal proceedings.

The trial Judge failed to give reasons or adequate reasons for his decision to make final orders.

It was neither necessary nor desirable for his Honour to have made the finding referred to previously as to the husband's involvement in the death of the wife.

2. The grandparents' and paternal aunt's grounds of appeal

The trial Judge failed to give adequate weight to the importance of preserving the relationship of the child with the husband's family and the close nature of that relationship.

The trial Judge failed to give adequate weight to the evidence of an expert witness in support of the appellants' case, particularly in relation to the methods of dealing with grief in eastern European families.

The trial Judge over-emphasised the conduct or involvement of the husband in the wife's death and this influenced him against the proposals of the appellants.

3. Intervention by the Commonwealth Attorney-General

Counsel for the Commonwealth Attorney-General submitted that this case warranted the appointment of a separate representative pursuant to sec 65 of the Family Law Act for two reasons: (a) because a permanent removal of the child from the jurisdiction was contemplated with the consequential likelihood of the cessation of any contact with the remaining parent, and (b) because of the relationships between and circumstances involving the parties and the interveners.

Held: appeals dismissed.

1. The husband's case

The question whether the Court should make interim or final orders depends ultimately upon the circumstances of the individual case. However, that decision is to be made solely against the criterion of the welfare of the child. Any perceived disadvantage to the party is secondary to considerations of the welfare of the child. The circumstances alone that one of the parties has criminal charges pending, and the wider question of potential prejudice in the party's subsequent criminal proceedings, would not ordinarily justify an adjournment. In most cases the child's welfare would not be served by his or her custody remaining in

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abeyance over what might be a substantial period of time pending the outcome of proceedings in the criminal court.

The circumstances of this case are an obvious example of a situation where it was not only desirable but necessary in the interests of the child to proceed to a final hearing.

The question of whether to make final or interim orders was a matter which was raised by his Honour at the beginning of the trial, and on a number of occasions throughout he made it clear that he would not make a final decision on this issue until the evidence was concluded. The evidence proceeded as if it was a final hearing. Although his Honour did not refer specifically in his judgment to this issue, the course followed by his Honour was clear. He ultimately came to the conclusion that the welfare of the child would be best served by final orders being made, a conclusion which needed no further explanation.

It is difficult to see what prejudice the husband's case suffered as a consequence of the trial Judge's finding. In any event, in the circumstances of this case it would have been artificial not to have recorded the basic facts, including the husband's involvement in the death of the wife, as the essential background against which to consider the proposals of the parties and the welfare of the child.

2. The grandparents' and paternal aunt's case

The trial Judge examined the proposals of the grandparents and the paternal aunt in detail, including their previous close and loving relationship with the child. Nevertheless, for reasons which his Honour set out in his judgment, he concluded that this was not a decisive circumstance and that the welfare of the child was better served by her being with the maternal aunt.

His Honour recorded the evidence of the three experts in detail and examined the implications of that evidence, including evidence as to the emotional structures of eastern European families which he described as ``most informative and helpful''. His ultimate conclusion was that he accepted the evidence of the court counsellor ``without qualification''. This was a conclusion which was open to him.

His Honour's consideration of this aspect was not inordinate in the special circumstances of this case. There is no basis for the view that the trial Judge's findings as to the involvement of the husband in the wife's death prejudiced the trial Judge in his consideration of the husband's family or their proposals.

3. Separate representation

In relation to this submission the Full Court considered the following issues:

(i) the power of the Court to appoint a separate representative;
(ii) the role and functions of a separate representative in the proceedings;
(iii) the power of the separate representative to seek orders from the Court and initiate appeals;
(iv) the power to discharge a separate representative;
(v) criteria for the appointment of a separate representative.

In relation to the last of these, the Full Court set out a list of guidelines for the appointment of a separate representative.

The Court concluded that, on the facts of this case, it was appropriate for a separate representative to have been appointed. However, the failure by the trial Judge to appoint a separate representative in this case should not lead to a reversal of the orders made.

[Headnote prepared by the CCH FAMILY LAW EDITORS from that written by the Court]

Appearances: Ms Bryant (instructed by Hogg and Reid) appeared on behalf of the first appellant; Mr Fookes (instructed by Trumble, Szanto and Braham) appeared on behalf of the second appellants; Mr Bartfield (instructed by Barker Gosling) appeared on behalf of the respondent; Mr Burmester (instructed by the Australian Government Solicitor) appeared on behalf of the Commonwealth Attorney-General.

Before: Nicholson CJ, Fogarty and Baker JJ.

Full text of judgment below

Nicholson CJ, Fogarty and Baker JJ:

Introduction

In these appeals it is appropriate, for reasons that appear hereafter, to preserve the anonymity of the parties and other persons involved. Consequently, we will refer to the parties and other major persons as follows: —

- The first appellant — the husband.
- The now deceased wife and mother of the child — the wife.
- The only child — the child.
- The wife's sister and the respondent to these appeals — the maternal aunt.
- The husband's parents (being two of the three other appellants) — the grandparents.
- The husband's sister (being the remaining appellant) — the paternal aunt.

The central focus in the proceedings at first instance and in these appeals arose from the circumstance that on 11 December, 1992 the wife died and the husband was subsequently charged with her murder and was awaiting trial. Those parties had one child who was born on 10 April, 1990.

In April 1993, Mushin J heard proceedings relating to the custody and guardianship of and access to that child. For practical purposes, the applicants were on the one side the maternal aunt, who lived permanently in the United States of America, and on the other side the grandparents and the paternal aunt, all of whom

lived in Melbourne. The husband was also an applicant but the nature of the orders which he sought are referred to in more detail subsequently.

On 30 April, 1993, Mushin J made orders to the following effect: —

1. He granted sole guardianship and custody of the child to the maternal aunt;
2. The maternal aunt was granted permission to remove the child from the Commonwealth of Australia;
3. The grandparents and the paternal aunt were granted limited rights of access to the child.

The husband, the grandparents and paternal aunt appealed against those orders.

At the commencement of the hearing of these appeals leave was granted to the Victorian Legal Aid Commission and to the Attorney-General for the State of Queensland to intervene. This was because one of the grounds of appeal of the husband appeared to raise the question whether the trial miscarried because the husband was unrepresented and had been refused legal aid: see *Dietrich* v. *R* (1992) 67 ALJR 1; [1992] 109 ALR 385. The Victorian Legal Aid Commission was the legal aid authority to which the husband had applied for legal aid. However, the husband's counsel, in the course of her opening submissions made the following concession, namely that it was not her client's case that the absence of legal representation, that is legal aid, was *per se* a basis upon which Mushin J should have stayed or adjourned the proceedings. In the light of that concession, the Legal Aid Commission and the Attorney-General for the State of Queensland were granted leave to withdraw and they took no part in the hearing of these appeals.

The Attorney-General for the Commonwealth of Australia intervened in the appeals pursuant to s. 91(1)(b) of the Family Law Act which provides that the Attorney-General ``may intervene in, and contest or argue any question arising in... any proceedings under this Act with respect to the custody or guardianship of, or access to, children''. Counsel for the Attorney-General made submissions to the Court in relation to the effect of s. 65 of the Family Law Act and, in particular, the making of an order for separate representation in proceedings where it is contemplated that the child may be removed from the Commonwealth of Australia.

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Facts

Because of the limited nature of the grounds of appeal, the facts can be set out relatively briefly. It is convenient to do so initially by referring to the history of the two families involved in this case.

The husband's family are Romanian by origin. In 1980 the paternal aunt (together with two other of her sisters) migrated to Australia. The paternal aunt has remained living in Australia since. She is now aged 39, is single, and in employment. In October 1982 the husband and the grandparents migrated to Australia. The husband is presently aged 27 years. The grandfather is now aged 66 and retired. The grandmother is aged 61 and employed in home duties.

The wife and her family come from Iran. The maternal aunt and her first husband migrated to Australia in 1982. The wife migrated to Australia in 1985 when she was aged approximately 17. Her mother migrated to Australia in August 1990.

The husband and the wife met in Australia in 1987 and married in Melbourne in November 1988. Their one child was born on 10 April, 1990 so that she was almost exactly 3 years of age at the time of the trial.

Shortly after the child's birth the maternal aunt (who by this time had separated from her husband) and the wife's mother came to live with the husband and wife. In December 1990 the maternal aunt left Australia to live permanently in the United States of America and in February 1991 she married her present husband, a United States citizen. She is aged 32 and is employed as a social worker. Her husband is employed as a teacher. They live together in California and they regard the United States as their permanent home.

On 23 March, 1992 the husband and the wife separated when the wife left the parties' home in Noble Park with the child and commenced to live in a nearby suburb. On the same day the mother of the wife committed suicide at the Noble Park home by hanging herself, a circumstance which was discovered by the husband.

The trial Judge made findings of violence by the husband towards the wife both before and after the separation. On 7 April, 1992 the wife obtained an intervention order against the husband under the Victorian legislation. In September 1992 proceedings between the husband and the wife in the Family Court were settled and orders were made under which the parties remained the joint guardians of the child, the wife was to have sole custody of her and the husband was to have access. In addition, property orders were made under s. 79.

On the night of 11 December, 1992 the wife died as a result of being shot whilst she was in bed with the child. The husband was charged with her murder and at the time of the hearing before Mushin J was still awaiting trial. The trial Judge made a finding ``on the balance of probabilities that that gunshot wound was administered by the husband...''.

Shortly after this the maternal aunt returned to Australia and on 11 January, 1993 filed an application in this Court in which she sought the guardianship and custody of the child with orders enabling her to take the child to America. A few days later an application for guardianship and custody was filed by the grandparents and the paternal aunt. The husband filed an answer in which he opposed the application of the maternal aunt, supported the application of his family insofar as they sought interim orders for guardianship and custody of the child, and sought ``leave of the Court to reserve the right to plead as to final orders until such time as the criminal proceedings pending against him have been disposed of''.

Those applications came on before Graham J on 22 January, 1993. In the intervening period the child had been in the care of Community Services Victoria. On that day all parties and Community Services Victoria were represented. His Honour made orders, the effect of which was as follows: —

1. The preparation of a welfare report.
2. Until further order the maternal aunt was granted custody of the child but she was restrained from taking her out of the Commonwealth of Australia.
3. The grandparents and the paternal aunt were granted access.
4. All parties were restrained from bringing the child into contact with the husband.
5. The matter was referred to the Listings Register for fixing in the general list “to determine the following questions: —

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(a) whether there be an urgent final hearing of the custody and access dispute;
(b) or whether the matter be adjourned until after the trial of the husband;
(c) if yes to (a), to try the questions of custody and access;
(d) if no to (a), to try all questions of custody and access pending suit.”

It was against that background that the proceedings were heard by Mushin J from 26 to 30 April, 1993. His Honour delivered judgment on 30 April, 1993.

The proposals of the maternal aunt were that she should have the guardianship and custody of the child and the child should live permanently with her and her husband in the United States of America. The grandparents and the paternal aunt sought the guardianship and custody of the child in Australia. In the light of the limited nature of the grounds of appeal, it is unnecessary to define the proposals of the parties or his Honour's conclusions in relation to them in any more detail. However, it should be said that his Honour examined the evidence and the submissions of each of the parties in detail, including the evidence of the three experts referred to hereafter, and concluded that the welfare of the child dictated that she should live with her maternal aunt in America.

Against that background, we turn to the particular issues raised on these appeals.

The appeal of the husband

Essentially the arguments for the husband can be summarized as follows: —

1. As the husband was unrepresented and was awaiting trial on the charge of murder, the trial Judge should have made interim orders and adjourned the proceedings rather than make final orders.
2. Further, having regard to those criminal charges and the husband's ``right of silence'' in the proceedings in this Court, there was a risk of injustice in the presentation of his case in this Court; consequently, the trial Judge should have exercised his discretion to stay or adjourn the proceedings, or at least adjourn their final determination until the conclusion of the criminal proceedings.
3. The trial Judge failed to give reasons or adequate reasons for his decision to make final orders.
4. It was neither necessary nor desirable for his Honour to have made the finding referred to previously as to the husband's involvement in the death of the wife.

It is convenient to deal with points (1) and (2) together as they involve similar issues and in practice frequently overlap. The issue identified here will not infrequently arise in the Family Court; for example, custody proceedings where a party has criminal charges pending against him or her, such as sexual abuse offences. That person has the privilege against self-incrimination (often referred to as the ``right of silence''). In those circumstances it may be suggested that the proceedings should be stayed or adjourned until the conclusion of the criminal proceedings and/or that the proceedings should be dealt with on an interim basis only until the criminal proceedings are determined.

This issue — whether civil proceedings should proceed or be stayed or adjourned — has been considered on a number of occasions in the civil courts in *McMahon* v. *Gould* (1982) 1 ACLC 98 Wootten J discussed these issues in some detail and at p. 101 summarized the authorities to that time as follows: —

``(a) Prima facie a plaintiff is entitled to have his action tried in the ordinary course of the procedure and business of the Court (*Rochfort v. John Fairfax & Sons Ltd* at p. 19);

(b) It is a grave matter to interfere with this entitlement by a stay of proceedings, which requires justification on proper grounds (*ibid.*);

(c)The burden is on the defendant in a civil action to show that it is just and convenient that the plaintiff's ordinary rights should be interfered with (*Jefferson Ltd v. Bhetcha* at p. 905);

(d) Neither an accused (*ibid.*) nor the Crown (*Rochfort v. John Fairfax & Sons Ltd* at p. 21) are entitled as of right to have a civil proceeding stayed because of a pending or possible criminal proceeding;

(e) The Court's task is one of `the balancing of justice between the parties' (*Jefferson Ltd v. Bhetcha* at p. 904), taking account of all relevant factors (*ibid.* p. 905);

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(f) Each case must be judged on its own merits, and it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors (*ibid.* p. 905);

(g) One factor to take into account where there are pending or possible criminal proceedings is what is sometimes referred to as the accused's `right of silence', and the reasons why that right, under the law as it stands, is a right of a defendant in a criminal proceeding (*ibid.* p. 904). I return to this subject below;

(h) However, the so-called `right of silence' does not extend to give such a defendant as a matter of right the same protection in contemporaneous civil proceedings. The plaintiff in a civil action is not debarred from pursuing action in accordance with the normal rules *merely* because to do so would, or might, result in the defendant, if he wished to defend the action, having to disclose, in resisting an

application for summary judgment, in the pleading of his defence, or by way of discovery or otherwise, what his defence is likely to be in the criminal proceeding (*ibid.* pp. 904-905);

(i) The Court should consider whether there is a real and not merely notional danger of injustice in the criminal proceedings (*ibid.* p. 905);

(j) In this regard factors which may be relevant include;

(i) the possibility of publicity that might reach and influence jurors in the civil proceedings (*ibid.* p. 905);
(ii) the proximity of the criminal hearing (*ibid.* p. 905);
(iii) the possibility of miscarriage of justice e.g. by disclosure of a defence enabling the fabrication of evidence by prosecution witness, or interference with defence witnesses (*ibid.* p. 905);
(vi) the burden on the defendant of preparing for both sets of proceedings concurrently (*Beecee Group v. Barton*);
(v) whether the defendant has already disclosed his defence to the allegations (*Caesar v. Sommer* at p. 932, *Re Saltergate Insurance Co. Ltd.* at CLC p. 34,131; A.C.L.R. p. 736);
(vi) the conduct of the defendant, including his own prior invocation of civil process when it suited him (cf. *Re Saltergate Insurance Co. Ltd.* at CLC p. 34,131; A.C.L.R. pp. 735-736);

(k) The effect on the plaintiff must also be considered and weighed against the effect on the defendant. In this connection I suggest below that it may be relevant to consider the nature of the defendant's obligation to the plaintiff;

(l) In an appropriate case the proceedings may be allowed to proceed to a certain stage, e.g., setting down for trial, and then stayed (*Beecee Group v. Barton*)."

Those principles were adopted by Wilcox J in *Cameron's Unit Services Pty Ltd* v. *Whelpton & Associates Pty Ltd* (1984) 59 ALR 754 and by Young CJ in *Philippine Airlines* v. *Goldair* [1990] VR 385 at pp. 387-8.

It is significant in the context of this case that in the latter case the Chief Justice at p. 390 summarized the position in the following terms: —

``It is sufficient to say that the `right of silence' is a right which relates to criminal proceedings and it would need a very strong case indeed before the Court should intervene solely on that ground to stay civil proceedings pending the determination of criminal proceedings."

In applying those principles in this Court the following additional features of this Court's jurisdiction in relation to children need to be noted:

(1) The Court has power to make interim orders.
(2) ``Final'' orders as to guardianship, custody and access are not final in the ordinary sense in which that would be understood in civil proceedings; they can in appropriate circumstances be reconsidered. The subsequent resolution of criminal charges may justify such a course.
(3) Proceedings relating to the welfare of children in this Court are not strictly proceedings *inter partes:* see *Re P (a child); Separate Representative* (1993) FLC ¶92-376, esp. at pp. 79,896-7 where these principles and the authorities were discussed.
(4) Critically, the welfare of the child is the paramount consideration.

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In such a situation a trial Judge in this Court would normally have a range of options, namely:

(a) make no orders and adjourn the proceedings leaving the current de facto or de jure situation to govern the matter;

(b) make interim orders and adjourn the matter until the conclusion of the criminal proceedings; or
(c) make final orders.

Where there is a genuine contest between the parties or other matters relating to the welfare of the child (a) would generally be inappropriate.

The question whether the Court should make interim or final orders depends ultimately upon the circumstances of the individual case. However, that decision is to be made solely against the criterion of the welfare of the child. The circumstances alone that one of the parties has criminal charges pending would not justify an adjournment. In most cases the child's welfare would not be served by his or her custody remaining in abeyance over what might be a substantial period of time pending the outcome of proceedings in the criminal courts. Generally a child is benefited by certainty and regularity in his or her life.

Any perceived disadvantage to the party is secondary to considerations of the welfare of the child. The outcome of the criminal proceedings may justify a subsequent application. In addition, there may be circumstances in individual cases which indicate that interim orders and an adjournment are consistent with the child's welfare. For example, the evidence may indicate that the criminal trial is about to take place and may only involve a short adjournment of the family law proceedings; or the evidence may indicate that the child's current circumstances are satisfactory and there will be no challenge to them or disruption of them pending the outcome of proceedings elsewhere.

So far as the ``right of silence'' and any wider question of potential prejudice in the party's subsequent criminal proceedings are concerned, we consider that the position was correctly stated by Young CJ, namely that it would be a rare case where that alone would justify an adjournment. Ultimately in this jurisdiction it is a question of the welfare of the child. The circumstances of the individual case may be such that there would be no significant prejudice to the child's welfare by a delay of the proceedings pending the outcome of the criminal charges: see *A* v. *Minister of Community Welfare* (1988) 12 Fam LR 117. However, where that is not the case, ordinarily it would be expected that this Court would proceed to determine the case and make such orders as it considered to be appropriate. The exercise by a party of his or her right of silence or privilege against self-incrimination in civil proceedings is a matter of decision by that party. Its exercise should not ordinarily determine whether the proceedings in this Court should continue. It would not usually be to the welfare of the child for disputed proceedings about guardianship, custody or access to be delayed for a significant period of time because that person chooses to exercise that right or privilege.

In this particular case the position of the parties at the trial was that the husband did not put forward any positive claim for custody. He indicated to the trial Judge that he supported the application of the grandparents and paternal aunt and that they should have ``temporary custody'' until the criminal proceedings were resolved. They did not seek any adjournment but sought orders that they be granted custody of the child. Similarly, the maternal aunt sought orders that she be granted the custody and an order enabling her to take the child out of Australia on a permanent basis.

Throughout the trial there was considerable discussion as to whether final or interim orders should be made, his Honour indicating, in effect, that he would determine that matter at the conclusion of evidence and addresses and having regard to the welfare of the child.

So far as the privilege against self-incrimination was concerned, this was more than adequately brought to the attention of the husband on a number of occasions during the trial and he conducted himself throughout with a close eye to that circumstance. There was no argument before the trial Judge or before us that the conduct of the trial was likely to prejudice any subsequent criminal trial and there would have been no difference on this aspect whether the orders were interim or final.

It was also submitted by counsel for the husband that the decision whether to make an interim or final order may have a critical impact upon subsequent forum issues. That is, her

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client could more readily invoke the continuing jurisdiction of this Court if interim orders were made whereas if final orders were made it may be necessary for him to resort to the Courts of the United States. Whether an interim or final order was made, the Family Court would continue to retain jurisdiction: s. 39(4). However, it must be recognized that if a final order was made and the child was living permanently in the United States the Courts of that country may be less ready to concede continuing jurisdiction to the Australian Courts.

The trial Judge was conscious of these issues and indicated that he would determine that matter at the conclusion of the evidence and against the criterion of the welfare of the child. Ultimately, he determined to make final orders and we think that his Honour was correct in those conclusions.

The circumstances of this case are an obvious example of a situation where it is not only desirable but necessary in the interests of the child to proceed to a final hearing. It was likely that the criminal proceedings would not be finally determined for a substantial period of time. The maternal aunt was in Australia in circumstances of personal and financial difficulty; it would have been inappropriate to have expected her to remain in Australia for the substantial further period involved or to return to America and then back to Australia at a later time. In addition, until these custody proceedings were determined the child's personal circumstances were uncertain.

Submission (3) above by counsel for the husband was, in effect, that the trial Judge failed to give reasons of his decision to make final rather than interim orders. We have already referred to the course of the trial. This was a matter which was raised by his Honour at the beginning of the trial and on a number of occasions throughout and he made it clear that he would not make a final decision until the evidence was concluded. The evidence proceeded as if it was a final hearing. Although his Honour did not refer specifically in his judgment to this issue, the course followed by his Honour was clear. He ultimately came to the conclusion that the welfare of the child would be best served by that child being with the maternal aunt in the United States and the child needed security after the traumatic events of the previous year. Once he reached that conclusion it was inevitable that he would make final rather than interim orders and that conclusion really needed no further explanation.

The remaining major submission by counsel for the husband was that it was not appropriate for the trial Judge to make the finding previously referred to of the husband's involvement in the death of his wife.

Implicit in counsel for the husband's submission is that the husband was, as a consequence, prejudiced in these proceedings. However, as previously indicated, the husband sought no positive orders but largely supported the application by his family; consequently, it is difficult to see what prejudice the husband's case suffered.

However, as this submission recurs in the submissions on behalf of the grandparents and paternal aunt, it is appropriate that we consider it further.

Counsel for the husband relied in particular upon the following passage in the judgment of the High Court in *M and M* (1988) FLC ¶91-979 at p. 77,081:

> ``No doubt there will be some cases in which the Court is able to come to a positive finding that the allegation [that a parent has sexually abused a child] is well-founded. In all but the most extraordinary cases, that finding will have a decisive impact on the order to be made respecting custody and access. There will be cases also in which the Court has no hesitation in rejecting the allegation as groundless. Again, in the nature of things there will be very many cases, such as the present case, in which the Court cannot confidently make a finding that sexual abuse has taken place. And there are strong practical family reasons why the Court should refrain from making a positive finding that sexual abuse has actually taken place unless it is impelled by the particular circumstances of the case to do so.''

In the sort of cases to which the High Court was referring, this Court has consistently followed that approach.

The facts in this case were different. The fact that the mother of this young child was dead and that she had died in dramatic and tragic circumstances and that, from the evidence before the trial Judge, the husband was involved in those events were central to this case. They explain the applications before the Court and the husband's limited involvement in them. His

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Honour did not deal further with the detail of the mother's death or express any views as to possible culpability of the husband. In the circumstances of this case it would have been artificial not to have recorded these basic facts as the essential background against which to consider the proposals of the parties and the welfare of this young child.

Appeal by the grandparents and the paternal aunt

Counsel for the grandparents and the paternal aunt adopted the submissions by counsel for the husband referred to above. In addition, he made three further submissions, namely: —

1. The trial Judge failed to give adequate weight to the importance of preserving the relationship of the child with the husband's family and the close nature of that relationship.
2. The trial Judge failed to give adequate weight to the evidence of Mrs Holmes in support of the appellants' case, particularly in relation to the methods of dealing with grief in eastern European families.
3. The trial Judge over-emphasized the conduct or involvement of the husband in the wife's death and this influenced him against the proposals of his clients.

Counsel for the grandparents and the paternal aunt recognized at the outset that, at least in relation to the first two of these submissions, they were challenges to the weight which the trial Judge placed upon the evidence in the context of discretionary orders and that consequently they attracted the well known principles relating to the review by an Appeal Court of such orders: see, for example, *House* v. *The King* (1936) 55 CLR 499 and *Gronow* v. *Gronow* (1979) FLC ¶90-716. This represented an especially difficult task for counsel in this case because the fact is that his Honour carefully and in detail analysed the competing proposals of the parties, and in so doing dealt specifically with these issues.

But turning specifically to the first of them, it is clear from his Honour's judgment that he examined the proposals of the grandparents and paternal aunt in detail, and in that context not only their physical proposals but their previous close and loving relationship with the child. Nevertheless, for reasons which his Honour set out in his judgment, he concluded that this was not a decisive circumstance and that the welfare of the child was better served by her being with the maternal aunt.

In relation to point 2, his Honour had before him the evidence of three experts, Mrs Holmes, who was called on behalf of the grandparents and the paternal aunt, Dr Wilson from Community Services Victoria and Miss Dockery, court counsellor. His Honour recorded the evidence of these three persons in detail and examined the implications of that evidence. His ultimate conclusion was that he accepted the evidence of Miss Dockery ``without qualification''. This was a conclusion which was open to him. So far as Mrs Holmes was concerned, her evidence suffered from the disadvantage that she had not seen the child or the maternal aunt. Nevertheless, his Honour specifically noted her evidence about the emotional structures of eastern European families and which he described as ``most informative and helpful''.

Counsel for the grandparents and the paternal aunt's final submission was that the trial Judge had over-emphasized the conduct of the husband and that this had influenced him against his clients.

It is clear from the transcript and his Honour's judgment that he was distressed by the husband's conduct and placed emphasis upon it. In his judgment he referred to being ``overwhelmed in my consideration of this matter by the circumstances in which the deceased met her death...''.

Given the circumstances of this case such feelings by his Honour are understandable. We do not regard his Honour's consideration of this aspect as inordinate in the special circumstances of this case. In any event, the critical point is that there is no basis for the view that this prejudiced the trial Judge in his consideration of the husband's family or their proposals or that he preferred the proposals of the maternal aunt for this reason. We think it fair to say that his Honour paid particular attention to the proposals of each of the parties and was sympathetic to the distressing situation in which the husband's family found themselves.

Appointment of a separate representative pursuant to s. 65

As previously indicated, counsel for the Commonwealth Attorney-General made submissions as to the circumstances in which a separate representative ought to be appointed

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pursuant to s. 65 of the Family Law Act. He argued that this case warranted such an appointment for two reasons: first, because a permanent removal of the child from the jurisdiction was contemplated with the consequential likelihood of the cessation of any contact with the remaining parent; secondly, because of the relationships between and circumstances involving the parties and the intervenors.

Counsel for the Attorney-General, however, submitted that there should not be fixed rules or criteria governing the circumstances for the appointment of a separate representative. Counsel for the grandparents and the paternal aunt supported the argument put on behalf of the Attorney-General despite the fact that he had not sought such an appointment at any earlier stage of the proceedings and no such application had been made by any of the other parties.

Having regard to these submissions it appears to us that there are three issues to be resolved. First, what are the principles which govern the appointment of a separate representative pursuant to s. 65 of the Act; secondly, whether in this case the trial Judge should have appointed a separate representative; and thirdly, whether, if he should have done so, his failure to make such an appointment vitiated his decision.

The first issue must be considered in the light of: —

(1) the power of the Court to appoint a separate representative;
(2) the role and functions of a separate representative in the proceedings;
(3) the power of the separate representative to seek orders from the Court and initiate appeals;
(4) the power to discharge a separate representative;
(5) criteria for the appointment of a separate representative.

(1) The power to appoint a separate representative

Section 65 of the Act provides:

> ``Where, in any proceedings under this Act in which the welfare of a child is relevant, it appears to the court that the child ought to be separately represented, the court may, of its own motion, or on the application of the child or of an organization concerned with the welfare of children or of any other person, order that the child be separately represented, and the court may make such other orders as it considers necessary for the purpose of securing such separate representation."

The current wording of the section is the result of amendments to the Act which removed two restrictions found in the original s. 65. The first amendment in 1983 eliminated the requirement that the proceedings be with respect to custody, guardianship, or maintenance of or access to a child. Although appointment is most common in proceedings under Part VII of the Act it is not confined to that. The second change in 1987 accompanied the extension of the Court's jurisdiction to encompass children of ex-nuptial relationships.

Order 23 Rule 4(1) of the Family Law Rules enables an application under s. 65 to be determined by the Court notwithstanding that a next friend has not been appointed for the child. This is no doubt because the role of a separate representative is one which safeguards the child's interests. Order 23 Rules 4(1) and (2) provide:

> ``(1) An application under section 65 of the Act in respect of a child may be heard and determined by the court notwithstanding that a next friend has not been appointed for the child.
>
> (2) Where the court orders that a child be separately represented in accordance with section 65 of the Act, it may request that the representation be arranged by the Australian Legal Aid Office, or by a legal aid body that is a relevant authority under section 116C of the Act."

A ``relevant authority" as defined in s. 116C(5) refers to a person, authority or body who or which receives funding from the Commonwealth Government to provide legal assistance in matters arising under this Act. For practical purposes this now means the various State and Territory Legal Aid Commissions.

(2) The role and functions of a separate representative

The Full Court in *Bennett and Bennett* (1991) FLC ¶92-191 (Nicholson CJ, Simpson and Finn JJ) at p. 78,259, after referring to *Lyons and Bosely* (1978) FLC ¶90-423 and *Waghorne and Dempster* (1979) FLC ¶90-700 and other

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authorities, summarised the role of a separate representative in the following terms:

> ``We therefore consider that a separate representative must of necessity form a view as to the child's welfare based upon proper material and, if appearing, may make submissions in accordance with that view or instruct counsel to do so. We think that the role of the separate representative is broadly analogous to that of counsel assisting a Royal Commission in the sense that his or her duty is to act impartially but, if thought appropriate, to make submissions suggesting the adoption by the Court of a particular course of action, if he or she considers that the adoption of such a course is in the best interests of the child. Unless the separate representative does this it seems to us that there is little purpose in having a separate representative."

The Court also stated:

> ``Whilst we consider it appropriate for the separate representative at trial to inform the Court by proper means, eg a Court Counsellor or other expert's report, as to the wishes of a child, we do not consider that the separate representative is bound to make submissions on the instructions of a child as to its wishes or otherwise. Nevertheless, the separate representative would be bound to inform the Court of such wishes. What is clear is that the separate representative should act in an independent and unfettered way in the best interests of the child."
>
> (at p. 78,259).

There is some difference of opinion to be found in the authorities as to the Court's powers to limit the appointment. In *F and R (No 2)* (1992) FLC ¶92-314, Fogarty J noted that previous cases had discussed the question whether the appointment of a separate representative may be confined in a particular way or within a particular ambit. His Honour said at p. 79,356:

> ``It appears to me that a Court, in making an order under s. 65, may mark out or limit the ambit of that representation. There are obvious circumstances where it would be appropriate to do so. No doubt that authority would encompass issues which necessarily arose from the original (limited) appointment

and, in any event, the Court has power to extend or alter the order for appointment as circumstances dictate."

However, in *Bennett and Bennett*, supra, the Full Court said, at p. 78,258:

``Finally, we consider that if her Honour had purported to limit the role of the separate representative then she did not have the power to do so.... It is to be noted that... [section 65] permits the appointment of a separate representative simpliciter, and the only additional orders which it empowers the Court to make are, such as it considers necessary for the purpose of securing such representation."

It is not necessary, for the present purposes, to determine this issue which would be best decided after hearing full argument.

It should be noted that, quite apart from issues of representation under s. 65, a child can be a party in his or her own right in proceedings. A recent example of this can be seen in *Pagliarella and Pagliarella* (1993) FLC ¶92-400, where Hannon J made an order on the application of a 14 year old child to be joined as a party to the proceedings pursuant to s. 63C(1)(b) of the Act.

One of the submissions before the Court in *Pagliarella* was that separate representation became unnecessary once a child was a party to the proceedings. In dealing with this argument, Hannon J had regard to the distinction between the role of a separate representative and that of counsel for the child who is bound by instructions received from the child (or, as the case may be, a next friend — see Order 23). His Honour concluded at p. 80,107-8:

``The court will not be assisted in this regard by counsel for N because her counsel will be bound by the instructions which she gives either directly or through a next friend if an appointment is made. Although the wife maintains the position she held at the previous trial she is unlikely to be represented and therefore may not be able to adequately put her case. It is not of any relevance that the wife's case may correspond with the views reached by the separate representative. The only independent assistance which would be available to the court is that which can be provided by a separate representative who though obliged to put N's wishes before the court is not bound to submit that they should be accepted. In fact it is the duty of the separate representative to submit to the contrary if he or she considers on all the

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evidence that it is in the interests of the child's welfare to do so. In the present case it is the separate representative who would be able to highlight the issues, to cross-examine the witnesses and to assist the court in assessing the weight to be given to the evidence of N's wishes."

In our view the approach taken by Hannon J was correct. It is true that at common law a child cannot instruct counsel or a solicitor except through a next friend or guardian. However, since the enactment of s. 63C(1)(b) of the Act in 1987, which enables a child to institute proceedings, the rule that a child may not give instructions should be regarded as having been abrogated by statute, for it seems inconceivable that Parliament intended that a child could commence proceedings but not give instructions to a solicitor or counsel to do so or to conduct the proceedings on his or her behalf. Similarly the Rules themselves contemplate that a child may conduct proceedings independent of a next friend. Order 23 Rule 3 provides as follows:

``(1) Where a party to the proceedings is a child, the court may, at any time, if it is satisfied that the party does not understand the nature and possible consequences of the proceedings or is not capable of conducting the proceedings on the party's own behalf, require that a next friend of the party be appointed for the purposes of the proceedings in accordance with Division 3.

(2) Where under sub-rule (1), the court requires the appointment of a next friend, it may order a stay of proceedings for such time and upon such terms as it thinks fit."

This view is supported by the judgments of the Court of Appeal in England in *Re S (A Minor) (Independent Representation)* [1993] 3 All ER 36.

It is unnecessary to recount all of the details of this case but it appears that the child, who was aged 11 and who was represented by solicitor and counsel, applied to a judge under certain provisions of the Rules to proceed without a guardian ad litem, the guardian ad litem having taken a course of which the child did not approve. Under the English Rules it was open to the Court to grant the leave sought and to remove the guardian ad litem if it considered that the minor concerned had sufficient understanding to participate as a party in the proceedings concerned or proposed without a next friend or guardian ad litem. The trial Judge refused the application and the child appealed. The appeal was dismissed; however, in the course of his judgment the learned Master of the Rolls, Sir Thomas Bingham MR, with whom Rose and Waite LJJ agreed, said at p. 40:

``The rule which prohibits a minor from bringing or defending proceedings otherwise than through a next friend or guardian ad litem (now embodied in RSC Ord 80 r 2) is of long standing. Advantage was taken of it in the wardship jurisdiction to enable the ward's best interests to be examined independently of the competing claims or arguments of the main parties. It became common practice, in cases where the court required an independent investigation, or a medical or other opinion to be obtained or where it was thought that the child's views should be presented to the court through an independent source, for the ward to be joined as a party and represented by a guardian ad litem who would perform those functions. Throughout the present century that duty has invariably been carried out by the Official Solicitor. It was a multiple function, for he acted not only as the child's solicitor and spokesman but also as an officer of the court with an independent brief to investigate issues of fact or divergent expert opinion and address the court as to the requirements of the best interests of the child. Instances would be bound to occur when the reconciliation of all those functions would prove impossible, and the guardian ad litem would be forced into a position of having to advocate a course of action which conflicted directly with the views and instructions of his child client."

This passage also provides a useful summary of the role of the separate representative appointed under the Family Law Act.

After referring to procedures under other legislation his Lordship continued:

``The 1989 Act and the rules of court passed under it have made radical changes in this respect. An exception is introduced to the general rule of disability, in that a minor is permitted in family proceedings to conduct a case in person or to instruct his own solicitor in certain prescribed circumstances. Those circumstances vary, however, according to the nature of the proceedings."

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Although the provisions of the Family Law Act and Rules are expressed in less detailed terms than the relevant English legislation, we think that the considerations associated with both sets of legislation are the same and that the traditional rule that a child cannot give instructions to counsel or solicitor has thus been abrogated. However, as in England, the Court retains the power under the Rules to require that a next friend or guardian ad litem should be appointed.

In the case of *Re T (X a minor) (child: representation)* [1993] 4 All ER 513 the Court of Appeal further decided, *inter alia*, that under the Family Proceeding Rules 1991 the Court has the ultimate right to decide whether a minor who comes before it as a party without a next friend or guardian has the necessary ability and understanding to instruct a solicitor. In the context of the Family Law Rules see Barbayannis, M. (1992)

`Infants as Parties to Family Law Proceedings' Vol. 66 No. 3, *Law Institute Journal*, 496 and its discussion of Order 23 Rules 3 and 18.

(3) The power of the separate representative to seek orders from the court and initiate appeals

The right of a separate representative to seek orders on behalf of a child and if necessary to appeal was determined by the Full Court (Nicholson CJ, Fogarty and Strauss JJ) in *Re P (a child); Separate Representative* (1993) FLC ¶92-376. Previous authority on the right of a separate representative to initiate proceedings and in particular the decision of the Full Court in *Urquhart and Urquhart* (1982) FLC ¶91-206, was reconsidered in *Re P* and held to no longer be good law.

(4) The power to discharge a separate representative

The issue of the Court's authority to discharge an order for separate representation has not been decided at appellate level. In *Re P (a child) supra*, Strauss J said by way of *obiter dicta* at p. 79,909:

> ``Whilst I have not heard argument on this matter, it seems to me that where a separate representative takes steps in proceedings which cannot be justified or which are inappropriate, then the Court could order the removal of the separate representative."

The majority judgment did not comment on this issue. The passage from Strauss J's judgment was cited by Hannon J in *Pagliarella and Pagliarella, supra*. Hannon J said at p. 80,105:

> ``It was not submitted that the court did not have the power to discharge a separate representative and I have no doubt that such a power exists. Section 65 of the Act empowers the court to make an order for separate representation of a child and although it may request a legal aid body to arrange the representation (see Order 23 Rule 4(2)), the appointment is by order of the court and the power of appointment would carry with it the power to discharge the person appointed pursuant to the order, if proper cause is shown that it is appropriate or desirable that the person appointed as the separate representative should be removed."

We consider that the views of Hannon J are correct.

(5) The criteria for appointment of a separate representative

As was pointed out by Hannon J in *Pagliarella and Pagliarella, supra*, at p. 80,107:

> ``The Act does not provide any guidelines for the duties and responsibilities of the separate representative."

Nor does the Act suggest where such an appointment is appropriate.

It would appear that a consequence of the lack of guidelines as to where appointment is appropriate there has been a wide variation in the frequency with which separate representatives are appointed by the Court. Examination of the Family Law Council's report of June 1989 *Representation Of Children In Family Law Proceedings*, indicates that there is a national average of one separately represented client per fifty custody, guardianship or access applications. There were, however, dramatic variations among States and Territories.

For example in New South Wales the rate was one per twenty-four custody, guardianship or access applications. In Western Australia the rate was one per four hundred and thirty-eight applications. These figures were drawn from information over a twelve month period between 1987 and 1988. Although more

recent data is not presently available, there is no reason to suppose that any significant change has occurred in the interim.

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These variations are no doubt influenced by a number of factors which would include the past experience in particular parts of Australia by the judges of the efficiency and efficacy of the particular separate representatives who have been appointed.

However, not the least of the problems which we consider has led to the wide variations referred to, has been the absence of any statutory criteria for the making of such appointments and the fact that this Court has not itself laid down guidelines. In its 1989 report the Family Law Council suggested, *inter alia*, that the Act be amended to state criteria and adopted a list suggested by Lambert J of this Court (now retired) in an address which he made to the Australasian Conference on Family Law in July 1980. In that address his Honour said:

> ``Given that for practical reasons the limited availability of Legal Aid funds to finance separate representation requires the setting of priorities, the following situations are suggested as appropriate for the Court to seriously consider the making of an order under s. 65 of the Act;
>
> (i) Where there is manifest continuing hostility between the parties to the proceedings and particularly where the children are being used by either or both parties to hurt the other;
> (ii) Where one of the parties to the proceedings is not a natural parent of the children;
> (iii) Where the children are ordinarily in the possession, care and control of a person other than their parents;
> (iv) Where the children are subject to an order under the State Children's Welfare Legislation;
> (v) Where there are real issues of cultural or religious difference;
> (vi) Where there are issues of exotic sexual or anti social tendencies on the part of a parent or parents or other persons with whom the children come regularly into contact;
> (vii) Where there are issues of significant mental illness or personality disorder in relation to either party or a child, or to other persons having significant contact with the children;
> (viii) Where there is a history of recurring resort to litigation over custody or access by either or both parents;
> (ix) Where it appears that the children are having difficulty adapting to a new family situation in either parent's household;
> (x) Where it appears that both parties propose arrangements which will have the effect of separating siblings;
> (xi) Where child abuse is an issue.''

The Family Law Council adopted these criteria but commented that, in light of developments since 1980, the last of the suggested criteria should become the first and, that by reason of the enactment of s. 60H of the Act, the fourth of the criteria was no longer relevant. Since s. 60H is once more under legislative consideration, this may no longer be the case.

The Government has not acted on the Council's report. In a report by a Sub-Committee of this Court, which was adopted by the Chief Justice's Consultative Council and referred to the Attorney-General, it was recommended: —

> ``(1) That the Court's view is that if guidelines are to be laid down for the appointment, by order, of a separate representative for children in proceedings under the Family Law Act 1975, then that must be done by legislative amendment of the Act;
>
> (2) That the Court does not support the laying down of such guidelines, because any attempt to do so may unduly fetter the discretion of the Court to appoint separate representatives in appropriate cases,

or lead to unnecessary proliferation of such appointments with a consequent blow out on the demand for limited Legal Aid funds."

The Court in its submissions to the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act in 1992 argued that if all of the criteria suggested by the Family Law Council were to be adopted, it may be that a separate representative would be required at almost every contested custody case. Although a separate representative is appointed in every contested custody case in New Zealand, the Court expressed the view that a separate representative is not needed in many cases and [80773]

that the cost would be unjustified. (See Vol. B, p. 53.)

The Joint Select Committee accepted, at least implicitly, that separate representation was not always necessary and made the following recommendations (at pp. 128-9):

``The Committee recommends that:

36. a separate representative for a child be appointed where:
36.1 there are allegations of child sexual abuse; or
36.2 where in the opinion of the Family Court the circumstances of the case are such that the welfare of the child is seriously at risk."

One member of the Committee, Senator Spindler, dissented on this issue and urged that, as in New Zealand, separate representatives be appointed in all cases involving not only access and custody disputes, but also property disputes where the parties have care and control of children.

In the final analysis, the determination of the issue whether a separate representative should always be appointed in contested custody, access and property cases involving children is a political one, carrying with it, as it does, considerable financial implications. The Family Law Act does not presently require it, but rather, confers a discretion on the Court as to whether and in what circumstances such appointments should be made.

Although the Court, in its submissions, questioned the need for legislative guidance, it did suggest that a revision of existing guidelines for the appointment of separate representatives was desirable.

On reflection, we think that it may be desirable for statutory guidelines to be provided and, in their absence, we think it appropriate that we should endeavour to give some assistance and guidance to judges, judicial registrars and registrars as to when such an appointment should be made.

It is not unknown for appellate courts to give such assistance when the law is otherwise silent. The Court of Appeal has provided sentencing guidelines in a series of cases in England: *Bibi* (1980) 71 Cr. App. R. 360 on imprisonment generally; *R* v. *Roberts* (1982) 74 Cr. App. R. 242; [1982] 1 All ER 609 for imprisonment following conviction for rape; *R* v. *Fairhurst* [1987] 1 All ER 46, for sentencing juveniles convicted of grave crimes.

Similarly this Court has on occasions provided guidelines: *Lee Steere* v. *Lee Steere* (1985) FLC ¶91-626, *Docters van Leeuwen* v. *Docters van Leeuwen* (1990) FLC ¶92-148, and *Beck* v. *Sliwka* (1992) FLC ¶92-296. Although views have been expressed by the High Court in the past which have been somewhat critical of this process: *Mallet* v. *Mallet* (1984) 156 CLR 605, it is apparent that more recently the High Court has taken the view that this Court ought provide guidelines in appropriate cases: see *Norbis* v. *Norbis* (1986) 161 CLR 513 especially at pp. 519-520. The majority judgment of the High Court in *Secretary, Department of Health and Community Services* v. *JWB and SMB* (1992) FLC ¶92-293; [1992] 175 CLR 218 said at FLC 79,185; CLR 259-60:

> ``It is true that the phrase `best interests of the child' is imprecise, but no more so than the `welfare of the child' and many other concepts with which courts must grapple.... With the range of expertise available to them, judges will develop guidelines to give further content to the phrase `best interests of the child' in responding to the situations with which they will have to deal.''

The guidelines that we propose are simply guidelines; they are not rigid rules of law and it does not follow that a departure from them will necessarily vitiate a judgment, although judges, judicial registrars and registrars should, we think, give sufficient reasons for departing when they consider a departure is appropriate. Similarly the guidelines do not propose to lay down a comprehensive code and there will be a number of occasions when separate representatives will be appointed in circumstances where the guidelines are silent.

In relation to appointments of separate representatives we consider that the broad general rule is that the Court will make such appointments when it considers that the child's interests require independent representation.

Subject to that broad general rule we suggest the following guidelines. Appointments should normally be made where:

(i) Cases involve allegations of child abuse, whether physical, sexual or psychological.

In such cases we consider that the separate representative has an independent investigative role and that the child in any event should have

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an independent person looking after his or her interests. The separate representative can in such cases also fulfil the function of arranging for the collation of expert evidence and presenting that evidence to the Court.

(ii) Cases where there is an apparently intractable conflict between the parents.

In this regard we lay stress upon the words ``intractable conflict''. There is a dispute of course in all contested custody cases and there is usually a degree of conflict, but we have in mind that category of cases where there is a high level of long standing conflict between the parents. In such cases the child is very much a pawn in the dispute and is often used as such by either or both parents. In these circumstances we think it important that the child have the support and assistance of an independent person and that the Court similarly have the assistance of such a person to present the child's point of view.

(iii) Cases where the child is apparently alienated from one or both parents.

If the child is alienated from both parents, the need for such representation is obvious. Where the child is alienated from one of them, this may or may not be for good cause and may have been largely brought about or contributed to by the conduct of the parent from whom the child is not alienated. In most cases it seems to us to be highly desirable for the child to have access to a person independent of the conflict who will have his or her interests at heart and who will be capable of assisting the child and putting both the child's view and submissions as to the child's best interests to the Court: see Law Council of Australia (1989) ``Law Council Submission on Role of Separate Representatives'' Vol. 4 No. 4 *Australian Family Lawyer*, 15. In this regard we also see the separate representative as having an investigative role which may be of great assistance to the Court. Further, the separate representative may well, in this and the previous category of cases, perform the role of an ``honest broker'' as between the child and or the parents.

(iv) Where there are real issues of cultural or religious difference affecting the child.

Such cases are an increasing feature in our community and the child is often very much torn between the contesting parties. Again we think that the child is likely to benefit from the services of an independent separate representative, as may the Court which may well be assisted by the independent investigative

role of the separate representative and by evidence from an impartial source as to the nature of the cultural differences involved.

> (v) Where the sexual preferences of either or both of the parents or some other person having significant contact with the child are likely to impinge upon the child's welfare.

Disputes of this kind typically raise claims that a homosexual parent and/or their new partner is unfit by virtue of that factor alone. It is clear, however, following cases such as *N and N* (1977) FLC ¶90-266, *Spry and Spry* (1977) FLC ¶90-271, *Cartwright and Cartwright* (1977) FLC ¶90-302, *L and L* (1983) FLC ¶91-353 and most recently *Doyle and Doyle* (1992) FLC ¶92-286 that the nature of a party's sexual relationships is relevant to the Court's proceedings only to the extent that it affects parenting abilities or the welfare of a child in a particular case: see Otlowski, M. (1992) ``Doyle and Doyle; Family Court Awards Custody to Homosexual Father'' Vol. 11 No. 2 *University of Tasmania Law Review*, 261.

The particular kind of acrimony which arises in such cases, considered together with the Court's obligation to make a decision from the viewpoint of a child's best interests, may warrant the appointment of a separate representative. This is so that the impact, if there is any, of a party or partner's sexual preference can be properly and dispassionately assessed for its relevance to the Court's inquiry into the best interests of the child.

> (vi) Where the conduct of either or both of the parents or some other person having significant contact with the child is alleged to be anti-social to the extent that it seriously impinges on the child's welfare.

Such conduct would include cases where there is a background of serious family violence. In using that term we make it clear that it extends beyond actual physical violence to circumstances where there is a history of serious threats or psychological and emotional abuse of one or other of the parents or some other person having significant contact with the child. It is obvious that if one party is in serious fear of the other the child may need separate representation to protect his or her position

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where the parent in fear may be overborne by the other.

> (vii) Where there are issues of significant medical, psychiatric or psychological illness or personality disorder in relation to either party or a child or other persons having significant contact with the children.
> (viii) Any case in which, on the material filed by the parents, neither seems a suitable custodian.

The need for the appointment of a separate representative in the above two categories of cases is self evident for all or most of the reasons stated in relation to previous categories.

> (ix) Any case in which a child of mature years is expressing strong views, the giving of effect to which would involve changing a long standing custodial arrangement or a complete denial of access to one parent.

In these cases, we are particularly mindful of the important ``honest broker role'' which can be played by a separate representative, especially if she or he is appointed early enough in the proceedings by a Registrar during a Directions Hearing (pursuant to the delegation to order separate representation contained in Order 36A Rule 2(ja)).

> (x) Where one of the parties proposes that the child will either be permanently removed from the jurisdiction or permanently removed to such a place within the jurisdiction as to greatly restrict or for all practicable purposes exclude the other party from the possibility of access to the child.

In the case of the permanent removal of the child from the jurisdiction, as in this case, we accept the argument of counsel for the Commonwealth that the step has such drastic implications for the welfare of the child that a separate representative should normally be appointed. The result of an order may well be to

permanently deprive the child of the opportunity of living in this country and of the culture in which he or she is being brought up, at least until he or she is adult, and may also create such a gulf between the child and his or her natural parent as to make it unlikely that the parent/child relationship will be resumed.

Similar, albeit not as acute, consequences may follow if the removal is to a part of Australia which is physically remote from the child's usual place of residence and the circumstances of the parties make it unlikely that there will be worthwhile access.

In either case we think it desirable that the child should have access to independent representation and that the Court may well benefit from the independent appraisal which a separate representative can bring to such a case.

(xi) Cases where it is proposed to separate siblings.

As the Full Court pointed out in *Bennett and Bennett, supra*, at p. 78,266, such a step is most serious from the point of view of the respective children. That was a case where the trial Judge had made an order which had the effect of separating siblings and a separate representative was in fact appointed by the trial Judge but only at the conclusion of the hearing for the purpose of explaining the decision to the children. Although the decision on the appeal did not turn on the issue of the appointment of a separate representative, the Full Court was critical of the appointment having been made at that late stage. In our view, in such cases, a separate representative should be appointed at an early stage of the proceedings.

(xii) Custody cases where none of the parties are legally represented.

This can occur through the choice of the parties, or the non-availability of legal aid. In such circumstances we consider it imperative that the child's interests be protected as soon as is practicable after this situation becomes apparent.

(xiii) Applications in the Court's welfare jurisdiction relating in particular to the medical treatment of children where the child's interests are not adequately represented by one of the parties.

In *Re Jane* (1989) FLC ¶92-007 and *Re Marion* (1991) FLC ¶92-193 [see also *Secretary*, *Department of Health and Community Services* v. *JWB and SMB* (1992) FLC ¶92-293; [1992] 175 CLR 218 the Public Advocate of Victoria and the Secretary of the Northern Territory Department of Health and Community Services respectively adopted the dual role of protecting the public interest and the interests of the child. In those cases it was accordingly thought to be unnecessary to appoint a separate representative. In both of these cases the child was unable, due to intellectual disability, to express a point of view, and the child's interests were actively

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pursued by the public officer concerned. However, in any case where the child is capable of expressing a view, or where there is no party in a position akin to the public officials involved, we think it desirable that a separate representative be appointed.

In the recent case of *Re Michael* (3 December 1993, Family Court at Melbourne, not reported) Treyvaud J took the view, with which we agree, that a separate representative should be appointed despite the involvement of the Public Advocate in circumstances where the child in question was capable of expressing a view and the Public Advocate was the applicant for orders dispensing with the need for parental consent to perform a surgical operation on the child in question and substituting himself as the person who could give a valid consent.

The above categories of cases is not intended to be exhaustive and there will be other situations where the appointment of a separate representative is necessary. For example, where one of the parties is not a natural parent such a course may in some cases be considered desirable or necessary. As we have said, these guidelines are not intended to inhibit the discretion of judges, judicial registrars or registrars but to give them some assistance in the exercise of it.

In developing these guidelines, we have had regard to the provisions of the United Nations Convention on the Rights of the Child and in particular to Articles 9 and 12 thereof.

Paragraphs 1 and 2 of Article 9 state:

> ``(1) State Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
>
> (2) In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known."

Article 12 states:

> ``(1) State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> (2) For this purpose, the child shall in particular be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

On one view, it could be argued that the Convention requires that a child be separately represented in any custody or access proceeding.

Another view might be that, provided that a family report is obtained, or the views of the child is otherwise obtained (where it is practicable to do so) and his or her interests are otherwise protected before the Court, this is sufficient compliance with the Convention.

The Court's Case Management Guidelines (Practice Direction No. 2 of 1993) provide:

> ``10.6 Family Reports may be ordered where one or more of the following apply: —
>
> (a) There is a significant dispute as to the wishes of a child and the child is of sufficient maturity for these to be significant;
> (b) There is a dispute about the relationship between a child and either or both parties or other significant persons;
> (c) The circumstances are such that a report is the best method of obtaining evidence significant to the welfare of the child which requires expert assessment within a Counsellor's field of experience;
> (d) If there is a child at risk, that is, where there are allegations of neglect or child abuse, either physical (including sexual), or emotional."

These issues were not the subject of argument before the Court and having regard to their potential significance, we think it undesirable to express any concluded view at this stage.

If the Convention does indeed require representation in every case, a further issue

would arise as to its incorporation into Australian domestic law in this regard. This question was recently discussed by the Full Court in *Murray* v. *Director of Family Services, ACT* (1993) FLC ¶92-416. Again, in the present case, we think it undesirable to express any concluded view.

Whatever be the outcome of these questions, we are satisfied that all of the guidelines that we propose are not only consistent with the requirements of Articles 9 and 12 of the Convention on the Rights of the Child, but further these objects.

It is clear from what we have said above that it was appropriate for a separate representative to have been appointed in this case. The proposal of the aunt was that the child would be permanently removed overseas and, as a consequence of that, contact between the child and the husband and his family would be terminated or greatly restricted.

However, we do not consider that in the circumstances of this case that factor should lead to a reversal of the orders which his Honour made. The question of a separate representative was not raised by any party at any stage of the proceedings, including the preliminary hearings before the trial. In addition, the trial Judge had the particular assistance of a number of independent experts who gave evidence relating to critical aspects of this case. The tender age of the child was such that no instructions could have been obtained. Taking all those matters into account we do not consider that this should lead us to any alteration of the orders which his Honour made.

Conclusion

For the reasons set out above, each of the appeals is dismissed.

The orders are as follows:

1. The appeals are dismissed.
2.

    (a) In each appeal the respondent and the Commonwealth Attorney-General may file and serve written submissions as to the costs of the appeal within fourteen (14) days.
    (b) The appellant in each such appeal may file and serve written submissions in answer within fourteen (14) days thereafter.
    (c) The respondent and the Attorney-General may reply thereto within seven (7) days thereafter.