"Completing the Charm": The Relevance of Children's Wishes in Contested Cases: A Contextual Commentary*

Frank Bates**

I

The recent decisions of the Full Court of the Family Court of Australia in *R and R (Children's Wishes)*[1] and *Re G (Children's Schooling)*[2] raise, once more, the issue of the weight to be attached to the wishes of children in contested cases. Under s 68F(2)(a) courts exercising jurisdiction under the Family Law Act 1975, as amended in 1995, must consider, "...any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes." In some ways the provision is more specific than those which have preceded it[3], but at the same time it seems to incorporate the concepts enunciated, by Lord Scarman in particular in the House of Lords decision in *Gillick v West Norfolk and Wisbech Area Health Authority*[4] and all the uncertaincies which it, and cases decided subsequent to it,[5] have imported into Australian Law by reason of the

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* "Round and round the circle
Completing the charm
So the knot be unknotted
The crossed be uncrossed
The crooked be made straight
And the curse be ended."
T.S. Eliot, The Family Reunion, Act II, sc iii.

** Professor of Law, University of Newcastle (NSW)

1 (2000) FLC 93-000

2 (2000) FLC 93-025

3 For comment on these earlier provisions, see below text at n 21, 116

4 [1986] Ac 112. For comment, see J M Eekelaer, "The Emergence of Children's Rights" (1986) 6 Oxf J Legal Studies 161

5 Re R (A minor) (Wardship: Consent to Treatment) [1991] 3 WLR 592; Re W (A Minor) (Medical Treatment: Court's Jurisdiction) [1993] 3 WLR 758

High Court of Australia's decision in *Secretary, Department of Health and Community Services v JWB and SMB*[6].

In *R and R*, the children of the relevant marriage were two boys, aged twelve and ten years at the time of the initial hearing. The trial judge had made a residence order[7] in favour of the wife in respect of both boys and ordered that she have responsibility for their day to day care, welfare and development[8]. Additional orders were made for contact[9] between the children and the husband[10]. The parties had been married for approximately ten years before their separation in 1994, when the husband had left the matrimonial home. Since that time, the children had lived in the home with the wife. The occupation of the husband required that he spent considerable periods of time in other parts of Australia and overseas, particularly in Asia. The wife and children usually joined him for all or part of these postings.

For the two years following the separation, it appeared that there were sensible and flexible arrangements made between the parties as to contact. Those arrangements included frequent (indeed, almost daily) visits to the home, camping holidays and a visit to Japan, when the wife accompanied the children. The trial judge found that the wife had facilitated those arrangements.

The husband, for reasons connected with his work, went to live for over two years in Bangkok[11], which greatly distressed the children. Contact, though, was maintained by telephone and by means of holiday visits by them to be with the husband, together with visits by him to Sydney, when he moved into the former matrimonial home, with the wife's agreement, for the period of the visits. Following the visits to the husband overseas, the husband gave evidence to the effect that the children showed considerable distress on their departure. The wife did not dispute that evidence and the trial judge seemed to have accepted that such was the case.

In addition, a Family Report[12] was available to the trial judge, the substance of which she accepted. The counsellor indicated that both boys wished to live with their father but also raised concerns regarding the husband's interaction with them and his commitment to facilitating contact

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6 (1992) 175 CLR 218. In that case the majority, consisting or Mason CJ, Dawson, Toohey and Gaudron JJ were of the view, at 238, the Gillick, "...should be followed in this country as part of the common law". For comment on the case at large, see P Parkinson, "Children's Rights and Doctors' Immunities: the Implications of the High Court's Decision in Re Marion" (1992) 6 Aust J Fam L 101.

7 See Family Law Act 1975 s 64B (7)(a)

8 Ibid s 64B (7)(c).

9 Ibid s 64B (7)(b)

10 Various property orders had been made and counsel for the husband had conceded that it would be difficult for him to argue that there was any error in respect of them were the residence orders to remain undisturbed.

11 During that period, as the court (Nicholson CJ, Finn and Guest JJ) pointed out, (200) FLC 93-000 at 87, 064, the husband did live in a de facto relationship, but that ended when he returned to Australia.

12 Family Law Act 1975 s 62G.

between the children and their mother in the future. In that respect, the trial judge had expressed concern about, "...the husband's open disregard for the wife's viewpoint, his apparent lack of respect for legitimate opposition she has expressed to unilateral decisions he has taken and his apparent difficulty in acknowledging her role in the children's lives."

In making the orders which she did, the trial judge had balanced the wishes of the children against factors which favoured the children remaining in the mother's care and also took into account what she described as, "...the husband's limited insight into the effect of his conduct on the children's future balanced development." Thus, whilst accepting that the children's wishes were a weighty consideration, she viewed them in the light of the children having missed their father whilst he was overseas, his now greater availability and the counsellor's opinion that frequent and regular contact could meet the children's wishes to spend more time with him.

On appeal, the only issue which was pursued on behalf of the husband was the trial judge's approach towards the wishes of the children and two major submissions were made. First, that children's wishes were important and ought not to be ignored where they were soundly based and had been expressed without influence from either parent and were expressed against a background of particular facts and circumstances. Second, that the trial judge had made an error of fact in that the expressed wishes of the children had not been that they should spend more time with their father, but that they should live with him. The Full Court[13] dismissed the appeal.

The major case upon which the husband relied was the earlier decision of the Full Court of the Family Court of Australia in *H v W*,[14] although it should be noted that that case was decided prior to the 1995 amendments and, hence, the statutory provision involved was different[15] from that which governed *R and R*[16]. In *H v W*, the parties had married in 1984 and separated in 1989. The children were born in 1986 and 1988 and had remained with the wife after separation. In 1990, the wife had commenced a de facto relationship, from which she had a child, and, in 1992, the husband remarried and also had a child from that marriage.

At first instance, the judge had granted sole guardianship and custody of the children to the wife. Some two years after that decision, the husband did not return the children to the wife after an access visit; the reason being that the children had told him that the de facto partner

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[13] Nicholson CJ, Finn and Guest JJ.

[14] (1995) FLC 92-598

[15] The relevant provision was contained in s 64(1)(b) of the Family law Act 1975, as amended in 1983, and stated that, "...the court shall consider any wishes expressed by the child in relation to custody or guardianship of, or access to , the child, or in relation to any other matter relevant to the proceedings, and shall give those wishes such weight as the court considers appropriate in the circumstances of the case."

[16] Above text at n 3.

had physically abused the elder child. The children remained with their father and the wife was granted access on the condition that the children not come into contact with the partner. In 1994, the husband applied for custody of the children and the matter came for hearing before the judge who had made the initial order. The children continued to remain with the husband until the trial, when the judge made orders for joint guardianship, custody to the wife and access to the husband. At trial, there was evidence that the children had both expressed wishes that they remain living with the husband. The children's separate representative[17] supported the husband as the preferred custodian both at trial and on appeal. A ground[18] for the husband's appeal was that the trial judge had failed adequately to consider the relevant provisions of the Act and, especially, had ignored the children's expressed wishes. In the event, the Full Court, which was very strongly constituted,[19] allowed the husband's appeal and substituted its own discretion,[20] thus permitting the children to remain with the husband.[21]

As regards the issue of the wishes of the children, Fogarty and Kay JJ began[22] by saying that the wishes of children were important and that "realistic weight" should be attached to them. After having discussed the legislative history of 64(1)(b),[23] as well as the Australian application of the *Gillick* test,[24] Fogarty and Kay JJ stated[25] that, "In the ultimate, whether by a statute or at common law, whilst the wishes of the children are important and should be given real and not token weight the court is still required to determine the matter in the child's best interests and that may in some circumstances involve the rejection of the wishes of the child". The law, they thought, was represented by dicta of Hannon J in *In the Marriage of Doyle*[26] and Butler-Sloss LJ in the English case of *Re P (A*

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17 See Family law Act 1975 s 98L

18 It was also argued that the trial judge's assessment of the evidence was unbalanced and had produced unjust results and that, having regard to the whole of the evidence, the decision was plainly wrong.

19 Fogarty, Kay and Baker JJ.

20 In the words of Fogarty and Kay JJ, (1995) FLC 92-598 at 81, 951, "... this court has on previous occasions intervened to reverse the orders where the welfare of the child dictates that course as this appears to us to be a compelling case to do so. It would, in our view, be ritualistic to return the matter for retrial. On the material before the trial Judge the welfare of the children strongly indicated that they should remain with the husband."

21 The wife was granted access on alternate weekends and for half of school holidays.

22 (1995) FLC 92-598 at 81, 944.

23 Ibid at 81, 946

24 Above text at n 4.

25 (1995) FLC 92-598 at 81, 947.

26 (1992) FLC 92-286 at 70, 128. There, it had been said that, "If the court is satisfied that the wishes expressed by the child are soundly based and founded upon proper considerations as well thought through as the ability and state of maturity of the child will allow, it is appropriate to have regard to those wishes and to give such weight to them as may be proper in the circumstances."

Minor)(Education)[27] Fogarty and Kay J also briefly referred[28] to the United Nations Convention on the Rights of the Child and the case law which stated that, although it had not been adopted into Australian municipal law, it could be used to resolve ambiguities and fill *lacunae* in Australian statutes and regulations.[29] The judges considered that it was legitimate to make reference to it, even though it had not been used in argument, as the Convention demonstrated growing recognition of the rights of children, including their right to express opinions and to be heard.[30]

It will be apparent that the views expressed by Fogarty and Kay JJ were very much in the mainstream of Australian judicial thought; however, they did comment[31] that Baker J had adopted a somewhat different approach and that they had approached the issue with "some diffidence". Baker J, on the other hand, sought to be altogether more definitive in his approach. After having briefly described[32] some of the behavioural science literature on the subject,[33] Baker J suggested that that literature concluded that there were four reasons why courts should endeavour to give effect to children's wishes unless those wishes were found to be unsound, or founded on improper considerations or were influenced by others.

These four reasons were: first, that children had a right to be heard in any determination of their future arrangements; the major authority for Baker J's view was Art 12 of the *United Nations Convention on the Rights of the Child*[34] as well as the statutory provisions which required that the

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27 [1992] 1 FLR 316 at 321. there, her Ladyship had commented that, "we are dealing with the welfare of a 14 year old boy. The courts, over the last few years, have become increasingly aware of the importance of listening to the views of older children and taking into account what children say, not necessarily agreeing with what they want nor, indeed, doing what they want, but paying proper respect to older children who are of an age and the maturity to make their minds up as to what they think is best for them, bearing in mind that older children very often have an appreciation of their own situation which is worthy of consideration by, and the respect of, the adults, and particularly including the courts."

28 (1995) FLC 92-598 at 81, 948

29 Murray v Director of Family Services Act (1993) FLC 92-416; McCall and McCall; State Central Authority (1995) FLC 92-551; Minister for Foreign Affairs v Magno 91992) 112 ALR 529.

30 See United Nations Convention on the Rights of the Child Art 12. At the same time, Fogarty and Kay JJ noted that the various articles of the Convention were, of necessity, expressed in general terms and that it was necessary to read them together. In particular they referred to Art 3, which states that, "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

31 (1995) FLC 92-598 at 81, 944.

32 Ibid at 81, 944

33 See J R Spencer and R Flin, The Evidence of Children (1990) at 236; F Ludbrook, "Hearing the Voice of the Child," Family Court Conference, 1994; N Collings, "Hearing the Voice of the Child in Custody and Access Cases," Family Court Conference, 1994; EG Garrison, " Children's Competence to Participate in Divorce Custody Decision Making" (1991) 20 J Clin Psychology 78.

34 Above n 30. This article provides that, "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

child's wishes be taken into account and which permitted the child to be separately represented.[35] The second reason, as expressed by Baker J,[36] was that the quality of a custody decision was likely to be enhanced if the child's views were taken into consideration. In that context, Baker J commented that, "[t]here appears to have been a tendency for adults to under estimate the wisdom of children and their ability to make sound choices as to their future welfare. It must be recognised that children know their parent's attributes and failings better than any outsider and in most cases also have direct experience of the environment which each offers." Third, Baker J was of the view that a decision was more likely to prove workable if it is reached with the involvement and support of the child.

Finally, Baker J stated that the ability of children to make a soundly based decision was, now, well researched and said that there was, "...a considerable body of psychological evidence which suggests that children as young as seven are capable of expressing soundly based wishes as to their preferred custodian. However, the crucial factor is the competency of the child rather then his or her age." Thus, research had established[37] that there was no particular age at which a child's wishes in regard to custody arrangements should be taken seriously and that the event of cognitive development was a more reliable predictor then chronological age.[38] It had also been shown that pre-adolescents,[39] and even children as young as seven,[40] could effectively participate in decisions which effected them. Hence, Baker J concluded[41] by saying that the research,

> "...supports a rebuttable presumption that children of the age of seven are capable of making a considered decision, a decision in which reason is employed. Having said that however, one must nevertheless be certain that the child's wishes are free from the influence of others and that the child possess a sufficient level of maturity to formulate a soundly based wish".

Despite Baker J's reliance on behavioural science literature for his

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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 separate representative or an appropriate body, in a manner consistent with the procedural rules of national law." See below text at n 136.

35 See also Re K (1994) FLC 92-461 which sets out guidelines for the appointment of separate representatives.

36 (1995) FLC 92-598 at 81, 964.

37 D M Siegel and S Hurley, "The Role Of The Child's Preference In Custody Proceedings" (1977) 11 Fam L Q 1.

38 E F Greenberg, An Empirical Determination of the Competence of Children to Participate in Child Custody Decision Making (1983, Unpublished Doctoral Dissertation, University of Illinois at Urbana-Champaign)

39 E G Gamison, "Children's Competence To Participate In Divorce Custody Decision-Making" (1991) J Clinical Child Psychology 78.

40 S Barry, R Cloutier, L Filian and S Gosselin, "La Place Faite < L'enfant dans les Decisions Relative en Divorce" (1985) 6 R Quebcoise de Psychologie 83.

41 (1995) FLC 92-598 at 61, 966.

conclusions, it must be said that there are writings which have taken the contrary view. Thus, Littner, a psychiatrist, had stated[42] that children's wishes are given more weight then they ought to be as, "...the child may be afraid to say how he really feels. I have seen many boys who say that they wish to live with their fathers, but, on examination, really wish to stay with their mothers. They are afraid to say so, or sometimes even to let themselves know for fear of being rejected by their mothers. And so they play it safe and pretend that they really wish to live with their fathers." Littner goes on to comment that requiring children to make a choice between their parents may only intensify their emotional problems because they may genuinely not know what is best for them. Like statements may be found in the work of Despert[43] and Weiss[44] as well as a judicial comment by Cross J in the English case of *Re S (an infant)*[45] to the effect that a child's expressed wishes, although genuinely held, might be so contrary to the child's best interests that they should by disregarded by the courts. That statement is important for the purposes of this article because it demonstrates a clear contradiction which, as will be seen, is apparent from both earlier and recent case law.

That notwithstanding, Baker J's view appears to be more consonant with more modern behavioural science and judicial thought. As regards the latter, in *JWB and SMB*,[46] Deane J had said that the, "...extent of the legal capacity of a young person to make decisions for herself or himself is not susceptible of precise abstract definition. Pending the attainment of full adulthood, legal capacity varies according to the gravity of the particular matters and the maturity and understanding of the young person." Taking that statement (and, presumably, *Gillick*[47]) into account, together with the literature to which he had made reference, Baker J. expressed the view[48] that children's wishes must not only be considered, but be shown to be considered in the trial judge's judgment. If the trial judge decides to reject the wishes of the child, then clear and cogent reasons for any such rejection must be given.[49] The judge went on to say that, "The wishes of children should not be discounted simply because they are expressed by children. The weight to be given to the wishes of the child depends upon the individual child and on assessment of the validity of the wishes must be made by the trial judge in each individual case. Such an exercise will require a consideration of both the child's level of maturity and understanding".

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42 N Littner, "The Effects on a Child of Family Disruption and Separation from One or Both Parents" (1973) 11 RFL 1 at 13.

43 JL Despert, The Children of Divorce (1968) at 198

44 R S Weiss, Marital Separation (1972) at 209.

45 [1967] 1 All Er 202 at 210. The child in question in this case was a thirteen year old boy.

46 (1992) 175 CLR 218 at 293.

47 Above n 4.

48 (1995) FLC 92-598 at 81, 967.

49 This was especially the situation in cases, such as the present, where the separate representative had submitted that effect be given to the wishes.

Baker J continued[50] by emphasising that he was not urging that trial courts should automatically act on children's wishes, but because it was the duty of courts to act in the best interests of children. "Rather," he said, "the goal is to take the wishes of children seriously by giving them careful, detailed consideration. To merely regard the wishes of children in a token manner, or to be dismissive of them, does not accord with the findings of psychologists as to the competence of children to express soundly based wishes and ignores the statutory requirement[s]..." On the facts of *H v W*, Baker J. considered that the children in the case, although relatively young, had provided sound reasons for the wishes which they had expressed and, more importantly, they had had a unique opportunity of experiencing each of the alternative arrangements and, hence, were able to make a decision based on their actual experiences. It followed that the trial judge had not adequately considered the wishes of the children.

Because of the different approaches adopted by the judges in *H v W*, it is not an easy case to evaluate – the more so as Fogarty and Kay JJ were unhappy[51] that the issue of children's wishes had not been the subject of any submissions at the trial. They were, thus, of the view that there could be dangers in expressing views in the abstract without assistance from the parties. Attention had not, at trial, been drawn to the literature to which Baker J had referred and they, therefore, found it difficult to attach themselves to the summary of it to be found in his judgment. The important issue, though, was how *H v W* was treated by the Court in *R and R*. It was argued in *R and R*, that *H v W* was authority for the proposition that children's wishes were important and should not be departed from where they were soundly based and had been expressed without influence from either parent. In *R and R*, the court were of the view[52] that that submission was too widely based and that what the Court had said in *H v W* was not that if the child's wishes were valid, then they must be acted upon. That, the court emphasised,[53] was not the law. What was required, they thought, was that, "...they be given appropriate and careful determination and not treated as a factor in the determination of the child's best interests without giving them further significance. When validly held reasons are departed from by the trial judge, it is apparent that good reason should be shown for doing so."

In addition, counsel for the appellant husband had been critical of the trial judge's apparent failure to determine whether the wishes of the children were unsound, founded on improper considerations or influenced by others. This clearly, of course, related to a comment made by Baker J in *H v W* regarding the "validity" of children's wishes.[54] The Court in *R*

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[50] (1995) FLC 92-598 at 81, 968.
[51] Ibid at 81, 944.
[52] (2000) FLC 93-000 at 87, 070
[53] Ibid at 87, 071
[54] (1995) FLC 92-598 at 81, 967

and R took the view[55] that, though the considerations to which counsel had referred were relevant in many cases, they were not the only issues which a trial judge had to consider when dealing with the issue of children's wishes. "There are," the Court stated, "many factors that may go to the weight that should be given to the wishes of children and these will vary from case to case and it is undesirable and indeed impossible to catalogue or confine terms in the manner suggested. Ultimately it is a process of intuitive synthesis on the part of any trial judge weighing up all the evidence relevant to the wishes of children and applying it in a common sense way as one of the factors in the overall assessment of the children's best interests."

I fear that this passage is rather unfortunate, in that it is capable of providing material for critics of the legislation (even as amended) and of the Family Court itself. The phrase "intuitive synthesis" is altogether too redolent of the, much more used, word "guess" and this is likely to be seized on by critics of the existing system.[56]

An especial difficulty in *R and R* is that, in being concerned as they were with the application of *H v W*, the Court did not deal directly with the issue of the relationship between the wishes of the children and the best interests test. That relationship is quite clearly crucial.

The later decision in *Re G (Children's Schooling)* involves a matter which has caused rather less difficulty than might readily have been anticipated – that of children's education.[57] *G* involved an appeal against an order made by a trial judge which permitted the wife to enrol the two children of the marriage (boys aged ten and eight years) at a particular private school. The parties, pursuant to consent orders made in 1997, were jointly responsible for the long term care, welfare and development of the children. The wife was solely responsible for their daily care, welfare and development; the children resided with her and the husband had contact. Since pre-school, the children had been educated at another private school, though the wife had always wanted to send them to the school in respect of which the orders had been made, and the parents had agreed on the other school as a compromise. In granting the wife's application, the trial judge had

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[55] (2000) FKC 93-000 at 87,072.

[56] See, for example, P. Tennison, Family Court: The Legal Jungle (1987) for a, quite admittedly, journalistic account.

[57] There has been little in the way of reported case law in this area; though, see In the Marriage of Newbery (1977) FLC 90-205; In the Marriage of Bishop (1981) 6 Fam LR 882. On a different issue, see In the Marriage of Mee and Ferguson (1986) FLC 91-716. For comment on these issues, see F. Bates, "Some Educational Considerations in Recent Family Law Cases" (1981) 7 U.Tas.L.R. 222, "Maintenance and Private School Fees" (1988) 2 Aust.J.Fam.L. 125. In Mee and Ferguson, the Full Court of the Family Court of Australia (Asche ACJ, Fogarty and Cook JJ) had said, (1986) FLC 91-716 at 75,200, that "The development of the dual school system in Australia is an interesting aspect of Australian history, but courts have always avoided being drawn into the issue of preference between them as a generality."

taken into account, *inter alia*,[58] of the children's wish to remain at their present school, their good progress at it and their reluctance to transfer to the other school. The Full Court of the Family Court of Australia[59] dismissed the appeal, even though they were of the view that the trial judge had erroneously exercised his discretion.[60]

As regards the question of the children's wishes, the Court made a detailed analysis[61] of *H v W* and *R and R* and concluded[62] that it was clear from those cases that, "... "proper regard must be had to the expressed wishes of the children and that reasons for decision must reflect their significance. However, there is no presumption that decisions should accord with expressed wishes and it is not to be expected that lengthy reasons for departing from expressed wishes is the equivalent of showing 'good reason' for doing so."

It will readily be apparent that the signals emanating from these cases are not a little confused. Both *R and R* and *Re G* purportedly applied *H v W*, a pre-1995 decision; however, it is far from easy to apply the totality of *H v W*. Baker J. considered that the wishes of young children were both generally valid and should be accorded significant probative value, whilst Fogerty and Kay JJ were rather more circumspect. In *Re G*, the wishes of the children appeared to have been subsumed into the totality[63] of the evidence which was used to support the mother's decision. What is also unclear is the relationship between the wishes of the children and the principle that the best interests of the child are the paramount consideration. These cases must, therefore, be contextualised.

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The earliest case normally cited in texts[64] relating to children's wishes is the Irish case of *Re O'Hara*,[65] a decision which is not without its own interest. There, the father of the relevant child, who had been a farm labourer, had died in 1890, leaving a widow and three children, of whom the child in question was the youngest. The widow, who was in a poor financial

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58 The other matters taken into account by the trial judge were that, first, the children had constantly resided with their mother; second, that the mother had undertaken thorough research into both schools; third, that the younger child had a physical disability; fourth that the travel time from the children's residence with the mother was much shorter to the new school than the school which they were presently attending; fifth, that the wife's intention to undertake retraining or employment would be hindered by the travel associated with the children's present school and, finally, there was a Family Report which stated the children would be able to cope with a move to the proposed new school.

59 Nicholson CJ, Kay and Brown JJ.

60 In essence, by applying the principles expounded in In the Marriage of Newbery, above n 57, which were no longer good law in consequence of the 1995 amendments to the Family Law Act 1975.

61 (2000) FLC 93-025 at 87,413.

62 Ibid at 87,415.

63 Above n 58.

situation, found work as a domestic servant and placed the children in the care of the Protestant Orphan Society. In October 1897, the mother was in the service of one, who had a substantial farm in the north of Ireland. An agreement was drawn up between the mother and M that M would adopt the child and that the mother would have no claim on the child. Shortly after, the mother remarried another, less wealthy, farmer in the same regional area. In early 1899, the mother demanded the child back from M, who refused to do so unless he was paid for the child's maintenance and support.

At first instance, the judge had seen and had had a conversation with the child and, in consequence was satisfied that the child regarded, with the *strongest aversion*,[66] the idea of returning to her mother. Having regard to that, and to the circumstances in which the child had been handed over; as well as the existing situation of the child, she ought not to be removed from M's custody as it was not in accord with her welfare to do so. The mother successfully appealed to the Court of Appeal.

As regards the specific issue of the wishes of the child, and they were not a major issue in the Court of Appeal's ultimate determination,[67] FitzGibbon LJ stated[68] that, "... a parent's *prima facie* right must also be considered, and the wishes of a child of tender years must not be permitted ... to subvert the whole law of the family, or to prevail against the desire and authority of the parent, unless the welfare of the child cannot otherwise be secured."

Indeed, perhaps because of that often cited *dictum*, the issue of children's wishes arose only relatively rarely in English law, prior at least to the 1990's[69] and brief reference has already been made[70] to the decision in *Re S*. Indeed, it is decisions such as that which have caused Maidment to comment[71] that the courts' response to the issue was "pragmatic". Cross J there said[72] that, "There are occasions when the wishes expressed by a boy of thirteen and a half may count for very little. In many cases it is unfortunately plain that they are reflections of the wishes of one of the parents which have been assiduously instilled into the ward and are not anything which could be called an independent exercise of his own will. Sometimes again the ward's wishes, although genuinely his own, are so plainly contrary to his long term interest that the court may feel justified in disregarding them." Having said that, Cross J stated that the instant

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64 See P.M. Bromley, Family Law, 2nd Ed (1962) at 316.
65 [1900] 2 IR 232.
66 Author's emphasis, though see ibid at 235.
67 The major issues were whether the mother had "deserted or abandoned" the child as was required by s 3 of the Custody of Children Act 1891 and the innate right of the natural mother.
68 [1900] 2 IR 232 at 240.
69 See above nn 26, 27.
70 Above text at n 45.
71 S. Maidment, Child Custody and Divorce (1984) at 275.
72 [1967] 1 All ER 202 at 210.

case was not one of those and effect was given to the wishes of the child who wanted to continue his education rather than go with his mother to California. Another English instance quoted by Maidment is the decision of the Court of Appeal in *B v B*[73] where a sixteen year old boy wished, in Edmund Davies LJ's words,[74] to have nothing to do with his father. But the same judge had also said that, the father's, "... character as a parent is absolutely untarnished. And it does not stop there: he is a man who is deeply devoted to his child. The mother, on the other hand, at one stage in these regrettable proceedings, brought herself to make an allegation against the father of the greatest gravity, namely that their son might be sexually in danger if the father was allowed access – an allegation which she has later said that she did not really mean." In addition, it also appeared that the child's attitude has been the product of his mother's and maternal grandfather's pressure and indoctrination.

B v B may be factually contrasted (rather than compared) with the pre-1975 Australian decision of Selby J of the New South Wales Supreme Court in *Gallaghan v Gallaghan*.[75] There, the former wife[76] had been awarded custody of the child of the marriage, a ten years old boy, with the husband being granted access between specified hours each Saturday. At the time of the instant proceedings, the boy was aged eleven and the husband seventy-two. The boy found the company of his father distasteful and did not want to associate with him at all. Further, the boy's Saturday sporting activities were curtailed because of the access requirements and the father showed little consideration for the boy during access periods.[77] Nonetheless, Selby J took the view that the father should still be permitted access and said[78] that, "Despite the weighty reasons which I have mentioned in favour of excluding the petitioner from all access, I am not by any means satisfied that this would be entirely in the child's interests. He may find his father's company boring. He may be embarrassed when his friends see him with the old man. But even if his visits amount to a duty rather than a pleasure, he is not too young to be placed under a duty to his father and brought to recognise that life involves duties as well as privileges. It would do nothing towards the building of his character and preparations for the obligations of citizenship to allow him to avoid this duty because he finds it uncongenial." However, the judge reduced the father's access to one Sunday each month.[79]

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[73] [1971] 3 All ER 682.

[74] Ibid at 689.

[75] (1967) 9 FLR 331. For comment on this, and related, cases, see F. Bates, "The Problem of Access" (1974) 48 A.L.J. 339.

[76] The husband had divorced the wife on the grounds of her adultery with the co-respondent, whom she had subsequently married.

[77] The father, apparently took the child on what was, in effect, a walking tour of public houses in Newcastle!

[78] (1967) 9 FLR 331 at 336.

[79] There were also, it is suggested, other good reasons for changing the access times as Selby J. had done.

The immediate distinction between the *Gallaghan* and *B* cases is, obviously, the respective ages of the children in question. *Gallaghan* also tends to bear out the description of the pre-1975 position to be found in the leading practitioners' text of that period where it was written[80] that, "A child's wishes are matters for consideration but they will not necessarily prevail: they may be contrary to what the welfare of the child requires by way of proper discipline and parental control. The psychological effect, if any, of the frustration of the child's wishes is of course a matter to be considered."

1975 was, however, to see a total turnaround in policy attitudes towards the question. In the original provision to be found in the legislation, s 64(1)(b) provided that, "... where the child has attained the age of 14 years, the court shall not make an order ... contrary to the wishes of the child unless the court is satisfied that, by reason of special circumstances, it is necessary to do so ..." Apart from that provision and the requirement that the welfare of the child was regarded as the paramount consideration,[81] the court could, "... make such orders in respect of [custody, access and guardianship] as it thinks proper..." that provision does not tell the whole story by any means.

In the first case to be reported on the issue, *In the Marriage of Nicholson and Crans*[82], Demack J was required to consider the wishes of a 15 years old boy who had, the judge said,[83] expressed a strong preference to be with his mother. In concluding that his wishes ought not to be acted on, the judge (after commenting that he was a small lad for his age!) concluded that he had been carefully rehearsed by his mother. That was also the issue in *In the Marriage of Guillesser;*[84] however, there, Bell J gave effect to the wishes of the children, who were both aged under 14[85], and emphasised[86] that children's wishes were not determinative of the issue but were, "...a factor that should be considered and scrutinised carefully in an endeavour to ascertain whether the children's wishes have been bought or coerced."

Thus, in those cases, the wishes of a child over the statutory age were not given effect, whereas those of children, in the other were heeded. That was also the case in *In the Marriage of Cattenach and Leavens*[87]: that case was also interesting in that the children regarded it as desirable that they should be separated with the girl going with her mother and the boy with his father. In older texts[88], the desirability of siblings remaining together

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80 P. Toose, R. Watson and D. Benjafield, Australian Divorce Law and Practice (1968) at 495. See also Hodge v Hodge (1965) 7 FLR 94; Mooney v Mooney [1965] LR 460; Rogers v Rogers (1947) 64 WN(NSW) 207.

81 Family Law Act 1975 s 64(1)(a).

82 (1976) FLC 90-025

83 Ibid at 75, 116

84 (1976) FLC 90-127

85 A boy aged 13 and a girl aged 11

86 (1976) FLC 90-127 at 76, 605

87 (1977) FLC 90-246

88 Above n 64 at 316

had been emphasised. Demack S J ultimately adopted[89] their solution as being the only practical one in all the complex circumstances of the case, even though they were too young to express reliable opinions. Once again, in *In the Marriage of Cartwright*[90], Smithers J gave effect to the wishes of a child, even though they had been expressed to the Officer preparing the welfare report three weeks before her fourteenth birthday.

In some ways, however, the most significant decision was that of Wood J in *In the Marriage of Fitzgerald and Robinson*[91]. There, divorced parents each sought the custody of their children, a boy aged 12 and a girl aged 9. The father had been caring for them for some eighteen months. The mother had suffered a nervous breakdown but had recovered and had remarried. The father, though, did not approve of the new husband who he considered to be a bad influence on the children. The choices available to the judge were, first, leaving the children in the custody of their father, with the mother having access to them. Second, transferring the children into the custody of the mother or, third, by giving effect to the wishes of the children, and placing the son in the custody of the mother. However, that last course was contrary to the wishes of the parents, who did not wish to see the children separated.

Ultimately, Wood J adopted the last course and noted[92] that the children had expressed their wishes *very forcibly*[93] and went on to say[94] that, "One of the determinants, however, is whether the child whose wishes are under consideration has been able to make as reasonable appraisal of the situation as its age will permit and, if so, in a case where there is little to choose between the competing proposals of the parents, a well-founded expression of the child's desires can frequently be the determining factor in resolving the issue of the child's placement."

In addition, Wood J concluded[95] his judgment by emphasising that he did not regard the order which he had made as necessarily being final and that it was "not beyond possibility" that the children might change their present attitudes[96]. Hence, not only was the decision in *Fitzgerald and Robinson* predicated essentially on the wishes of the children, but so were any possible future developments. It is surely hard to imagine a decision which could pay more attention to the wishes of the relevant children, including those who were below the age which was specified

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[89] (1977) FLC 90-246 at 76,328
[90] (1977) FLC 90-302
[91] (1978) FLC 90-401
[92] Ibid at 77, 062
[93] Author's emphasis
[94] He also pointed out, (1978) FLC 90-401 at 77, 062, that, "It has been constantly reiterated in the cases that the Court should not too readily act upon the wishes of young children because of their inability to take an overall view of their situation and make determinations which are in their best interest." See, for example, In the Marriage of P and B (1978) FLC 90-455
[95] Ibid at 77, 064
[96] Ibid at 77, 065

in the Act.

It will, of course, be remembered that s 64(1)(b)[97] contained an escape clause which related to "special circumstances". The meaning of this expression was considered by Evatt CJ and Fogarty J in the Full Court of the Family Court of Australia's decision in *In the Marriage of Schmidt*[98]. First, the Chief Justice was of the opinion[99] that such circumstances were difficult to define but she said that the court would not make an order contrary to the wishes of the child unless there was, "...such a risk in giving effect to those wishes that he welfare of the child would require the court to depart from those wishes." The risks to which she referred involved risks of some detriment to the child of a physical, moral or emotional nature. Further, it was also relevant for, the court to consider the degree of the risk as well as the strength of the wishes and the reason for them.

In *Schmidt*, the risk which was advanced lay in the fact that the mother was living in a lesbian relationship, which Evatt CJ commented was not of itself a disqualifying factor. After having analysed the nature of the mother's relationship and various arguments advanced by the father[100], the Chief Justice concluded[101] that there were no risks involved in the instant case which justified the court in disregarding the child's wishes. The 14 years old child had strongly expressed a wish to live her mother and there was evidence which showed that there was friction and discord when the child lived with her father and his new wife.

Fogarty J adopted a similar approach to that of the Chief Justice[102] and expressed the view[103] that it was difficult to lay down any precise definition of the phrase and, indeed, it was undesirable so to do. The judge was further of the opinion that it was, "...desirable to retain its flexibility of scope and application to the facts of particular cases, and this particularly so because experience in this jurisdiction constantly illustrates the myriad unusual circumstances which seem always to be the staple diet of custody cases and which it would be almost impossible to anticipate in advance".

It followed, he considered, that orders made by the Court ought not to be contrary to the wishes of the child unless it was concluded that so to was likely to produce a custodial situation which possessed real elements of detriment to the future welfare of the child or a realistically held

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97 Above text at n 81

98 (1979) FLC 90-685

99 Ibid at 78, 656

100 That the child might be at risk from sexual advances made by the mother's companion; that the mother visited other homosexual couples and took the child with her on such occasions; that the child was in danger of being ostracised by her friends because of her mother's relationship and that it was undesirable that there was no father figure in the household. These were issues which were canvassed in detail by Baker J. in In the Marriage of L (1983) FLC 91-353

101 (1979) FLC 90-685 at 78, 657

102 Yuill J, ibid at 78, 660, agreed with the Chief Justice

103 Ibid at 78, 660

apprehension that such may result. Here, perhaps at last, in a consideration of s 64(1)(b), as the legislation then stood, is something of a pre- 1975 awareness that there might be some (albeit not especially well clarified) situations where the wishes of the children might be subordinated to their welfare. At the same time though, Fogarty J was at very considerable pains to point out[104] that any eventual decision was very much a discretionary conclusion and that it would be in error for general conclusions to be drawn from individual factual situations.

That having been said, the importance of the child's wishes *per se* were further emphasised by Hogan J in *In the Marriage of K*[105]: in that case, a daughter of the marriage was aged over 14 years and had expressed the wish to have no further contact with her father. The judge emphasised[106] that the fact that a court might not agree with the propriety of the particular wishes did not justify it in departing from them. At the same time, though, Wood J, who it will be remembered was the judge in *Fitzgerald and Robinson*[107], adopted a rather diverse approach from that which he had adopted in that landmark case in *In the Marriage of Wotherspoon and Cooper*[108]. In the latter case, Wood J stated[109] that, as a matter of law, if a Court is to give effect to the wishes of a child in these circumstances, "...it must be satisfied that those wishes are soundly based and founded upon considerations as the ability and state of maturity of the child will allow".

That dictum, of course, represents settled law, at any rate insofar as the law can be regarded as settled! Wood J then turned his attention to the statutory provision and commented that he had, "...from the outset been unable to understand why the age of 14 has been selected by the legislature as the age at which a child can in effect make his own decision as to future placement..." With respect to Wood J, given the fact that there were no other restrictions on the discretion provided by the legislation, the age of 14 would not seem to be, to this writer at least, too outrageous: first, at common law (and in some civil law jurisdictions still[110]) it represents the age of puberty for male children – 12 years, which is the traditional age in respect of girls, might legitimately be considered as being too young. Second, the age of 14 does seem to represent a reasonable and effective compromise between removing any age constraint and specifying an age where compliance with any order might well be unenforceable.

Since the child in question was under the statutory age (he was the elder of two sons and aged 12), Wood J determined[111] that the way to

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[104] Ibid at 78, 660
[105] (1980) FLC 90-903
[106] Ibid at 75, 685
[107] Above text at n 91
[108] (1981) FLC 91-029
[109] Ibid at 76, 281
[110] See, A.H. Manchester, A Modern Legal History of England and Wales 1750-1950 (1980) at 389 ff; A.M. Pritchard, Leage's Roman Private Law (3rd Ed 1964) at 95ff
[111] (1981) FLC 91-029 at 76, 281

approach the issue was to apply the common law. That has already been discussed earlier in this article[112] and, generally, subordinated the wishes of children to their welfare. In *Wotherspoon and Cooper*, Wood J did precisely that: the judge found[113] that the boy was, "...expected to make a near-adult decision where the whole of his upbringing seem to indicate that he functions at a lesser level of emotional maturity then his years."[114] It also appeared that the child's father, with whom the boy had expressed the wish to live, would not have pursued the proceedings except at the boy's insistence. Thus, Wood J. ordered that the boy remain in the custody of his mother on the basis[115] that the child's wish for a change in custody could not be relied upon. Although, strangely perhaps, the judge noted that, in the event that the child maintained his wish to live with his father after he reached the age of fourteen, the parents would be well advised to prepare for the fact that there might ultimately be a change in custodial arrangements.

The totality of this decision is not easy properly to grasp: whilst critical of the 14 years restriction, Wood J had said that, when the child reached that age there did not appear to be any of the special circumstances found in the provision which would inhibit the child's choice, despite the attitude of the judge towards the child's immaturity which, given his mother's attitudes, might not be easy to overcome in the relatively short term. Hence, the perceived welfare of the child appeared, *Fitzgerald and Robinson* notwithstanding, to take precedence over clearly expressed wishes.

In 1984, there were significant changes to the relevant statutory provisions in the *Family Law Act*: the requirements for judicial consideration were contextualised and, although the wishes of the relevant children remained the first-named matter for courts to take into account, the age restriction (if such it were ...) was removed.[116] At the outset, there was little

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[112] Above text at n 64ff

[113] (1981) FLC 91-029 at 76, 282

[114] Wood J went on to say, ibid, that he did not wish to criticise the mother, "...but, in her evidence, she referred to him as her 'little boy' and said she would still regard him as her little boy even when he is 50'

[115] Ibid at 76, 283

[116] The new s 64(1) read as follows:
"In proceedings with respect to the custody, guardianship or welfare of, or access to, a child of a marriage –
(a) the court shall regard the welfare of the child as the paramount consideration;
(b) the court shall consider any wishes expressed by the child in relation to the custody or guardianship of, or access to, the child, or in relation to any other matter relevant to the proceedings, and shall give those wishes such weight as the court considers appropriate in the circumstances of the case;
(bb) the court shall take the following matters into account:
(i) the nature of the relationship of the child with each of the parents of the child and with other persons;
(ii) the effect on the child of any separation from –
(A) either parent of the child; or
(B) any child, or other person, with whom the child has been living;
(iii) the desirability of, and the effect of, any change in the existing arrangements for the care of the child;

in the way of significant case law, although, in *In the Marriage of Joannou*,[117] the Full Court were critical of a trial judge who had said that evidence of the four children of the marriage – aged 8, 7, 5 and 4 respectively – were "not particularly relevant" and that he was "not going to take any notice of their wishes," which the Full Court described[118] as being "a curious circumstance." The Full Court declined[119] to accept that suggestion and noted[120] that the expression of wishes might, or might not, have been helpful were they properly ascertained by a counsellor.[121]

Thereafter, *H v W*[122] apart, there was still a relative dearth of reported case law on the issue: however in *In the Marriage of White*[123] where there were four children of the marriage aged between 10 years and 18 months, the Full Court examined the proper response of a trial judge towards both the wishes of the children themselves and the provisions of the amended s 64(1). In *White*, the trial judge had examined a welfare report which had outlined the wishes of the two older children and which had concluded that, whilst there was a fine balance in the case, came down in favour of the father.[124] The wife appealed against the award of both custody and guardianship of the children to the husband on the grounds, *inter alia*, that the trial judge had failed to take account of the relevant matters set out in s 64(1),[125] as amended, and had failed to give adequate reasons for his ultimate decision and in relation to findings on the issues generally relating to custody. The Full Court upheld her appeal and ordered a re-trial. In reaching that decision, the Full Court commented[126] that, beyond the presentation of the case on the basis that all the children should stay

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(iv) the attitude to the child, and to the responsibilities and duties of parenthood, demonstrated by each parent of the child;

(v) the capacity of each parent, or of any other person, to care adequately for the child;

(vi) any other fact or circumstance that, in the opinion of the court, the welfare of the child requires to be taken into account.

(c) subject to paragraphs (a), (b) and (ba), the court may make such order in respect to those matters as it thinks proper, including an order until further order."

117 (1985) FLC 91-642. See also, In the Marriage of Daines (1986) FLC 91-705.

118 (1985) FLC 91-642 at 80,183 per Pawley, Fogarty and McGovern JJ

119 Ibid at 80,182.

120 Ibid at 80,183.

121 The major issue in this part of the case was the method of ascertaining children's wishes: see In the Marriage of Ahmed (1979) FLC 90-633; In the Marriage of Hall (1979) FLC 713. For general comment about these, and other cases, see F. Bates, "The Social Worker as Expert Witness in Modern Australian Law" (1982) 56 ALJ 330.

122 Above text at n 14 ff.

123 (1995) FLC 92-648.

124 The background to the dispute was that relations between the parties had become strained after the birth of the youngest child, when the wife's former boyfriend resumed contact with her. On separation, it was the wife's intention to move to a property with her former boyfriend and the children. The trial judge was also of the view that the wife had, "... set about to paint a picture of the husband as a fairly hard, uncompromising man who was not suitable to be sole parent of the parties' four children."

125 Above n 116.

126 (1995) FLC 92-648 at 82,564 per Barblett DCJ, Kay and Purvis JJ.

together, there was little in the way of consideration given by the judge at first instance to the interests of the younger children. In turn, that decision appeared to have been based on the elder children's expressed wish to live with their father.[127] The major emphasis which the Court cast in *White* was the importance of the trial judge's giving reasons – a consideration which had been clearly emphasised by Baker J in *H v W*.[128] White appears to have been an especially unfortunate first instance decision, as the Full Court were forced to state[129] that they had been unable to discover where the trial judge had paid attention to the matters which were set out in s 64(1) of the *Family Law Act*, particularly with respect to the younger children.[130] Although the matter of provision of appropriate and adequate reasons for decisions is an important issue, it is not central to the thrust of this article, which leads to yet another question.

Note has already been made of the relative dearth of reported case law in the period between 1984 amendments and the more radical[131] amendments in 1995. Quite apart from any considerations of coincidence, it seems likely that legal practitioners had taken the view that the underlying principles had been settled by the pre-1984 case law. However, as we have generally seen, those principles were not as clear as might initially have been thought.

III

Any discussion of the existing situation, however, is further confused by another decision of the Full Court of the Family Court of Australia – *Cowling v Cowling*,[132] to which little subsequent judicial attention seems to have been paid. There, the husband and wife had been married for almost 12 years and there were three children of the marriage: two, aged 17 and 15 respectively, who lived with the husband after separation and a third, aged 10, whom the wife had taken with her when the parties separated, although contact was maintained with the husband and siblings. At first instance, it was decided that the youngest child should live with the father.

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[127] At the same time, the Court noted, ibid at 82,565, that the parties (author's emphasis) should focus on relevant issues and leave aside matters which were, at best, peripheral. This, the Court considered, would require a significant reworking of the parties' affidavits.

[128] Above text at n 49.

[129] (1995) FLC 92-648 at 82,565.

[130] In particular, the Court commented, ibid, that, "Whilst the legislation lays down no firm rule, where it is proposed to remove the children from the day to day care of the person who has otherwise been their full-time caregiver all of their lives and about whom there has been little or no complaint in the carrying out of that task, it is incumbent upon the trial judge to all the more carefully.

[131] Not a view unanimously shared; see H. Rhoades, "Posing as Reform: the Case of the Family Law Reform Act" (2000) 14 Aust J. Fam L. 142.

[132] (1998) FLC 92-801.

In reaching that decision, the trial judge had considered the wishes of the child and gave them such weight as was appropriate having regard to the child's age and all other relevant circumstances. The trial judge found that the wife had been the child's primary caregiver during the parents' cohabitation and subsequently and then returned to the fact that, if the relevant child were to live with his father, he would be reunited with his older siblings, as well as being returned to the home and environment to which he had become accustomed during the subsistence of his parents' marriage. The trial judge concluded that it was in the youngest child's best interests to be reunited and brought up with his siblings. The mother's appeal to the Full Court of the Family Court of Australia was unsuccessful.

As regards the issue of the child's wishes, it was argued by the mother that the trial judge had attached inappropriate weight to the child's wishes and had failed to consider properly, or place sufficient weight on the circumstances surrounding the expression of those wishes. However, it is clear from the Court's judgment in *Cowling* that that was an issue of, at best, minimal importance. The Court were most clearly concerned[133] with whether the child in question, "... was, at the date of the hearing, living in an environment in which he was well settled." In the present case, the trial judge had made no such finding on that question of fact and, moreover, from an overall scrutiny of his reasons for decision, it was a reasonable inference that he was not living in such an environment. As regards the submissions based on the wishes of the children, the Court found[134] no substance in them, without commenting on them directly and stating that no cogent arguments had been advanced in their support.

The decision in *Cowling*, when compared with *R and R (Children's Wishes)* and *H v W*, takes the reader instantly into the controversy between the perceived *Rights* of children and their *Best Interests*, as might more objectively be perceived. Although there is available assistance from various sources, it should, at the outset be said that it is far from conclusive. Thus, one might, from the decision of the majority of the High Court of Australia in *Minister of State for Immigration and Ethnic Affairs v Teoh*[135] that assistance might be forthcoming from the *United Nations Convention on the Rights of the Child*, but, as will be seen provisions in that document are not infrequently vague or at odds in policy terms with Australian domestic law and there is evidence that the *Convention* has been taken far from seriously in Australia.[136]

On the issue of children's welfare, *qua* welfare, it is specified in Art 3(1) of the *Convention* that, "In all actions concerning children ... the best interests of the child shall be a primary consideration." Immediately, the

[133] Ibid at 85,007 per Ellis, Lindenmayer and Jordan JJ.
[134] Ibid at 85,008.
[135] (1995) 183 CLR 273.
[136] See J.N. Turner, "Panic Over Children's Rights" (1996) 1 (2) Newcastle LR 72.

contrast with s 65E of the *Family Law Act* 1975, as amended in 1995, becomes apparent: there, it is provided that, "In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.' In the Convention, the "best interests" principle, as it might be conveniently called, is still further weakened by a reference in Art 3(2) which requires States Parties, in understanding to ensure the proper care and protection of the child, take into account,"... the rights and duties of his or her parents, legal guardians and other individuals legally responsible for him or her ..." There is no equivalent in s 68F(2) of the amended *Family Law Act* of Art 3(2) which, in turn, is reinforced by Art 5 which requires States Parties to, "... respect the responsibilities, rights and duties of parents ..." On the specific issue of wishes, Art 12(1) states that, "States Parties shall ensure 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 being given due weight in accordance with the age and maturity of the child."

That article is, it will be remembered,[137] redolent of s 68F(2)(a) with its importation of the *Gillick* principle. It should also be remembered, in that general context, that, in its jurisdiction of origin, there have been attempts, in probably unfortunate situations, to undermine the already rather uncertain principles to which that case gave rise.[138]

Nor does it appear that much guidance is to be found in the structure of the new Part VII of the *Family Law Act*, as amended in 1997.[139] The leading decision is that of the Full Court of the Family Court of Australia in *In the Marriage of B: Family Law Reform Act 1995*[140] which, although not significantly concerned with the relevance of children's wishes, did give that Court[141] an opportunity to comment on the aims and organisation of the amendments. It was, unsuccessfully, argued by the husband that the 1995 amendments, particularly section 60B, represented a major change in family law policy. Section 60B sets out the object of Part VII and the principles underlying it: thus, section 60B(1) provides that, "The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children." Section 60B(2) goes on to state that the principles underlying these objects, except when it would be contrary to the child's best interests, are: first, that children have the right to know

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[137] Above text at n 4.

[138] See Re R [1991] 3 WLR 592; Re W [1992] 3 All ER 758.

[139] It should be said that this new Part VII has not gone uncriticised: see, H. Rhoades, "Posing as Reform: The Case of the Family Law Reform Act" (2000) 14 Aust J Fam L 142; H. Rhodes, R. Graycar and M. Harrison, The Family Law Reform Act 1995: The First Three Years (1995); S.M. Armstrong, "'We Told You So ...' – Women's Legal Groups and the Family Law Reform Act 1995" 2001) 25 Aust J Fam L 129.

[140] (1997) FLC 92-755. For comment, see R. Kaspiew, "B and B and the Family Law Reform Act" (1998) 12 Aust J Fam L 69.

and be cared for by both parents, regardless of whether their parents are married, separated, have never married or have never lived together; and, second, that children have a right of contact, on a regular basis, with both their parents and other people significant to their care, welfare and development; and, third, that children have a right that parents share duties and responsibilities concerning the care, welfare and development of their children and, finally, that parents should agree about the future parenting of their children. It was, hence, argued that the amendments had intended to move the focus of Australian family law from being a balancing process between the rights of parents to an emphasis on the basic rights to be found in section 60B. It was argued that section 60B now constituted defined normative criteria and that the rights of children were superior to, and, indeed, extinguished, in appropriate cases, any rights which parents might have.

The essence of the Full Court's decision[142] was that, in deciding cases under Part VII of the Act, the best interests of the child were the paramount consideration[143] and that all other provisions in the past were subservient to that. The Court continued[144] by stating that the basic issue involved in the appeal was the interrelationship between sections 65E, 60B and 68F. Section 60B was important, the Court stated,[145] because it represented a deliberate statement by the legislature of the object and principles to be applied in cases under Part VII.[146] At the same time, it was subject to the "best interests" test to be found in section 65E. As regards the structure of section 60B itself, the Court noted that the first limb of the section[147] could be regarded as an optimum outcome but was unlikely to be of great value in the adjudication of particular cases. The principles contained in section 60B(2) were more specific but were not exhaustive and their importance would vary from case to case. They provided guidance in relation to the Court's consideration of the matters contained in section 68F, which sets out the matters to which the courts must have regard in making

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[141] Nicholson CJ, Fogarty and Lindenmayer JJ.
[142] (1997) FLC 92-755 at 84,217.
[143] Family Law Act 1975 s 60E.
[144] (1997) FLC 92-755 at 84,218.
[145] Ibid at 84,220.
[146] Section 60B provides as follows: "60B(1) The objective of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, meet their responsibilities, concerning the care, welfare and development of their children. 60B(2) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:
(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
(b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and
(c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
(d) parents should agree about the future parenting of their children."
[147] Above n 146.

adjudications, as well as to the overall requirement of section 65E.

The Court went on to note that, in cases where no countervailing circumstances existed, the section 60B principles could be decisive, not merely because of their existence, but because they accorded with what was in the best interests of the particular children. "Where there were no countervailing factors," the Full Court said,[148] "the Court may normally be expected to conclude that it is in the best interests of the children to have as much contact with each parent as is practicable. However, to attempt to impose that in cases where the best interests of the children may not indicate that conclusion as appropriate is contrary to the legislation and contrary to the long established views of this and other courts which deal daily with the welfare or best interests of the child." At the same time, though, the Court had earlier commented[149] that it was clear that many of the aims of the Act, as amended in 1995, were long-term, educative and normative. By that was meant that they were directed towards changing the ethos, where parents separate, in the ways which they think and act in their roles as parents, in their approaches to resolving disputes about their children, in the ways in which lawyers act for the parents (and, indeed, their children), in the approach by the courts in the adjudication of disputes and, yet more broadly, in the attitudes of society generally.

From the point of view of this discussion, *B* represents something of an ambiguous approach: although it emphasises – as from the words employed in the legislation it must – the desirability of children maintaining contact with both parents subsequent to separation. However, it is clear that all (or any) of that is subject to the "best interests" consideration.

Taking all of this together, does the legislative structure suggest that a child who expresses a wish to maintain contact with a non-resident parent will be more likely to be given credence by a court than one who expresses the reverse? Given the state of the case law, it is all but impossible to suggest an answer, just as it seems now impossible, despite the organisation of s 68F(2) of the *Family Law Act*, to ascertain the place, in the priorities of the issues set out in that subsection, of children's wishes.[150]

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[148] (1997) FLC 92-755 at 84,221.

[149] Ibid at 84,213.

[150] Section 68F(2) of the Family Law Act, as amended in 1995, states that, in determining what are a child's best interests, courts must have regard to the following:

(a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;

(b) the nature of the relationship of the child with each of the child's parents and with other persons;

(c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:

(i) either of his or her parents; or

(ii) any other child, or other person, with whom he or she has been living;

(d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

Thus, despite the fact that children's wishes are placed first in the subsection cases, such as *Cowling*[151] seem to suggest that, where appropriate, the criterion is subordinate to the child's general environment or, as in *Re G*,[152] become subsumed into the totality of the criteria themselves or the evidence available to support each one.

Taking the structure of the 1995 amendments into account, it is hard to avoid, albeit in somewhat general terms, that Australian courts are, on occasions unwillingly, being moved to regard the best interests of children as being the dominant consideration. The issue, then of course, is whether the "best interests" criterion, to be found in the 1995 amendments to the *Family Law Act*, is the same as "welfare" in earlier case law or legislation. In *B*, the Full Court had said[153] that, although "best interests" had been substituted for "welfare," it seemed, "... to be clear and was accepted by all counsel in this appeal that no difference was intended from this change in terminology."

Hence, in academic platitude, what is now needed is a definitive statement on the issue from the Full Court of the Family Court of Australia. However, given the recent cases discussed in this article, that desirable development seems far to seek. Even were it to be forthcoming, it would, in every probability, take one into the further mire of seeking to ascertain how good best interests really are. And that is the subject of a wholly new disquisition.

(e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
(f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant.
(g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
(i) Being subjected or exposed to abuse, ill-treatment, violence or other behaviour or;
(ii) Being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;
(h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
(i) any family violence order that involving the child or a member of the child's family;
(j) any family violence order that applies to the child or a member of the child's family;
(k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
(l) any other fact or circumstance that the court thinks is relevant."

[151] Above text at n 123.
[152] Above text at n 7.
[153] (1997) FLC 92-755 at 84,217.