CUSTODY OF CHILDREN

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MR. AUSTIN ASCHE:

Background

DISPUTED cases of custody of children stand in a special category in the law so far as human emotion is concerned. It may be safe to say that no other contests can raise such bitterness or be more productive of anguish than those where people are fighting over possession of a child. Because each side is convinced that the child's welfare can only be served by one result, they become equally convinced that the opposite result will totally destroy the child's happiness and future and an adverse verdict is to them not merely a loss but a human tragedy. Yet until about 100 years ago there were very few legal cases where custody was contested. This does not mean that there were not cases needing adjudication but that the law possessed only limited machinery to interfere. A conspicuous feature of the development of the law in this respect has been the move from a position where the question of the child's welfare was virtually not considered at all to a position where it has become of supreme importance, and further recent indications that, in assessing this, the Court should move outside the realm of adversary contest and normal rules of evidence. I propose to examine this change in approach in the last 100 years and to point out the extent and limitations of suggested new approaches, bearing in mind always the comment by His Honour Herron, C.J. of New South Wales in *Kocis v. Statz* (1964) N.S.W.R. 667 at 669 that "In fact there is no branch of the law which is more difficult than the question of custody of a young child".

As I have suggested, the question of custody of children and principles relating thereto has been a comparatively recent development so far as English law is concerned. This is because at least up until the 19th century it was firmly established that at Common Law the father had almost absolute rights to the custody of his legitimate children. (Insofar as anyone had any right to

custody of an illegitimate child, it was the mother but only to a very limited extent because of the scant recognition accorded by the Common Law to the position of a bastard. As late as 1841 an English Judge could still ask "how does the mother of an illegitimate child differ from a stranger"). In this approach, the Courts did not vary greatly from the approach in Roman law although certainly English law never permitted a father the full extent of the powers of a paterfamilias who at least in early Roman law had unfettered powers of life and death over his children of whatever age. Thus Blackstone writing in 1768 could say, "the legal power of a father (for a mother as such is entitled to no power but only to reverence and respect) the power of a father, I say, over the persons of his children ceases at the age of 21. . . . Yet, till that age arrives, this empire of the father continues even after his death; for he may by will appoint a guardian to his children". The absence of any rights in the mother was emphasized in 1840 in the case of *Talbot v. Shrewsbury* (1840), 4 My. & Cr. 673 by Lord Chancellor Cottenham where he said, "I thought it necessary to explain to the mother that in point of law she had no right to control the power of the testamentary guardian . . . if however, under the peculiar circumstances I think it proper now to leave the custody of the children in the mother it is not in respect of right in that mother but it is in consequence of that power which the Court has of controlling the power of testamentary guardians". The most that the Common Law recognized was that there could be cases of cruelty or personal ill-usage which might justify taking a child from the father but such cases appear to have been very rare.

The result of this interpretation made for some very hard cases. For instance, in *R. v. Greenhill* (1836), 4 Ad. & E. 624, a father took from the mother against whom nothing improper was alleged, three girls aged 5, 4 and 2. The father had been living in adultery with another woman although it was true that he promised to give up his association. Counsel for the wife felt constrained to say to the Court, "The general proposition that the father has the right to custody of his children is not disputed". The Court upheld the right of the father to take and keep his children and the mother was not even granted any rights of access and it appears that her rights of access were regarded as entirely within the discretion of the father. Similarly, in *R. v. De-Manneville* (1804), 5 East 221, a wife had left her husband because of his alleged ill-treatment. She took with her their eight-

month old female child. The father sought her out and (to adopt the expressive language of the case itself), "took the child forcibly from her when at breast and by night and carried it away almost naked in inclement weather". The mother proceeded by way of habeas corpus against the father but failed. Lord Ellenborough, C.J. said, "The father is the person entitled by law to the custody of the child. If he abused that right to the detriment of that child, the Court will protect the child. But there is no pretence that the child has been injured for want of nurture or in any other respect".

While the approach of the Common Law remained rigid as to the power of the father, the Courts of Equity were in this, as in so many other areas, developing doctrines designed to soften the harshness of the Common Law. They did this by accepting their jurisdiction as coming from the Crown and invoking the Monarch's position as parens or pater patriae. Thus in cases where guardians had been appointed, Equity had the power to control these guardians and in doing so could make suitable arrangements for the welfare of the children. As early as 1756 Lord Hardwicke (in *Butler v. Freeman* (1756), Amb. 301) could say that the Court had a general right delegated by the Crown as pater patriae to interfere in particular cases for the benefit of such who are incapable of protecting themselves. However, although Lord Hardwicke speaks of a general right, it seems that this right was only exercised as ancillary to rights of property and in the exercise of matters connected with the control of such property. Thus only the rich could really resort to the jurisdiction. It is true that Lord Eldon (in *Wellesley v. Duke of Beaufort* (1827), 2 Russ. 1) denied that the jurisdiction was dependent upon property but he went on to say that when there was no property there was a "want of means to exercise the jurisdiction because the Court cannot take on itself the maintenance of all the children in the kingdom. It can exercise this jurisdiction usefully and practically only where it has the means of doing so, that is to say, by its having the means of applying property for the use and maintenance of the infants".

In exercising their jurisdiction in this way, the Courts of Equity developed the principle that they would act for the welfare of the children but it is apparent that the Court still recognized the strength of the father's rights in considering the welfare of the children.

If the Courts of Equity acted they had considerable power

and, although their views on what constituted welfare of the children may have been conditioned by the times, at least they were moving towards a more modern concept.

A good illustration of the power of the Courts of Equity is shown in the case of *Shelley v. Westbrooke* (1817), Jac. 266. This concerned the efforts of the poet to gain custody of his children by his first marriage to Harriet Westbrooke. At the time Shelley was living abroad and in sin with Mary Godwin who later became his wife. Harriet Westbrooke had committed suicide and the children were with her father. Mr. Westbrooke first took care to settle £2,000 in trust for the children and having then done so invoked the jurisdiction of the Court and drew the Court's attention not only to Shelley's immoral life but to his atheistical opinions and his published works denying the existence of God. The Lord Chancellor said, "this is a case in which, as the matter appears to me, the father's principles cannot be misunderstood, in which his conduct which I cannot but consider as highly immoral, has been established in proof and established as the effect of those principles; conduct nevertheless which he represents to himself and to others, not as conduct to be considered immoral but to be recommended and observed in practice and worthy of approbation". Having delivered himself of these sentiments, the Lord Chancellor issued an injunction restraining Shelley, his servants or agents from taking the children out of the jurisdiction or "intermeddling" with them. Equity lawyers will appreciate the significance of the use of the word "intermeddling" in this context as indicating an approach to custody questions based on the language of property and trusts.

Similarly in *Wellesley v. Wellesley* (1828), 2 Bli. N.S. 124, a father sought habeas corpus in order to obtain custody of his children who were in the care of his wife's sisters. The sisters retaliated with a petition in chancery to restrain the father from removing the children from their custody. This the Court was prepared to do after having heard that the father had not only lived with a mistress but had encouraged the children in swearing and had written a letter in which he stated "a man and his children ought to be allowed to go to the devil their own way if he pleases".

But except in such cases of what the Courts referred to as "gross moral turpitude", Equity as much as Common Law accepted the right of the father to his children as against other claimants and although regard was paid to the principle of the

welfare of the child, it was on the basis that this welfare was best served by giving them to the father. This was most clearly stated by the Court of Appeal in *Re Agar-Ellis* (1883), 24 Ch.D. 334, "When by birth a child is subject to a father it is for the general interest of families and for the general interest of children and really for the interest of the particular infant that the Court should not except in extreme cases interfere with the discretion of the father".

In face of such a philosophy it is not surprising to find that one of the dangers of being both a woman and a radical in the 19th century was that custody of children would be lost. This was what happened in 1879 to the celebrated Mrs. Besant (11 Ch. D. 508). Although her husband, a clergyman, had previously agreed by deed to let her have custody of her female child for 11 months of the year, he subsequently sought and was granted custody on the grounds that his wife has promulgated atheistical opinions and had been convicted with Charles Bradlaugh of publishing an obscene book although the conviction had been quashed on appeal and the jury had exonerated the defendants from any corrupt motives in publishing it.

In the late 19th century by legislation, the father and mother were placed on an equal footing so far as custody applications were concerned and the counterpart of what is now section 133 of the Victorian Marriage Act was enacted. This directs that "the Court shall regard the welfare of the infant as the first and paramount consideration and shall not take into consideration whether from any other point of view the claim of the father or any right at common law in respect of the father is superior to that of the mother or that of the mother is superior to that of the father".

This section has been the subject of a great deal of judicial comment particularly on the interpretation of the phrase "the welfare of the children shall be the first and paramount consideration". This is not the time to discuss the two different points of view which are best summed up by contrasting the remarks of Herring, C. J. in *Priest v. Priest*, (1965), V.R. 540 that, "the use of the word paramount shows that other considerations are not excluded. They are only subordinated", with those of Barry J. in *Cuartero v. Cuartero* (1967), 11 F.L.R. 472, the welfare of the children was the consideration that was "supreme and unqualified and uttermost". In the sense that all Courts look primarily to the welfare of the children, it may be that the distinction is, as

one commentator has put it, "a distinction without a difference". (See Finlay in 42 A.L.J. 96.)

In one sense the pendulum has now swung the other way and Courts give considerable regard to the mother-child relationship. This springs from the frequently quoted passage of Sir John Romilly in *Austin v. Austin* (which was not a case of custody but of appointment of a guardian), where he said words which are always passionately cited by counsel for the mother, "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 other person can supply that care". These are very proper observations but the heresy is to deliver them as a rule of law rather than as a rule of common sense. They were strongly re-echoed in 1954 in *Harnett v. Harnett* by Mr. Justice Barry who being an experienced judge, was careful to say that it was in fact a heresy to suggest that a mother is in law some right to custody of a child of tender years superior to that of the child's father. Having properly guarded himself he then went on to say, "but it is beyond question that guarded by intuition and experience the Courts have long recognized that generally speaking it is in the interests of a young child that it should be in the care of its mother". He adopted the observations of Lord Romilly as a rule of prudence and common sense.

Since the establishment of the principle of the welfare of the child as the paramount consideration, the Courts have been faced with certain possible procedures and developments the effect of which, if accepted by the Courts, is to remove part of the dispute out of the adversary situation and out of the realms of properly admissible evidence and to involve to some extent the opinions of third parties. These developments can be summed up as follows:

1. Evidence of Psychiatrists;
2. Reports of Welfare Officers;
3. Separate representation for the infant;
4. Interviews of the children by the Judge;
5. Involvement of Marriage Guidance Counsellors.

Evidence of Psychiatrists

A prevalent tendency in many cases and despite some judicial

cautions has been to call psychiatric evidence. The value of this sort of evidence has been a matter of debate. The problem, of course, is to avoid usurping the Judge's duty to decide the welfare of the children by putting forward the opinion of a person professed as an expert as to what that welfare should be. Counsel are, of course, aware of the value of having an advocate not only at the bar table but in the witness box and some psychiatrists have proven themselves very able exponents of the particular viewpoint submitted by one parent or another. Judges are well aware of this and there must be many cases where their task is really made more difficult rather than easier because a psychiatrist has expressed opinions as to the welfare of the children contrary to the view that the Judge has formed from other evidence. In 1966 two eminent Sydney Judges registered strong protests against the practice of calling psychiatrists in custody cases. Begg J. in *Lynch v. Lynch* (1965), 8 F.L.R. 433 said, "In my view the evidence of a psychiatrist usually has little place in a contested custody application. In many of the cases recently I have noticed that the tendency is developing to employ a psychiatrist virtually to argue the Applicants case rather than to give a straightforward medical opinion about the child's nervousness or mental condition and the possible effects of the strains and stresses. I make no secret of the fact that I seek to discourage these tendencies to bolster up a claim for custody with the assistance of so-called expert evidence". He was followed a month later by Selby J. in *Neill v. Neill.* He remarked, "I do not find the evidence of the psychiatrist much assistance in determining this difficult matter. One of the principal defects of his evidence was that his opinion was formed after interviewing the mother and child and reading the mother's affidavit. He did not interview the child's father or hear his side of the case. In *Lynch v. Lynch,* Begg J. trenchantly criticized the practice of taking children to be examined by a psychiatrist so that one parent's claim to custody might be bolstered by psychiatric evidence. I fully concur with his Honour's views and consider the practice most undesirable. I would have thought that the principal function of the psychiatrist was the treatment of the mentally ill. Perhaps to such specialists no one is normal, but sitting in this jurisdiction I will not encourage the practice of taking children for psychiatric examination for the sole purpose of obtaining evidence in custody applications". It is clear that these cases cannot be read as a blanket condemnation of psychiatric evidence in all cases. For

instance, if a child, before any custody application had been made, had been treated by a psychiatrist, there seems no reason why his evidence would not be of assistance. Similarly, if the child showed obvious symptoms of psychiatric disorder at a time when custody proceedings were being fought it may well be useful for the Court to have a psychiatrist give evidence as to the reasons for this disturbance. Indeed, Mr. Justice Begg has conceded as much in *Lynch v. Lynch* because he says, "in a frank case of mental ill health such opinion evidence may be of real value to the Court", and Lord Upjohn in *J. v. C.* (1969), 2 W.L.R. 540 at 578-9 has made similar remarks.

The real problem with psychiatric evidence is, of course, that the psychiatrist rarely sees both parents. Usually the child is taken to a psychiatrist by one parent who then gives the psychiatrist a one-sided view of the matrimonial history and presents to the psychiatrist a child who has probably been influenced directly or indirectly to say that he or she feels great nervousness, tension and distress in the presence of the other spouse. Faced with such a situation, the psychiatrist may frequently prepare a report which will contain the history of what one parent told him and observations of the child as seen in one or two interviews. Whether this assists the Court may be queried but may be sufficient grounds for Counsel to submit triumphantly that there is medical evidence that to give custody of the child to the other parent would be detrimental.

Reports of Welfare Officers

Under the Matrimonial Causes Act the Court is empowered to call for a report from a Welfare Officer on questions relating to welfare of the children. Although the Matrimonial Causes Act gives the Commonwealth Court this specific power, it appears that such power could have been exercised by State Courts even before the Commonwealth Act came into force. This seems to be the result of the decision of Barry J. in *Re Three Infants* (1950), V.L.R. 411, where His Honour, pointing out that the Court could so act in the exercise of its parental and administrative jurisdiction and in the interests of the infants, directed the Master of the Supreme Court to inspect the home in which and to interview the person with whom the infants were residing and to report thereon to the Court for the purposes of determining the interim custody of the infants. Although this was within the residual power of the Courts, it does not seem that such power had been exer-

cised very often. After the Matrimonial Causes Act came into operation reports of Welfare Officers were sometimes requested particularly by Barry J. There are, however, some disadvantages in the use of this procedure which have tended to discourage Judges from employing it. The first problem arises from the power given to the Welfare Officer. In the course of investigations the Welfare Officer may well receive evidence which would certainly not be admissible in Court or if admissible has not in fact been adduced to the Court or tested in cross-examination. The Officer may, for instance and quite properly, interview neighbours of the parents in investigating whether the child is happy in one home or the other. These neighbours may not have given evidence before the Court. He may also hear from the neighbours a great deal of hearsay or opinion evidence which could not be admissible in Court. In acting wholly or in part on such evidence, the Officer may report that the conditions for the child are best in one place rather than the other. A further difficulty presents itself that the Officer, being only human, may form certain subjective likes or dislikes to one or other of the parents and unconsciously colour his report in favour of one or other of the parents. Again the Welfare Officer may and indeed will probably feel bound to question the child to ascertain the child's preferences. He may do this in many cases where the Judge himself has scrupulously avoided speaking to the child. It is, of course, notorious that a child, particularly a young child, is a "feather to each wind that blows" and the strength of a child's likes and dislikes will frequently be in direct proportion to the extent of the last contact which one parent has had with it particularly if that parent has come armed with the necessary bribes in the form of cakes, chocolates or promises of trips to the zoo. But the principal danger in calling for a report from a Welfare Officer is that the report, no matter how carefully prepared, must to a greater or less extent, tend to usurp the function of the Judge in making a decision which only he can properly make. The result may often be of some embarrassment to the Judge if it conflicts with the totality of the view which he forms after hearing all the evidence. Gowans J. commented on the use of this procedure in *Priest v. Priest* (1965), V.R. 540 at 549 where he said, "It will no doubt be inevitable . . . that the Welfare Officer will travel outside the mandate given to him . . . and in doing so introduce matters of hearsay but as long as the Judge excludes from consideration that which he has not asked for and gives to what is asked only such

weight as its sources properly deserve the procedure is not likely to render itself susceptible of impeachment". There seems to be some need here for a Welfare Officer to be permanently attached to the Court so that he or she may develop a continuity and consistency of approach and experience in presenting material to the Judges. The present problem is that when a Welfare Officer is appointed he is appointed for that particular case alone and it is not usual for the same Welfare Officer to investigate a number of cases so that the opportunity of Officers to gain experience in this field is limited.

It has been the practice that the reports of the Welfare Officers be made available to Counsel on both sides and this has on a few occasions resulted in an application by Counsel to cross-examine the Welfare Officer. No such application has in my experience, ever been granted and in *Reeves v. Reeves* (No. 2) (1961), V.R. 685 at 688, Barry J. expressed himself strongly to the view that it would not be seemly or proper that the Welfare Officer as an agent of the Court be subjected to cross-examination.

Although in Australia it seems to be the practice to make available reports of Welfare Officers to Counsel and to the parties, there may be limits to this and certainly in England the House of Lords has held in *Official Solicitor v. K.* (1963), 3 A.E.R. 191 that where confidential reports have been lodged with the Judge by the Official Solicitor disclosure of such reports must remain a matter for the Court's discretion.

Burbury, C. J. has commented on section 85(2) in *Sing v. Muir* (1961), 16 F.L.R. 211 at 214 that, "To my mind the clear purpose of the legislature in enacting section 85(2) was to give the Court a robust initiative exercisable of its own motion to make further relevant inquiries through a Welfare Officer in any case where it feels that the evidence which the parties have chosen to adduce is inadequate to enable a fully informed decision to be made in the best interests of the children. Section 85(2) is the recognition by the legislature that in exercising a jurisdiction in which the overriding principle is what is best for the children of a broken down marriage it is often unrealistic and illusory for the Court to come to the proper decision only upon such evidence as the warring parties choose to submit in accordance with traditional adversary procedures and rules of legal admissibility".

However, it must be said that so far it has not been very often that the Court has applied this "robust initiative" of which the Chief Justice of Tasmania speaks. The reason partly lies in the

problems already stated and partly in the unfortunate delay which is usually occasioned in obtaining a report. Delays of several months are not unknown but again this could be overcome by the appointment of a permanent Welfare Officer to the Court.

Separate representation for the Infant

Section 85(2) clearly illustrates the tendency in the legislature to treat custody cases as somewhat different from the ordinary adversary procedure. It is becoming increasingly recognized that in custody cases there is a third party who is not before the Court yet whose welfare is the paramount consideration for the Court. Necessarily in an adversary process only that evidence which is favourable to a particular side will be placed before the Court by each side. The Court will be left often with reservations as to whether either side has presented the full picture. No doubt it could be said that this situation prevails in all legal disputes on an adversary basis but in an ordinary civil dispute the Judge comes to a decision on the evidence placed before him and if that decision is wrong because relevant evidence was not adduced then that has nothing to do with the Judge because he has performed his function in deciding the case on evidence. But in custody proceedings he is directed to regard the interests of some third party as paramount. As Lord Devlin said in *Official Solicitor v. K., supra* at 210, "Where the Judge sits as an arbiter between two parties he need consider only what they put before him. If one or other omits something material and suffers from the omission he must blame himself and not the Judge. Where the Judge sits purely as an arbiter and relies on the parties for his information the parties have a co-relative right that he should act only on information which they have had the opportunity of testing. Where the Judge is not sitting purely or even primarily as an arbiter but is charged with the paramount duty of protecting the interests of one outside the conflict, a rule that is designed for just arbitrament cannot in all circumstances prevail".

In England a practice has grown up at least in wardship proceedings of appointing the Official Solicitor to represent the child. This removes from custody proceedings the criticism that the one person whose interest the Court is concerned with is not represented. The appointment of the Official Solicitor has been considered part of the Court's general power exercising the earlier chancery jurisdiction as parens patriae. In theory there

seems no reason why the Court should not similarly act in Victoria in wardship proceedings and appoint, say, the Public Solicitor to represent the interests of the infant. In practice this has not occurred. By Rule 115A of the Matrimonial Causes Rules which came into force in October 1967, the Federal Court is given power to adjourn a suit in order that a guardian ad litem be appointed to represent the child. So far as I know, this rule has never been applied and no doubt the reasons would be, firstly, that the matter might necessarily only appear of significance to the Judge when it came to trial and to adjourn the matter for the appointment of a guardian ad litem would cause delay which can never be encouraged in custody disputes and, secondly, since the guardian ad litem would not apparently be an official person presumably some order would have to be made for the costs of his representation and the Judge may be very reluctant to increase costs in a case. Normally it would be unlikely that either party would ask the Judge to make such an order. Presumably each party would already have considered the evidence he wishes to present to the Judge and further evidence adduced by someone representing the child would be unknown and uncertain so far as the parties were concerned.

Judicial Interview of Children

Although there is some deviation in practice between Judges, it is fair to say that generally Judges are reluctant to see the children. The reason for the Judges' reluctance has been succinctly stated by Selby J. in *Sargeant v. Watkins* (1965), 6 F.L.R. 303, "I think the most serious disadvantage inherent in the practice lies in the fact that Judges properly regard what is said to them at such interviews as confidential . . . This means that a decision may be influenced to a considerable extent by what the Judge hears in his chambers. What he hears is not the nature of evidence. It is not subject to cross-examination, and neither Counsel in his address is aware of what is in the Judge's mind or able to address him on what might be a compelling and decisive factor". His Honour then went on to say that he had made notes of his interview with the children and would place them in a sealed envelope with a direction that they should not be open without the order of the Judge and said that was the course which he proposed to follow in the future.

Despite the reluctance of Judges to see the children, there are undoubtedly cases where this is a course which would assist the

Judge in determining their welfare. This is particularly so where the children are reaching years of maturity, say in the 12-16 age group. In my view it would be in many cases extremely valuable for the Judge to interview the children to determine whether they are children mature enough to face the conflicting claims and make a responsible assessment themselves of where they would most like to be. An experienced Judge would naturally make due allowance for influence upon the child one way or the other but in many of these cases a very clear picture may present itself of the child's desires and the reasonableness of those desires which may not be present in the Court; but there is a very real and vital reason why these statements should be treated as confidential and at least not disclosed to the parties although possibly disclosed to Counsel only. This reason is that many children will say to either parent what they hope will please that parent and are reluctant to distress the parent. If a child of maturity were sure that his remarks were not disclosed to either parent, he would in many cases give a completely frank answer to the Judge and make perfectly clear his preferences but it would do enormous harm to the child's subsequent relationship with one of his parents if they were disclosed. This does seem to be a case in which the Judge should properly put the welfare of the child over and above the normal rules of evidence and procedure.

Marriage guidance counsellors

Under the Matrimonial Causes Act provision has been made for marriage guidance counsellors but so far as resort to marriage guidance counsellors for reconciliation purposes are concerned, these provisions have not been of any practical value. However, it may well be worth considering another aspect of the powers of a marriage guidance counsellor which has been mentioned by several persons connected with marriage guidance, namely that their services are available not only to discuss questions of reconciliation but, where the parties have recognized that their marriage breakdown was irretrievable, to discuss with them ways in which questions of property and custody may be settled and arrange to alleviate the rancour and bitterness which otherwise might arise on these issues. Much good can be done in many cases where the parties can talk out their difficulties in front of a neutral observer and in an informal atmosphere. This is something which is very difficult for a Judge to do himself but could

be productive of consent orders in some cases if the Judge were prepared to refer the parties to such a person.

The adversary system

One difficulty which a Judge is always faced with and must necessarily be faced with while the adversary system remains—and one, however, which can only be resolved within the framework of an adversary system—is to analyse the real motives of the parties in contested custody. Many cases are fought sometimes only on one side and sometimes on both sides not because a party is basically concerned with the welfare of the children but because of personal pride or spite. Personal pride is very much involved particularly with women. Although we may be moving rapidly towards broad equality of the sexes in many fields, there still appears to be a general condemnation of a mother who lets her children remain in the custody of another. There are many instances where I believe a mother would secretly be glad not to have the custody of her children but feels that she must make the claim only because she will otherwise be criticized as an unnatural mother who has abandoned her children.

I do not mean to suggest by this that the woman is necessarily callous or unfeeling with regard to her children, but often the arrangements suggested by the husband to have custody for himself and to give her access at reasonable times is really better for her particularly if the husband can provide a housekeeper, the wife is working and has a relationship with another man. Yet often in this case the wife will steadfastly maintain her desire for custody and there have been cases where, having obtained this custody after a disputed case, she has some months later returned the children to the husband. No doubt her self-respect has been saved but at considerable cost emotionally and financially to the children and the husband. In one of these cases the wife and the co-respondent had assured the Court of the co-respondent's enduring affection for the children and his good relationship with them, yet within a matter of months the wife had returned the children to the husband because the co-respondent objected to their presence. Some of these problems stem from the fact that custody itself is such an emotive term. When an award of custody is made it involves the concept that one party has "won" and the other party has "lost" and this is extremely productive of bitterness between them. Experienced Judges frequently warn both parties that they are not to look on the result in this light

but unfortunately this does not always have the required effect. There may be some value in suggesting a concept of joint custody in many cases and in making an order that the Applicant have custody for certain periods and the Respondent have custody for other periods and if necessary making a further order that decisions relating to education and religion or other possible matters of dispute should rest with one party. It is true that this is not a perfect solution and Mr. Justice Barber has pointed out the difficulties which arise in the practice of giving custody to one parent and care and control to the other. See *Travnicek v. Travnicek* (1966), V.R. 353. But if the concept were rather that of joint custody, it may be worthwhile considering sometimes in order to take the heat out of the situation as between the parties.

Although the movement is very gradual it does seem to be a general trend to recognize now that the adversary system is not the complete answer to determining custody cases. It is very doubtful if it could be entirely abolished. Unquestionably it is of the utmost importance that evidence on both sides particularly by the disputing parties themselves is tested by careful and searching cross-examination. Although this will frequently exacerbate the ill will of the parties towards each other and will frequently cause the final breakdown of any rational communication between the parties, there seems no other way by which a Judge can properly sift the weight of statements made by both sides and properly assess the character of those who are putting themselves forward as proper custodians of the child. It must be remembered that by the time a custody suit comes to Court, all avenues of conciliation have usually been explored so that the Judge is confronted with an irresistible force on one side and an immovable object on the other and there is nothing for it but to proceed and determine. But having said that, it does seem that there are certain areas where either certain facts could be placed before the Judge by a person who will not be cross-examined such as a Welfare Officer or that the Judge makes use of information and observation which the parties cannot in the real sense challenge.

There have been some suggestions that these questions of custody should be removed entirely from the forum of the Court. I cannot agree with this. Where the parties are determined to fight they must fight before a tribunal skilled in assessing and weighing evidence and sifting the truth through the mesh of cross-examination, even if assisted at times by reports and inter-

views, but bearing the ultimate responsibility of making considered findings of fact and drawing therefrom a reasoned decision relating to the children's welfare. I have yet to be convinced that a social worker or marriage guidance counsellor or some other graduate in the Social Sciences or some tribunal comprising such persons would manifest greater experience or ability in this field than a Judge.

DR. DORA BIALESTOCK:

I decided that the custody of children in a medical context could be taken as care and the provision of opportunity for normal development. Children are in care or custody of their biological parents, of foster or adoptive parents or in institutions, State or statutory. In Victoria the latter are administered by religious organizations.

As my expertise lies in the care of pre-school children, I shall be speaking predominantly of this group, their needs for care for normal opportunities of development and some of the disorders or pathology of care which they endure. As well as my own records, I will attempt to outline the size of the problem in Victoria.

In the year preceding June 30th, 1972, I accumulated a number of records to present something of the size of the problem. I am grateful to the Children's Protection Society of Victoria, the Royal Children's Hospital, the Paediatric Department of Monash University, the Social Welfare Department, and the Health Department for help with these figures. A study of Coroner's reports over the first 6 months histories revealed 200 deaths and in 18 the cause was due directly or very suggestive of the action of an adult.

I shall not be speaking on either foster-care or adoption, nor on institutional care, so it may be of interest to make one observation. In the U.S.A. in the 1920's one child in every 50 came into care because of loss of parents. But in 1970, only 50 years later, less than one child in every 1,000 came into care as an orphan; most are in care because of poverty, poor housing, mental or physical illness of parents, and marital conflicts. I suggest that the position here would be similar to that in U.S.A. In Victoria there were in the year 1971-1972, 7,236 State Wards.

My interest in the pathology of child custody began in the early 1950's when I was a young honorary doctor to a paediatric out-patients. A 9 month child, successfully treated for pneumonia in casualty, was referred to me because of pallor and poor weight

gain. Mother, a pretty woman in her late 20's readily supplied a family history. She lived with her own mother and both were pensioners, she had five children of three separate fathers. Of the five, only two were alive, this baby and a 9 year old daughter. Of the three other children, all had died before the age of three, one of gastro-enteritis, one had been electrocuted and one had been run over by a car. This woman was concerned about her children but was incapable of sustained and consistent mothering; her children were at risk until old enough to fend for themselves.

At about the same time, one Saturday afternoon at my home, in hearing distance of cheering Carlton football fans, a well-developed 11 year old girl knocked at the front door with the following request.

She lived with her parents and 8 year old sister and felt the urgent need to talk to someone other than her family. Her father, an interstate truck driver was a large powerful man, often not sober and he was expected home at 6 p.m. when the pubs closed. At this time, as was often his habit, he would sexually assault this girl. I went with the girl to her mother and the story was confirmed. Mother, a dull placid woman added that it was certain to happen today as she would be unavailable to her husband because of currently being treated for a vaginal complaint. The girl had come to me because she had decided to run away, and wanted protection for her 8 year old sister who would be forced to have intercourse if the elder girl were absent. My husband and I requested help from the police, but were told they could not help unless they caught the father in the act and could then charge him.

When in the early 60's I commenced duties as Medical Officer to the State Reception Centre, it was not rare to have babies admitted who had resulted from incestuous intercourse, usually between father and daughter and with full knowledge of mother and other members of the family.

The only figures available to me on the incidence of sexual abuse are from U.S.A. for 1971 where the American Humane Society gives a figure of 50,000 to 75,000 cases annually. A detailed study of the families by Tormes is available for those interested in the subject. In the same year when laws for notification of child abuse had been passed in all 50 States of U.S.A., there is a figure of 25,000 cases annually in this category, but for severe neglect and malnourishment a figure considerably in excess of 200,000 per annum is given.

It is my belief, based on experience in this country and also observations in U.S.A., U.K., Scandinavian countries and Israel, that child abuse is not a large part of the tapestry of parental insufficiency. Child neglect and deprivation form the largest and most important part.

A case described by Leontine Young will describe better than I could the commonest problem of babies coming into care as I have seen it in the last decade.

"A baby lies on a filthy, sodden mattress. There are no sheets or blankets, though the room is chilly and the cold drafts seep along the floor. Sometimes the baby cries wearily, but more often lies in dull silence. The turmoil of children fighting and playing in the room brings no response from him. He seems deaf and blind to the life around him. He looks ageless, with his shrunken body and his distant stare. Actually he has lived in this less than perfect world for only one year.

"He was the fifth child born to the family. The seven live in a three-room house which is dirty and deteriorating. The floor is littered with dirty clothes, decaying garbage, broken bits of old toys, papers and boxes and rags. The children, nearly as dirty as the floor, squabble and scream over a bag of potato chips. They seem oblivious to the dirt, the smells, and the disorder.

"The oldest of the five is now seven. She has successfully appropriated the bag of potato chips and is doling them out one by one to the frantic smaller children, each time popping one into her own mouth. All of them ignore the baby silent in his crib. They also ignore the inert woman, sitting in a chair from which broken springs and bits of wadding protrude. The woman yells at them now and then, but mostly she stares blankly at the stained wall.

"The mother is not mean to the children. If you ask her, she will tell you that of course she loves them. If you talk more, she will also tell you, 'If only they wouldn't fight so much. Then I get sick of them. They never pay any attention to me.'

"If you remark that the children are thin and seem hungry and that they might quarrel less if they were fed and cleaned up, the mother might stir to a petulant defence. 'I do try to clean them up, but they get dirty right away. I tell them to stay off the floor but they're right back there soon as I look the other way.' As for food, she puts some on the table. They can eat when they want. You look at the table with its crumbs of bread and cake, at

the two year old girl who would have to climb to reach the table top, at the baby who cannot even climb.

"The mother sees your look and again she comes to her own defence. 'I do the best I can. If my husband brought his money home the way he should, if he'd help me with all these kids. But he says that's a woman's job and he works all day and he shouldn't have to help at home. He says he earns the money and ought to be able to spend it the way he wants. He gives me twenty dollars and says that's for food. Then he goes and buys beer for himself. He gets out and does what he wants. I'm stuck here all day long with the kids yelling and nobody to help.' Her face is already aged ten years beyond its actual twenty-six. The children pay no attention; they have heard it all many times. The baby continues to stare at nothing and now and then to give a small, despairing wail which no one hears.

"Nothing changes when the father walks in. The children continue with their own affairs and after one brief glance ignore their father. He does not speak to them. His whole attention is riveted upon his wife's recital of complaints. Angrily he interrupts. 'If she'd clean up this place and take care of the kids, there wouldn't be any trouble. I give her money and what does she do? I'll tell you what she does. She goes next door and drinks beer all day. I work all day, and I'm entitled to a little rest and some fun. She ought to stay home and cook a meal for me.' He is thin and short. His body is tense and his movements jerky. Like his wife his face looks older than his twenty-seven years, and like her, his face has the crumpled look of a petulant child."

This description illustrates that, even if hate is the opposite of love, indifference does considerable harm to growth and development of children.

If we stress physical injury and abuse too much, we may fail to plan for the more important condition of failure to thrive. Failure to thrive in infancy is a community problem, not just a problem to be tackled by hospitals, doctors, the paramedical professionals and lawyers. If not eradicated, this condition in infants will at best lead to physically, mentally and emotionally retarded children and adults, or at worst to premature deaths. If failure to thrive was tackled realistically, we would also eradicate physical abuse.

In studies in U.K., U.S.A., N.Z. and Australia, most physically abused children are under 3 years as are the failure to thrive infants. In the 12 months preceding June 30th, 1972 in the Royal

Children's Hospital there have been seen in the out-patient department 882 babies who failed to thrive and 145 with feeding problems. In the same period 103 children were admitted to hospital, being the serious cases. These consisted of 19 with the battered baby syndrome, 58 with social problems including deprivation and maternal neglect, and 45 failure to thrive children.

In the care of the Children's Protection Society of Victoria for this same year, 302 children were resident in the Melbourne centres, and 88 in the Ballarat foster care. In Geelong an assodiated voluntary group of foster-parents cared for a further 102 children. Most children are in care with parental consent, to prevent the child from becoming a State ward.

In the past decade, I have seen yearly, about 200 babies who have not reached the 10th percentile in weight and as was the position when I published the study in 1966, two out of every three babies admitted to care are poorly nourished in the affluent Melbourne of today.

Kempe in Denver believes that deficiency in parental care is responsible for 25% of all fractures in the first two years of life, for 10% to 15% of all trauma to children under 3 years and for 20% of all failure to thrive cases, regardless of history given or social class of the parent. If the incidence of maltreatment in this country is similar to that in the U.S.A., then we should expect about 1,000 cases would occur annually in Victoria if, as indicated by notifications following compulsory reporting in all states of U.S.A., the incidence there is 250-300 per million of population.

As one paediatrician has put it, perhaps we should consider socio-cultural growth retardation has replaced scurvy and rickets as the nutritional disease of infancy.

For every child physically abused I see at least 50 nutritionally deprived, and it is in the intact home that the common condition failure to thrive is seen and is related to parental insufficiency.

In Denver 20% of battered babies have also failed to thrive; from my own observations in the past decade I think this percentage may be higher in Victoria.

Why is it so important to find and treat the child at risk of failure to thrive?

Young children, well nurtured, grow and change faster from birth until two, than ever again. In this time they have learnt to walk, talk, feed themselves and have developed personality; the characteristics of love or hate, trust or distrust, and predictability in a changing world, compared with confusion and expectation

of chaos, in a meaningless, bewildering community, all by the age of two.

That a nation and its children can be changed in one generation can be seen in many examples in the past 20 years in Israel, Japan and United Kingdom, where growth and development of height and weight norms of the underprivileged have radically changed and are approaching those of the affluent in these countries. Better diet and community involvement in care and development has changed these children. It has not changed their genes, yet it has considerably increased their educational potential.

There is little difference in the groups of mothers studied, and the adequate poor mother of today with any added stress becomes the neglectful mother of tomorrow. I wonder if the added stresses of a household would account for the fact that there is an increase in admissions of babies in Melbourne into care at both Easter and Christmas.

If we believe that child neglect is associated with poverty, then the assumption will be that the community will need to alleviate poverty. In 1966 Harper published that there were 35,468 children in Melbourne living in poverty; 13,046 were under the age of six years.

Perhaps we should stop defining neglect as a static discreet diagnostic entity. The condition is a failure of the community to help poor and pressured parents and reflects community pathology as much as it does individual parents' pathology.

Child care is not easy in our nuclear family and neglectful and abusing parents are not particularly different from normal parents. My first question to mothers when I examine their children is "Do you enjoy your baby?" Those who know me well, may answer quite frankly, "I suppose so, but today I could murder him!" I wonder if it is time to question the belief in the adults right to privacy if the right of a child to normal growth and development in the first two years is being jeopardized by this concept.

It is only in the 20th Century that it has become practice to use the courts to separate those cases where parental rights and responsibilities are in conflict with the right of the child to normal health and growth. What can be done, and what changes in current practice are needed to prevent child neglect and abuse?

In 1966 I suggested the need of an authoritative outreach worker trained in child development to see all children, not just

the 90% who attend at the excellent Infant Welfare Centres. If these nurses were given right of entry when a child is considered at risk of malnourishment, it would seldom be necessary to involve police in the difficult task on when to act on child development needs. Why should this child development nurse not be allowed a right of entry for the protection of an infant in the same way as a Health Inspector now has the right of entry with regard to contraventions of the Health Act? Currently only the Children's Protection Society and the Police have this right.

In the Scandinavian countries there are local child care committees to whom the outreach worker or health visitor regularly brings the local problem families for evaluation and help.

In other countries I observed a spectrum of flexible local community resources and services to help and support inadequate parents. These were, family planning, home help and re-educative homemaker services, educative day care centres—the latter were considered by many the most important single service to help pressured parents quickly to improve family relationships.

Day nurseries were available to mothers not coping with children not just for mothers working outside the home. Also available were a group of people experienced in helping others. The social worker, the homemaker who taught home management and did not just clean up the house, and the doctor trained in normal child development acting as a consultant to the team and the parents. That is, doctors practising preventive community paediatrics.

If these grass roots community services were available here in a sensitive and easily accessible way, we would see few children who failed to thrive or were battered.

In a climate of opinion and practice where parents own sense of worth could be developed by supportive community resources, very few children would come into custodial institutional care.

However, despite all these supports there are a number of people who suffer from what I call "cancer of the soul". They are unfit to give nurturant care to dependant young children.

I would now like to mention a couple of matters in current legal practice which are injurious to the children they aim to help. These are appearance of young children at court, and the timing of court proceedings.

The appearance of children in court when they are in need of care and protection is harmful to the children in two ways. First it is distressing for young children, already rejected by their own

parents, to be taken to court as early as 4 or 5 a.m., by strange people, so they can appear at 10 a.m., in a country court.

Also, as I recently experienced, the presentation of the case against the parents was repeated twice before the distressed and rejected children. Once in the custody hearing, then again in the charge against the parents, and was accompanied by 16 photographs of the degraded home conditions in which they were living. The court personnel, were all kindly and well-meaning people, but none glanced at the quietly sobbing elder children listening at the back of the courtroom.

For many years I have suggested that where the child will not need to be cross-examined by the court, then a photograph and a report about the child be submitted, and the child be spared further misery of court appearance. This would also help in later rehabilitation of the family.

For adults little development is time locked in the same way as are the most important growth parameters for a child. Speech, for instance if not learnt in the first two years is likely to be imperfect, loving personal relationships can be developed in depth probably only in the first 18 months of a child's life. Decisions about a child's future will be of greatest importance if made in the critical time of rapid development.

The child's future is allowed to swing like a yo-yo while a disturbed parent, unlikely to be cured by doctors, even psychiatrists, vacillates for her own developmental needs and in this time loses for the child the opportunity for normal progressive, developmental potential. If boy children are not adopted by one year of age it is difficult to find adoptive parents for them and they will more often remain in an institution.

The law may wait interminably for more evidence in cases of child abuse. A child recently in care had been severely burnt by her mother who refused to take her for medical treatment. This was reported by the baby minder and the poorly nourished 10 month old girl with disfiguring burns was admitted to care. There was a long clear history of maternal rejection and the child was well below 10% in weight.

Court hearing of this case was adjourned for months to allow the father who was away at sea to come home in the routine way and to allow time for the mother to receive psychiatric treatment.

In all this time there was no questioning by the law on the effect of these delays on the child's growth, nor was any consideration given to the critical time lost for this infant's potential for

the establishment of emotional ties which could reverse her environmental deprivations.

When the case was finally heard, only the opinion of the psychiatrist, who had never seen the mother-child as a functional unit, was sought to assess whether the child should be returned to the mother.

Courts have not required observations on the daily hurly-burly of the mother child unit in the feeding, nappy changing, vomiting , crying and sleep and bathing patterns required by a young child.

Babies are helpless, weak and inept, irregular in their excretion and create by their needs unpleasantness for others. A child urinates, defaecates, vomits and cannot feed himself, and when he tries to do so, makes a mess. He cries, whimpers, demands attention and if not given this, develops irritability mechanisms to obtain the attention he craves. Many people are unable to accept these difficulties without help from others. It is only in the last 50 years that the nuclear family has replaced the extended family in the industrialized western democracies, and young parents are expected to cope alone without physical relief, advice or constructive help.

Should the courts request a report of a trained observer on the functioning parent-child unit? If so, who should this be?

After a basic training of 5 months, policewomen are placed in the position of child development and care experts. They are given the same training as men, and the training is in law enforcement with no special time spent on child care and child development; they learn by practice with the help of a more senior policewoman. Social workers also are not trained particularly in child care or development and I doubt if either a young social worker or policewoman could differentiate between a poorly nourished 6 month old baby and a healthy average 3 month old.

I believe that evidence ought to be sought by the courts on the functioning parent-child unit and that this report should be made by these trained in child care and development, the Infant Welfare Centre Sister, the general practitioner or the paediatrician.

I believe that the adversary principle mitigates against curative child care practice. Currently hearing of cases of child neglect and abuse is too closely orientated to the adversary principle.

In New York in 1965 Judge Felix ruled that the ordinary rules of evidence are too stringent to establish the facts in child

abuse. The principle "res ipsa loquitur" (the thing speaks for itself) applies—since proof of abuse by parents in the privacy of the home is difficult. As the child can't speak so the condition of the young child speaks for itself. This permits inference of neglect or abuse to be drawn from the child's age and condition.

In conclusion there are many children in our midst who are denied the opportunity for normal growth and development, and many are already in State or other institutional care. If we believe that a child is best cared for by the biological parents, then we should pay more than lip service to the following:

1. Realistic help to the poor with multiple pressures, especially large families with children born close together and living with a lone single parent. Lack of adequate housing in this group still contributes an important factor for infants and toddlers coming into care.

2. A local community based support system involving a variety of help and support people and services. These would include family planning, day care centres, home help and home maker or home management services and an authoritative outreach person trained in child care and child development with a right of entry. These people could be called Health Visitors as in U.K., also social workers and doctors practising preventive community paediatrics should be available. Most important, self-help parent groups, like the Council for the Single Mother and her Child, and Parents Anonymous, a group formed in U.S.A., by abusing parents to act as a lifeline and to help group members to relieve pressures from each other and to build up self-confidence. In Melbourne, in April, 1973 a group of Infant Welfare Centre Sisters and Paediatric nurses commenced a telephone service for worried parents. This is manned by trained nurses at times other than when the normal health centres are open, so that advice is available to parents on a 24 hour per day, 7 day per week basis just as is the parents responsibility for child care.

3. A change in the legal processes to evaluate child care pathology in a constructive way without the adversary process, so that planning for family help and integration, not proof of guilt will be the paramount function of the law.

In a paper delivered by Sir James Darling in 1968 to the Society he quoted from Plato:

"The ability to weigh two duties and balance them against each other is a measure of human worth and dignity."

May I suggest we reconsider the opposing duties of the right

of an adult to privacy as against the right of an infant to be assured by society the chance for progressive, orderly, predictable growth and development.

Finally I would like to quote from Aristotle:

"Health of mind and body is so fundamental to the good life, that if we believe men have any personal rights at all as human beings, they have an absolute moral right to such a measure of good health a society, and society alone, can give them." For men, can we tonight interpose "children".

DR. SPRINGTHORPE:

The speakers have dealt with slightly different topics and have shown a great depth of humanity. I have appeared in custody cases and have examined children at the request of the legal advisers of one party. I always feel that I would like to examine the other parent. There is often enormous bitterness between those parties and there is more lying on oath by the parties to custody cases than in any other judicial procedure. Often one party is concerned with the welfare of the children while the main concern of the other party is to humiliate his or her spouse. For very young children to be involved in contested custody cases can be very harmful to them. On the other hand, some children of greater maturity do tell me quite frankly what their preferences as between their parents are.

DR. J. P. BUSH:

Dr. Bialestock has presented a courageous and outstanding address. She presented the problem as a contest between the parent on the one hand and the State on the other. Mr. Asche has considered the problem as a contest between parent and parent. So far as the general practitioner is concerned, he is in a peculiarly privileged position to give advice to the Court. He has not been engaged in anticipation of the proceedings by one of the parties. I know of a case between parties who had been patients of mine who split up and the result of the custody proceedings appeared to me to be inconceivable. The general practitioner is in an especially good position to assist in these cases.

DR. E. BRENTNALL:

In the United Kingdom the health visitor is a highly trained person, one of whose tasks is to seek out the child in need of care or assistance. There is a lamentable lack of equivalent facilities

in Victoria and the welfare clinics fall down. These clinics serve the healthy child and the over-anxious mother. The United Kingdom health visitor is less concerned with mere questions of weight or measurement but is concerned with the whole welfare of the child and in particular cases where that welfare, physical or mental, is at risk.

DR. JULIE JONES:

As a child psychiatrist our task would be easier if the assessment in custody cases were given directly to the judge and not to the legal advisers of one party. It is important for us also to assess the mother-child relationship and the father-child relationship and, of course, to assess both parents.

MR. JUSTICE BARBER:

It would be nice to be able to say, let's get down to reality. We are all appalled by what we read and what we learn concerning children being tortured by their parents and know of the need for the protection of young children. But the solution does not necessarily lie in throwing over the established rules of evidence and procedure. It is necessary to preserve a balance between the rights to privacy of the individual and the need to protect children. There is a happy mean to be worked out between these two requirements. I have dealt with a very great number of custody cases. I would have been much assisted in many of them by a sensible and articulate welfare officer with plenty of intelligence and common sense who could go to the homes of the warring parties and to act, as it were, as the eyes and ears, and even in some cases as the nose, of the Court. The welfare officers do a magnificent job but they take about six months to do it. I do not despise the evidence of psychiatrists but would be much more assisted if they had been appointed by the Court to look after the interests of the children rather than, as is the usual case, where they have been called by one of the parties and tend to "wear the guernsey" of that party. In the past, I always used to interview the children in custody cases and assured them before the interview that nothing they said would be passed on to their parents. In these interviews I would often learn things which the parents did not know and did not know that I knew. I have now found that the better course is only to interview children for the purpose of a view, that is to say to ascertain their physical appearance and condition.