THE WISHES OF CHILDREN AND THE ROLE OF THE SEPARATE REPRESENTATIVE

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Recognition of the rights of children to equal protection by, and access to, the legal institutions of our society has gradually influenced Australian legislative thinking. In recent years in Victoria, we have seen the *Status of Children Act* 1974 and the *Community Welfare Services Act* 1978 expand the jurisdiction of the courts and the ability of children or their representatives to seek judicial intervention in relation to the domestic arrangements made for a child's care.

The time, however, when most children are likely to experience the intrusion of the judicial system into their lives, is when their parents are divorced and they, along with the house, the car and the furniture must go one way or the other. Australian courts, even when dealing with disputes arising out of marital and family problems, have continued to maintain the British common law system of adjudication—the adversary system. Using such a system, in the past, disputes with respect to the custody of children have tended to appear as no-holds-barred battles between the contending parents, where the feelings of the child have seemed to be as irrelevant as the colour of the matrimonial home.

The introduction of the *Family Law Act* 1975 (Cth.) saw for the first time a legislative attempt to give recognition, not only to the welfare of the child who was the subject of a custody dispute, but also to that child's wishes. The relevant section, section 64(1)(b) of that Act, reads as follows

> "In proceedings with respect to the custody, or guardianship of, or access to, a child of a marriage—where the child has attained the age of fourteen years, the court shall not make an order under this Part contrary to the wishes of the child unless the Court is satisfied that, by reason of special circumstances, it is necessary to do so."

Although the equivalent to section 64(1)(b) did not exist in the predecessor to the Act—the *Matrimonial Causes Act* 1959 (Cth.)—the principle of taking into consideration the wishes of children had been recognized by both British and Australian courts. As early as 1958 an English Court had held that the views of an 11½ year old child could not be ignored as a "most important factor" in deciding a custody dispute.[1]

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[1] *D.* v. *D.* (1958) 3 C.L. 479.

The High Court of Australia also supported this view in *Reynolds* v. *Reynolds*,[2] where the issue of the admissibility of evidence concerning the wishes of a 10- and a 7-year-old was raised. Mason J. commented

> "The relationship which exists between a child and its parents is plainly a relevant consideration and the wish of a child (of reasonable age) to live with one parent rather than the other is a matter to be taken into account by the Court, although the weight to be given to it will depend upon the circumstances of the case. . . ."[3]

The important difference established with the introduction of section 64 was the compulsion placed on the judiciary to consider such wishes and, in fact, the almost mandatory nature of the provision in terms of the Court's duty to abide by those wishes. In addition, the legislation establishes the age of 14 years as chronologically significant in terms of a child's ability to make a choice.

THE AGE OF THE CHILD

For the purposes of promoting the Year of the Child as established for 1979 by the United Nations General Assembly, the Australian government has declared a child to be any person up to the age of 14 years. The *Community Welfare Services Act* 1978 (Vic.) describes a child as one who is under the age of fifteen years of age. The *Family Law Act* 1975 (Cth.), on the other hand, by section 61, grants jurisdiction to make an order with respect to the custody of a child who has not attained the age of 18 years. The provisions of section 64 can therefore be seen as part of the process by which legislatures are moving towards a recognition that, while not yet adults, "young persons" aged between 14 and 18 should be accorded more decision making power than "children".

Apart from the modern trend towards a category of people described as "young persons", the age of 14 does have some direct links with precedent both in family law and other areas of the law to justify it. In *Re Agar-Ellis, Agar-Ellis* v. *Laschelles*,[4] a case involving the custody of a 16-year-old girl, counsel for the petitioner attempted to persuade the court that the girl's wishes should be acceded to by quoting from several cases concerning parental rights to an action for habeas corpus at common law.

> "In *Rex* v. *Greenhill* (4 Ad. & E. 624) the principle is laid down that when the infant is of an age to exercise choice, the Court will allow him to determine where he will go. *Reg* v. *Clarke* (7 E. & B. 180) lays down the same rule. *In re Shanahan* (20 L.T. 183) a habeas corpus to remove a boy of fourteen from a Protestant institution was refused to the father, the boy wishing to remain where he was. In *Reg* v. *Howes* (3 E. & E. 332) it was laid down that 16 is the age up to which the father of a female child has a legal right to her custody. *In re Connor* (16 Lr. C.H.

[2] *Reynolds* v. *Reynolds* (1973) 47 A.L.J.R. 499.
[3] Ibid. 502.
[4] (1883) 24 Ch.D. 317.

Rep. 112) the Court recognised the right of a boy of 14 to choose his place of residence."

Although the Court in *Re Agar-Ellis* did not accept this argument, holding that the father was entitled to the custody of his child until the age of majority, over the next thirty years members of the English judiciary developed the idea that a child who had reached the "age of discretion" and who expressed strong wishes concerning its custody, should only in special circumstances be ordered into the custody of the disfavoured parent.[5]

The distinction was made in these cases between the age at which girls could be held able to make such choices and the age at which boys were entitled to do so. The age of 16 for girls was probably related to laws concerning criminal charges for carnal knowledge and civil actions for enticement and seduction, while no such statutes applied to boys. The references to a "child who has attained years of discretion" could be taken as analogous to the age of "criminal responsibility". The presumption that a child of 14 is responsible for its actions in criminal law could logically lead to the assumption that a child of that age is capable of knowing its own mind and expressing its own wishes.

"SPECIAL CIRCUMSTANCES"

Aside from establishing a definite age at which a child has the right to have its wishes presented to the Court and, even more importantly, followed by the Court, section 64 also recognizes that what a child wants may not always be in its best interests. The section allows for the Court to go against the child's wishes in "special circumstances". The phrase appears to have been originally used in this context by Lindley L.J. in *Thomasset* v. *Thomasset*,[6] although it is not defined either in that case or in the *Family Law Act* 1975 (Cth.).

The requirement of "special circumstances" also appears in section 14(6)(b) of the *Family Law Act* 1975 (Cth.) in relation to the discretionary power of a judge of the Court to hear an application for dissolution where the parties have been married for a period of less than 2 years. This use of the term appears to be analogous to its use in section 72(3)(b) of the *Matrimonial Causes Act* 1959 (Cth.) with respect to applications for reduction of the statutory time between a decree nisi and decree absolute.

Both the courts exercising jurisdiction under the former *Matrimonial Causes Act* 1959 (Cth.) and the Family Court have been reticent in defining "special circumstances", preferring to leave each case to the discretion of the presiding judge.[7] In any event, these cases would offer

[5] *Thomasset* v. *Thomasset* [1894] P. 295; *Mozley-Starke* v. *Mozley-Starke and Hitchins* [1910] P. 190.

[6] [1894] P. 295, 297.

[7] *Thompson* v. *Thompson* (1942) 59 W.N. (N.S.W.) 219; *Seddon* v. *Seddon* (1942) 59 W.N. (N.S.W.) 176; *Nuell and Nuell* [1976] F.L.C. 90-031; *Birch and Birch* [1976] F.L.C. 90-088.

no guidelines for interpreting section 64(1)(b), as the circumstances relating to the need for a reduction in the statutory time period for dissolution of marriage would mostly be irrelevant to custody cases.

In two Family Court cases the question of "special circumstances" under section 64(1)(b) has been discussed. In *Nicholson and Crans*[8] Demack J. interviewed a 15-year-old boy as to his wishes and then made an order contrary to those expressed by him

> "G expressed a clear preference to being with his mother. He is a small lad for his age and appears to be extremely nervous. His answers appeared to me to have been carefully rehearsed and designed to bring forth all conceivable reasons to support the view that he was advancing. In view of the opinion I have expressed about the way in which Mrs Crans set about to manipulate the children so as to lay a basis for an application for custody, I am not satisfied that the wishes G expressed are ones that ought to be acted on."

In *Hill* v. *Hill*, a case before Barblett J. of the Family Court of Western Australia, the applicant mother advanced the proposition that there were special circumstances which justified the Court in making an order contrary to the children's wishes. In his judgment Barblett J. commented on the effect of s. 64(1)(b) and said with respect to the requirement of "special circumstances"

> "Let me say that I would have thought that there were special circumstances if it could have been proved, or it can be proved in the future, that a child who has attained 14 years is not, because of some mental or emotional defect or from disease, capable of giving those instructions. In such a case I would hold that that constituted special circumstances."[9]

It would be unwise to fetter the judge's discretion by laying down too stringent definitions of what might or might not constitute special circumstances. Obviously, however, if it was known or suspected by the court that the children's wishes had been obtained by duress, fraud or manipulation then obviously "special circumstances" would exist. It might also be possible to establish that a particular child, due to incapacity or immaturity, did not possess the facilities of an ordinary 14-year-old and therefore "special circumstances" existed. What other conditions would amount to "special circumstances" would probably depend on the facts of a particular case. For example it was held by Smithers J. in *Cartwright and Cartwright*,[10] that the homosexuality of the chosen parent did not, in itself, amount to a "special circumstance".

ASCERTAINING THE CHILD'S WISHES

(i) *Judicial Interviews*

Prior to the coming into operation of the *Family Law Act* 1975 (Cth.),

[8] [1976] F.L.C. 90-025.
[9] *Hill and Hill* (unreported) No. 3806/76 Family Court of Western Australia, page 3 of transcript.
[10] [1977] F.L.C. 90-302

and in particular section 65 of the Act, the main method of ascertaining the wishes of children involved in custody disputes was for them to be interviewed by the Judge in chambers. The interview was confidential and no evidence was given to the court of the matters discussed between the Judge and the child or children. In the New South Wales case of *Rogers* v. *Rogers*,[11] concerning the application for custody of a 9-year-old boy, Bonney J. interviewed the child and announced in his decision that he believed the child's wishes had been subjected to undue influence from the father and his new wife and could not be relied upon as decisive in deciding the issue. He also adopted a practice followed by other judges in this situation of recording notes of the interviews and having them placed in a sealed envelope with the evidence presented by the parties in the case.

The practice of interviewing children concerning preferences for one parent or the other has not been universally approved of by the judiciary. In the English case of *Boyt* v. *Boyt*,[12] for example, Tucker L.J. expressed the view that it would be "very undesirable" to question a 16-year-old girl concerning her preference. In that case, however, the child had already been interviewed by the Judge at first instance without expressing any preference.

The High Court of Australia discussed *Boyt* v. *Boyt* in *Hodge* v. *Hodge*,[13] where Gibbs J. expressed the view that the earlier case could be distinguished on its particular facts, and on the basis that the English Court of Appeal was not attempting to lay down a general rule. In Australia, the judicial interview remained the main method of ascertaining children's wishes prior to the coming into operation of the *Family Law Act* 1975 (Cth.).

Although the Australian judiciary continued to use the method of the judicial interview they were not unaware of the problems associated with such a practice. In *Sargeant* v. *Watkins*[14] Selby J. outlined what he saw as some of the disadvantages

> "a decision may be influenced to a considerable extent by what the judge hears in his chambers. What he hears is not in the nature of evidence. It is not subject to cross-examination, and neither counsel in his address is aware of what might be a compelling and decisive factor."[15]

Since the introduction of the *Family Law Act* 1975 (Cth.), with the ability of the court to order separate representation and/or welfare reports, there has been a tendency to use judicial interviews less frequently. Some problems have arisen which have led both to legislative change and directions to the judiciary from the Full Court. In *Todd and Todd (No. 1)*[16] the Judge felt unable to interview the child because an affidavit had already

[11] (1947) 64 W.N. (N.S.W.) 207.
[12] [1948] 2 All E.R. 436.
[13] (1965) 7 F.L.R. 94.
[14] (1965) 6 F.L.R. 302.
[15] Ibid.
[16] [1976] F.L.C. 90-001.

been filed on behalf of the child bringing the child's wishes directly into evidence. As a result of this case Regulation 116(6) of the Act was amended making it impossible to file an affidavit by a child without prior leave of the Court. In two cases the problems of an appeal court faced with a decision by a trial judge which was said to be in accordance with the children's wishes, but where no record of the judicial interview was kept, led the Full Court to issue directions on the function and conduct of a judicial interview.

In *Ryan and Ryan*[17] the Full Court of the Family Court considered the desirability of confidentiality in judicial interviews, the need for a court of review to have access to the material on which the judge at first instance based his decision, and the problem of a judge being in receipt of information which cannot be discussed openly with the parties. The Court (Evatt C.J., Watson S.J. and Ellis J.) suggested that interviews should be "used sparingly", and that if they were a sealed record of the interview should be kept on the file. The Court also suggested that the problem of the judge receiving information which he believed should be made available to the parties could be overcome by the court calling for a further report from a welfare officer, or by making an order for separate representation.

Although the procedure of judicial interview is still being used in certain cases by Family Court judges, the view expressed in such cases as *Pailas and Pailas*,[18] namely that the Court now has better methods at its disposal of ascertaining children's wishes, is probably becoming more accepted.

(ii) *The Admission of Statements by the Child*

The attitude of courts to reliance on statements by children in both criminal and civil proceedings has always been one of extreme caution. The unreliability of witnesses of tender years has been the justification for including in the rules of evidence provisions that allow children to give unsworn testimony, provided they are of sufficient intelligence and understand the duty of telling the truth. However, such evidence must be materially corroborated and cannot be relied upon on its own. Even where sworn evidence is give by children in criminal cases (the requirement for such being that they understand the nature of an oath), the judge must warn the jury of the dangers of accepting such evidence without corroboration, although they may still choose to do so. The justification for such rules of evidence has always been the belief that children, because of their tender years, are more susceptible to the influence of third persons and may also allow their imaginations to run away with them.[19]

[17] [1976] F.L.C. 90-144.
[18] [1976] F.L.C. 90-083.
[19] *R.* v. *Dossi* (1918) 13 Cr. App. Rep. 158.

It is worth noting also that the test for accepting such evidence is not related to chronological age but to certain testable capacities of the child in question.

The question of accepting statements made by children was discussed by the High Court of Australia in *Reynolds* v. *Reynolds*,[20] with the view being expressed that the probative value of such statements, when compared with other available means of establishing the wishes and attitudes of the child, was "slight".

Mention has already been made of the situation that arose in *Todd and Todd (No. 1)*.[21] As a result of that case the matter was referred to the Family Law Council, which, after deliberation, recommended that the regulations to the *Family Law Act* 1975 (Cth.) be amended to disallow the filing of affidavits by children without leave of the Court. The recommendation was expressed in these terms

> "It is considered undesirable that parties should be able to involve children in cases, by asking them to swear formal affidavits. The procedure itself could be distressing for a child, particularly with the later realisation or suspicion that the document may have significantly affected the outcome of the case. Ideally, no affidavit by a child should be prepared and sworn, without leave of the Court."[22]

The recommendation was implemented in 1977 by the introduction of regulation 116(6) in the Family Law Regulations.

(iii) *Welfare Reports*

Another method available under the *Family Law Act* 1975 (Cth.) for the presentation to the court of evidence concerning the wishes of the children is the power under section 62(4) to adjourn proceedings for the purpose of obtaining a welfare report "on such matters relevant to the proceedings as the court considers desirable". The report may be received in evidence and the person making the report may be subject to oral examination.[23]

The use of welfare reports has raised some problems both of law and of policy for the Family Court. One question which has arisen and which involves legal questions of evidence concerns the acceptability in evidence of statements made to welfare officers by children, without the presence of either party, concerning their wishes. Two competing views have been expressed regarding the admissibility of such statements. The view which appears to have gained the acceptance of the Court[24] is that all statements made in a welfare report are admissible and that it is a matter for the court to decide as to how much weight should be given to such statements.

[20] (1973) 47 A.L.J.R. 499.
[21] (1976) F.L.C. 90-001. See text accompanying fn. 16.
[22] Family Law Council Recommendations 1976-77.
[23] Regulation 117.
[24] *N. and N.* [1977] F.L.C. 90-208; *Hogue and Haines* [1977] F.L.C. 90-259; *Foster and Foster* [1977] F.L.C. 90-281.

The contrary view, that such statements are hearsay and should be treated according to the normal rules of evidence, has not gained acceptance,[25] although it is still applied to statements made in the evidence of witnesses other than welfare officers of the Court.

The Court even went so far in *Cartledge and Cartledge*[26] as to express the view that communication of the child's wishes to the court was not hearsay if it was made via welfare officers' reports, court counsellors' reports, by the separate representative of the child, or in an interview with the judge, but *was* hearsay if the communication was made in the evidence of a child psychiatrist called by one of the parties.

Although the power to order welfare reports and receive them in evidence was available under s. 85(2) of the *Matrimonial Causes Act* 1959 (Cth.), the fact that the Court did not have its own welfare officers was an inhibiting factor in its use. Restrictions also existed as a result of such cases as *Reeves* v. *Reeves*[27] which laid down that as a general rule the person making such a report should not be subject to cross-examination. While no express right to cross-examine welfare officers exists in the *Family Law Act* 1975 (Cth.) the practice which has been adopted by the Court, after some initial objection by Wood S.J.,[28] has been to allow the parties to cross-examine.[29]

One problem which still has not been resolved is the power of the Court to refuse to disclose to the parties the contents of a welfare report. According to regulation 117 of the Family Law Regulations the court *may* furnish copies of the report to the parties or their legal representatives, receive the report in evidence, permit oral examination of the person making the report, or give such directions as to the future disposition of the report as the court thinks fit. It would appear from the regulation that the court is not obliged to disclose the contents of the report at all. The problem was discussed by Asche S.J. in *Mulcahy and Mulcahy*,[30] but on the request of both counsel the report was admitted into evidence, in the absence of both parties, without the question of disclose being debated.

(iv) *Separate Representation of Children*

> "Where, in proceedings with respect to the custody, guardianship or maintenance of, or access to, a child of a marriage, 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 organisation concerned with the welfare of children or of any other person,

[25] *Pailas and Pailas* [1976] F.L.C. 90-083; *Lane and Lane* [1976] F.L.C. 90-143; *Cartledge and Cartledge* [1977] F.L.C. 90-254.
[26] [1977] F.L.C. 90-254.
[27] [1961] 2 F.L.R. 280.
[28] *McKee and McKee* [1977] F.L.C. 90-258; *Hogue and Haines* [1977] F.L.C. 90-259.
[29] *M. and M.* [1978] F.L.C. 90-429; *Harris and Harris* [1977] F.L.C. 90-276.
[30] [1978] F.L.C. 90-425.

order that the child be separately represented, and the court may make such other orders as it thinks necessary for the purpose of securing such separate representation."

The inclusion of s. 65 in the *Family Law Act* 1975 (Cth.) introduced a new element into the process of child custody adjudication and in particular to the presentation to the Court of the child's wishes. Although the practice of separate representation of children was not unheard of prior to 1975 the practical difficulties of introducing such a scheme were prohibitive. The question of payment for counsel was a basic difficulty for if either party were to pay counsel, some presumption of influence might be made. If the party losing the application for custody were to be ordered to pay the costs of the child's representative much bitterness and hostility might be provoked between the party and the child. The establishment of the Australian Legal Aid Office made possible the provision of legally aided children's representatives, its establishment coinciding with the introduction of the Act.

In two New South Wales cases, however, prior to the introduction of the *Family Law Act* 1975 (Cth.) separate representation of children was ordered on the intervention of a group called Action for Children. In *Dewis* v. *Dewis*,[31] Selby C.J. held that power existed under s. 85(1)(b) of the *Matrimonial Causes Act* 1959 (Cth.) to appoint the President of Action for Children as guardian *ad litem* of the Dewis children. This policy was also followed by Allen J. in *Rosen* v. *Rosen*.[32] Allen J. not only appointed a member of Action for Children as the child's guardian *ad litem* but ordered a qualified social worker, who was a member of the group, to interview the child for the purpose of presenting a welfare report to the Court.

It was obviously the existence of the group, Action for Children, which allowed the Court to make these type of orders and clearly, in the absence of such a group the question of separate representation would not have been raised.

The first case under the *Family Law Act* 1975 (Cth.) to attempt to use and define the provisions of s. 65 was *Todd and Todd (No. 1)*.[33] Because s. 65 was such a new concept, particularly outside New South Wales, the issue arose as to what role the separate representative should play in presenting a case for the child. Watson J. expressed the view that "the proper analogue was the role carried out in wardship cases by the Official Solicitor in the Chancery Division of the High Court in England".[33a]

The function of the Official Solicitor was discussed at length in the English case of *Re L (an Infant)*[34]

[31] (1973) 47 *A.L.J.* 548.
[32] (1976) 50 *A.L.J.* 145.
[33] [1976] F.L.C. 90-001.
[33a] Ibid. 75,058.
[34] [1967] 2 All E.R. 1110.

"Counsel for the Official Solicitor argued that the Official Solicitor is, in effect, at one and the same time the child's guardian ad litem, the child's legal adviser and the child herself speaking with an adult voice. He would say that, once the guardian ad litem is appointed, the child, together with the guardian, becomes equivalent to an adult party, the guardian taking the necessary decisions and acting for the child. It would, I am sure, be a mistake to infer from this submission that the Official Solicitor as guardian ad litem is seeking to assert a right to oust the court's ultimate discretion in such matters. The powers and duties of a guardian ad litem are defined in R.S.C. Ord 80 r. 2(2), in these words: 'Subject to the provisions of these rules, anything which in the ordinary conduct of any proceedings is required or authorised by a provision of these rules to be done by a party to the proceedings shall or may, if the party is a person under disability, be done by his next friend or guardian ad litem.' This includes the right to consent, for example, to evidence being given on affidavit and to other procedural steps, but if the guardian ad litem does anything beyond the mere conduct of the proceedings it must be for the benefit of the child or done with the sanction and approval of the Court. . . . His primary duty, it seems to me, is to see that the child's interests are fully safeguarded and to help the court arrive at the best and wisest decision so far as the child is concerned. In the present case, his duty is to present, by evidence and argument, the case for the child. . . . It remains only to add that the guardian ad litem has no parental or quasi-parental powers or obligation to the child. . . ."[35]

The function of the guardian *ad litem* as expressed in that judgment is such that it goes beyond merely providing legal representation for the child. The Official Solicitor in England has a staff of several hundred and his position is such that he acts not only as the legal representative of the child but as an officer of the court. As such, officers of the Official Solicitor may not only represent the child in court but interview the child and the parents and prepare a report upon which the officer concerned may be cross-examined in Court.[36] The officer also has the prerogative of submitting a confidential report to the judge provided he "states to the judge the reasons that have persuaded him to take such a course".[37]

Section 65 of the *Family Law Act* 1975 (Cth.) does not refer to the appointment of a guardian *ad litem* but merely to a separate representative. In my view the roles are quite different; the guardian *ad litem* seeming in fact to cover both the role of the separate representative and that of the welfare officer.

Todd and Todd was an initial attempt to define the role of the separate representative. The opinions expressed by members of the judiciary since then tend to indicate that the analogy with the Official Solicitor is not a

[35] Ibid. 1120.

[36] J. M. Eekelaar, "The Protection of the Child's Welfare in Custody and Care Proceedings" in, *The Child and the Law* (Vol. 1) (The proceedings of the First World Conference of the International Society on Family Law held in Berlin, April 1975) 96, 103.

[37] *Official Solicitor* v. *K.* [1965] A.C. 201, 222.

valid one. In *Pailas and Pailas* McCall J. expressed the following views on the separate representative's role

> "The broad direction given to Counsel for the children was that he was expected to investigate the situation of the children thoroughly, which would naturally include interviews with the children for the purpose of ascertaining their wishes, and in particular the wishes of any child over the age of 14 years. He would subsequently be expected to appear at the hearing and assist the Court by cross-examining any of the parties or their witnesses to elucidate all matters which, in his view, bore upon the question before the Court, namely the welfare of the children. If he thought fit he could call witnesses to give evidence relevant to the issue before the Court; he would be expected to address the Court bearing in mind the interests that he represented. This would almost inevitably require of him an evaluation of the cases put by each of the parties. . . . He might well advance proposals for the future custody arrangements which neither of the parties had sought but which, in his view, would best serve the interests of the children. Should it become necessary for him to communicate to the Court the wishes of the children he was representing, then it was for him to decide whether he should seek leave to call the children or communicate their wishes in some other way."[38]

The role to be played by the separate representative was further qualified by Asche J. in *Demetriou and Demetriou.*[39] He pointed out that the representative of the child is not a guardian *ad litem* but that some of the principles applicable to the guardian *ad litem* can also be applied to the separate representative. Because s. 65 is not limited in operation to cases under s. 64(1)(b), where the wishes of a child over 14 must be given priority, Asche J. held that the separate representative was not limited by the child's wishes; the child's wishes were only one factor in assessing the interests of the child.

An attempt was made to resolve the confusion over the role of the separate representative in *Lyons and Boseley.*[40] Separate judgments were handed down by Wood S.J. and a joint judgment delivered by Evatt C.J. and Pawley S.J. There is, however, little difference in the guidelines both judgments lay down.

Evatt and Pawley JJ. saw the functions of the separate representative as

(a) to cross-examine the parties and their witnesses

(b) to present direct evidence to the Court about the child and matters relevant to the child's welfare and

(c) to present, in appropriate cases, evidence of the child's wishes.

The separate representative should be free to interview the child, although it was not advisable that he/she interview the parties. His/her submissions should be in accordance with the child's wishes (if the child

[38] *Pailas and Pailas* [1976] F.L.C. 90-083, 75,391.
[39] [1976] F.L.C. 90-102.
[40] [1978] F.L.C. 90-423.

was old enough to express them) unless he/she considered these not to be in the child's best interest, or, with a young child, in accordance with the separate representative's own objective understanding of the child's interests. The separate representative should not submit a written report to the Court of his/her findings or opinions.

The comments of Mr Justice Wood were in accordance with his colleagues, although he tended to stress the desirability of counsel interviewing the child and calling independent witnesses and the undesirability of his/her attempting to act as a conciliator between the parties.

Although the case did clarify some points it leaves one with the impression that if the welfare officer and counsel for both parties do their jobs, the separate representative is left with little to do but form his/her own judgment of the case, without even necessarily seeing the child, and submit to the Court what may be a decisive opinion on what is in the child's best interest.

Several issues, however, remain unresolved by the decision in *Lyons and Boseley*. The issue raised in *Harris and Harris*[41] reopens the whole question of just what guardianship powers the separate representative has. In that case the children had been subject to psychiatric and psychological examinations on the advice of the parents' lawyers without the separate representative being informed of this fact. The judge held that it was "inappropriate" for such tests to be done without the prior knowledge of the separate representative but left open the question as to whether such a person's consent was required.

On the other hand, the emphasis on the separate representative presenting to the court what was "in the best interests" of the child seems to me to suggest that the role of the separate representative could be usurping that of the judge, whose duty it is, after all, to decide what is in the best interest of the child.

REPRESENTING THE CHILD OR REPRESENTING THE BEST INTERESTS OF THE CHILD?

The wording of s. 65 does not empower the Court to appoint a guardian *ad litem* but to order that the child be separately represented. It does not empower the court to appoint a representative to assist the court in ascertaining the child's best interests or to represent the child's interests, but to represent *the child*.

The lawyer's function is to ensure that all issues are, in the interests of his client, put before the Court and that the Court acts legally and fairly on the basis of the evidence before it. The question of how a child's advocate does this has been the subject of several articles.

[41] [1977] F.L.C. 90-276.

The central dilemmas facing the child advocate seem to be deciding whether to represent the child's wishes or his/her own conception of the child's best interests, the problems of representing the child's wishes and the question of the possibility of duress or influence in the child's decision. One article strongly advocates that the lawyer not advance his/her own opinion but leave the choice of action up to the child client

> "The child advocate's privilege to act independently, will vary with respect to child client's age, intelligence and ego development. He may advise and even strongly attempt to persuade the child. But when the child has formulated his will the lawyer cannot substitute his own opinion; he is an advocate, not psychiatrist, judge or parent."[42]

While agreeing that the preliminary step is to ascertain the child's preference of custodial parent Bersoff contends that in making this determination there should be some assurance that the choice is not the product of duress or coercion.[43]

The author also suggested that where the child had no stated preference or did not wish to make one, then a separate representative had no special competence to assist in deciding the case and it would be better for the Court to engage in its own independent investigation, for example by ordering a welfare report.

These views have been supported by the role played by the law guardian in the Family Court of New York. The function of the law guardian there is to (a) protect the interests of the minor and (b) help the minor express his wishes to the Court, regardless of what the law guardian thinks or feels about the matter.[44]

Need for Special Skills

The role of the separate representative suggested by the preceding comments requires some consideration of the type of skills needed by those persons who are appointed to undertake the task of representing children in custody applications. Lavin suggests that the separate representative

> "mainly needs a legal training, assisted by a basic knowledge of the various theories on the care of children. The role of the representative could also be undertaken by social workers with experience in Court work."[45]

Although the use of social workers as advocates may not find favour with some, and certainly in the Family Court it would only add confusion to the role to be played by the welfare officer, the child's advocate does

[42] J. K. Genden, "Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings" (1976) II, *Harvard Civil Rights/ Civil Liberties Law Review* 565, 588.

[43] D. N. Bersoff, "Representation for Children in Custody Decisions: All that Glitters is not 'Gault' " (1976-77) 15 *Journal of Family Law* 27, 41.

[44] N. Edelstein, "The Duties and Functions of the Law Guardian in the Family Court" (1973) *New York State Bar Journal* (April) 183.

[45] J. Lavin, "The Legal Representation of Children" (1975) 5 (No. 4) *Family Law* 129, 133.

require special skills in acting for a juvenile client. It has been suggested, and I believe quite rightly, that these types of skills are not often present in members of the legal profession and possibly point to a need to make changes in legal education if the use of child advocates in both the Family Court and the Children's Court is expanded

> "In order to deal effectively with his client the child advocate requires very special personal abilities. He/she must be able to understand how children think to express themselves. The advocate should know how to interview the young client, how to listen, and how to understand. He/she must also be able to perceive when the child is repressing matters of major concern. . . . These unique personal and professional skills required for effective child advocacy are not within the competence of large segments of the legal profession. . . ."[46]

SOME SPECIAL PROBLEMS AND SOME SUGGESTIONS

One solution suggested to the problem of separate representation and the presenting of information regarding children's wishes to the Court is made in the Report of the U.K. Committee on Parent Rights and Duties. It recommends the establishment of a Family Court and the appointment of a Children's Ombudsman

> "He would have the power to request a welfare report whenever he thought it necessary, as a result of information received, to do so. He would have the duty of instructing solicitors, and counsel on behalf of the child, the subject of a custody suit (and the power to do so in other legal proceedings) so that the interests of the child were separately represented before the court . . . the Children's Ombudsman would use local solicitors willing and qualified to undertake the work; the qualifications should include some training in social work and we think solicitors intending to practice in the Family Court should undergo this as part of their own professional training."[47]

The appointment of a Children's Ombudsman may assist in solving some of the problems surrounding the presentation of children's wishes to the Court. It may be useful for the Family Court to have its own officers to handle problems in this area who have special training in dealing with children. This would also allow the children, if capable, to express their own views about such things as whether they want their wishes to be known to the Court or whether they want the Court to decide for them which parent should have their custody. The Children's Ombudsman could decide in conjunction with the child whether a separate representative was necessary, whether a welfare report was adequate or whether the child wished only to be interviewed in confidence by the judge. The problem of children expressing wishes under duress or undue influence could also be handled by the Ombudsman requesting a welfare report which should bring this to the notice of the Court.

[46] Genden, op. cit. 589-90.

[47] G. Godfrey, "Report of the Committee on Parental Rights and Duties" in *The Child and the Law* (Vol. II) 573, 590-1.

In the absence of such action as appointing a Children's Ombudsman some clarification should be made of the role of the separate representative. I think where a child is capable of expressing his/her wishes and making them known to the representative then it is the duty of the representative to present those wishes to the Court. If the child is old enough, this could be achieved by the presentation of a sworn affidavit, by the calling of witnesses to whom the child has in the presence of the representative expressed such a wish or by calling a welfare officer to whom the child has spoken. If the child is by reason of age or incapacity incapable of making such an expression of his/her wishes, then the separate representative should call for a welfare report to be made and presented to the Court. Without showing preference to either parent the representative should attempt in cross-examination to adduce any evidence which may have bearing on the Court's decision. If the child is capable of expressing his/her wishes but declines to do so, then the separate representative should make the decision to either call for a welfare report or ask the judge to interview the child in chambers.

The use of a welfare officer to actually present the child's wishes to the Court was recommended by Asche J. in *Demetriou and Demetriou*.[48] The value also of the welfare officer's evidence is that he/she is not a witness for any of the parties, but is an officer of the Court

> ". . . I should point out that the Welfare Officer puts before the Court material which places him in the character of a witness. But he is a witness in a very special sense. He is an officer of the Court and responsible only to the Court. His report is made directly to the Court and it is only with the leave of the Court under regulation 117 that it can be made available to the parties or their legal representatives. His complete independence and impartiality is vital to the administration of the Act."[49]

As such the Welfare Officer cannot be the separate representative's witness and there may be cases where the welfare officer's report will conflict with the separate representative's instructions. In such a case the separate representative would have a duty to produce evidence to rebut the welfare officer's views.

Separate representatives are not only used in cases coming under s. 64(1)(b). In some cases the child may be a baby, or there may be several children, some of whom are covered by s. 64(1)(b) and others who are not. In such cases should the separate representative still seek to present the child's wishes and attempt to persuade the judge to exercise his/her discretion to hear and be guided by evidence as to those wishes? It has been suggested that the reference to the age of 14 should be removed from s. 64(1)(b) and that the matter be left up to judicial

[48] [1976] F.L.C. 90-102
[49] Ibid. 75,469.

discretion. The question of the age at which a child's custodial preference should be accepted has been discussed by Bersoff

> "Distinctions made on the basis of age, while easy to make are by nature arbitrary. Ideally, the ability of a child to make a sound custodial preference should be judged according to universally accepted criteria, the evidence for which is observable and verifiable. Neither the law nor behavioural sciences are yet able to supply such criteria."[50]

Bersoff suggests the age of 12 rather than that of 14. This bears some social significance as it is generally the age at which children reach physical maturity and at which they enter secondary education. The criteria for making judicial decisions are these

> "If the child is beyond 12, his preference should control in the absence of evidence that the preferred parent has made the child the victim of criminal behaviour. If the child is under 12, his wish should control unless the opposing party can show that placement with the non-preferred parent would provide predominant advantages, essential to the child's development, which are substantially unobtainable with the preferred parent."[51]

Under the present legislation the judge does, of course, have the discretion to take into consideration the wishes of children under the age of 14 and give them as much weight as he/she thinks appropriate in the circumstances of the case. When dealing with the case of two children aged 11 and 13, Bell J. not only ordered a welfare report, but also saw the children himself in chambers before deciding that the children's wishes should be implemented

> "I am of the opinion that the wishes of the children in a case such as this where the children are of an age where one should consider their wishes, whilst not being a determining factor, as Mrs Forbes said, it is a factor that should be considered and scrutinised carefully in an endeavour to ascertain whether or not the children's wishes have been bought or coerced. I am satisfied in this case that the children have made a determination and that such determination is based upon rational thought."[52]

The problem of putting a definite age in the legislation is obviously a difficult one. Some children of even 8 years of age are quite capable of making a rational choice in such matters while others at 14 are obviously suffering from lack of maturity or uncertainty which hinders them in making a concrete choice. It has been suggested that the age be raised to 16 years. This would serve no useful purpose. At 16 any child, provided they are not exposed to moral danger, can live where they choose anyway. At 15 they are legally able to leave school. It would be ludicrous to suggest that a child who had left school and was self-supporting could not make a choice regarding his/her own desired place of residence.

[50] Bersoff, op. cit. 42.
[51] Ibid. 43.
[52] *Guillesser and Guillesser* [1976] F.L.C. 90-127, 75, 604-5.

Where a child is not capable of verbalising his/her own preference it should not be excluded that such preference may exist. Preference by implication should be available when it is evident to the separate representative that the child prefers one parent to the other, but because of infancy or incapacity is unable to express this preference verbally. Because implied choices are harder to establish than verbal ones, preference by implication should be subjected to strict tests of evidence. Often the observations of a welfare officer regarding the child's interactions with both parents can be of material assistance in this case.

It has also been suggested that the powers of s. 64(1)(b) are such that children involved in a custody dispute between competing parents obtain some lever which enables them to blackmail the parents by threatening to express preference for one or the other party. This has been regarded to be particularly likely where the child is approaching the age of 14 and custody has already been awarded. Then it is suggested the child may threaten the custodial parent that he/she may go to live with the non-custodial parent if certain conditions are not met. This assumes that it is common in custody cases for the "losing" parent to continue to offer the suggestion to the child that they could change their custody arrangements. It assumes that children are made aware of the provisions of s. 64(1)(b) and it assumes that children under the age of 14 are not usually satisfied living with the parent who has obtained custody. It also tends to leave aside the fact that most adolescent children tend to go through a period of rebellion against parental authority and the "Dear Dorothy Dix" type columns of newspapers and magazines are full of children threatening to leave home as soon as they turn 16 if their demands are not met.

It would be more appropriate to penalise the non-custodial parent who encourages such behaviour rather than to remove the power of the section because of the possible misuse that may be made of it by some unscrupulous parents and manipulative children.

CONCLUSION

Little has been written as yet on the issue of children's wishes and the role of the separate representative. The problems of child custody adjudication within the framework of the adversary system and how the separate representative was an attempt to modify this system without changing the whole nature of the procedure by which such decisions were made has been examined by Kobienia.[53] The emphasis of that article, however, was on the role that the separate representative played within the court structure rather than on the relationship between the separate representative and the child.

[53] S. Kobienia, "Separate Representation in Custody Cases" (1978) 6 *Adel.L.R.* 466.

The introduction of s. 64(1)(b) and s. 65 in the *Family Law Act* 1975 (Cth.) has sought to ameliorate the situation of children who are the subjects of custody disputes. However, children still seem to be the objects of, rather than parties to, the whole procedure. It is important to remember that they do not have the legal capacity to initiate action in custody cases themselves. If they are not given the opportunity to have their position adequately and properly advanced when their custody is decided upon, then they cannot appeal. A separate representative is appointed by the court and the child has no capacity to either engage or dismiss his/her representative. The responsibility imposed on such lawyers is therefore very great. How lawyers approach their role as a separate representative, and how the court develops its view of their role, is therefore important in determining what rights the child client will have.