DISCRETIONARY POWERS IN ADOPTION STATUTES

By A. C. CASTLES*

At common law legal adoption was unknown[1] and the rights of natural parents were inalienable.[2] Nevertheless, for centuries it has been recognized that it is customary for children to be adopted[3] and the law has allowed limited rights to arise from the *de facto* relationship of foster parent and child.[4] In the last eighty years adoption legislation has been introduced in most British countries. In Canada the first statute was passed in New Brunswick in 1873[5] and this was followed by an Act in Nova Scotia in 1896.[6] The other provinces have since followed suit.[7] New Zealand acted similarly in the Adoption of Children Act 1895 and Western Australia passed the first Australian adoption legislation in 1896.[8] The other Australian states were slow to follow. New South Wales first provided for adoption in the Child Welfare Act of 1923 and South Australia in 1925.[9] The passing of the English Adoption Act in 1926 focused more attention on the problem and Victoria[10] and Queensland[11] largely followed its provisions.

A feature of the legislation has been the discretionary powers vested in the courts.[12] In certain circumstances the parent's consent to adoption may be waived, and even after an adoption order is given a court may quash or rectify it. In New Zealand, New South Wales, South Australia and Western Australia the courts have a general discretion to discharge or vary the orders,[13] but in Victoria and Queensland restrictive limitations are made. Section 13 (1) of the Victorian Adoption Act 1928 provides that the discretion is not

* LL.B. (Melb.), Tutor in Law, University of Melbourne.

1 *Humphrys v. Polak* [1901] 2 K.B. 385, 390 per Stirling L.J.

2 *Poole v. Stokes* (1914) 110 L.T. 1020; *Fleming v. Roburite Co. Ltd.* (1910) 10 B.W.C.C. 176; *Boylan v. Hunter* [1922] S.C. 89; *Brooks v. Blount* [1923] 1 K.B. 257.

3 The Home Office and Scottish Home Department. Report of the Departmental Committee on the Adoption of Children, presented to Parliament, September 1954. Cmd. 9248, 2. A brief review of the report is contained in 18 *Modern Law Review* 274.

4 17 *Halsbury's Laws of England* (2nd ed., 1935) 1679.

5 36 Vic. c. 30.

6 1896, c. 9.

7 *See* Kennedy, 33 *Canadian Bar Review* 751.

8 No. 6, 1896. Adoption of Children Act 1896.

9 Adoption of Children Act 1925.

10 Adoption of Children Act 1928.

11 The Adoption of Children Act 1935.

12 In Queensland, the Director of the State Children Department.

13 New Zealand, Infants Act (1908), s. 22 (1); New South Wales, Child Welfare Act (1939), s. 170; South Australia, Adoption of Children Act 1925-34, s. 14 (1); Western Australia, Adoption of Children Act 1896, s. 9.

to be exercised 'unless the court is satisfied that the variation or discharge of the order if made will be for the welfare of the infant, due consideration being given for this purpose to the wishes of the infant, having regard to the age and understanding of the infant'. Section 16 (1) of the Queensland Act is to like effect.

Provisions for initially dispensing with consent have caused legislators more concern. Western Australia and New Zealand provided that consent should only be dispensed with in the case of a deserted child.[14] New South Wales provided in section 2 (e) of the Child Welfare (Amendment) Act 1924 that where a child over twelve refused to consent to adoption, a court could dispense with consent 'where in any special circumstances it deems it expedient so to do'. Section 2 (e) also added a provision that consent of the parent or guardian might be dispensed with if the child had been abandoned or deserted. The 1939 New South Wales Child Welfare Act has a different form. It permits waiver of consent 'where, having regard to the circumstances, the court deems it just and reasonable so to do'.[15] The original English Adoption Act provided for the waiving of consent where a parent or guardian had abandoned or deserted a child or where a person liable to contribute to the infant's support persistently refused to contribute to such support. There followed a general proviso that a court could dispense with consent in all the circumstances of the case.[16] The 1950 Adoption Act has eliminated this general proviso and consent can now only be dispensed with where a child has been abandoned, neglected or persistently ill-treated, or where the person whose consent is required 'cannot be found or is incapable of giving his consent or his consent is unreasonably withheld.'[17] South Australia provided that if a court is satisfied that any parent or person or society is unfit to have custody or control of the child it may, if it thinks fit, waive consent and give an adoption order.[18] Victoria and Queensland provided that consent could be waived if a child has been deserted or abandoned, if the parent or guardian cannot be found or is incapable of giving consent, or, being a person liable to contribute to the support of the infant, is a person whose consent ought to be dispensed with 'in all circumstances of the case.'[19]

Despite the ever-increasing number of adoptions[20] there is sur-

[14] New Zealand, s. 5 (f) of the 1895 Adoption of Children Act re-enacted in s. 18 (f) of the Infants Act 1908; Western Australia, No. 6, 1896, s. 5 (6).
[15] S. 167. [16] Adoption of Children Act 1926 (c. 29), s. 2.
[17] S. 3. [18] Adoption of Children Act 1925-34, s. 7 (1).
[19] Queensland, s. 5 (4). Victoria has an additional provision dealing with wards of the State, s. 4 (3) (c) (iv).

prisingly little authority on the interpretation of these statutory powers. The courts have found themselves dealing with questions of status when the ties of parenthood are severed irrevocably. This has been held out as a basic point of departure from the law relating to custody where the welfare of the child is given paramount consideration. What adoption authorities there are, have tended in the main to show a marked reluctance to depart from the common law emphasis on the inalienable rights of the natural parent in preference to giving primary consideration to the child's welfare.

In *R. v. M.*[21] Chief Justice Herring in the Victorian Supreme Court refused to grant an adoption order although he considered the natural mother was unfitted to have her child, and ordered accordingly. The mother sought the return of a nine-year-old child who had been living with foster parents since she was eight months old. His Honour held that it would be cruel to take the child away from its foster parents but refused to make an adoption order in their favour by exercising the discretion vested in him by section 4 (3) of the Adoption Act. Reading the proviso in the light of the context and the object of the Act His Honour considered that a Victorian court should limit the operation of the proviso to circumstances where a parent had been guilty of some serious parental misconduct.[22] His reasoning was in line with the approach taken by Martin J. in the other leading Victorian authority on this section.[23]

In England, although the statutory provision on dispensing with consent is now different from Victoria, the general trend of authority stems from the same approach to interpreting discretionary powers. Courts have taken great care to stress the underlying difference between adoption and custody. Two decisions by the Court of Appeal on the interpretation of the Adoption Act 1950[24] have maintained this position.[25] In the *Hitchcock* case Chief Justice Lord Goddard stated that courts went astray in their approach to adoption problems when they filled their minds 'with considering what is for the benefit of a child.'[26] Lords Justices Somervell, Jenkins and Hodson in *In re K.*, referred to the *Hitchcock* decision and expressed their complete agreement with it.

Even where a provision in an adoption statute has stated that the 'welfare' of a child is to be the main consideration in certain circum-

[20] Cmd. 9248, 4; *The Age* Melbourne, 23 June 1955, p. 2.
[21] [1946] V.L.R. 106.
[22] [1946] V.L.R. 106, 114.
[23] *In re B*, [1939] V.L.R. 42.
[24] 14 Geo. 6, c. 26.
[25] *Hitchcock v. W. B. and F.E.B. and others*, [1952] 2 Q.B. 561; *In re 'K' (An Infant)*, [1953] 1 Q.B. 117.
[26] [1952] 2 Q.B. 561, 569.

stances, the primary emphasis in Victoria has remained on the maintenance of blood ties. In *A v. C–S (No. 1)*[27] two judges of the Full Court went to considerable pains, in interpreting section 13 of the Adoption Act, to conform with this view. A child had been adopted by Mr and Mrs C–S. In making the adoption order a County Court Judge dispensed with the mother's consent. Evidence was adduced and accepted that the mother was incapable of giving her consent because of her mental condition. However, she recovered soon after the order was made. An application was brought on her behalf to the Supreme Court by the Attorney-General. At first instance Dean J. dismissed the application. His Honour seems to have considered that the mother-child relationship was irrelevant to the exercise of his discretion. He concluded from the expert evidence that: 'The evidence of the psychiatrist and psychologist satisfied me that no special bond exists, which cannot exist between the child and the permanent mother substitute, given a suitable substitute.'[28] As a result, his decision turned on the view that 'the welfare of the child does not require that the child be under the control of the mother rather than the adopting parents . . . For the purposes of section 13, which places on those who seek the discharge of an adoption order the onus of showing that it is for the welfare of the child to discharge the order, it is not proper to begin with the assumption that it is for the welfare of the infant that the natural parent should be the legal parent, and the fact of natural parentage is not itself relevant to the inquiry as to what is for the child's welfare.'[29] His Honour then dismissed the application, stressing that future recurrences of the natural mother's mental illness could be detrimental to the child, and might destroy or weaken her security.

The Full Court, however, emphatically disagreed with Justice Dean's views, and remitted the case for a re-hearing. In particular, Herring C.J. and Sholl J. reasserted the approach shown in *R. v. M.*[30] and the Court of Appeal decisions.[31] They disagreed both with Dean J.'s acceptance of the psychologist's evidence and the restrictions he placed upon himself in interpreting section 13 (1). The entire court held that in exercising the discretionary power in 13 (1) a court should not exclude from consideration the advantages of the natural mother-child relationship. Included in this, on the facts of the case, were the prospects of the child's future happiness being affected *by the child knowing* of the injustice of allowing the adoption order

[27] [1955] A.L.R. 943. [1955] V.L.R. 340. [28] Quoted Herring C.J., *ibid.* 953.
[29] *Ibid.*, 953. [30] [1946] V.L.R. 106.
[31] *Hitchcock's* case [1952] 2 Q.B. 561. *In re 'K'*. [1953] 1 Q.B. 117.

to stand and the possibility of this leading to a recurrence of the mother's mental illness.

Chief Justice Herring pointed out that Dean J. had called to his aid tests normally applied in custody cases. This led to the case being a straight-out contest between the parties. He held that 'in the solution of a problem of such far reaching importance for the child, many of the considerations that Courts are accustomed to take into account in custody cases appear somewhat trivial.'[32] His Honour concluded that the welfare of the child was *prima facie* best served by restoring the natural mother-child relationship. Dean J.'s refusal to do this, in his opinion, vitiated his judgment. Sholl J.'s judgment was to like effect. He cited *In re K.* and drew on that decision to hold that the very form of the adoption legislation recognized that natural ties were most important of all, except in very special circumstances.[33] On the remittal, Smith J. quashed the order.[34]

In the light of this preceding authority the High Court decision of *Mace v. Murray*[35] seems to be somewhat surprising. The net result was that a mother was permanently deprived of her infant son although she sought his return before an adoption order was made. Each of the nine judges who considered the case agreed that she had a *bona fide* desire for the return of the child. Despite this, the High Court allowed the child to be adopted.

The case turned on the interpretation of the proviso to section 167 (d) of the N.S.W. Child Welfare Act 1939. This gives a court power to dispense with consent to adoption 'where having regard to the circumstances, the court deems it just and reasonable so to do.' As it stands, the proviso is close to its Victorian counterpart in Section 4 (3) of the Adoption of Children Act.

Before going to hospital where her son was born on 12 November 1952, Miss Murray informed the hospital that she wanted her child adopted. The hospital authorities agreed to her request that she should never see the child. Two days after her son's birth Miss Murray was visited by a Child Welfare Department officer. She wavered about signing a consent form to allow the adoption to proceed. The officer did not press the matter but returned two days later. Miss Murray then signed the usual consent form, although the officer again detected signs of indecision. At another interview a few days later Miss Murray stated that she knew adoption was in

[32] [1955] A.L.R. 943, 950. [33] [1955] A.L.R. 943, 976.
[34] *A. v. C–S (No. 2)*, [1955] A.L.R. 979; [1955]. V.L.R. 376.
[35] [1955] A.L.R. 292. Leave to appeal against this decision was refused by the Privy Council in October 1955, 20 A.L.J., 387.

the child's best interests. The child was subsequently handed over to a Mr and Mrs Mace. Before taking him the Maces were warned that he would have to be returned if no adoption order resulted. They later signed a document recognizing this position. However, they were given to understand that this was a remote possibility. Because of the Christmas legal vacation the adoption order was not made immediately. Before the proceedings came up for hearing Miss Murray asked the officers of the Department on 9 January 1953, to have the child returned to her. Two weeks later she signed a document formally withdrawing her consent. Meanwhile the Maces were informed by the Department that they would have to return the child. They refused. On 9 April, on the motion of Miss Murray, a rule nisi for a writ of habeas corpus was made absolute by the New South Wales Supreme Court. Mrs Mace fled with the child to Canberra, outside the court's jurisdiction. She returned to New South Wales on 14 April. In the intervening period the Maces filed an application for the adoption of the child in the N.S.W. Supreme Court. On 16 April they were granted by the High Court leave of appeal against the order making absolute the habeas corpus rule nisi. By consent, however, the proceedings were stood down to await the outcome of the adoption proceedings.[36]

Because of the undoubted importance of this decision as a major authority in the interpretation of discretionary powers in adoption statutes, a full examination of this case is necessary.

After a ten day hearing at first instance, McLelland J. exercised the discretion vested in him by the proviso and granted an adoption order to the Maces.[37] Miss Murray appealed to the Full Supreme Court of New South Wales which reversed the decision by a 2-1 majority.[38] The majority judgment was handed down by Street C.J. and Maxwell J. Throughout their joint judgment they emphasized that a clear distinction had to be made between the law relating to adoption and that relating to custody. They approved the approach shown by the Court of Appeal in interpreting the English Adoption Act. Dealing with the proviso they held that the interpretation of 'just and reasonable' was limited by the context under discussion. This was the question of consent. As a result they concluded that the only question to be asked was the reasonableness or unreasonableness of the parent's refusal to give consent. Discussion of 'welfare' was precluded by section 167 (b) which made 'welfare' an

[36] The facts are fully set out in *Re Murray* (1955), 55 S.R. (N.S.W.) 88.
[37] *Re Murray* (1953) 70 W.N. (N.S.W.) 251.
[38] *Re Murray* (1955) 55 S.R. (N.S.W.) 88.

essential pre-requisite to any adoption order. Their Honours did admit, however, that in some circumstances the consideration of consent and welfare might overlap. They then listed abandoning, neglecting or consistently ill-treating an infant, grave dereliction of parental duty or a mode of life which made it impossible to permit a child to remain with its natural mother, as examples of where a court might dispense with consent. But where a mother *bona fide* wanted to keep her child, then no adoption order should be made. As McLelland J. had found in Miss Murray's favour in this regard, Chief Justice Street and Maxwell J. seem to have held this sufficient to conclude the appeal in her favour. They went on, however, to deal with her background because of the nature of the personal attack which had been made on her in argument.[39]

Roper C.J. in Equity in the dissenting judgment refused to apply the same interpretation to section 167. He held that the four paragraphs of the section could not be considered apart from each other. The welfare of the child was a relevant although not conclusive factor in considering the discretion given by the proviso. In his opinion, McLelland J.'s finding that the child's best interests would be served by making the adoption order, after taking into account the question of blood ties as a relevant consideration, was the correct result.

The High Court handed down a unanimous judgment by Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.[40] They restored McLelland J.'s original decision. At the outset the High Court criticized the way in which the New South Wales Full Court had approached the appeal. Street C.J. and Maxwell J. had stated that the case had been re-argued before them as if it was a re-hearing in the fullest sense.[41] The High Court held that an appellate court had no power to exercise a discretionary power unless they were certain it had not been properly exercised already. This was so even if counsel had expressly given an invitation to decide the case afresh. But their decision does not rest on this procedural point. Referring to the Full Court's interpretation of the proviso, Their Honours held that the majority judges had mistakenly used *In re K.*[42] as authority for their construction of it. They pointed out that *In re K.* dealt with section 3 (1) (c) of the 1950 English Adoption Act. This states that a court might dispense with consent only when it is being unreasonably witheld. The court held that the New South Wales proviso was necessarily of wider application. Construing the

[39] (1955) 55 S.R. (N.S.W.) 88, 99.
[40] [1955] A.L.R. 292.
[41] (1955) 55 S.R. (N.S.W.) 88, 95.
[42] [1953] 1 K.B. 117.

section they took into account the consequences flowing from Miss Murray's initial consent, her fitness to have custody, her ability to provide a home and the welfare of the child in addition to the question of blood ties. They justified this approach by holding that the case was one in which *special considerations* must apply. Once a mother, with premeditation and full knowledge, has excluded a child from her life from the moment of its birth, the normal emphasis on the natural mother-child relationship cannot be given the usual overwhelming weight. In a case with such special circumstances, facts which show that a mother is unfitted by character to be a mother in a worthwhile sense, assume 'an importance which otherwise they well might not have'.[43] The court then found in favour of the Maces, holding that Miss Murray was 'removed from the category of ordinary parents naturally fitted for the upbringing of children.'[44]

It is submitted that this decision marks a change in emphasis in the interpretation of discretionary powers in adoption statutes. McLelland J. took into account similar factors to those applied by the High Court. This led to what, in the view of the New South Wales Full Court majority, was a contest on the facts between the parties. Chief Justice Street and Maxwell J. refused to allow this. The High Court's statement that the Full Court's decision was dependent upon *In re K.*[45] is not borne out by an examination of that judgment. Their Honours do approvingly cite several passages from *In re K.* and *Hitchcock's* case,[46] but their examination of these decisions is not conclusive for their case. They are cited to emphasize the difference which Their Honours hold to exist between custody and adoption law. For example, the discussion in *In re K.* dealing with the question whether consent has 'unreasonably' been withheld, is quoted to stress that '*prima facie* the consent of the mother of an illegitimate child or of the parents of a legitimate child is an indispensable and necessary prerequisite to the making of an order, and only in special circumstances would the order be made in face of the express opposition of the mother.'[47] Their Honours then embark on a separate investigation of the New South Wales provision. Independently of *In re K.* they hold that the proviso should be considered in the light of the subject matter under discussion – the consent of the mother. To assist their case they point out that the Child Welfare Act already makes adequate pro-

[43] [1955] A.L.R. 292, 298.
[44] *Ibid.*, 300.
[45] *Supra.*
[46] *Supra.*
[47] (1955) 55 S.R. (N.S.W.) 88, 97.

vision for the situation where a mother fails to perform her parental duties, and that welfare must be considered under section 167 (b).[48] The High Court does little to traverse this finding. Instead it relies upon what it terms 'special circumstances' to justify its decision. Miss Murray's initial consent to adoption made *Mace v. Murray* a case of a 'peculiar kind', the court holds. By doing this the High Court allows itself to draw away from the preceding authority.

In *Re Hollyman*[49] the Court of Appeal held that a 'parent may very well feel one thing at one moment and another thing at another.' The important question to be asked, the court said, was whether there was consent or not at the date of the adoption proceedings.[50] Although dealing with the new proviso inserted by the 1950 Act, Jenkins L.J. in *In re K.* made some pertinent remarks in this regard. 'But why should a parent not change his or her mind on a vital question of this sort?', he asked. He held that the fact that a parent had signed a documentary consent which was subsequently withdrawn 'seems to us to be wholly irrelevant.'[51]

In the Adoption of Children Act 1954 the Victorian Legislature recognized that a natural parent should be given some time to change his or her mind. Section 3 provides that any consent may be revoked within thirty days after signing a consent form. After that period consent is irrevocable. The difficulties inherent in the statutes which do not have this provision, clearly exemplified by *Mace v. Murray*[52] and *The Queen v. Biggin, Ex Parte Fry*,[53] should largely disappear in Victoria. Nevertheless, it is questionable whether this amendment is in line with the spirit of the existing adoption legislation. The Scottish Home Department Report refused to countenance a proposal that consent should be irrevocable after a three months period and sounded a warning that there were several moral and practical objections to it.[54] 'It seems to us that it would be wrong to provide that a mother's consent should be irrevocable three months after she had given it in those not uncommon cases where after three months the mother marries and can offer a home. Again the position of a child whose parents had given irrevocable consent would be unfortunate indeed if the prospective adopters subsequently rejected him, as they have every right to do (and it

[48] (1955) 55 S.R. (N.S.W.) 88, 98. [49] [1945] 1 All E.R. 290.
[50] The English proviso was then in the same terms as the present Victorian provision.
[51] [1953] 1 Q.B. 117, 132. [52] *Supra.*
[53] [1955] A.L.R. 222, Heard before the 1954 Act came into operation.
[54] Cmd. 9248, paragraph 118.

would obviously be iniquitous to insist that a child should be adopted by unwilling persons)', the report states.

The High Court's finding of 'special circumstances' allows *Mace v. Murray* to turn finally to an assessment of the relative worth of the Maces or Miss Murray.[55] Although Their Honours concede that in what they term the 'ordinary case', a mother's moral right to a child should be inalienable they lay no great stress on the difference between adoption and custody law. The tenor of their judgment calls for an increasing emphasis on 'welfare' as a more important factor in interpreting adoption discretionary powers.

How far this view may alter the authority of Victorian cases on the proviso to Section 4 (3) of the Adoption Act, is an open question. At first glance it would seem that Herring C.J.'s limitation of its operation in *R. v. M.*[56] to parental misconduct is too restricted, as Miss Murray never had an opportunity to misconduct herself in a parental capacity. It might be argued that the New South Wales proviso is wider in its application than its Victorian counterpart. Roper C.J. in Equity took this view in *Re Murray*. He said that he thought the New South Wales provision was wider than the pre-1950 English provision[57] which was substantially similar to the present Victorian proviso. It is submitted, however, that the addition of the words 'just and reasonable' adds nothing to Victoria's provision that consent may be dispensed with 'in all the circumstances of the case'. For all practical purposes the provisos are the same. A real point of departure may be the different contexts of the two sections. Section 4 (3) comes from the English Adoption Act of 1926. Section 167 is re-enacted from section 5 of the Western Australian Adoption of Children Act 1896. Added to this is the operation of section 3 of the 1954 Adoption (Amendment) Act which eliminates the effect to be given to withdrawal of consent by permitting renunciation.

It is open to considerable doubt how far this shift in emphasis to 'welfare' is desirable. There is spirit abroad among some psychologists, as exemplified by the evidence accepted by Dean J. at first instance in *A. v. C–S (No. 1)*,[58] that no special bond exists between natural mother and child that cannot exist between a child and permanent mother substitute. An acceptance of this view necessarily leads to an acceptance of the change in approach to interpreting adoption discretionary powers. But the Scottish Home Department

[55] [1955] A.L.R. 292, 299 and 300. [56] [1946] V.L.R. 106.
[57] (1955) 55 S.R. (N.S.W.) 88, 103.
[58] Referred to in the Full Court decision. [1955] A.L.R. 943.

Report issues a timely warning against accepting this view without a good deal more consideration. The report points to the fact that the view is still strongly held in many quarters that there is no substitute for blood ties.[59] Added to this the report gives a warning against accepting 'welfare' as a major factor in allowing a court to dispense with consent. It states that it seems 'inescapable' that a different approach must be brought to bear in adoption in contrast to custody law. 'We are fortified in our view by the evidence of a number of witnesses who foresaw the danger that, by assigning paramount importance to the welfare of the child, the way would be open for any parent who, for a time, gave up the care of his child to be deprived permanently of the child, merely because adopters had been found for him who appeared to be more suitable or financially better able to bring him up than the natural parents. We think that this danger is not so remote as it may sound, particularly in these days when many suitable would-be adopters are seeking children', the report says.[60]

The report goes as far as recommending the removal from the English statute of the ground that adoption can proceed if consent is unreasonably withheld. In its place it urges that further specific grounds should be set out enabling a court to dispense with consent only if the parent has failed to discharge his responsibilities.[61]

In conclusion, it is submitted that the existing adoption legislation calls for great emphasis to be placed on the maintenance of natural ties. The authorities which make a clear distinction between custody and adoption law conform with the spirit of this legislation. Welfare should only be an incidental factor in determining whether a court should exercise a discretionary power which may lead to the permanent severance of the natural parent-child relationship.

[59] *Ibid.*, paragraph 119.
[60] *Ibid.*, paragraph 119.
[61] *Ibid.*, paragraph 120.