

## Book Review

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### Child Representation In Family Law – William J Keough LBC, Sydney, 2000

The representation of children in family law proceedings has been described as 'a Cinderella area of the law'.<sup>1</sup> Although there has been provision for the representation of children in proceedings involving custody, guardianship and access<sup>2</sup> has been possible since 1967,<sup>3</sup> it is only since the decision of the Full Court of the Family Court in *Re K* (1994) FLC 461 that representation of children in such proceedings has become more prevalent. The *Family Law Act* (Cth) 1975 as amended<sup>4</sup> allows for the appointment of a representative for a child in matters affecting the welfare of the child of the Court's own motion, or on application of one of

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<sup>1</sup> Chief Justice of the Family Court of Australia, the Honourable Justice Nicholson, quoted in W.J.Keough *Child Representation in Family Law* LBC Information Services, Sydney, 2000 p. 29

<sup>2</sup> These terms have now been replaced following amendments to the Family Law Act (Cth) 1975 in 1995 with terms including residence, contact and parental responsibility.

<sup>3</sup> With the insertion of Rule 115A into the Matrimonial Causes Rules; see *Ibid* pp. 41-42. The provision in this Rule for the appointment by the Court of a guardian ad litem was 'rarely used. There was no system established whereby a truly independent guardian ad litem could be located and the rules required that one of the parties meet the entire costs of the guardian.' The role was usually undertaken by a social worker who interviewed the parties and children and then provided the Court with a report: J. Ryan 'Separate Representation: A Child's Voice' in *A Child's Voice: National Training Program for Child Representatives appointed under the Family Law Act in the Family Court of Australia College of Law; Law Council of Australia and National Legal Aid* 2001

<sup>4</sup> Section 68L which replaced the previous s.65 following the enactment of the Family Law Reform Act (Cth) 1995. The reference in s.68L to the appointment of a child representative in 'proceedings...in which a child's best interest are, or a child's welfare is, the paramount, or a relevant consideration' and in s.65 following amendments in 1983 are more expansive than in the relevant section prior to the 1983 amendments and conceivably allows for such representation in s.79 property proceedings; cf. J.Ryan *op.cit.* p.27. Confusingly, in the 'Historical Introduction' of W. J.Keough *op.cit.*, p.8, reference is made to s.65 as being the currently applicable section; no doubt this is an editorial error.

the parties to the proceedings, or of the child him or herself. The Act does not, however, give any indication as to when such an appointment is to be made in particular proceedings, or what is to be the role and function of the child representative once appointed. The author of the book *Child Representation in Family Law*, William J. Keough, gives helpful guidance in this area. Keough outlines his opinion as to the role and functions of the child representative, based on a consideration of case law and practice directions of the Family Court, and provides suggestions and guidelines as to the practice of a child representative in terms of preparation for and conduct of the trial; all in the context of the historical development of child custody law in Australia and the effects of family breakdown upon the parties and the children of a relationship. Many of the theoretical and practical difficulties associated with the role of the child representative are investigated in the book. Clearly, Keough is an experienced family law practitioner and is able to shed light upon some of the practical issues that arise in performing that role by reference to his own experiences in cases in which he has acted as a child representative.

The concept of 'the rights of the child'<sup>5</sup> has become the focus of family law legislation in Australia with the introduction of the *Family Law Reform Act* (Cth)1995. That Act brought into domestic law emphasis upon the rights of the child<sup>6</sup> following ratification by Australia of the United Nations Convention on the Rights of the Child (the CROC) in 1990, which Convention attempts for the first time to define the concept of children's rights.<sup>7</sup> The *Family Law Reform Act* includes in Part VII, relating to children's matters, the objects and principles of the Part, which incorporate some provisions of the CROC into the Act. For example, in section 60B, the child is given 'the right to know and be cared for by both their parents' unless this is contrary to the best interests of the child.

The first part of Keough's book in particular is of interest to all those with a general interest in family law, as it examines, albeit in brief, the historical development of child custody law in Roman civil law, and Anglo-Australian law. Blackstone commented that originally '[t]he father had a natural right to the custody of his children'<sup>8</sup> but following the industrial revolution, the full time responsibility for child care assumed by women led to a common law preference in favour of mothers to have custody of children, at least of children under seven years of age, assisted by the *Custody of Infants Act* (the *Justice Talfourd Act*) 1839 and judicial decisions throughout the common law world. The *Matrimonial Causes Act* (Cth) 1959 included the 'best interests of the child' approach to child custody

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<sup>5</sup> Keough quotes Hilary Rodham in 'Children under the Law' (1973) 43 *Harvard Educational Law Review* at p.487: 'the phrase 'children's rights' is a slogan in search of a definition' (p.29). He argues that 'separate representation of children is likewise a concept in search of a definition' (p.29).

<sup>6</sup> See s.60B *Family Law Act* (Cth) 1975 as amended

<sup>7</sup> W.J. Keough, *op.cit.* pp.8, 30-31

<sup>8</sup> *Commentaries on the Laws of England* p.493

decision making, and the development of the law in this area moved away from the maternal preference towards a non-gender specific approach, at least on the face of the legislation and judicial decisions. This continued in the *Family Law Act (Cth) 1975*. The latter Act saw emphasis upon court counselling, and the involvement of the social sciences in child custody law. It also included in section 65 (later section 68L) provision for the appointment of child representatives in matters concerning the welfare of children before the Court.<sup>9</sup>

Keough investigates questions as to the purpose of having children represented. He argues that there is an international trend towards what he refers to as the 'childrenisation' of family law, as seen in the CROC and increasing representation of children. An important part of the representation of children is the fact that children should be 'involved' in the proceedings concerning them; Keough refers to the discussion as to this issue in the Family Law Council report in 1995 *Involving and Representing Children in Family Law*<sup>10</sup>. The notion of involving children in the proceedings, which can be achieved through the appointment of child representatives, is consistent with the provisions of the CROC.<sup>11</sup> Keough refers to the argument of Professor Peter Nygh, that 'inherent in child representation is the notion that the process involves a right of self determination on the part of the child. To fulfil this right of self determination a child must be able to express his/her wishes in court.'<sup>12</sup>

A thorough examination of the development of the law in relation to criteria for the appointment of a child representative in Family Court proceedings includes reference to the fact that '(t)raditionally, a child representative was only appointed in cases that involved allegations of serious misconduct towards a child',<sup>13</sup> however following suggestions by the Honourable Justice Lambert in his paper given at the Australasian Conference on Family Law in July 1980 and recommendations of the Joint Select Committee in its Report on the Operation and Interpretation of the *Family Law Act* in 1992, the landmark decision of the Full Court of the Family Court in *Re K* (1994) FLC 92-461 enabled a clear set of guidelines as to the circumstances in which a child representative ought to be appointed in any particular case. The Full Court commented in *Re K* that in developing the guidelines regard was had to the provisions of the CROC and that the guidelines were 'not only consistent with the

<sup>9</sup> see note 3 above

<sup>10</sup> Family Law Council, Canberra, May 1995; W.J. Keough op.cit. p.30

<sup>11</sup> Article 12.1: 'the child...capable of forming his or her own views (has) the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child'; Article 12.2: '...the child shall...be provided with the opportunity to be heard in any judicial...proceedings affecting the child, either directly, or through a representative or an appropriate body...'

<sup>12</sup> Prof. P. Nygh 'The 1995 CCH Family Law Seminar: The New Children's Provisions' Melbourne, 5 September 1995; W.J. Keough op.cit. p.34

<sup>13</sup> N.M. Eidelson and V. Papaleo 'Separate Representation in Light of *Re K*' (1995) Vol 10 No 2 Australian Family Lawyer, at p.36 quoted in W.J. Keough op.cit. p.53

requirements of Articles 9 and 12 of the Convention on the Rights of the Child, but further these objects.<sup>14</sup>

After reviewing judicial decisions in relation to the role of the child representative, including cases such as *In the Matter of P and P* (1995) FLC 92-615, Keough presents his view of the role, which essentially involves an assessment of the Gillick competency of the child or children being represented.<sup>15</sup> Put simply, he argues that should the child representative assess the child as Gillick competent, then the wishes of the child in relation to the matter before the court should be advocated; unless those wishes cannot be reconciled with the best interests of the child, in which case, as in the case of a non-Gillick competent child, the child representative assumes the role of *amicus curiae*, putting all relevant evidence before the court, the court being assisted to make a proper decision on the basis of submissions as to those facts and applicable law. In this latter event, the child representative becomes something akin to counsel assisting a Royal Commission.<sup>16</sup>

Ultimately the important and interesting question of *how* the child representative is to assess what is in a particular child's best interests, especially where those interests conflict with the expressed wishes of the child, remains unanswered; although Keough raises this as an issue, no answer is given. To be fair, this issue is beyond the scope of this book, with its emphasis on practical aspects of child representation rather than theoretical considerations. However, Keough does discuss what he refers to as 'a number of new paradigms in contemporary family law', including gay and lesbian parenting issues, the rights of grandparents, cross-cultural issues, and issues arising out of surrogacy arrangements,<sup>17</sup> and in so doing examines the challenging issues which arise in such matters for the child representative.

There is some emphasis and useful information in relation to techniques in interviewing a child in a manner consistent with that particular child's cognitive development, and reference is made to the

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<sup>14</sup> At p. 80,775; W.J. Keough *op cit* p.56. Keough suggests that perhaps this aim has not been achieved, in view of the fact that the Full Court in *Re K* said that 'plenary compliance with the Convention would require the appointment of a child representative in every case including financial matters where a distribution of property is made to a party that has the care and control of a child or children of the marriage and where such distribution is made having regard to the welfare of that child or children': p.56. As Keough points out, this would require amendment of the Family Law Act and a greater strain on the resources of the Court and the Legal Aid authorities.

<sup>15</sup> 'Gillick competence' is a term originating from the House of Lords decision in *Gillick v. West Norfolk and Wisbech Area Health Authority and Another* [1986] 1 AC 112 which refers to a child having a right to make his/her own decisions when he/she 'reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision' per Lord Scarman at 186.

<sup>16</sup> Full Court of the Family Court in *Bennett and Bennett* (1991) FLC 92-191

<sup>17</sup> *Ibid* p.9

theories of Piaget<sup>18</sup> and others. It is interesting that although Keough promises to 'identify what a child representative should look for and be aware of in representing children ranging in ages from the pre-verbal to the adolescent',<sup>19</sup> in the context of interviewing children, he does not cover suggested techniques and potential difficulties in interviewing infant and primary school aged children, although he deals with such matters concerning pre-verbal children, toddlers and adolescents.

Keough deals with pre-trial and trial preparation which is of great practical assistance to a less experienced child representative. Keough brings his wealth of experience to bear on all the many aspects of preparation of the matter following appointment as a child representative, referring to the pitfalls and problems which may be encountered, and how to avoid them.

Apart from practical considerations as to the role of the child representative, the book examines areas of great importance to child representatives: accreditation, training, funding, accountability and removal.

Although the national training programme developed by the Law Council of Australia, National Legal Aid and the College of Law in 1996 is documented, reference is made to the fact that there is as yet no national accreditation process in existence. Training consists of workshops on evidence gathering, procedural matters and decision making, preparation for trial and interim matters, conduct of the trial and post hearing and appellate matters.<sup>20</sup> Keough argues, quite properly, that training of child representatives should involve information as to child developmental psychology which is 'crucial to the delivery of effective child representation'.<sup>21</sup> This is so particularly in the light of the fact that most legal practitioners undergoing training of this kind would be familiar with procedural matters, but unless trained in psychology or education would have limited knowledge of child development. Keough also submits that there should be a requirement for knowledge in relation to child abuse and domestic violence indicators, in much the same way as is done in New York for professionals including psychologists, psychiatrists, physicians, nurses and teachers.<sup>22</sup>

Problems with funding of child representatives by government and how this affects Australia's international obligations are also examined.

<sup>18</sup> J Piaget *The Psychology of Intelligence* Routledge, London, 1950; 'Principle Factors in Determining Intellectual Evolution from Childhood to Adult Life' in D Rapaport (ed) *Organisation and Pathology of Thought* Columbia University Press, New York, 1951; 'Le relations entre la perception et l'intelligence dans le developement de l'enfant' (1956) 10 *Bull Psychol Paris* 376 - 381.

<sup>19</sup> W.J. Keough *op.cit.* p.105

<sup>20</sup> W.J. Keough, *op.cit.* pp.205-6

<sup>21</sup> *Ibid* p.200, and see Chapters 5, 6 and 7.

<sup>22</sup> Such professionals are required to undertake two hours of training on the identification and reporting of child abuse prior to becoming licenced: The Lisa Steinberg amendment New York State Law 1998. A similar course is referred to which was offered in 1996 in Victoria by the Prevention and Education Unit of the Victorian Department of Human Services.

Statistics show that following the decision in *Re K* there was an estimated increase in costs of child representative matters of \$5.934 million from 1993/4 to 1994/5 Australia-wide.<sup>23</sup> An uneasy situation has developed whereby in some cases, although the Court appoints a child representative, the Legal Aid authorities then refuse to fund such appointment. Issues arise in these cases as to whether the Legal Aid providers are thereby in contempt of Court, and whether the Court can compel those providers to fund child representatives. Whilst Legal Aid authorities attempt to have the costs of the child representative shared between the parties to proceedings, this is often not possible due to the financial circumstances of the parties. In many cases, the total cost of the child representative in any one matter is capped to a maximum amount.<sup>24</sup> The important decision of the High Court in *Re JJT; ex parte Victoria Legal Aid*<sup>25</sup> is discussed. In that case, the Court by majority held that Victoria Legal Aid was not responsible for the ongoing costs of a child representative, upholding an appeal against a decision of Faulks J in the Family Court of Australia at Melbourne, which included orders that the Victoria Legal Aid was to either provide future costs of the child representative and counsel, or facilitate the services of the child representative. Keough raises the issue at stake: if Legal Aid providers can limit the amount of funds available for child representatives in individual cases, is this not a failure to comply with the provisions of the CROC?

Keough's book is useful for those practitioners considering training to become child representatives, and for inexperienced child representatives, and many practical suggestions are made, relevant to the appointment following a court order pursuant to section 68L, through to gathering evidence, preparation for pre-hearing conference, interim applications to protect the best interests of the child, settlement negotiations following the release of a section 62G or order 30A report if relevant, advising the child/ren as to the effect of orders made and applying for court orders to allow continuing involvement in the matter following the trial. Appendices include a great deal of useful information including suggested draft orders which may be sought by a child representative, draft letters to experts (such as child psychologists) and others interested in the welfare of the subject children (teachers, doctors, counsellors) and draft subpoenae.

Keough, with his wealth of experience, provides practical tips and suggestions which are of great assistance to the less experienced child representative. All suggestions are based on experience of the writer and are supported by reference to recent case law. Many of the practical aspects referred to are of interest to any family law practitioner, for example, the

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<sup>23</sup> Legal Aid Office, Australian Capital Territory statistics, quoted in *Ibid.* pp.216 - 217

<sup>24</sup> See *S v S* (1997) FLC 92-762 where the Victoria Legal Aid refused to extend aid above the \$15,000 cap placed on services of the child representative.

<sup>25</sup> (1998) FLC 92 - 812

problems with issuing of subpoenas and with costs applications.

What Keough sets out to achieve is done admirably: informing practitioners how to be effective child representatives, with the only exception that he does not cover the specific issue of interviewing children of infant and primary school age. Readers with a more general academic interest, although not so interested in practical issues concerning representation of children, will find other parts of the book useful, as it provides a general overview of the issues associated with the history and development of the representation of children in family law proceedings, and helpfully refers the reader to many resources, including cases, articles and texts, to continue to build their knowledge in this interesting and developing area of the law.