THE RELEVANCE OF RELIGION IN CUSTODY ADJUDICATION UNDER THE FAMILY LAW ACT

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The overriding principle that determines decisions regarding custody of children under the *Family Law Act* 1975 (Cth.) is that the court shall regard the welfare of the child as the paramount consideration.[1] While, however, the statute sets forth the principle to be applied in custody proceedings, criteria establishing what factor or factors will promote the welfare of a child are not delineated. Thus, in all custody and related matters, the judges exercise a broad discretionary power. Some guidelines to assist the court in the proper exercise of this discretion have been developed through the decided cases. The most important of these guidelines is that the welfare of a child in any particular case must be determined on all the relevant facts and circumstances of the particular case.[2] Further, to qualify as a proper exercise of judicial discretion, the court is required to assess the competing situations available to the child and, having decided in favour of one, to state why that situation should be preferred when compared with the other.

"Custody cases", it has been said, "pose the more subtle and difficult question of preference between different alternatives".[3] In particular, difficult questions of preference are posed when the alternative is, on the one hand, placement with a parent embracing a religious life-style, or, on the other, placement with a parent embracing a less religious—or non-religious—life-style. Since that stated preference should relate to the circumstances of the case rather than to some hypothetical advantage,[4] it follows that a mere reference to a generalized environment and lack of attention to the specific situation of the child, subject to the dispute, may constitute an improper exercise of judicial discretion.

The first problem confronting a court in the determination of a custody dispute is to ascertain the meaning of "welfare". While consensus in a community exists on certain fundamental matters conducive to the welfare of children, there is no consensus on all such matters. Not only do prevailing attitudes as to what constitutes "welfare" differ over time, but there also exists a diversity of views among individuals, as well as different

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1 S. 64(1).

2 *Jurss* and *Jurss* (1976) F.L.C. 90-041, 75,184; 1 Fam. L.R. 11, 203, 11,205.

3 *Sanders* and *Sanders* (1976) F.L.C. 90-078, 75,371; 1 Fam. L.R. 11,433, 11,437.

4 *In the Marriage of Hobbs* 2 Fam. L.R. 11,380, 11,384.

sectors comprising a pluralist community. For example, in 1893 the English Court of Appeal stated

> "The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a 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."[5]

Today, with the apparent demise of religious influence and the concomitant emergence of the overriding influence of the behavioural and biological sciences, the focus of attention in custody adjudication has shifted from consideration of the child's moral and religious welfare to what is termed its "psychological" welfare. Further, moral and religious welfare appear to play no part in attaining psychological welfare. That this is the view of many members of a secular community is not in dispute. But the continuing influence of religious bodies and the resurgence, over recent years, of fundamentalist and other religious sects suggests that, for at least some members of the community, religious welfare continues to be an integral component of "psychological" welfare. The point to be made is that, since the court has a duty to decide each custody dispute on the facts of the particular case, a factor which may not promote the welfare of most children may nonetheless promote the welfare of some children. Thus, in some instances, the religious welfare of a child may be crucial to that child's psychological welfare. This, of course, is dependent upon the mores of the child's family and its upbringing prior to the custody dispute.

SECTION 116 OF THE CONSTITUTION

Section 116[6] does not preclude a court exercising jurisdiction under Commonwealth legislation (such as the *Family Law Act*) from evaluating the religious practices of parties to a custody dispute when such an evaluation is necessary for the effective exercise of its jurisdiction. Further, provided that there is a proper exercise of the discretionary power under s. 64(1)(a), there can be no infringement of s. 116. For these reasons, there will be no detailed analysis of this section in this article.

The following propositions, it is submitted, abstract the inter-relationship between the Constitution and the *Family Law Act*:

1. Since the *Family Law Act* derives its power from the Constitution, the exercise of jurisdiction under that Act is subject to the Constitution.[7]

[5] *Re McGrath* [1893] 1 Ch. 143, 148 (emphasis added).

[6] S. 116 states:
"The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Constitution."

[7] Per Latham C.J. in *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (1943) 67 C.L.R. 116, 123.

2. With respect to s. 116, it has been suggested that a court should proceed upon the constitutional premise that religious freedom is unrestricted.[8]
3. Proposition (2) is qualified in so far as religious freedom may be restricted if, by so doing, some value of societal life is served.[9]
4. In the exercise of judicial discretion under the *Family Law Act* s. 64(1)(a), the fundamental principle to be observed is that the welfare of the child shall be the paramount consideration.

Analysis of propositions (3) and (4) above could be interpreted as permitting an award of custody to a non-religious parent in preference to a religious parent, on the basis that a value of societal life is served thereby. For example, if a child's unrestricted ability to communicate with any other member of the community is regarded as a "societal value", then a refusal to award custody to a parent, whose life-style imposes a condition of separateness from society, could be justified on the basis that such an award falls within the ambit of the proviso qualifying s. 116. Such an interpretation, however, fails to take into account judicial pronouncements on the proper exercise of discretionary power under s. 64(1)(a), i.e. that each custody disposition must be determined by reference to the specific facts and circumstances of the child who is the subject of the dispute.

Therefore, a determination of a custody dispute which is predicated on the assumption that a particular religious up-bringing may be detrimental to children generally because it infringes a societal value is probably constitutionally valid. However, in the event that such a determination fails to establish that the particular religious life-style relates specifically to the circumstances of the child, subject of the dispute, it is not a proper exercise of the discretionary power under the *Family Law Act*. It follows, therefore, that a custody award to a non-religious parent in preference to a religious parent can be made validly only if the determination by the court is made, not on the basis of religious life-style, but on the effect that a parent's religious life-style has on the welfare of the particular child.

THE PROCESS OF CUSTODY ADJUDICATION

Analysis of custody decisions suggests that the court, in order to arrive at a decision, adopts a process which involves two stages; the first is a determination of factors said to be relevant to the welfare of children generally, and the second a stage whereby a factor (or factors) is isolated and is usually determinative of the specific dispute before the court.

As far as the first stage of the process is concerned, the court has suggested that most decisions involve at least some of the following factors:

[8] C. L. Pannam, "Travelling Section 116 with a U.S. Road Map" (1964) 4 M.U.L.R. 41, 65 ff.

[9] *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (1943) 67 C.L.R. 116, 123.

(a) findings of fact about the child in its current setting;
(b) findings of fact about the competing parties, their character and suitability as parents;
(c) findings of fact about other significant adults/children;
(d) findings and/or inferences about the child's relationships with parents and others;
(e) findings of fact about the competing households and physical environments;
(f) an assessment of the merits or otherwise of the competing proposals for the custody of the child.[10]

This list of factors, however, is not exhaustive. Depending upon the particular life-style of the parents concerned, sexual orientation,[11] drug taking,[12] employment in a massage parlour[13] and religious persuasion[14] have, for example, been considered by the court. The latter factor, "religious persuasion", becomes relevant only when the religion concerned is other than a mainstream religion such as Catholicism, Judaism or Protestantism.

The first stage of the adjudication process, although culturally influenced, is comparatively value-free. This stage involves an objective analysis which is not especially fraught with difficulties. It is the second stage of the adjudication process, however, which is problematic. This stage requires the court to balance diverse factors, and the allocation of more weight to some and less to others. Ultimately the court will often be required to make a value-judgment to determine which alternative is more likely to promote the welfare of the child when compared with the other alternative.[15] Thus the process of adjudication becomes less objective and relatively more subjective.

Some recent decisions involving a parent embracing a particular religious life-style are illustrative of the process adopted by the court in custody adjudication. For example, in *In the Marriage of Paisio*[16] an order for custody of a seven year old girl was sought by the father and opposed by the mother. The mother was a Jehovah's Witness. At first instance, the judge considered the following factors:

(a) the character of both parents;
(b) the child's rights;

[10] *Sanders* and *Sanders* (1976) F.L.C. 90-078, 75,371; 1 Fam. L.R. 11,433, 11,437.
[11] *N* and *N* (1977) F.L.C. 90-208; 2 Fam. L.R. 11,493; *Spry* and *Spry* (1977) F.L.C. 90-271; 3 Fam. L.R. 11,330; *Schmidt* and *Schmidt* (1979) F.L.C. 90-685; 5 Fam. L.R. 421.
[12] *Horman* and *Horman* (1976) F.L.C. 90-024; 5 Fam. L.R. 796.
[13] *D.K.I.* v. *O.B.I.* (1979) F.L.C. 90-661; 5 Fam. L.R. 223.
[14] *In the Marriage of Paisio* 4 Fam. L.R. 689; *Plows* and *Plows* (1979) F.L.C. 90-607; 4 Fam. L.R. 764; *In the Marriage of Lehman* (1977) 31 F.L.R. 16; (1977) F.L.C. 90-321; *K* v. *K* (1979) F.L.C. 90-680; 5 Fam. L.R. 179.
[15] *Sanders* and *Sanders* (1976) F.L.C. 90-078, 75,372; 1 Fam. L.R. 11,433, 11,437.
[16] 4 Fam. L.R. 689.

(c) the child's wishes;
(d) the physical environment of the child;
(e) the emotional well-being of the child;
(f) the effect of a child living with a single parent (in this case the mother) compared with the alternative which entailed living with the father, his de facto wife and the child's two older siblings.

Briefly, on these various issues, his Honour found as follows: the child had resided with her mother for several years. The mother was said to be caring and loving. Indeed the court found that "the salient features which emerge from the situation of the child with the mother are its security and stability".[17] The child expressed a clear preference to remain in the care of her mother.[18] As well, the court took into consideration the fact that the child was secure and happy in her present environment and that it could be very disruptive for her to change.[19] The father also impressed the court favourably.

Ultimately, the court conceded that it was not possible to prefer one parent over the other in respect of their personal qualities.

After a lengthy and exhaustive appraisal of the alternatives available to this child, the judge came to the conclusion that the interests of the child would be better served by awarding custody to the father. The basis for this decision is not stated. By inference, it appears that uppermost in the mind of the judge was his concern for the rights of the child; these rights, he felt, included a right to be free and that right to be free included a freedom of choice.[20]

On appeal, the Full Court affirmed the decision. Their Honours were of the opinion that ultimately it was the relationship between the child and her siblings which seemed most significant to his Honour.[21] Be this as it may, a great deal of attention was given by the learned trial judge to the question of the religious practices of the wife. While his Honour conceded that no evidence had been adduced suggesting that the child had suffered any psychological harm as a result of her mother's life-style,[22] he nevertheless felt constrained to observe that the faith of Jehovah's Witnesses imposes a strictness and condition of separateness from society as a whole "which, by its very teachings and its very nature, tends to set aside the child and later the adult from general society around it".[23] The Full Court reiterated this view stating that the

> "doctrines of a particular religion may be so detrimental to children as to necessitate that children should not be in the custody of the parent

[17] Ibid. 698.
[18] Ibid.
[19] Ibid. 701.
[20] Ibid. 694.
[21] *Paisio* and *Paisio* (No. 2) (1979) F.L.C. 90-659, 78,516; 5 Fam. L.R. 281, 286.
[22] *In the Marriage of Paisio* 4 Fam. L.R. 689, 697.
[23] Ibid. 693.

holding such views. The court, in such a case, is doing no more than saying that certain practices albeit given a veneer of religious justification, are in fact so positively harmful to the welfare of children that they must be removed from the influence of those who advocate such practices".[24]

Although criticizing the exercise of judicial discretion poses problems, some comments on this decision are in order. First, it is informative to consider prior judicial pronouncements on altering an existing custodial arrangement—a matter which was given scant attention in *In the Marriage of Paisio* either at first instance or on appeal.

Previously it has been held that, although the status quo need not necessarily be preserved, the court must, in every custody application, consider carefully the evidence in relation thereto.[25] However, reference to a single factor such as the status quo does not absolve the court from its obligation to assess the competing situations and form a view as to why one situation should be preferred to another. An existing status quo, it has been held in a recent decision,

"is but one factor to be weighed with all other relevant factors in determining a particular case. When weighing that factor, the quality of the status quo would require examination and if a long standing status quo is disturbed, the factors which influenced the Court to come to that conclusion should be clearly identified."[26]

Similarly, in *Jurss* and *Jurss*, the court took the view that to remove a child from an environment to which he had become accustomed may involve choosing uncertainty and require the child to make a variety of emotional adjustments which may not necessarily be for his well-being. The judge referred to the fact that in recent times there has been an increasing awareness of the damage done to the emotional development of children if they are suddenly removed from a known, secure, supporting set of relationships and thrust among strangers, even if there be some blood relationship with one or more of the strangers.[27]

As will be recalled, in *In the Marriage of Paisio*, the child had been in the care of her mother for a considerable period of time. Moreover, her only contact with her father and siblings was three periods of access during school vacations amounting, in all, to five weeks over a period of fifteen months. Thus, in this case a long-standing and seemingly satisfactory arrangement was disturbed, *inter alia*, on the assumption that the child would benefit by being brought up in an environment considered, by the court, to be less restrictive than that possible with her mother, and that reunion with her siblings was desirable.

The assumption underlying the decision is that past conduct of the mother, viz. her religious practices, may adversely affect the child, despite

[24] (1979) F.L.C. 90-659, 78,514; 5 Fam. L.R. 281, 284.
[25] *Jurss* and *Jurss* (1976) F.L.C. 90-041; 75,184, 1 Fam.L.R. 11,203, 11,206.
[26] *Burton* and *Burton* (1979) F.L.C. 90-622, 78,218; 4 Fam. L.R. 783.
[27] (1976) F.L.C. 90-041, 75,184; 1 Fam. L.R. 11,203, 11,206.

the fact that no such adverse effects were evident at the time of the hearing, and the further assumption that a change in the existing situation would provide a better alternative. There are problems inherent in adoption of this view. Since prediction about the outcome of a custody order is never possible, the court must rely on untested assumptions, viz., that the new "mother" will provide a satisfactory substitute for the mother to whom the child was accustomed; that the child will not suffer from deprivation and loss with respect to her biological mother and that she will adapt to the new non-religious environment. Since the religious parent, as a rule, continues to have access to the child, placement with the less or non-religious parent may not resolve the conflict which has engendered the hostility over the child's future in the first place. Finally, while it is conceded that certain parental practices, including religious practices, may be harmful to some children, there is no evidence to suggest that those practices are invariably harmful. Indeed, the sudden change from a ritualistic, authoritarian and ordered way of life to a more permissive way of life may be equally detrimental to a child's welfare.

On the other hand, of course, the court is faced with the dilemma of having to evaluate the possible future effects on the child of a life-style which is alienated from the community at large; which, in some instances, stifles initiative and is opposed to tertiary education and private enterprise. Indeed, such a life-style can impose upon the children restrictions to the extent that they are not allowed to eat with others outside the sect, visit public beaches, engage in team sports, visit places of public entertainment, listen to the radio or watch television.[28]

It would appear, however, that the approach adopted by the court in evaluating alternative environments, when one of those environments deviates considerably from the norm, is to some extent at variance with the approach adopted when this is not the case.[29] Where the alternative involves an unusual religious practice the court appears to rely more heavily on general assumptions rather than the particular situation of the child who is subject to the dispute. Of course, any court-ordered change to an existing custodial arrangement must of necessity be based on a hypothetical assumption, i.e. that the change will not only promote the child's welfare but that the new environment is to be preferred, compared with the presently existing environment. There is, however, a difference in adopting the proposition that all children will be adversely affected by a particular religious life-style, therefore this child must be removed from that life-style; and adoption of the proposition that this particular child is being adversely affected by his/her parent's religious practices, therefore this child ought to be removed from this environment.

[28] *Plows* and *Plows* (1979) F.L.C. 90-607, 78,116; 4 Fam. L.R. 764, 768.
[29] See also custody disputes involving homosexual parents fn. 11 supra.

Serious implications flow from adoption of the former approach. All children of divorced parents, where one parent belongs to a non-conformist religious group and the other does not, would be disadvantaged if their preference is to live with the religious parent. Further, this approach is not consistent with the court's own pronouncement with respect to the proper exercise of judicial discretion.[30]

Attention must also be drawn to the fact that in decisions such as *Paisio*, only the negative aspects of religious adherence are adverted to. Thus, there is a failure to recognize that membership of a religious group may have positive aspects for its members. As Yinger says, "every religion affirms the ultimate dignity and importance of the believer, whatever his status".[31] Through a code of loyalty, a set of values clearly defined, and the support of others with similar views, the believer achieves a sense of belonging and worth. Today, urban communities are characterized by anomie and value confusion. In such a community some will seek a life-style that is not, in the eyes of the majority, "free", but structured and authoritarian. In this way a sense of security is achieved. Such a life-style is, in some senses, a substitute for the family or an extension of family membership—providing its members with authority-figures to be obeyed, in the form of "elders" of the church, as well as clear guidelines with respect to acceptable behaviour and the conduct of one's day-to-day affairs. Thus, it seems strange that a child whose immediate family has become estranged will be deemed to be at a disadvantage if given into the care of a parent who belongs to a system which, in many respects, is a substitute or surrogate biological family.

[30] Supra 217.
[31] J. Milton Yinger, *Sociology Looks at Religion* (New York, The Macmillan Co., 1963) p. 95.