

News
from the
Family
Court

Disclosure of Child Protection Information

Child protection issues frequently arise in Family Court proceedings, and State and Territory welfare departments may be served with a subpoena from one of the parties requiring the production of records relating to the child in question. In all jurisdictions (except Western Australia) there is some form of legislation governing the disclosure of information and documents associated with child protection investigations, such as the identity of the notifier or file material about the process and its outcomes.

The effect of State and Territory laws on this subject when there are proceedings under the *Family Law Act*, was the subject of a split decision by the Full Court of the Family Court in *Re Z* (1996) FLC 92-694. One major difference of view within the Court is discussed below.

The basic facts of *Re Z* are simple. In June 1995, the mother applied to discharge previous orders for the father to have contact with his five-year-old daughter. The basis of her application was an allegation that the father had sexually abused the child. As required by the *Family Law Act*, a notice setting out the allegation was filed in the Family Court by the mother and forwarded by the Court to the Northern Territory Department of Community Welfare. Investigations were carried out by Departmental Officers and also by the police. The Department did not institute protection proceedings.

In October 1995, the father issued a subpoena to the manager of the Child and Family Protective Services section of the Department requiring the production of 'all files and records in relation to (the child)'.

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reports on a new Family Court decision which qualifies the protection that State and Territory legislation may give to material gathered in child abuse cases.

As a follow-up to his article in the previous edition of Family Matters, he also provides an update on the first High Court case concerning the Child Abduction Convention, and announces a forthcoming conference about medical treatment and children's rights.

An objection was subsequently made on behalf of the manager to the production of the documents sought. The objection relied on s97(3) of the Northern Territory *Community Welfare Act 1983* which provides as follows:

'A person who is, or has been, an authorised person shall not, except for the purposes of this Act, be required to –
(a) produce in a court a document that has come into his possession or under his control; or
(b) disclose or communicate to a court any matter or thing that has come under his notice, in the performance of his duties or functions under this Act.'

The trial Judge decided to refer the legal issues to the Full Court and it was asked to decide whether there were inconsistencies between s97(3) and certain sections of both the *Family Law Act* and the

Commonwealth *Evidence Act*. The importance of the issue lay in the fact that, under the Australian Constitution, a finding of inconsistency between a State or Territory law and a law of the Commonwealth will result in the latter prevailing to the extent of the inconsistency.

Chief Justice Nicholson and Justice Frederico, in the majority, found that the *Family Law Act* provision which requires the best interests of the child to be the paramount consideration, gives rise to inconsistency. Underlying this decision was a view that the Commonwealth family law jurisdiction overlaps with the area of child protection in that both are concerned with the welfare of individual children and children as a segment of the community.

In their view, the Commonwealth Parliament intended the *Family Law Act* to prevail subject to the Constitution and as a consequence State and Territory legislation could not operate to prevent relevant records and files being produced to and examined by the Family Court in proceedings where the best interests of the child are at stake. In particular, they considered that to preclude the Court from obtaining information held by child protection authorities would significantly interfere with the exercise of the Court's duty where allegations of child abuse have been made.

In coming to this conclusion, their judgment stressed that confidentiality provisions in legislation are important and that producing the documents to the Court does not mean that sensitive information is automatically revealed. Their Honours explained that the Court retains a discretion to determine whether the public interest considerations requiring the preservation of confidentiality outweigh the importance of admitting the evidence

in the best interests of the child and that the Judge hearing the case is to first undertake this balancing exercise.

The significance of the decision extends beyond the Northern Territory. Although some jurisdictions already contain exceptions permitting information to be divulged to a court under certain circumstances, specific mention of disclosing such material in proceedings under the *Family Law Act* only appears in the Tasmanian *Child Protection Act 1974*. Other Acts of this sort refer in different ways to permitting disclosure to 'a court' and there would seem to be scope for argument as cases arise about the applicability of the majority's reasoning.

Even more far-reaching is the implication in the majority judgment that the paramountcy principle may give rise to inconsistencies with a wider range of Commonwealth, State and Territory laws than those specifically concerned with child protection. In his dissenting judgment on this issue, Justice Fogarty described the possible consequences in the following way:

'it may override all Commonwealth, State and Territory confidentiality or privilege provisions in cases in relation to [what was then termed] the guardianship, custody or welfare of, or access to a child, where such provisions relate to information which is potentially relevant to the child's welfare. As the potential ambit of relevance in child-related cases is almost limitless – it might intrude into such areas as ASIO secrecy, taxation or social security confidential information or Cabinet discussions – the consequences of such a finding would be significant.' (At 83, 253-4)

Unlike the majority, Justice Fogarty considered there is an important distinction to

be drawn between the *Family Law Act* and child protection schemes which include provisions such as that contained in the Northern Territory Act. His Honour saw no conflict of laws because different aims were being addressed: although both are concerned with the welfare of children, State and Territory laws such as the Northern Territory *Community Welfare Act* are concerned with promoting the best interests of children as a segment of the community, whereas the *Family Law Act* is directed towards the promotion of the best interests of the child who is the subject of the proceedings.

Based on this approach, he concluded that general provisions of the *Family Law Act*, such as the paramountcy principle, should not be construed to interfere with specific confidentiality provisions that are enacted as an important component of a system which is recognised by the *Family Law Act* to be a matter of State and Territory responsibility.

From a legal policy perspective, the majority judgment heralds a potential expansion of the reach and power of the paramountcy principle. The Northern Territory has applied for special leave to appeal to the High Court and if leave is granted, one might expect intervention in the appeal by other States and Territories as well as the Commonwealth which submitted arguments to the Full Court. The majority decision stands as the law unless it is over-ruled. Whatever transpires, *Re Z* will be a stimulus for lively debate about both the practical and jurisprudential implications of the Full Court's judgments to child protection and other child-related matters, particularly because the binding legal authority of the judgments apply to the Act as it was prior to the recent amendments.

When Does an Abducted Child 'Object' to Being Returned?

The case of *De L*, now reported at (1996) FLC 92-674, was discussed in the last edition of *Family Matters* (No. 44, pp. 40-41) and it was foreshadowed that it may be the High Court's first case concerning applications made under the Australian Family Law Act Regulations which give effect to Hague Convention on the Civil Aspects of Child Abduction. Special leave to appeal from the Full Court of the Family Court was, in fact, granted and the case proceeded promptly to full argument. The case is now reported (1996) 20 Sam L R 390.

A central issue before the High Court was the meaning to be given to a regulation under the *Family Law Act* permitting a Court to refuse to order the return of child if he or she 'objects' to being returned to another jurisdiction, and has reached an age and degree of maturity at which it is appropriate to take account of those views. Justices Kay and Mushin as the majority of the Full Court decided that there should be a 'strict and narrow reading' of exceptions to the policy of mandatory return underlying the convention. They implicitly favoured an interpretation of the word 'objects' which 'imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute'.

Chief Justice Nicholson's dissent favoured taking a literal rather than restricted view of the term and on appeal in the High Court, six of the seven judges preferred his approach saying:

'there is no reason why [the regulation] should be construed by any strict or narrow reading of a phrase expressed in broad English terms . . . No form of words has been employed which would supply, as a relevant criterion, the expression of a

wish or preference or of vehement opposition. No 'additional gloss' is to be supplied.

'... Further, as was pointed out by Nicholson CJ in the present case, the policy of the Convention is not compromised by hearing what children have to say and by taking a literal view of the term "objection". That is because it remains for the Court to make the critical further assessments as to the child's age, maturity and whether in the circumstances of the case the discretion to refuse return should be exercised.' (At 399-400)

While acknowledging the arguments accepted by his fellow High Court judges, Justice Kirby was not persuaded that the word 'objects' should be given a broad construction. Like Justices Kay and Mushin in the Family Court, His Honour appears to have approached the question of how to interpret the term with foremost concern for giving maximum effect to 'the language, objectives and history of the Convention'. From this standpoint, an interpretation which permits only the narrowest exceptions to the presumption of mandatory return is entwined with the deterrence of abductions. In his Honour's view, a child's preferences or wishes should not defeat:

'the high policy expressed in the Convention which the Contracting States have negotiated on a reciprocal basis. They have done so in the asserted belief that, in general, return will be in the best interests of children as a class.' (At 424)

The prevailing legal approach leaves it more open for a child's objection to be made out in Australian law than is the case in Contracting States such as Switzerland, Israel and the United States, which have adopted a strict reading of the meaning of the word. However, it should be remembered that the finding that a child 'objects' only opens the door for a Court to exercise

CONFERENCE

Special Medical Procedures for Children

In the highly publicised *Marion's case*, it was established that the Family Court of Australia has responsibility for the authorisation of special medical procedures in relation to children. This is a sensitive role which includes and extends beyond the authorisation of sterilisation interventions and it has been concerning for the Court that the need for authorisation is not as widely known as it ought to be (see also *Family Matters* No. 44, p. 41).

In order to raise professional awareness, a working group comprising representatives of the Court, the Queensland Department of Families Youth and Community Care, the Legal Aid Office (Queensland) and the Queensland Anti-Discrimination Commission, has organised a one-day conference program which will be held in Brisbane on 8 February 1997 and bring together the professions and organisations which

have a significant role to play in the process.

Titled *A Question of Right Treatment: Special Medical Procedures for Children*, the conference will introduce participants to protocols which have been developed among key agencies and professional groups, and there will be workshops which involve cross-disciplinary case studies and special interest sessions. Keynote speakers at the Conference will include Sir Ronald Wilson, the President of the Human Rights and Equal Opportunity Commission, the Hon Kev Lingard, Queensland Minister for Families Youth and Community Care, Dr Sonia Grover, representing the Royal Australian College of Obstetricians and Gynaecologists, and Chief Justice Nicholson of the Family Court of Australia. Registrations for the conference close 20 December 1996 (or until all places are taken). For further information contact Denise Deane on (07) 3248 2210.

the discretion to refuse to order the child's return; it does not lead to such a decision. It therefore remains to be seen whether *De L* actually results in Australian Courts deciding to refuse to order the return of children at a more frequent rate than is the case in contrasting jurisdictions.

One problematic feature of the High Court majority judgment is their Honours' briefly stated view that a legal representative acting on behalf of the child's interests (not instructions) should be appointed where there is an issue about the child's objections or maturity. Such appointments have not been made in the past for Convention cases and it is difficult to envisage how a lawyer will assist the Court in these cases, above and beyond the expert

evidence assessment which can be obtained from the social science professionals of the Family Court Counselling Service.¹

Note: ¹A recent report titled *Representing the Child's Interests in the Family Court of Australia* was recently prepared for the Chief Justice by a Working Group chaired by Judicial Registrar Dianne Smith with representatives from Legal Aid organisations and the Court's Registrar and Counselling sections. The Report and its recommendations were formulated following the preparation of a widely circulated discussion paper and the receipt of submissions. Copies are available from Judicial Registrar Smith, Family Court of Australia, PO Box 9991, Brisbane 4001.

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