

Aboriginal Issues and the Welfare of Children

A recent decision of the Full Court of the Family Court focuses on several important issues relating to disputes involving children of mixed race parentage.

B and R and the Separate Representative (1995) FLC 92-636 involved a two-year-old girl known as C who had been living in Tasmania with her white Australian father for nearly 15 months at the time of the hearing. Her Aboriginal mother lived in Victoria and had seen the child only rarely during that period. There was evidence that the parents' relationship had been characterised by heavy drinking and domestic violence on the part of both. Both custody and access were in issue and at first instance custody was granted to the father and access to the mother.

There were three inter-related issues involved in the appeal.

The first was the extent to which evidence of the effects on Aboriginal children of being raised in a non-Aboriginal environment could be admitted into evidence in a custody dispute of this nature.

The second was the treatment of the argument that the admission of such evidence, which describes uniquely Aboriginal experiences, would amount to discriminatory or preferential treatment.

The third was the role and functions of the separate representative, particularly as these related to the bringing of evidence before the Court and supporting the case of one parent.

Removal from natural environment

The Full Court experienced no difficulty in accepting that the historical evidence of the universally negative impacts on Aboriginal children of forcible removal from their natural environment and culture and subsequent rearing by non-Aboriginal caregivers was (together with other factors) relevant to determining what would be in the best interests of C. It was relevant to the extent that the consequences as experienced by previous generations of Aboriginal children might also be experienced by C.

The Full Court noted that: 'The history of Aboriginal Australians is a unique one, as is

News from the Family Court

*In this occasional column
MARGARET HARRISON
reports on recent decisions and
other activities of the Family
Court of Australia, and the
implications these have
for families.*

their current position in Australian life. The struggles which they face in a predominantly white culture are, too, unique. Evidence which makes reference to these types of experiences and struggles travels well beyond any broad "right to know one's culture" assertion. It addresses the reality of Aboriginal experience, relevant as that experience is to any consideration of the welfare of the child in the present case, a reality far deeper and more profound than the type of traditionally broad statements of principle referred to by the trial Judge.'

Differential treatment

The discussion of whether giving particular weight to the child's Aboriginality imposed impermissible differential treatment centred around the issue of what constitutes equal treatment before the law. The Full Court stressed that equal justice cannot be seen as being the same as identical treatment where it may result in disparate impact on particular individuals, in this case Aboriginal people. The treatment of individuals in a manner which recognises and responds to their relevant differences is just, and to ignore those differences accords them less respectful treatment than is given to others in the community.

Arguments about the propriety of 50-50 outcomes in property distribution between men and women after marriage breakdown are also relevant to such an analysis.

Separate representation

The final issue was that of the role of the separate representative who was acting on behalf of C and whose counsel had argued that the mother should be granted custody. Difficulties surrounding what such advocates should do includes the fact that they are not appointed by the persons they represent, may not be removed by them, do not necessarily argue for what their 'clients' want, and may either be unable to obtain instructions from them or may decide not to act on the wishes expressed to them (although they are obliged to inform the Court of any wishes). Moreover, the 'client' is not a party to the proceedings.

At first instance the trial judge had restricted the separate representative's cross-examination on the basis that she was attempting to usurp the role of the mother's counsel and that this would prejudice the father's case.

The Full Court found that the trial judge had unduly limited the role of counsel for the child. It summarised previous case law which included guidelines for the role of the separate representative. These included the collation of expert evidence and other activities to ensure that everything relevant to the child's welfare is before the Court, including the calling of expert evidence.

The Full Court amplified the functions listed most recently in *P and P* (1995) FLC 92-615 by explaining that the separate representative may in certain circumstances: ask questions relevant to the child's welfare, irrespective of whether this would result in evidence being adduced which could have been led by a party; ask leading questions of a party as a witness; make an opening address to the Court; and indicate, either at the beginning of the hearing or in a final address to the court, the orders sought.

Outcome

The appeal was allowed and a re-trial ordered.

Postscript: Chief Justice Nicholson last year recommended to the Government that the Family Law Act should be amended to require the Court to take into account traditional law and culture when making custody and similar decisions involving children of Aboriginal and Torres Strait Islander descent. The Attorney-General accepted this

suggestion and the Government has announced its intention to introduce an amendment to the first Family Law Reform Bill to achieve this objective. (See Justice Nicholson's paper on indigenous customary law and Australian family law elsewhere in this issue of *Family Matters*.)

Representing Children in Family Court Proceedings

The issue of separate representation of children is also the subject of a recently released Discussion Paper, *Representing the Child's Interests in the Family Court*, prepared by a Family Court committee.

The paper suggests guidelines for the respective roles of Separate Representatives and Court Counsellors working together. It also includes a consideration of the current relationships between the two professional groups as they operate in each State, and an examination of what that relationship should be in view of recent cases and the overall objective of producing the best outcome for the child.

Background

A number of issues provided the impetus for the establishment of the Committee. These included: the continuing confusion surrounding the role and functions of the separate representative; the increase in appointments following the guidelines set out in *Re K* (1994) FLC 92-461; concerns about inconsistent practices across the country and the lack of training programs for such representatives (who have legal qualifications but not necessarily any additional skills); and the obligations imposed by the United Nations Convention on the Rights of the Child.

Earlier this year, in May, the Family Law Council published a Discussion Paper titled *Involving and Representing Children in Family Law*, and will follow this up with a report next year. This paper proposed a model for change based on its conclusion that the involvement and representation of children in family law goes far beyond the

courtroom and the assumption that lack of coordination between the various participants is a problem. It recommended that a coordinator, (either a Court Counsellor or an 'external' social scientist) be appointed to oversee the wider aspects of involving children and representing their interests. It also identified a number of shortcomings in the present system, including the circumstances in which children's wishes are obtained, the lack of a comprehensive training program for separate representatives, and the need for more cooperation between relevant State and Commonwealth agencies.

Findings and recommendations

The Family Court's Discussion Paper examines a number of points raised in the earlier paper and in particular looks at: the time at which a separate representative should be appointed; whether, and to what extent, counsellors and separate representatives liaise with each other during counselling interviews to discuss the main issues the separate representative might present on the child's behalf in Court; the interaction with State welfare authorities; children as witnesses; and the management of difficult matters – for example, those involving cross-cultural issues or sterilisation and other medical procedures.

The opinions of those currently working as separate representatives and counsellors were obtained via a questionnaire which asked what liaison there was between the two professional groups, and what respondents thought should occur.

The report also contains a chapter on interviewing children. This emphasises both the difficulties involved, and the importance of involving counsellors, whose training enables them to provide an interpretative framework and context for the views a child may express. The practice of some separate representatives not to interview children is strongly discouraged and practical guidelines for the conduct of interviews are included. These cover areas such as how to prepare for a meeting with the child, relating to the child, using children's wishes in negotiations, how to manage disclosures made by the child, and terminating the relationship.

One of the most sensitive areas involving court counselling is the issue of privileged communication. Both the Family Law Act and Rules provide that evidence of anything said or any admission made at a court ordered conference with a counsellor is not admissible

in any Court. Such a provision helps parents to reach a negotiated settlement and to express themselves freely without fear that issues raised will be used as evidence should the dispute ultimately be litigated.

(The situation is quite different where a Family Report is ordered by a judge to enable additional information to be made available before an order is made. In these situations there can be no issue of confidentiality, as the counselling is directed towards the preparation of the report which is used as evidence of the child's welfare.)

The paper recommends that once the privileged counselling is finished the counsellor should be able to inform the separate representative about the family dynamics, the involvement of other agencies, case management recommendations, counselling or therapy indicated for the child, urgent issues, and any child abuse notifications. Once the separate representative has met the child s/he should discuss with the counsellor issues relating to the management of the case, what further investigations are indicated, wishes expressed by the child, strategies to support the child, and settlement proposals.

The discussion paper points out that the confidentiality provisions would not prevent a counsellor from discussing matters raised in these conferences with a representative for the child, although s/he could not put those discussions into evidence. The report does not recommend that the separate representative be present during the counselling interview, nor that s/he should be given a detailed account of what took place in counselling, but rather that an objective overview of the relevant issues for the child be provided.

Copies of the Family Court committee's Discussion Paper, *Representing the Child's Interests in the Family Court*, may be obtained by phoning the chambers of the Chief Justice of the Family Court on (03) 9242 5888. Comments on the issues raised in the Discussion Paper and its recommendations are sought by 19 January 1996, although it is likely that late comments will be accepted.

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