FAMILY LAW RESEARCH PAPER

SEPTEMBER 1972

Custody Proceedings - The Husband's Position

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Foreword

In compiling this paper I originally set out to determine whether a husband in custody proceedings was subject to inherent bias by the Courts in making their findings. By "inherent bias" it is meant the kind of allegation made by The Divorce Law Reform Association, (hereinafter referred to as "the Association"), that a mother's right to custody of a child incustody proceedings is really a foregone conclusion, that must be rebutted by the husband adducing evidence. However, it became obvious from reading pamphlets published by the Association, other organisations, and interviewing parties who claimed to have been unfairly treated by the judicial process, that collateral to the custody issue, are the maintenance issue, access rights, and lawyers fees. Hence this paper is not confined merely to custody issues.

One fact that should be noted is that in the family law field, because each case depends upon its own facts, it is impossible to make generalisations to cover every contingency and my conclusions should be read subject to this premise.

Introduction - the Welfare of the Child

In New Zealand the Court is instructed that it shall regard the welfare of the child as the first and paramount consideration in any proceedings relating to guardianship or custody. (1)

(1) Section 23 (1) Guardianship Act 1968

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But who is to say what is in the child's best interest? The concept will change in any case with different competing moral values and community attitudes. "Even fifty years ago the courts tended to give more weight to material, moral and religious considerations and less to the child's mental and emotional well being than they would today."(2) An obvious example of a drastic change is the Courts' attitude towards a mother to have custody, or even access, if she has committed adultery. Sir Cresswell said in 1862, "It will probably have a salutary effect on the interests of public morality, that it should be known that a woman, if found guilty of adultery will forfeit, as far as the Court is concerned, all right to the custody or access to her children".(3) By 1910 this attitude was modified to make it possible to give a mother custody in such circumstances(4), but they remained reluctant to do so, and often are today. (See R v D [1971] NZLR 563 for example).

This raises the question of how do you determine what is in the child's best interests, and can the law derive any help from other disciplines? Various socialogists and psychologists would argue that the Courts could learn from their

(2) Bromley Family Law Butterworth, London 3rd Ed, 1966 P. 326
(3) Seddon v Seddon (1862) 2SW and Tr. 640
(4) Stark v Stark [1910] P. 190

disciplines, though the Courts tend to frown on this suggestion, because they consider the expert witnesses may usurp the Courts' function.(5)

The Proceedings

To determine what is in the child's best interests, the Court must obviously conduct an inquiry.

> "The aim and purpose of the judicial inquiry is the benefit of the infant, and for such purpose to make a decision about its immediate future upbringing or control. For such purpose also the infant is in relation to the Court in a special position distinct from that of other parties - for he or she is a ward of Court, a 'child in law' of the Court exercising the ancient and parental juristriction ... The juristriction is not only ancient but it is surely also very special, and being very special must be applied and qualified accordingly. The judge must in exercising this juristriction act judicially, but the means whereby he reaches his conclusion must not be more important than the end. The procedure and rules ... should serve and not thwart the purpose." (6)

This inquiry presupposes the existence of a *lis inter parties*. Yet if one examines the Act in detail it is clear that custody proceedings are not to be regarded as a *lis*. First, the welfare of the child is to be regarded as the first and paramount consideration and counsel may be appointed to represent the child and assist the Court in the proceedings.(7) Secondly, the Court is told to regard "the conduct of any parent to the extent only that such conduct is relevant to the welfare of the child."(7a) Thirdly, the Court is able to

(5) See Cases discussed later
(6) *Per Evershed* L.J. In Re K [1965] AC 201 at 218,219
(7) Section 30
(7a) Section 23(1)

regard the wishes of a child in custody proceedings to such an extent as it thinks fit.(8) What the parties to custody proceedings and the Association fail to realise, is that "there is no lis between the parties. The plaintiffs are not asserting any rights, they are committing their child to the protection of the Court and asking the Court to make such an order as it thinks is for its benefit."(9)

Despite the fact the proceedings are not to be regarded as a lis, because evidence is usually introduced into the proceedings from the husband and wife, the practical effect of the proceedings is that they are turned into a contest between the husband and wife as to who will get custody. The Court is free, it is true, to obtain the help of outside experts,(10) and free to accept evidence, "that it thinks fit whether it is otherwise admissible in a Court of law or not".(11) It may also have regard to reports made by a child welfare officer in the proceedings,(12) a practice common in New Zealand.

The parties may introduce expert evidence in order to explain or interpret evidence involving specialist learning.

(8) Section 23(2)
(9) Per Cross J. In Re B [1965] 3WLR 253, 257
(10) See Finlay "First" or "Paramount". The interests of the Child in Matrimonial Proceedings" 42 ALJ 96
(11) Section 28 See Also W v W [1968] 1 WLR 1310 (CA)
(12) Section 29

But it does not always occur to them to do so, and often in the majority of cases at first instance, it may not appear necessary, or appropriate, to either the parties or the Court that expert evidence should be obtained. In such a situation it has been suggested that there is a danger of injustice being done, because the Courts perception of a given situation may be out of keeping with the accepted modern scientific knowledge(13). In a case when no expert evidence is introduced the Court more often than not uses aphorisms to decide the issues as substitutes.(14)

The parties to the proceedings may have tendered evidence on matters contained in a child welfare officer's report, but a fact that has come into criticism by the Association is that the Court may order that a report may not be shown to one or both parties in any proceedings.(15) This provision as a breach of the audi alteram partem rule has also been the subject of litigation overseas (16) as well as to the extent that a Court may accept evidence that would be strictly inadmissible in normal proceedings relating to custody(17).

With regard to reception of inadmissible evidence such as hearsay, it is doubtful if a party would be unfairly prejudiced by such evidence since a "judge in chambers is, of course, quite capable of giving hearsay no more than its

(13) Goldstein (1969) Psycho-analysis & Jurisprudence. The Pyscho-Analytic Study of the Child Vol 23, 459. Also The Paramount Interest of the Child in Law Psychiatry. Finlay & Gold (1971) ALJ 45 82
(14) Aphorisms - discussed later
(15) Section 29(3)
(16) See Reeves v Reeves [1961] VR 481 and Official Solicitor v. K(an infant) 1965 AC 201

proper weight"(18) The practical benefits of such evidence easily outweigh the possible detriments. "A responsible person who has seen the child in his home enviroment, who has noticed the quality of the relationship between each parent and the child, who has observed the response of the child to each parent or to one parent over a period, or who has been able to form an impression of the parties involved, should be perfectly free to comment on such matters and to express a frank opinion on them."(19)

The Association has contended that such evidence is often likely to be "manufacturered". Also the Association contends that before children are interviewed by the judge, they usually have been "schooled" by the mother before, since she usually has custody. It is respectfully submitted that neither of the objections are of any significance. First, the reliance is only made on a "responsible person" such as a clergyman, (20) the family doctor,(21) or a registered nurse.(22) Secondly, as the "manufacturered" or "schooled" evidence is not the only evidence introduced into the proceedings, and it is considered with all other evidence, it usually becomes obvious to the judge when a child has been schooled or evidence manufacturered. E^G In D v D (22a) a neighbour's evidence of the wife's respectability was accepted by D'Arcy J together with the other evidence.

(17) For a detailed review of these provisions see Finlay "Natural Justice in Custody Proceedings" [1970] ACLR 94, Sect28
(18) Per Devlin LJ in Re K. Supra at 242
(19) Inglis "Family Law" 2nd Ed Vol 2 at Pg 517.
(20) W v W [1968] 1WLR 1310 (CA)
(21) Re C (I) [1965] 2QB 449
(22) Daines v Daines White J unreported 23 June 1972 (M101/72)
(22a) [1968] WAR 177 (discussed later)

In recent years the Divorce Law Reform Association has suggested inter alia in many of its pamphlets and publications, that a mother's right to custody of a child in custody proceedings must be rebutted by the husband adducing evidence. Also from the pamphlets one gets the impression that the burden of proof is very high, something akin to that in a criminal trial "beyond reasonable doubt", rather than on the "balance of probability". To quote from one of the Association's publications: "The mother, in almost every case, will have the custody of the children and will be granted permanent maintenance by her husband 'so long as they both shall live'. The Court may grant the ousted father (or mother) access to the children expecting that both parents will act in this matter as responsible parents should. But what happens?

"We have cases on our files where this privilege is denied to the lonely 'other parent' such as follows: He will arrange to visit the children at an agreed time. He arrives.

"Answer No 1. He is told 'Oh the children have just gone out. They will be back directly' (but they don't come back. Secretly t hey have been told not to) ...

"Answer No 3 'They must have gone to the beach, go and look for them if you like.' (In other words 'Get out of my sight') ..."

To quote a case history from another publication:

"Two minute Domestic Story for TV"

"Alimony: A Magistrate found that the primary reason for my marriage not being a happy one was "the wife's withdrawal and rejection of her husband". I convinced him that no grounds existed to justify a Separation Order against me. My wife had deserted me three times, but I was ordered to pay her Alimony at $11 weekly. By contemporary public viewpoints she had no reasonable cause to live apart from me, so our alimony payments seem unethical and immoral. These could continue for life.

Custody: After divorce my ex-wife was known to have a deteriorating mental or emotional problem since 1956. this had already harmed our children, so that they'd been in institutions. When her doctor certified her as mentally unfit for employment, custody of our children was given to my ex-wife, to raise them in abnormal circumstances with the help of a loose committee. At the time, I was remarried and enjoying a happy family-life with a capable new wife and adopted children.

Access: The Courts have repeatedly ordered that my first family have school holidays with us - but refuse to enforce the Access Orders. My guidance to the maturing of my son and daughter is denied to them, and I am robbed of our relationships.

General Complaints: I have been defamed untruely by the Justice Department, whose administration is poor. My experiences make me severely critical of some lawyers and some magistrates and unfair court procedures - even a Judge can fail to keep his promise. Applications of mine have been decided or dismissed without a hearing. The Legal Aid Committee has held applications for a year without granting or declining them.

Conclusion: Now on a salary of $3,500, I am expected to support seven children and three adults. Litigation still puts strains on my second marriage, and all nine of us - 5 years after the marriage ended. " .....

The Association cites the Justice Department report for the year ending the 31 March 1971 as showing an increase of 50 per cent in divorce proceedings, and that the Government Statistician's figures show that one marriage in eight now ends in divorce. The Association's pamphlet continues to

state that "this alarming state of affairs is a direct result of our legislation which favours even irresponsible and defaulting wives. The bias in the legislation penalises an innocent husband by removing the children from his custody and control, yet usually orders him to maintain the guilty spouse as well as the children he has lost." Speaking on custody of children the same publication continues, "in theory, the legislation provides for both parents to have equal rights to custody of children and in fact a father, irrespective of his conduct, is considered by law to be the natural custodian. In practice however, it is virtually impossible for a father to retain their custody, unless a mother is totally unfit to have their care, custody and control. The bias of the judiciary and magistrates in favour of the mother irrespective of her general condust is a well known anomaly for which remedial legislation is urgently required ..."

"The present excessive awards of maintenance for children are completely out of proportion to the needs of the children or the income of the father, and must be abolished and replaced with a fixed scale of maintenance relevant to the age and needs of the child with the financial burden falling on both parents."

The Association also claims that "access orders granted to fathers are interfered with and flouted by vengeful women, secure in the knowledge that repeated applications to Courts to hance orders for access enforced are beyond the means of most fathers." The discretion of the judiciary also comes

under heavy criticism. Another pamphlet states: "Discretionary powers used by the judiciary and magistrates are far in excess of those envisaged by the legislators. Generally speaking, this power is exercised in favour of even an adulterous or otherwise guilty or vindictive woman. She will obtain custody with all her costs paid by her/innocent husband, and she will not infrequently be awarded a handsome property settlement as well."

"Whilst this anomaly is well known to the legal profession no remedy has been instituted over the years. An order made against a husband - father, based on discretionary powers, must be tested by an appeal which almost never succ eds, and this is beyond the means of an already impoverished husband."

Before evaluating these criticisms, it is worth noting that the Justice Department attributed the increase in the divorce rate to the reduction from three years to two years separation as a basis for petitioning for divorce. Also it is doubtful if by reading the Guardianship Act 1968 that the legislation penalises a man as the Association claims. Rather the Association's complaint should be only directed at the administrator of the legislation,as it also is.

Also from these articles and others put out by the Association, certain obvious features should be noted in my opinion. In any Court proceedings there will always be a dissatisfied person, usually the party who looses. The party that wins the contest may also be dissatisfied in that he may not have achieved in the proceedings all that he claimed.

The party who looses will often say the case was wrongly decided in the same way that the convicted criminal maintains his innocence. In a custody dispute the proceedings are often begun with a desire to get even with the party who at present has custody of the children, and probably was the successful party in the divorce or separation proceedings. The child's best interests are not even really considered by the parties.

With these ideas in mind, one must be cautious in judging quickly the aggrieved party's allegations and those contained in the pamphlets of the Association. The aggrieved party is quite likely not to have mentioned facts that do not recommend him having custody of the children. It is worth noting here that the Secretary of the Christchurch Branch of the Association has stated, "we regret though that parts of many case histories have not been gathered, and that too few workers with too much personal litigation of their own have prevented our substantiating the 'stated facts' as thoroughly as we intended and still want to do".

The Association itself is guilty of not stating the substantiated facts. For example, the explanation of the so called "increase in the divorce rate" contained in the Justice Department report is not mentioned in the Association's pamphlet. Also the law may be reported by the Association in such a way to mislead a reader with no legal knowledge what the law in fact is ... An example here is the statement mentioned on page

as follows. "The bias in the legislation penalises an innocent husband by removing the children from his custody and control, yet usually orders him to maintain the guilty spouse as well as the children he has lost!" Another incorrect statement will be found on page 3 of the Association's Bulletin of April 1972. "Persons charged with murder or robbery are not required to pay costs of the prosecution. But a man involved in a divorce case is compelled to pay the costs of both sides, whether he is petitioner or respondent, whether he wins or loses. And this applies even when his opponent has retained expensive counsel to appear against him, in which case he has no say in the choice or in how much expense is to be incurred."

Because of the many legal inaccuracies stated by the Association, its members, and in its publications, it leaves one sceptical that the case examples given may be prejudically presented, for the reasons outlined above. Also without evaluating the literary style of the Association's publications, they are guilty of sensationalism and exaggeration in presenting their viewpoint. This of itself suggests also their presentation of the facts may be prejudically presented.

Wives favoured in the proceedings?

As mentioned above, the Association continues that the mother's right to custody is a foregone conclusion. There is unfortunately no accurate means of checking the number of custody cases that are decided in favour of a mother in New Zealand, and it is therefore very difficult to come to a correct assessment of the proportion of cases decided in a

wife's favour. A quick look through reported cases in the New Zealand Law Reports since 1930 will show custody disputes decided in the wife's favour on a ratio of about 2:3. This does not of itself suggest husbands have been unfairly prejudiced in these proceedings. On a random reading of these cases it would appear there are no decisions that one could disagree with, but there are a few which could have been decided either way.

There is of course, no means of checking whether the many cases that are unreported would give rise to about the same ratio in the mother's favour, though Magistrates I have spoken to have suggested that there would probably be a heavier ratio in a mother's favour than 2:3 amongst the numerous unreported cases. The reason for this was given as simply because taking all considerations into account, the child's best interests would in the majority of custody issues, be served by the mother having custody. To a suggestion that most custody cases would be decided by common sense, a magistrate agreed.

This recognition that most custody cases would be decided by a common sense analysis is also born out by Mr Justice Megarry when he said:

> "In my judgement, I must take account of all relevant matters - but in considering their affect and weight I must regard the welfare of the infant as being first and paramount. It is objected that this formulation does little to define or explain the process. I would reply that it is precisely a process such as this which calls for the quality of judgment which

> inheres in the Bench; and this is a quality which in its nature is not susceptible of detailed analysis. There is a limit to the extent to which the Court can be fairly expected to expound the process which leads to a conclusion not least in the weighing of imponderables. In matters of discretion, it may at times be impossible to do much more than ensure that the judicial mind is brought to bear with proper emphasis on all that is relevant to the exclusion of all that is irrelevant." (23)

With regard to the commonsense approach, the Association contends that because "the powers conferred upon each individual judge are so wide, it would not be wise to entrust them even to a living saint, must less to the 80 or so ordinary men of various standards of public behaviour, private morality, personal integrity, sense of justice, emotional restraint and psychological balance who have been appointed to Supreme Court rank., with power to administer the Matrimonial Causes Act. Each of these judges has been empowered to impose his own personal whim on the individual litigant." (24) In dismissing this contention it should be noted that someone must have the task of adjudicating in this field. The judge because of his training it is submitted, is the only person qualified to evaluate and make such a determination. The Association while criticising the judiciary in this field does not offer any suggestions as to an alternative to dealing with the problem. It only sees the solution as one of rehabilating the Court by limiting their authority within a defined area and in particular, the removal of the judicial discretion. If the above were

(23) In Re F [1962] 2 Ch 238 at 241 - 242
(24) Divorce Law Reform, Victoria, Australia. "Submissions to Standing Committee of Divorce Reform Enquiry" Page 5, (12 May, 1972).

done it is contended by the Association that "it would transform the matrimonial Causes Act from an instrument of unrestrained and unpredictable oppression of men into a known legal quantity dependant upon the proven facts. It would prevent the judge from bending the law in any direction that his whim led him. He would be obliged to give his decision according to the grounds established and not upon personalities, sex bias, or his likes and dislikes." (25)

It is clear that the Association's view here is grossly incorrect. But what does emerge from its view is that each judge may have slightly different material, moral and religious values from his contemporaries. Therefore, the commonsense of one person may differ slightly from another since his values may be different, in the same way the concept of what is in the child's best interests has changed over the years.(26) Hence, there may be disagreement as to what is in a child's best interest(27). Similarly there is a possibility of an injustice occuring because of different values. This is obvious if one considers for example the cases of D v D, H v D [1968] WAR 177 (28) and R v D [1971] NZLR 563 and the facts on which they are decided.

(25) Submissions to Standing Committee Supra Page 5.
(26) See Ante Page 2
(27) See The Paramount Interest of Child in Law and Psychiatry ALJ 45 82 Finlay and Gold.
(28) For a detailed commentary and discussion of this case see Finlay and Gold "The Paramount Interest of the Child in Law and Psychiatry" (Supra).

Both these cases involve the decision of custody being decided on the commonsense principle of "what are the probabilities of the child being corrupted by moral weakness of the parent, or the child being subject to immoral surroundings?" This is a commonsense principle or aphorism that has developed in the more recent years. In this area of "moral conduct" the Australian Courts seem to have a more liberal view than that of their New Zealand counterparts. For example if one compares the cases of Thompson v Thompson [1966] 2 NSWR 534 and R v D supra, it is doubtful whether the same constituted Court of Appeal in R v D would have given custody to the mother, im the Australian cases. Rather the decision would possibly be in the father's favour. The same result it is submitted would arise from the facts disclosed in D v D, where D'Arcy J considered that the effect of "moral conduct" was to be superseeded by the "mother principle". On appeal the Full Court of Western Australia saw fit to reverse the order made by D'Arcy J, not on the basis involving an error of law, but rather on the primary courts assessment of the evidence. The basis of the husband's claim for custody in D v D was that the mother had committed adultery on several occasions with two co-respondents, one of whom was the brother of her husband and still a minor. There was also evidence of sexual perversities between the mother and the co-respondents. D'Arcy J accepted on the evidence that she was a good mother but had failed in her duty to her husband in having committed repeated adultery with the two co-respondents. But she had been the victim of the misfortune of sexual incompatibility

with her husband. Hers was not a case of "unrestrained and irresponsible promiscuity".[29] On the contrary, a neighbour's evidence of the wife's respectability was accepted by the judge. "Her misconduct with D warrants disapprobation according to the gravity with which adultery is regarded in law. But in the circumstances, is it proper to disregard this past transgression as indicative of a future disregard of moral proprietory disqualifying her as a suitable custodian? In my view the answer is No."[30] His Honour found "The transgressions complained of ... were exceptional and ... out of character ..."[31] as to both the wife and co-respondent H "a morally responsible person"[32] and awarded custody of both children to the wife.

The Full Court of Western Australia took a different view after considering D'Arcy J's assessment of the evidence. The Chief Justice Sir Albert Wolf (Jackson & Neville J concurring) saw the sexual relationship between the husband and wife as a "disagreement" rather than "incompatibility"[33] and her conduct "stamps the wife as of low moral calibre". After considering the acts of sexual perversion and the possibility of the children coming into the room while the acts were being committed, the Chief Justice draws the conclusion that -

(29) At Page 236
(30) At Page 237
(31) At Page 239
(32) At Page 244
(33) At Page 180

"When the wife's moral character is so loose as there is nothing of substance which can be levelled at the husband, this should, have a leaning in his favour in ajudging the question of custody[34]. Concluding he came to the conclusion that D'Arcy J did not assess her conduct in its true light.

"She never tried to reconcile herself to the marriage; her degrading sexual lapses with T the second named co-respondent and the easy way she fell into adultery with H, her submission of the children to the corrupting effect of her blatant association with him, and her act of sexual perversion stamps her as a woman unworthy to have custody."[35]

Normally an appellate Court will only interfere if an error of law has occurred or if the judge of first instance made some mistake. The apellate tribunal only has access to a transcript and "The greatest weight should be attached to the opinions of the Trial Judge upon the question of the character of claimants for custody." [36] Perhaps this is the reason for Section 31(3) of the New Zealand Guardianship Act 1968 which provides that an appeal other than one involving law "shall be by way of rehearing of the original proceedings." Whilst this provision has merits, in that there is now no room for the complaint that appeals must be decided on the basis that the trial judge must be shown to have gone wrong in principle[37], it has been criticised heavily by the Court of Appeal[38].

(34) At Page 180 (35) At page 181
(36) per Latham LJ in Lovell v Lovell (1950) 18CLR 513 at 523
(37) See Inglis "The Hearing of Matrimonial and Custody Cases" in Family Law Centinary Essays (1968) 47-49.
(38) See unreported portions of the judgments in R v D.

Similar reasoning was adopted by Haslam J in R v D supra at first instance. There custody of two girls was given to the father, not because the mother was unsuitable to have custody, but because her association with D, the co-respondent, would lead to the girls being brought up with liberal moral values, not in the best interests of the children. The Court of Appeal upheld this decision. In the unreported portion of its judgement it referred to the undesireability if the girls were brought up under the influence of D.

The inconsistencies in findings would also appear to be common in New Zealand between the Magistrate's and Supreme Court. Daines v Daines (39) provides a good example in this instance.

There the husband and wife agreed to separate after the birth of their fourth child, the wife having custody, and the husband having access rights. Soon after, the wife formed an association with one M and she began to be out most hours of the night often not returning until 7am. The children were left in the company of a Miss P during these times who was living in the home.

After the husband left the home he resided with his brother for a short period before commencing a de facto relationship with a Miss D. The husband continued to take an interest in the welfare of the children, but relations deteriorated over time and the wife set out to cause as much

(39) Unreported decision JK Patterson SM 18 February 1972 DP 39/71
Unreported White J 23 June 1972 M101/72

embarrassment to the husband as possible. Mr Patterson also accepted that the wife's domestic affairs left much to be desired. The house was generally untidy, clothes were everywhere, dishes accumulated in the sink, and beds were not made. Food given to the children was below normal standards. The wife also was absent from the home on numerous occasions because of her interests in St John Ambulence, Church Work, woodwork and speech training, and solo parents.

In June 1971, the wife's health deteroriated and she was admitted to hospital. Arrangements were made to look after the children but these did not prove satisfactory, especially with the young baby, P, who was in poor health. The husband and Miss D then took possession of the children who were returned to the wife on her leaving hospital, except the baby P. P was looked after by Miss D who the Magistrate accepted was the best to look after P. The wife and husband began cross applications for custody pursuant to Section 11(1) of the Guardianship Act 1908.

Patterson S.M. granted custody to the mother of the three eldest children because of the effect of Section 18. He said "I am satisfied that while the circumstances of these three children in the custody of the wife are not ideal and are subject to a good deal of warranted criticism, nevertheless the terms of the document on custody should be implemented so far as they are concerned at the present time." Custody of P was given to the husband and Miss D because he was in a neglected state when the husband took control. He had recovered

from this condition thanks to Miss D and her sister who was a medical practitioner.

With regard to the wife's conduct, Patterson S.M. said "The attitude of the wife as established by the facts is such that she is quite prepared to exploit the welfare of the children to gain her own selfish ends. This is completely contrary to several decided authorities and in particular the views of Danckwerts LJ in S v S and P [1962] 2 AllER "stated at page 4: -

> 'In all these cases of divided homes, where access is given to one of the parties, it is essential that the parents should refrain from criticism of each other before the children. If they do not do that, there is bound to be an adverse effect on the children which it is very desirable to avoid.'

This is a classic case where particularly the wife, has embarked upon a course of conduct which has been exemplified since the separation to utilise the children and any other circumstances to cause embarrassment and difficulty to the husband. The conduct of the child David, in writing to his father in reply to a normal letter along the lines disclosed in the established facts, ('To Dad and Miss D living in sin'), indicates the extent to which the wife is prepared to go. I am not prepared in these circumstances to allow a child or children to be subject to this type of conduct if it can be avoided, and I am convinced that it is against their general welfare in the long run to live in such an atmosphere."

The wife appealed and White J gave custody of P to the wife because:

> "The grounds for his decision in paragraphs (1) and (2) quoted above have been shown to relate to a period when the appellant was herself ill and thus cannot be regarded as evidence of her present or future capacity to look after the child. It is also evident from the Child Welfare Officer's report and the submissions of Counsel appointed by the Magistrate's Court to represent the children that the appellant is considered capable of caring for the baby and that all the family should be in her custody. Furthermore, I was informed that no submission was made by Counsel on either side or by Counsel representing the children than they should be divided. In considering the youngest child it was necessary for the Magistrate to have regard to the mother principle and the desirability that the family should not be divided, and to the fact that the youngest child is a baby and that Miss D. and the respondent are not yett in a position to marry. The advantage of a very young child being with its mother is a most important consideration in considering the welfare of the child. The fact that the child has been well looked after by the respondent and Miss D for a period cannot by itself outweigh the factors to which I have referred in a case where there was no finding and could be no finding on the evidence that the mother was unfit to look after her children."

In these cases the various personal prejudices of the individual judges, it is submitted, are obvious, and in such situations there is a possibility of injustices occurring. What may be "best for the child" for one judge may not be "best for the child" for another judge, because of these personal prejudices. The personal prejudices of a judge also arise in the field of maintenance it has been suggested by the Association. The most common example here is the difficulty encountered in arguing proceedings for a variation of a maintenance order on the grounds that the changed circumstances of the applicant justify a variation if the applicant husband is in arrears with the maintenance. There may be good reasons

for the husband being in arrears, yet the Court will sometimes take no account of the reasons. The Secretary of the Christchurch Branch of the Association commenting on a comparison of custody cases stated "A few of these cases are particularly notable for legal justice being much different from moral or natural justice - or even reasonably measured against contemporary 'public opionon'".

Without entering into a jurisprudential discussion of the terms "legal justice", "moral" and "natural justice", it should be noted again in that justice in custody proceedings depends on the facts of each case. This is not a rule of law to be applied by the judges in coming to a decision because "What the Court has to do is deal with the lives of human beings and these cannot be regulated by formula"(40)

Replying to the above contentions of the Association, it is submitted that the injustices that may occur (if any) are the result of these personal prejudices, and not because moral or natural justice is any different from legal justice. With regard to "contemporary public opinion" it is impossible to find. No doubt the opinions of the Association will be very different from those of the "reasonable man", because of the Association's own prejudices towards the system they are attempting to have reformed.

(40) Per Megarry J In Re F [1969] 2 Ch 238 at 241

Aphorisms

However, the individual judges' personal prejudices (if any) are usually only present when morality of a spouse is in issue as mentioned above. In approaching most cases parental morality is not relevant, and the Courts have felt the appeal of principles or aphorisms for general guideance.(41) Insofar as they guide the Court they are legal principles but they are not to be regarded as principles of law or rules of law.(42) Apellate Courts have emphasised many times that they are only rules of common sense or rules of humanity, and they need to be considered along with all the other factors.

-- All things being equal it is better for a young child to be with his mother(43) or it is better for an eight year old boy to be with his father..

> "As a boy is growing up out of babyhood through boyhood into young manhood, it is his father's care he wants, a father's care and companionship over him and around him and about him. When he is just a baby and growing out of that into boyhood, it is his mother that matters most. As time goes on it is his father that matters more." (44)

(41) For a full review of these principles see Toose Watson and Benjafield Australian Divorce Law and Practise paragraphs [729] to [740]. Also Inglis Family Law Supra Page 496 et seq.

(42) See Palmer v Palmer [1961] NZLR 702 (CA) In Re B [1962] 1 WLR 550 (CA), In Re L. 1962 [1962] 1WLR 886 (CA)

(43) In Re Thomson (1911) 30 NZLR 168 In Re H [1940] GLR 37 Norton v Norton [1951] NZLR 678 Miller v Low [1952] NZLR 575 (CA).

(44) Per Callan J in M v M [1941] GLR 396,397. Also see Re C (A) an Infant [1970] 1All ER 309 (CA)

Confusion seems to exist amongst the judiciary in this area of the law as stress on aphorisms or principles has varied from insistence depreciation and even denial. For example, Roxburgh J In Re S [45] said "the prima facia rule (which is now quite clearly settled) is that other things being equal, children of tender age (under five) should be with their mother"... Yet in Re B [46] the Court of Appeal disapproved of this as a principle of law but not as a principle of commonsense. Lord Evershed MR stated that he did not "believe that in these cases there is any such thing as a rule". More recently in H v H & C [47] Salmon LJ said"this is not a proposition of law (but) from the view of commonsense and ordinary humanity, all things being equal the best place for any small child is with its mother".

Also as another example one questions the English Court of Appeal's adoption of one of the above aphorisms as a general principle when awarding custody of an eight year old boy to his father in W v W & C [48]. Yet 18 months later a differently constituted Court of Appeal rejected such a proposition as a rule of law [49] in Re C.A.

(45) [1958] 1WLR 391 at 391
(46) [1962] 1WLR 550
(47) [1969] 1WLR 208 at 209
(48) [1968] 1WLR 1310
(49) [1970] 1WLR 288

Whether the Courts use aphorisms or commonsense though, they should be used carefully since as Barwick LJ said recently, "aphorisms are as like to mislead as assist"(50).

In New Zealand our own Court of Appeal is equally guilty of elevating aphorisms to rules of law. In Palmer v Palmer (51) for example, Cleary J (52) said in his judgement:

> "I am prepared to accept the principle as a general rule but by no means invariable rule that young children, including young male children, are better in the care of their mother, and I accept also that good and sound reasons affecting the welfare of the infant should be shown before the principle is departed from where no grounds of unfitness can be advanced against the mother or the home provided by her. The question is whether there are such grounds in the present case".

In the same case Gresson P (53) in his judgment said:

> "The principle that the custody of an infant of tender years should normally be given to the mother may of course be displaced but a good deal is required to warrant departure from the commonsense of the proposition that as a general rule young children will be better off with their mother than with their father - if they cannot have both."

The underlining emphasis is mine, and on its face does suggest that there is some justification in the Association's complaint that a mother's right to custody is a foregone conclusion.

(50) Kotis v Kotis (1970) 45 ALJR 62 at 64
(51) [1961] NZLR 702
(52) at page 724
(53) at page 714

Yet the Courts do realise that such aphorisms are not to be regarded as rules of law. Gresson P before stating the principle passage quoted above, said of the principle, "it does not amount to a rule or presumption of law"(54) Again North P in R v D speaking of the mother principle said it "is a very vital one ... but at the same time, one has to remember this, that it is not a right in law - the law has never recognised the 'mother principle' as having the status of a rule of law. It is a factor of importance which varies from case to case." Having added the caution above though the Court then falls into the trap it is submitted, because it then elevates the "welfare concept" to a rule of law.

> "I think like the President, that it is impossible to contend that, when other things are equal, the welfare of the children is best served by placing them with a mother who has broken up the family home to live in adultery for her own selfish purposes. I do not say this with the slightest thought that the consequences of her conduct should be visited upon her as a matter of justice." (55)

Perhaps a good deal of the Association's criticism is levied here against the judgements as written. In nearly every custody case that one is able to read reported or unreported, the judge invariably reviews the law. In doing so the mother concept will nearly always be referred to some where in the judgment and an authority cited for it, even when the custody dispute is between relative and the natural parents.(56)

(54) at Page 714
(55) Per Turner J at 955
(56) See J v C [1970] AC 668 also In Re D [1971] NZLR 737

In addition, it would appear that some judges appear to place too much weight on aphorisms by discussing them in depth and not the facts on which their decision is based. An example here is Griffiths v Griffiths [57], where White J spends in his judgment, approximately four pages reviewing the law and principles on what a decision should be based, in a six page judgement. Some of the judiciary seem to be aware of the dangers of placing too much reliance on aphorisms. For example Sir Michael Myers CJ in Reid v Reid /1941/ NZLR 952 expressly rejected the so called principle that the mother, unless quite unfit, should have the custody of a male child until 11 or 12 years old, and said that if there were such a rule then great inconveniences and much misery could result. The aphorisms seem to be seen by the Courts in different degrees of importance, the most obvious being the"mother principle" [58] discussed above. However, an aphorism that has been considered by the Courts in more recent years is "what are the probabilities of the child being corrupted by the moral weakness of the parent, or the child being subject to immoral surroundings?" In such a case, the mother principle "should not be elevated when the mother has caused a breakup in the matrimonial home"[59] But conduct is relevant "insofar as it shows character tendencies relevant to the welfare of the children what she has done is part of the stuff of the case upon which it must be decided." [60]

(57) In Re D /1971/ NZLR 737 unreported decision June 3, 1971 D211/69
(58) Morton v Morton 91911) 31 NZLR 77
(59) Per Gresson P in Palmer v Palmer Supra at 712
(60) Per Turner J in R v d Supra at 954

The most recent example in New Zealand is that of R v D Supra and Australia D v D Supra (both discussed ante in relation to personal prejudices of the judicary.)

> "Just as a custody application is a family matter, it is a dispute involving comparisons. Ineviatably it resolves itself into comparing one prospective home with the other, one parent's attitude and character, facilities and so on, with those of the other; and all custody matters resolve themselves in some degree into this kind of comparison" (61)

Expert Evidence

In both reported and unreported cases there now seems to be an emerging realisation that the place of the aphorisms can best be taken by reception of and reliance on expert guidance. The evidence of medical experts where the child is not suffering any "physical neurological or psycological malady or condition" has been stated by Lord Upjohn to be "valuable if accepted" but "only as an element to support the general knowledge and experience of the judge." (62) Also the judges are reluctant to accept evidence from an expert if the expert states the obvious. "One does not need the testimony of the psychiatrists to know that a young child is happier and better with its own natural mother of 24 or thereabouts than with its grandmother of 54" (63) The last phrase would be likely to be criticised heavily by a parent who had lost custody of his child. He might argue that the experts evidence should or should not be followed by the judge.

(61) Per Turner J at 954 (R v D Supra)
(62) J v C [1970] Ac 668 at 726
(63) Per Gresson P in Palmer v Palmer Supra at 715

Against this it has been suggested by Begg J that "the evidence of a psychiatrist usually has little place in a contested custody application"(64). This is because while psychiatrists "are persons of the highest integrity" ..."if they are instructed on behalf of one party their views are bound to be coloured to some extent by that party's views. Further, if they are ordinary human beings as I hope and believe they are, they can hardly help having some faint desire that their side should win just because it is their side ... My suggestion is simply directed to ensuring the psychiatrists who give evidence in wardship cases should receive unbiased instructions." (65)

A further caution was added in Re C (L) an Infant [1965] 2QB 449 by Pearson LJ (66) when he said: "there is some risk in the decision in cases of this kind, being possibly taken out of the hands of the court and put into the hands of the medical profession, which of course is not right, because it is meant to be the Courts that decide these questions." The expert witness in Re C (MA) [1966] 1AllEr 838 was criticised because he did not "seek to interview the wife or father and see whether they or either of them fulfilled these qualifications, and thought it enough to commend the adoptors, who were the persons employed by him. This looks like a case of letting advocacy creep into expert evidence" (67)

(64) Lynch v Lynch [1966] 84WN(pt 1) NSW 315 at 316
(65) Re S (infants) [1967] AllER 202 at 209 Cross J
(66) At pages 469-470
(67) Per Harrison LJ at 860

Wigmore (68) tells us that originally the experts testimony was regarded not as evidence presented to the jury, but as an aid sought by the Court. Yet as illustrated above this has not become the use in modern trials. Walsh J stated: "As to the evidence of the accademically qualified a brief review will suffice, because I cannot regard this as of much assistance ... (the witnesses) are all learned and intelligent men, and I have no doubt that they give their evidence honestly although affected in greater or lesser degree by the kind of unconcious bias which is a well known characteristic of expert evidence." (69)

The prejudices of expert witnesses were observed by the Court of Appeal in Palmer v Palmer Supra. Gresson P at page 709 commenting on evidence given by Dr Bourne said ... "but he regarded Mrs Palmer Senior as the 'natural mother' in some mother substitute or mother figure capacity. That in my respectful opinion was mere sophistry." And on Page 714 he said "The mother appears to be of a gentle disposition. Dr Bourne, who examined her on behalf of the father, conceeded with some reluctance that that was the case though he preferred to designate her as a 'timid hysteric' - whatever that may mean."

In spite of these criticisms it has been said that expert evidence should be applied more than it has to test "the

(68) Evidence 3rd Edition Vol VII 1917
(69) Miller Steamship Company Pty Ltd v Overseas Tankship (UK) /1963/ SR (NSW) 948 at 963. For a discussion of Expert Evidence see "Expert Assistance" 1971 45 ALJ 2

general knowledge and experience of the judge and the proposition of commonsense on which he relies.(70) This does not infer their propositions would fail the test, as the expert in Re C [1966] 1 WLR 646 suggests that they might pass with honours. It should be noted though that some principles once regarded as being commonsense are now accepted as being erroneous. For example, the view taken by Eve J in Re Thain [1926] Ch 616(71) that the effects of partings were mercifully transcient is no longer accepted. Medical opinion stresses the possible risks in transferring young children from the care of one person to another, especially those children aged between 6 months and 3 years.(72) Evidence in Palmer v Palmer Supra was introduced to this effect by Dr Bourne and Dr McLaughlin (See judgement North J at Page 719). Professor H.K. Bevan noting the increased reliance on medical evidence in contested proceedings said, "previously, when the Courts had to consider removing a child from a foster parent or prospective adoptor and returning him to the natural parent they seem to have assumed that a very young child was not likely to suffer serious harm if the natural parent was capable of bringing him up and was anxious to do so; and as for the older child they tended to accept the view of Eve J in Re Thain Supra". Now it is recognised that the adverse effects of emotional disturbance may range from the trival to the disastrous depending on the original child.

(70) See "Custody and the Expert Witness" [1971] 45 ALR 53
(71) at 684 c.f. J v C Supra at 715
(72) See Michaels "The Dangers of a change in parentage in custody and adoption cases" (1967) 83 LQR 547

Aggrieved husbands who have lost custody of the children to their wife have argued that because of the "coloured evidence" given by the expert, if there was one in the proceedings, they had not received a fair hearing. I doubt if there is any merit in this claim as the husband has the right of cross examination when coloured evidence is usually revealed. (See Gresson P's comments in Palmer v Palmer discussed ante). The judiciary is also quick to note if the witness is usurping their function and drawing the conclusions.(73) "It is not competent in any action for witnesses to express their opinion upon any of the issues, whether law or fact which the Court or a jury has to determine."(74)

Another objection with evidence by experts is that as such evidence often stems from instructions which are in the nature of hearsay and which are based on premises supplied to the expert, there is a danger that if these premises are incorrect then also the experts hypothesis may be incorrect. The doctor may not be in a position to detect these incorrect premises from the child's background and hence give a false hypothesis. While there is obviously some merit in this criticism and the Courts have sometimes criticised reception of such evidence unless it is adduced on the joint instruction of both parties(75) it seems to be generally accepted that

(73) Pearson LJ adverted to the danger of allowing the medical profession to usurp the functions of the judiciary in this connection - Re C (L) [1965] 2QB 449 at 469-470.

(74) Per Neville J in Joseph Crossfield Ltd v Techno Chemical Laboratories Ltd (1913) 29 TLR 378 at 379

(75) Lynch v Lynch (1966) 8 FLR 433

psychoanalytic theory and experience can provide some guidelines for the law. This is the view of many psychiatrists.(76) To conclude in this area, it is best summed up by Parker LCJ in a recent unreported case, when he said: "When you are dealing with children, juries and justices need all the help they can get, so with respect do the judges".(77)

More often than not the one or two injustices that may occur are because the aphorisms and rules of commonsense have been elevated to matters of law. There does not seem to be any decision which has been criticised which stems from evidence given by an expert, though a general criticism has been levied against experts by the Association. On reading the Association's pamphlets most of their grievances seem to be in the area of the wife's matrimonial wrongs or morality. The argument usually proceeds on the basis that "she committed adultery and this was found as a fact by the Court yet she got custody of our children. Furthermore the judge accepted that I, the husband, was innocent of any matrimonial offence or wrong." A typical example is the "Two Minute Domestic Study" on Page 8.

The aggrieved party in these case histories usually seems to think that the fact his wife committed adultery should <u>per se</u> deprive her of custody. Yet the Court as mentioned before, must consider all the circumstances of the case, and

(76) See Custody and Psychiatry: TheRole of the Psychiatric Expert" Vol 45 (1971) ALJ 93 et seq.
(77) Referred to by Finlay (1971) 45ALJ 53

the factors leading up to the adultery or immoral conduct. Admittedly there are many cases where the party guilty of immoral conduct has got custody,(78) because the Court has felt that the child's interests would be best served. Not as the Association contends because of judicial bias in favour of all wives. Obviously, if the mother is a common prostitute she would be disqualified from having custody(79) or if she openly in front of the child indulged in immoral conduct(80). The Association contends that "fault"should be a criteria considered in custody disputes. "It is a callous denial of the elementary right to deny custody of children to a parent who has not infringed the matrimonial code and who could care for the children in a reasonable manner, on the ground that, in somebody's opinion the other parent could look after them better. It must become an established principle of any just law, that the parent found guilty of, on proven evidence, conduct justifying dissolution of the marriage, shall not be given custody in preference to the other parent, unless it can be shown that that parent is not a fit and proper person to have custody of the children."(81)

(78) Allen v Allen [1948] 2 AllER 413
(79) Thompson v Thompson supra
(80) Albrecht v Albrecht [1967] 10 FLR 125 Maile v Maile [1968] NSWR 752
(81) Association's submission to Standing Committee (Victoria) on Divorce Law Reform Enquiry Page 3, dated 12 May 1972.

In reply to the Association's above views, it should be noted the object of custody proceedings is not to punish a spouse who has been guilty of a matrimonial wrong, but the object is the welfare of the children.

Access

A large degree of the Association's complaints are directed at father's access rights to their children after the mother has been awarded custody. There is not any criticism of the non molestation provisions (82) or the consequences of breaching an order(83) though they are noted in one or two of their publications as possible evil. Their criticism is of mother's deliberately making the children "not available" when the father's turn for access arrives. This criticism seems out of proportion because most separated parents interviewed seem to come to suitable agreements amongst themselves even though each parent may have some inner resentment about it.

Yet time and again the publications refer to access being denied as illustrated on pages 7 and 8, as though it is as common as the mother being awarded custody. There are the provisions in the Domestic Proceedings Rules for a warrant to issue to Enforce Access Orders (84) as well. However, in practise they seem to be very seldom used.

(82) Section 22 Domestic Proceedings Act 1968
(83) Section 23 Domestic Proceedings Act 1968
(84) ~~Access for more than a fortnight~~ DP 40 Domestic Proceedings Rules.

Mr Mathews the present Christchurch Secretary of the Association contends these provisions are not suitable and the warrant is there only as "window-dressing" in the legislation. He said"I have never yet been able to obtain one by use of the normal legal processes. Very few parents/ guardians are ordered an Entitlement to Access for more than a fortnight., at one time.

"~~At one time~~ —If it takes over a month to obtain a hearing for a DP 40 - what purpose is served? The holiday or access periods are over."

He then related his present problem to that with the access provisions. "In March 1969 a Magistrate ordered both children were to spend weeks of each school holiday with me. This has been ordered two or three times since. Yet during only one school holiday period has access been properly complied with - because my Application for Custody was about to be heard."

Mr Mathews' problem in my opinion it is contended is the exception rather than the rule. It does show however, a fault in the Court system if one must wait a month for a hearing. In this field perhaps the delay could be reduced if the power was able to be delegated to the Registrar or Depty Registrar of the Court to make access orders. If this were done then the measures in the Act could not be said to be "window dressing".

Maintenance

Using the "fault concept" above, the Association is also critical of the maintenance provisions as they stand at present. Pamphlet No 5/21769 states "we are deeply interested in justice for innocent women, and they fortunately have the protection of this Act. But what of the innocent men?" A criticism of the Domestic Proceedings Act 1968 then follows:-

> "... Part 4 Maintenance Although the Act stresses the same benefits to Husbands, we do not know of one case where a wife has been ordered to maintain or split assets in favour of her husband ...
>
> General Sub Section 81. Should the marriage be dissolved, the maintenance payments will carry on regardless.
> S.S. 82 A wife either mentally defective or in a Psychiatric Hospital, shall continue to receive maintenance through her appointed Agent or Public Trustee
> S.S. 85 A wife can at any time apply to the Court for a variation of maintenance, by discharge, suspension or extension. In all the cases we know of, the wife has sort additional moneys. This padding of the Act by granting the power to discharge or suspend is almost anomalous.
> S.S. 101 Did you know the Court can order a charge on any real or personal property of yours? Which means any property, land, car, furniture, clothes etc., in fact anything you own can be taken and sold up and paid to your wife.
> S.S. 102 Did you know that a 'charging order' can even be made out against your life insurance policies?
> S.S. 104 Did you know the Public Trust will be appointed (if you are in prison or 'disappear') and any moneys due to you such as inheritance, rents, dividends, War Pensions, etc, will be paid to your wife. ...."

Before commenting further on these statements, the provisions of the Act listed above are extreme provisions. They are designed, it is submitted, to catch the husband unwilling to pay maintenance regardless of the legal consequences.

in the same way as the attachment order. From enquiries I have conducted at the Courts I have been unable to find that they have been used, with the exception of the variation proceedings. The Association it is submitted, has blown these provisions out of all proportion in their use in an endeavour to add colour to their cause.

Similarly the following statement of the Association's it is submitted, is without foundation ...

> "Most men who pass through these Courts are appalled by the scandalous treatment they receive. In the Maintenance Courts they are told to be silent. Their attempts at statements of defence or explanation, and their allegations against their wives are cut short and brushed aside by the Magistrates, or supressed by their own lawyer. The Magistrates pretend to believe the unlikliest statements by the wives. They tolerate their wilful and deliberate lies and excuse them. They allow the most far reaching cross examinations of the husbands and the deepest delving into their affairs, and they protect the wives from even mild questioning which could expose them. They are completely biased, and they make orders on the flimsiest complaints ...
>
> "The judges and magistrates are not restrained by any considerations of public opinion because the public are not allowed to know the details of the individual cases and the general standard of decision made. Behind their veil of secrecy, the Courts are completely biased."
>
> "We do not want any more secret courts ... the secret courts have already undermined justice and the belief in justice. They are encouraging widespread disrespect for the law ..."

Dealing with the first portion of the above statement, I have not found any cases which would support the husband's contention that they have been unfairly treated by the judges and not given a fair hearing. If such cases exist they can always be successfully appealed against, such as in

Black v Black [1951] NZLR 723. The only maintenance provision which seems to be difficult for husbands sometimes to argue successfully is proceedings for a variation of the maintenance order, because of a change in circumstances. This is common if the husband is in arrears when he applies for the variation (See for example, cases 7 and 9 Bulletin of Association April 1972). A few cases that seem difficult for husbands to successfully argue are that there has been a change of circumstances when the wife begins in part-time employment, or has an income from another source (See Case 9 above). If a husband intentionally changes positions and gets a reduction in his income, he cannot claim that there has been a change in circumstances justifying a variation. Yet if a wife begins a part-time position (85) and earns a small wage, works full time leaving her mother to look after the children, or puts her children in a day nursery, or takes in a boarder(86), as soon as the husband files proceedings claiming there has been a change in circumstances the wife ceases her business activity, and the husbands seem to have little or no success. With respect to the Courts it is submitted that here the Courts do not pay sufficient attention to the words, "may have regard to any increase or decrease in the earning capacity of the wife or in the means of the wife" in Section 47(6) of the Domestic Proceedings Act.

(85) Cooper v Cooper unreported M.C. Decision March 1972 Wellington
(86) Groube v Groube unreported Lower Hutt September 1972 Patterson S.M. D.P. 563/72

A few cases in this area seem to be incorrectly decided against the husband. The Courts should adopt the same objective test as they do for husbands.

As regards the Association's claim that such cases should not be heard in camera to prevent unfair decisions. It is submitted that these contentions are without foundation. The purpose of the camera hearings is to prevent the "dirty linen" of people's lives being aired in public. If the facts and decisions were reported publicly people in the family courts would not be as open or truthful as they would otherwise be, for fear of the public at large and their friends finding out. This would also make the Courts position considerable more difficult to administer the law.

The Association in its pamphlets has argued that a set scale of maintenance allowances should be specified by legislation to prevent apparent differences in the amount of maintenance awarded by the Courts between different cases. To do this it is suggested would be equally unjust since the needs of children will vary from family to family and city to city. For example, to live in Wellington is more expensive than living in Dunedin. It is also reported that girls are more expensive to cloth than boys, and such like. Also the standard one family may be accustomed to will be different from another family, usually depending on the father's income and position. For these reasons a set scale of maintenance would be equally unjust.

Conclusion

From the observations in the paper it would appear that there is little merit in the Association's contentions that the husbands in custody proceedings are subject to judicial bias or legislative bias. This is whether experts are used to give evidence in the proceedings or not, when reliance is usually placed on aphorisms and the facts of the case. It is true that in the past some aphorisms were based on incorrect concepts such as that propounded in Re Thain (discussed ante on page 32). Today the Courts have progressed a little way since the judgement of that case and of Romily MR in Austin v Austin (1865) 55ER 634, when he said "No thing and no person and no combination of them, can, in my opinion, with regard to a child of tender years, supply the place of a mother, and the welfare of the child is so intimately connected with its being under the care of the mother, that no extent of kindness on the part of any person can supply that care. It is the notorious observation of mankind that the loss of a mother is irreparable to her children and particularly so if young. If that be so, the circumstances must be very strong indeed to induce this court to take a child from the guardianship and custody of her mother. It is, in point of fact only done hwere it is essential to the welfare of the child." (87)

(87) At 636 - 637

To refer to R v D again it is clear the Courts today will not hesitate to deprive a mother of custody if the circumstances so require. The reported cases in the law reports also provide unbiased case histories for study. It is worth noting that of the cases reported which I felt could have been decided either way, they usually were decided in the mother's favour. This occurred when all things were equal or the family comprised boys and girls and the Court was against splitting the family.

As mentioned before more reported cases were decided in the mother's favour, and also unreported cases to which I managed to gain access. Also the mother principle is used as a basis for decision in most of these cases, but this does not mean that the husband's are unfairly prejudiced. It means simply that in most cases, the mother is in a better position to promote the welfare of the children or that the children's best interests would be served by the mother having custody. The Association would no doubt, say that I am guilty of following in the Courts' footsteps in view of the last sentence, but my statement is based not just on aphorisms but reports of experts in this field.(88)

(88) J. Bowlby "Forty four Juvenile Thieves" (1946) Bailliere Tridall and Cox London
(1951) "Matrimonial Care and Child Health" W.H.O. Monograph Series No 2
R.N. Spitz and K.M. Woolf "Anailytic Depressions" "The Psychoanalytic Study of the Child Volume 2" esp P.310etseq

The Association's allegations that the mother will nearly always get custody because of legislative and judicial bias, seems therefore to be misfounded in most cases. The only area of custody decisions that seems uncertain is when an issue of parent morality arises in relation to the welfare of the children. Unfortunately, there will then sometimes appear to be inconsistencies between the judiciaries reasoning in such cases because of individual personal prejudices.

When reliance is placed on an expert witness or witnesses, their presence is of assistance rather than a hinderance. Their evidence sometimes, for reasons explained before, must be received with scrutiny.

There may be cases when the evidence given by experts may seem unfair to a party such as in Palmer v Palmer Supra. However, with the right of cross examination and a judge assessing the weight to be placed on such evidence, along with other evidence, it is submitted there is no apparent bias against husbands from decided cases. With access problems, again the Association, it is suggested, has blown the situation out of proportion. The vast majority of separated parents seem to have no problem in this field, and are able to come to suitable arrangements. There is of course, the machinery provisions in the Domestic Proceedings Rules to enforce access rights mentioned before which could be "streamlined" by delegation of power.

In the maintenance area there would seem to be the odd case which seems to penalise husbands to a degree. As mentioned before, the Courts do not seem to give as much effect to potential earning capacity of the wives as they should.

The conclusion therefore, is that the majority of the Association's allegations seem to be misfounded. Also the case histories cited by the Association do not perhaps mention all the relevant facts.

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R J V Buckle

Buddle, R.J.D. Custody proceedings.


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