Equivocation in the Family Court: The Sexual Abuse of Children and Adults' Rights to Justice *M v Y* and *S v S*

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I: INTRODUCTION

One of the most potent concepts within the philosophy of the Family Court is contained in s 23 of the Guardianship Act 1968: that the welfare of the child shall be the first and paramount consideration in any decision about that child, and that the conduct of any parent shall be considered only in so far as it is relevant to the welfare of the child.

The recent High Court decisions of Temm J in *Y v M*[1] and Thomas J in *S v S*[2] have articulated a previously unspoken division within the Family Court as to the approach to be taken to s 23 in custody and access proceedings where sexual abuse is alleged against one parent. Despite the Court of Appeal having reviewed both cases,[3] many issues remain unresolved.

The conflict arises when children's rights clash with adults' rights. Resolving this conflict is a question of policy. The Court of Appeal stressed that Temm J and Thomas J agree on the law in that both ostensibly recognise s 23, and the leading case of *M v M*[4] in the High Court of Australia. Both lower court judges also recognise that there are two stages of inquiry in a custody hearing: first, ascertaining the truth or otherwise of allegations made, and second, determining the best placement for the child in the light of the court's findings in stage one. However,

1 [1993] NZFLR 609.
2 [1993] NZFLR 657.
3 *M v Y* [1994] 1 NZLR 527 (CA); *S v S* [1994] 1 NZLR 540 (CA).
4 (1988) 166 CLR 69 (HCA).

the judges differ in the extent to which they uphold s 23 in response to other competing policy considerations.

As a statement of policy, s 23 is highly contentious because, by its very nature, it must often conflict with adult rights and interests. To say that the interests of the child come first threatens both adults' power over their children and adults' rights vis à vis one another. The policies clearly conflict and can only exist at one another's expense. It is unmistakably true that "when it is said that a court need only find a "possibility" of wrongdoing sufficient to intervene [on the basis of the need to protect the child] the citizen's right to be judged according to the law is not recognised".[5] Yet, it is equally true that when "the focus ... shift[s] from the welfare of the child to the truth of the allegation [against the parent] ... it is easy to lose sight of the child, innocently caught up in the midst of the strife".[6] All the judges recognised that there is a choice to be made. As the Court of Appeal stated, the child's interests had to be weighed against those of the adult.[7] Temm J made this trade-off explicit when allowing multiple interviews of the child. He stated:[8]

> The need to protect a child from unnecessary interrogation is obvious, but at the same time, there is also an equal need for full and adequate enquiry as to whether sexual abuse has occurred so that the person accused can see justice done.

In general terms, Thomas J opted for total commitment to the paramountcy of the child's welfare above all other considerations, whereas Temm J gave recognition to the competing rights of the accused adult to due process. Thomas J, in what was essentially a decision in reaction to *Y v M*, strongly criticised Temm J's judgment for seriously eroding the pre-eminence of s 23, and failing to protect the interests of children.

In the Court of Appeal, Temm J's decision was overturned and Thomas J's was upheld. For that reason, it might seem that the issue is dead and any re-examination is purely a post-mortem. However, it is submitted that this plain verdict has not finished the matter. To a large extent, s 23 made the result inevitable. Therefore, what was important was not that the Court of Appeal dismissed Temm J's approach, but the extent of its condemnation of it and the way it treated Thomas J's approach. Although the Court of Appeal did overturn Temm J and uphold Thomas J, it did neither unequivocally. Instead, it stressed that Thomas J's approach is only one among many, thereby reserving a significant grey area of policy discretion, and arguably giving Temm J's approach some scope.

In this way, Temm J and the Court of Appeal show that if s 23 is the most fraught of principles, it is also the most fragile. Where adult power reigns supreme, so also do adult interests, and children's interests exist on sufferance only.

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5 Supra at note 1, at 640.

6 *M v Y*, supra at note 3, at 533 per Hardie Boys J.

7 *S v S*, supra at note 3, at 545 per Gallen J.

8 Supra at note 1, at 636.

II: FACTS

Both cases concerned the custody and access arrangements for very young boys where sexual abuse had been alleged by the custodial parent against the non-custodial parent - in both cases the mother against the father.

M v Y concerned the arrangements for E, five years old at the time of trial, and living with his mother and her de facto partner ("the stepfather"). Due to the dispute, E had been out of contact with his father for most of his life.[9] The mother alleged sexual abuse on the basis of E's sudden distress over access visits and fear of the stepfather, and a variety of verbal disclosures and some physical evidence seen by the stepfather, the grandmother, and herself. The court-appointed psychologist supported the allegation, while the father's witness, a psychotherapist, did not. The father applied to the Family Court for joint custody and unsupervised access, arguing that the accusation was merely a ploy to win custody. The Family Court found that sexual abuse had occurred. However, notwithstanding this, it ordered supervised access. This was in line with the recommendations of the court-appointed psychologist.[10] The father appealed to the High Court. Temm J overturned the Family Court's findings on sexual abuse and gave joint custody. His Honour subsequently ordered immediate unsupervised access. It is clear from comments in the Court of Appeal that the first attempt at access was unsuccessful, and the mother appealed.[11]

S v S concerned the custody and access arrangements for pre-schooler L, living with his mother. The mother alleged that the father had sexually abused L. This was based on her observations of L's overt sexual behaviour, conversations she had had with L, and inappropriate behaviour on the part of the father. The court-appointed psychologist altered his initial view that abuse was likely, to one that it was less than likely. The father's witness felt abuse had not occurred. In neither case did the father's witness have an opportunity to interview the child. The Family Court Judge, although unable to draw any clear conclusions, stated there was nonetheless a "real possibility"[12] that abuse had occurred, and therefore ordered that access be supervised. In the High Court, Thomas J upheld the Family Court's finding on sexual abuse and dismissed the father's appeal, but allowed the mother's cross-appeal. His Honour suspended the order for supervised access for six months. The main reasons for suspending access were that first, a time lapse would allow the child to complete a therapy programme, second, facts might emerge to resolve whether abuse had occurred, and third, it would give the mother and son time to heal their relationship, which had deteriorated under the strain of unsupervised access.[13]

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9 *M v Y*, supra at note 3, at 536 per Hardie Boys J.

10 Ibid, 535.

11 Ibid, 531.

12 *S v S* [1992] NZFLR 803, 810.

13 *S v S*, supra at note 2, at 683-685.

In both cases, it was the presence of sexual abuse allegations that drew out the conflict surrounding s 23. The seriousness of sexual abuse for both the adult implicated and the child victim is juxtaposed against the extreme difficulty of either proving or disproving that it occurred. As Thomas J points out, sexual abuse allegations:[14]

> [P]ose an acute problem for the Courts simply because of the difficulty in determining whether [abuse] has taken place ... allegations frequently are neither conclusively proved, nor disproved.

The courts face the dilemma that a finding of sexual abuse must not be made lightly, and the highest standards of proof should be adhered to.[15] Yet, the child's physical and emotional survival are severely endangered if, because it cannot be proven with absolute certainty that sexual abuse has occurred, he or she is allowed to remain in a situation where sexual abuse is nonetheless possible, or even highly likely. Thomas J comments:[16]

> [I]t would be easy for the Courts to find that the allegations of sexual abuse had not been established to the requisite standard of proof and dismiss them from contention. But to make that finding and no more may result in the child being exposed to an appreciable risk of being sexually abused while in custody or during access visits.

Hardie Boys J stated in *Gooch v Gooch*:[17]

> It would be a terrible thing for the children if I were to entirely reject their allegations and order their lives on the basis that there was no substance in them, and yet in fact for them to be true.

III: EVALUATION

1. Temm J's Approach

Temm J's concern is that in the Family Court s 23 has been allowed to dominate to the extent that the fundamental right to justice of parents accused of abuse has been violated. This is exemplified by the courts allowing a mere

14 Ibid, 659.

15 The Court of Appeal agreed with Thomas J that this, in effect, means "little if any less than ... beyond reasonable doubt": *S v S*, supra at note 3, at 546.

16 Supra at note 2, at 659.

17 High Court, Christchurch. 22 April 1983 M156/82 Hardie-Boys J. Cited in *S v S*, supra at note 2, at 659.

possibility of sexual abuse to restrict custody and access. In his Honour's words, the rights of the accused:[18]

> [A]re so elementary that like so many simple propositions [they] can be overlooked, and when it is said that a court need only find a possibility of wrongdoing sufficient to intervene, the citizen's right to be judged according to the law is not recognised.

Instead, Temm J asserts three competing principles. The first breaks into two distinct assertions. First, "every citizen has the right to be judged "according to the laws and usages of New Zealand"",[19] and that "[w]here a citizen ... is accused of sexual abuse and denies the accusation, he has the right to ask the Court to make a finding on the matter and the Court should do so."[20] Second, the laws of New Zealand dictate that "[i]n this civil case, [the] standard [of proof] is the balance of probabilities, proved to a point "which is commensurate with the occasion"".[21] The third principle, of course, is contained in s 23.[22]

2. The Assumptions Underlying Temm J's Approach

Temm J's approach is predicated on two assumptions. The first is that the Family Court, whatever special functions have been grafted onto it, is still primarily a traditional court of law both in the sense of adjudicating between two conflicting positions and in passing judgment. Second, his Honour's approach stems from his acute awareness of sexual abuse as a criminal charge with serious implications for the falsely accused.

These assumptions have several consequences. The first is his Honour's conviction that in the interests of justice the Family Court must accord to those it judges the fundamental protections of an accused person tried in any other court. That is, the rights to be heard when an allegation is made, to have a decision made, and for that decision to be made on the basis of proper legal standards.

The second consequence is that the main focus of the hearing becomes the trial of the implicated parent on a charge of sexual abuse. The Court of Appeal noted that Temm J put the "focus ... narrowly on the allegation. Indeed, in his second judgment, Temm J said that was the only issue".[23] Thomas J identifies the basis of Temm J's approach as being "his perception of the issue of sexual abuse as an accusation in the nature of a criminal charge against the parent which the Court must determine".[24]

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18 Supra at note 1, at 640.
19 Ibid, 639.
20 Ibid.
21 Ibid.
22 Ibid, 640.
23 *M v Y*, supra at note 3, at 533.
24 Supra at note 2, at 668.

The third consequence is that Temm J then sees the court's finding on sexual abuse as pivotal to the decision on placement. The Court of Appeal found that Temm J had wrongly ordered joint custody as the "automatic consequence"[25] of finding the father not guilty of sexual abuse. Both the Court of Appeal and Thomas J preferred the approach of the High Court of Australia in *M v M*:[26]

> The fact that the proceedings involve an allegation that the child has been sexually abused by the parent who seeks custody or access does not alter the paramount and ultimate issue which the court has to determine, though the court's findings on the disputed allegation of sexual abuse will naturally have an important, perhaps a decisive, impact on the resolution of that issue.

Temm J makes clear his characterisation of the proceedings as being the trial of the father by utilising the Family Court Judge's wide discretionary powers under s 28 of the Guardianship Act 1968 to admit the father's affidavits of good character on the basis that they may be the only positive action he is able to take to defend himself:[27]

> When a father is accused of sexual abuse of his son he faces a charge that it is impossible to disprove positively. He cannot prove a negative (short of proving an alibi) and in a sense he is defenceless save for steadfast denial of any wrongdoing. In such circumstances, his good character may be a highly relevant factor which militates against an argument that he had been guilty of any wrongdoing.

However, as Thomas J points out:[28]

> The fact is that abusers are not restricted to persons of bad character .... Sexual abuse knows no social boundaries, and it would or could be perilous for the child if the court were to conclude that sexual abuse had not occurred ... on the basis of the parent's excellent general character. The legislature has directed the court to have regard to "the conduct of any parent *to the extent only* that such conduct is relevant to the welfare of the child." It is the same with evidence of reputation.

Therefore, evidence of general character should not be admitted under s 23.

3. Objections to Temm J's Approach

(a) Mischaracterisation of the Family Court

The first objection is that characterising the Family Court as an ordinary

25 *M v Y*, supra at note 3, at 536 per Hardie Boys J.

26 Supra at note 4, at 76.

27 Supra at note 1, at 614.

28 Supra at note 2, at 668.

adversarial court in the sense of resolving adult issues, is a fundamental misunderstanding of the objective of the guardianship proceeding.

The Family Court is not an ordinary civil court. As Ungoed-Thomas J stated in *Re K (Infants)*,[29] guardianship proceedings are "not ... an ordinary lis between parties but [partake] of an administrative character".[30] Nor is the Family Court a criminal court. In the words of Judge Aubin in *M v M*,[31] to be deprived of custody or access is not "a punishment, because punishment is no part of the function of this Court".[32]

> [I]t is a mistake to think that the Family Court is under the same duty to resolve in a definitive way the disputed allegation of sexual abuse as a court exercising criminal jurisdiction would be if it were trying the party for a criminal offence.[33]

The Family Court's role is not to judge between two parents' different perceptions of what is best for the child, but to come to its own judgment on the welfare of the child, independent of the parents' opinions. One possible analogy for the separateness of the endeavour is the *parens patriae* jurisdiction. In essence, where the parents show that they cannot exercise their guardianship roles, the court will take that role and obligation upon itself. Therefore, parents' interests and disputes are irrelevant, except in so far as they impact upon the child. The Court of Appeal adopted the Australian High Court's statement that:[34]

> Proceedings for custody and access are not disputes inter partes in the ordinary sense of that expression .... In proceedings of that kind the court is not enforcing a parental right of custody or right to access. The court is concerned to make such an order for custody and access which will in the opinion of the court best promote or protect the interests of the child.

One of the best illustrations of this is the way in which the High Court of Australia was careful to distinguish between the rights of the child to have contact with his or her parents, which the court was prepared to enforce, and any rights of the parents to the child, which the court did not see as its role to enforce.

> In deciding what order it should make the court will give very great weight to the importance of maintaining parental ties, not so much because parents have a right to custody and access, but because it is prima facie in a child's best interests to maintain the filial relationship with both parents. [35]

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29 *Re K (Infants)* [1963] 1 Ch 381.
30 Ibid, 387.
31 (1984) 1 FRNZ 388.
32 Ibid, 396.
33 Supra at note 4, at 76.
34 Ibid.
35 Ibid.

As Thomas J said, "the parent is not on trial, and the court is not obliged to determine the issue".[36]

Moreover, the Family Court has been made inquisitorial in order to fulfil this philosophy. One of the primary ways of making the Family Court inquisitorial is s 28 of the Guardianship Act 1968. Section 28 enables judges to conduct their own investigations without relying on the parties adducing the necessary evidence in the manner of an adversarial court. Temm J's admission of the father's character affidavits under s 28, allowing the father to conduct his defence, is a further example of misunderstanding the different ethic of the Family Court. For Temm J to use s 28 in such a way contravenes its purpose. In the words of the Australian High Court:[37]

> The Family Court's wide-ranging discretion to decide what is in the child's best interests cannot be qualified by requiring the court to try the case as if it were no more than a contest between the parents.

By making this ad hoc return to the adversarial system, Temm J has done exactly that. This hampers the courts' ability to protect the child's welfare.

The final example of Temm J's adherence to the adversarial model of the Family Court is his limitation of the role of counsel for the child. Temm J restricts counsel to exploring "all the relevant matters and so [helping] the Court to form a judgment on the case".[38] Although Thomas J's definition of the child counsel's role is perhaps too wide in that it includes the power to put forward counsel's personal opinions, as advocate for the child, this counsel has a "vital task".[39] He or she should not be restricted to the role of *amicus curiae*, for which there is other provision in the Act. Temm J's limitation of the role would seem to stem again from his adherence to the inter partes model of the adversarial court. This two party system does not admit of a third.

In summary, Temm J bases his approach upon assumptions about the nature of the Family Court which are in themselves flawed. The Family Court is concerned with the welfare of the child. It is not concerned with adjudicating between adults.

(b) Weakening the paramountcy of section 23

The second objection is that Temm J's mischaracterisation has substantially eroded the paramountcy of s 23. Section 23 states that "the Court shall regard the welfare of the child as the first and paramount consideration".

In guardianship cases, courts apply a two stage process. Stage one is concerned

36 Supra at note 2, at 668.
37 Supra at note 4, at 76.
38 Supra at note 1, at 646.
39 Supra at note 2, at 669.

with determining the facts. Stage two looks at the best placement for the child, given the factual findings. The Court of Appeal described this process in *M v Y*:[40]

> Where an allegation of sexual abuse is made ... the Court's task is twofold. First it must deal with the allegation; and secondly it must determine the application before it in the light of all the circumstances that are relevant to the child's welfare, including its findings upon the allegation.

Stage two of the process must have priority over stage one. As Hardie-Boys J stated:[41]

> The second aspect, involving as it does, a much wider issue than the first, is the Court's primary function, and the result is not necessarily dependent on the result of the first

However, in *Y v M*, Temm J inverts the importance of the basic two-stage process, making s 23 secondary to trying the parent for the crime of child abuse.

The model of the Family Court which Temm J creates is that of an ordinary adversarial court applying the first and second principles which are applied universally by all courts of law. This will be so unless and until s 23 demands that an exception be made to protect the special interests of a child.

> [T]he welfare of the child may well require intervention by the court even when the allegations of sexual abuse are not proved .... The question for decision then is when does the application of the third principle justify intervention of the court when an allegation of sexual abuse has not been proved as required by law.[42]

Therefore, s 23 is not the rule but an exception. The child's best interests are paramount only in the sense that they can override the accused's rights in cases of unacceptable risk, but they have no further power over the way in which the case proceeds.

Deciding whether or not to exercise s 23 will depend on the nature of the issue before the court. There will be a sliding scale on which the gravity of the consequences of the allegation for the accused will be set off against the child's need for protection. This is shown by the way in which Temm J refuses to apply the English case, *Re K (Infants)*, but is still able to read it as being within his model. In *Re K (Infants)*, Ungoed-Thomas J adopts an approach radically different to that of Temm J:[43]

40 *M v Y*, supra at note 3, at 533 per Hardie Boys J.

41 Ibid.

42 Supra at note 1, at 643.

43 Supra at note 29, at 387.

> In the ordinary lis between parties, the paramount purpose is that the parties should have their rights according to the law and in such cases the procedure, including the rules of evidence, is framed to serve that purpose. However, where the paramount purpose is the welfare of the infant, the procedure and rules of evidence should serve and certainly not thwart that purpose. Over a very large field in infant cases, the procedure and rules of evidence applicable to a lis between parties serve that purpose admirably and are habitually applied, but they should never be so rigidly applied as of inflexible right so as to endanger or prejudice the very purpose which they should serve.

His Honour sketches a framework in which s 23 is the guiding principle which shapes the proceeding rather than an exception to an ordinary court. However, Temm J is able to incorporate this apparently contradictory statement by distinguishing it on its facts:[44]

> [The] statement of the court's function in guardianship proceedings is as true here as it is in England. It deals with a confidential report that is, or is not to be kept confidential. It is not on its facts a relevant statement where a father is directly accused by a mother of sexual abuse against a child.

Thus, while rejecting its application as a general principle, and by placing it on the sliding scale, his Honour allows that it could apply to factual situations where the threat to adult interests is low, and the good done for the child high. By using this "exceptionalistic" framework, Temm J is able to accommodate both s 23 and the case law which supports a strong role for it, so long as he can distinguish it on its facts. In this way he is also able to accommodate *M v M* in the Australian High Court, and the contradictory New Zealand case law on the basis of the opposite factual findings on abuse in those cases. However, the accommodation is purely nominal, and allows the substance of their approach to be ignored.

(c) Threat to the child's safety

The third objection is that not only does Temm J's approach violate the theoretic basis of the Family Court and the strict interpretation of s 23, but that in doing so it jeopardises the actual safety of the child. The evil of treating the investigation of an allegation of sexual abuse as analogous to a criminal or ordinary civil trial is that those processes threaten to ignore the child's interests, focusing instead on the interests of the adults. In the words of Thomas J:[45]

> First and foremost ... to give primacy to the "right" of the parent to have allegations of sexual abuse against him determined would or could subvert the interests of the child. The focus of the hearing, which should be on the welfare of the child, is diverted to the resolution of the allegations of sexual abuse.

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44 Supra at note 1, at 643.

45 Supra at note 2, at 665.

Hardie Boys J clearly identifies this as the underlying problem in Temm J's approach:[46]

> It is all too easy - and it is understandable - when an allegation of gross misconduct towards a child is levelled at a parent, for the focus to shift from the welfare of the child to the truth of the allegation .... [F]or the accused parent, most particularly if the accusation is false, its refutation may seem essential; while the accuser, firmly believing it, may see it as essential to sheet it home. Along the way, it is easy to lose sight of the child, innocently caught up in the midst of the strife.
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> With respect to all concerned, that seems to be what happened here.

If the court gives priority to the need to try the parent implicated as an abuser and to make a positive finding, the definition of the unlawful act must become the focus of the inquiry. To focus on the act means that child placement will be decided on the basis of the criminality, or objective seriousness of the act, irrespective of the child's subjective response to it. However, it is the effect on the child which dictates where he or she is best placed. That response may or may not be commensurate with the objective seriousness of the act:[47]

> [F]or the purposes of a positive finding, it is likely that the Court would need to give some precision to the meaning of the phrase ["sexual abuse"]. Essential in a criminal proceeding involving a charge of sexual misconduct, it is out of place in a custody and access proceeding when the Court's attention must be primarily focused on the effect of the parent's behaviour on the child, however it is defined.

The Court of Appeal held that the emphasis should be on the effect on the child:[48]

> [Thomas J] points out, and I agree, that even although there is no acceptable foundation in the evidence for the proposition that sexually inappropriate behaviour has occurred, the state of mind of the child may be such that that must affect custody or access arrangements even in the case of unfounded allegations.

Thus the Court's findings on sexual abuse should not be seen as necessarily pivotal. This is the first of the two errors in law for which the Court of Appeal overturned Temm J's decision:[49]

> [T]he order [for joint custody] seems to have been made by Temm J as an automatic consequence of allowing the appeal. I am satisfied that no basis had been established for making the order, and that the appeal should be allowed for this reason.

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46 *M v Y*, supra at note 3, at 536 per Hardie Boys J.

47 Supra at note 2, at 665-666.

48 *S v S*, supra at note 3, at 547 per Gallen J.

49 *M v Y*, supra at note 3, at 536 per Hardie Boys J.

There are three ways in which a court could have come to see its finding on sexual abuse as pivotal to the decision on placement. It is not clear which Temm J relied upon, but all three need to be addressed. The first occurs where sexual abuse is presumed the definitive indicator of the child's best interests. However, as was recognised by the Court of Appeal above, the two are not necessarily linked. The second and third ways are implicit in the structure of the adversarial court model.

The natural tendency in both the criminal and ordinary civil court is to see custody and access orders as the means by which the court rewards or punishes the parties. First, in the civil court context, the child is "awarded" according to the request of the winning party. The judge is purely the arbiter between the parties and has no jurisdiction to explore alternative outcomes beyond those presented. Therefore, the only interests considered are those of the parties, regardless of whether they correspond to what is best for the child. Alternatively, in the criminal court and in the civil court under its jurisdiction to award punitive damages, the child's placement becomes the means of implementing the court's function of punishment, subjugating the child's interests to those of the wider community. However, as Judge Aubin said in *M v M,* a parent is deprived of access to his or her child "not as a punishment ... punishment is no part of the function of this court." [50]

Third, Thomas J makes the point that if the court is to focus on positive findings on the issue of sexual abuse, they may not have much success:[51]

> [I]n most cases it is unrealistic to expect that the issue of sexual abuse can be definitively resolved ... in a custody or access proceeding ... [because] both the range of activity encompassed in sexual abuse and the very definition of the term is unclear.

Finally, the Court of Appeal criticised the imposition of an obligation to make known the court's finding, if any, because in itself it could violate the child's welfare by removing the flexibility not to make a decision known. This mirrors the approach in the Australian High Court:[52]

> [T]here are strong practical family reasons why the court should refrain from making a positive finding that sexual abuse has actually taken place unless it is impelled by the particular circumstances of the case to do so.

(d) Decision made by legislature

The final rebuttal of Temm J's approach is that the choice has already been made. By enacting s 23 the legislature has upheld the interests of the child at the expense of adults' rights. Therefore, if s 23 is the focus of conflict between the two

50 Supra at note 31, at 396.

51 Supra at note 2, at 665-666.

52 *M v M,* supra at note 4, at 77.

policy interests, it is also a clear statement of choice between them. It is important to realise that the choice was made in full knowledge that adult interests would be harmed, despite Thomas J's argument that a Family Court finding of sexual abuse carries less stigma than that of the Criminal Court. In *Gooch v Gooch*,[53] Hardie Boys J explicitly stated that because of the nature of such proceedings, although it might appear unjust to the father to take a mere possibility of abuse seriously enough to restrict custody and access, the judge must do so in the interests of the child. Thus, the father must "derive ... such comfort as he can from the realisation that [it is done] ... only for the children's sake".[54]

Likewise, the Family Court system as a whole is predicated upon a conscious choice to protect children, in recognition that in the conflict between adults' and children's interests children are more frequently the losers.

IV: THE COURT OF APPEAL

1. Summary of the Court of Appeal's Decision

In *M v Y*, the Court of Appeal, with no jurisdiction to review the findings of fact, overturned Temm J's decision on two grounds. First on the basis that the judge had erred in law by ordering joint custody as an automatic consequence of finding for the father that sexual abuse had not occurred. Second, that his Honour had erred in not taking into account the child's views.[55]

The Court of Appeal upheld Thomas J's decision in *S v S*, although expressing reservations about the possibility of further disclosures as a reason for suspending access. Nonetheless, the need to heal the relationship between the mother and child was a sufficient reason.

2. Criticism of the Court of Appeal's Decision

Although the Court ostensibly upheld Thomas J's decision and overturned that of Temm J, the effect has been to limit Thomas J's approach. When called upon to evaluate Thomas J's approach as a whole, Gallen J stated: [56]

> I do not think that the guidelines to which the Judge refers can be criticised separately or in combination as leading to an unacceptable approach. They are after all no more than an approach and will carry a greater or lesser degree of emphasis in particular cases, which will all need to be considered in relation to their own facts and background.

53 Supra at note 17.

54 Ibid, p26.

55 *M v Y*, supra at note 3.

56 *S v S*, supra at note 3, at 547 per Gallen J.

The Court of Appeal failed to take the initiative, preferring to leave the matter to the discretion of the individual judge.

This is indicative of the Court's failure to deal with the conflict. Hardie Boys J remarked that: [57]

> The difference between the High Court judgments in the two cases [was] not one of substance but rather of emphasis.

This contention is clearly ill-founded. The conflict is both substantive and intense. Temm J clearly set out to change what he saw as a fundamental error in the Family Court's approach to s 23. Thomas J disagreed with Temm J's argument and set out to rebut it. That both claimed to recognise the same legal framework does not lessen the difference between the two positions.

One of the clearest examples of the Court of Appeal's equivocation is its response to the issue of allowing the parties' psychologists to interview the child in addition to the interviews conducted by the court-appointed witness or the evidential investigators. The Court of Appeal effectively limited Thomas J's interpretation of s 23 to the particular facts of that case, although, as Thomas J pointed out, and Temm J himself explicitly recognised, "the harm which can be caused by interviews is well-documented".[58] Temm J strongly advocated allowing additional interviews:[59]

> That obstruction to [the witness'] investigations was undesirable. In a case where there is an allegation of child abuse a properly qualified psychologist ought to be given the fullest opportunity to make all the investigations that are prudent and necessary for a considered opinion.

Research has shown that victims of sexual assault can find interviews extremely traumatic. Multiple interviews can delay healing because they require children to keep events fresh in their minds and to relive them repeatedly. Thomas J found that, given this factual background, s 23 must lead him to the opposite conclusion to that of Temm J:[60]

> I believe that the care which is now taken to protect children from unnecessary interviews should continue. I appreciate that this often means that psychologists ... are not permitted to interview and assess the child. Again, the interests of the child come first .... I ... cannot agree with [Temm J] .... Such a view ... suggests ... that the allegation of sexual abuse is the central issue when it is not. The child's wellbeing is not to be sacrificed to that cause.

The Court of Appeal explicitly agreed with Thomas J that the issue involves a choice between adults' and children's rights, and that interviews can harm chil-

57 Ibid, 541.

58 Supra at note 2, at 668.

59 Supra at note 1, at 636.

60 Supra at note 2, at 668.

dren. However, its recognition went little further than that of Temm J. The Court was significantly less positive than Thomas J in its opposition to interviews. Rather than adopting a presumption against re-interviewing, the Court of Appeal clearly preferred a presumption that a particular child would be damaged. The Court of Appeal explicitly limited Thomas J's approach to its particular facts, and denied it wider scope as a general rule:[61]

> [Thomas J] drew attention to the fact that the desirability of obtaining some certainty on the question of whether or not the behaviour complained of had actually occurred, had to be weighed against the need to protect the child from unnecessary interviews. As the judge points out, such interviews may themselves have a serious effect as far as the child is concerned *and it follows that there may in particular cases be circumstances where the needs of the child outweigh the desirability of achieving some greater degree of certainty* .... I agree with that concern and conclusion.

Although the Court of Appeal upheld Thomas J's vigorously pro-child interpretation of s 23, there is a very real sense in which it has marginalised the arguments on which his Honour's conclusion is based. While these arguments were exemplified in his Honour's stringent criticisms of Temm J's approach, the Court suggests that the concerns which underlie this approach retain some validity. Given the threat these arguments pose to s 23 and to the interests of children, this is an issue of major concern.

V: CONCLUSION

The measure of a society is how it treats its most vulnerable members. That the strong should protect and not abuse the weak is widely accepted. However, the protection of the weak often involves the diminution of the strong. It involves a moral tug-of-war between one's self-interest and one's sense of justice. Moreover, it often requires learning to see oneself through the eyes of the other, weaker person.

It is undeniable that in our society, children are among the weakest and most vulnerable members. Child sexual abuse stands as the paradigm of both the competition between adults' and children's rights in the court setting, and of the process of overturning a common myth - that adults are always the benevolent protectors of children.

If the High Court judgments revealed the conflict between adults' and children's rights, the Court of Appeal revealed the continuing ambivalence which remains towards the choice generated.

The courts are faced with this stark choice: to protect children from abuse will often involve sacrificing some of the rights of the adult accused which are believed to be fundamental to justice. The question for judges over the next few years will be to what extent they are prepared to face the decision fully.

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61 *S v S*, supra at note 3, at 545 per Gallen J. Emphasis added.