Specialist evidence in child custody disputes in New Zealand

Craig Jackson*

This paper, now expanded and up-dated, was originally presented to the Conference on 'The Rights of the Child and the Law' held at the University of Canterbury in November 1979. The paper examines a number of recent custody decisions in which expert evidence from mental health professionals has featured. The weight given by the courts to such evidence is critically examined and discussed.

In 1973, Catherine Mallon, a graduate law student of the University of Otago, presented a memorial essay on "Judicial Interpretation of a Child's Best Interests in Inter-Parental Custody Disputes in New Zealand". A strong argument was put forward for specialist opinion from mental health professionals and specialists in child psychology and development to be called for in these cases.[1] In 1978, five years after the publication of this essay, in *M.* v. *M.*[2] a Dunedin Magistrate, Ross S.M. considered the reports from two child psychologists called by the father. Both reports, quite independently presented, and using different techniques of examination, found the father to enjoy the closest emotional relationship to the 6 year old daughter subject of the dispute. Custody was awarded to the mother by the magistrate who, in his judgment, appears to have replaced psychological insights brought to bear in this case with traditional legal understandings of parenthood. The case was re-heard approximately twelve months later by the same magistrate. No current specialist evidence was available to the court, although the child herself still expressed a strong wish to remain with the father. Custody was again decided in the mother's favour, and the father was strongly dissuaded from making any further application. The specialist evidence available had countered the strong legal preconception that a mother and daughter relationship should not be broken by court fiat.

* Senior Psychologist, Psychological Service, Department of Education.

1 C. Mallon "Joshua Williams Memorial Essay 1973 — A Critical Examination of Judicial Interpretation of a Child's Best Interests in Interparental Custody Disputes in New Zealand" (1973) 3 Otago L.R. 191.

2 *M.* v. *M.* (1978) Unreported, Dunedin Registry D. No. 126/77.

Over recent years, in safeguarding the best interests of the child in custody cases, comparatively more attention is now being paid by the courts to factors likely to affect the emotional and psychological wellbeing of children subject of a dispute. While traditionally, the courts in this country have neither called for, nor attached particular weight to psychological and psychiatric evidence where this has been available, a number of recent judgments have given an indication that a dialogue is beginning between individuals whose speciality it is to understand child psychology and development and the courts whose custody decisions can so profoundly affect the emotional interests of children for years to come. However, individual custody decisions vary greatly in the interpretation, understanding and use made of specialist evidence, and while a number of custody cases in 1977 and the earlier part of 1978, either made reference to psychological concepts of parenthood or discussed the significance of the psychological or psychiatric findings available, there is an indication from more recent decisions that the dialogue between behavioural science professionals and the judiciary having scarcely begun, has largely ceased and that the traditional legal viewpoints and assumptions about parenthood are re-asserting themselves. Bates[3] describes a similar retrogressive trend in Australia, re-presenting his previous arguments[4] that modern family law "is not an arena where traditional insularity and reactionary scepticism can have a place",[5] and that a proper working partnership between the law and other disciplines must be established if the aims of the Family Law Act 1975 (Aus.) are to be given genuine effect. The position in the United States is not dissimilar. Orthner speaks[6] of no other area of Law "where there is such a dearth of expertise among the lawyers who try these cases, and the judge who hears them", while Crouch in quoting the New York Court of Appeals majority warning in *Bennett* v. *Jeffreys*[7] that in custody matters dependence on psychiatrists, psychologists and social workers "may be an evil when the dependence is too obsequious or routine or the experts too casual" speaks[8] of a time that must come

> . . . when we start bringing up future generations free from the wreckage of shattered emotions caused by custody determinations that are tainted by consideration of any determinants other than the best interests of the child.

Muench[9] regards the failure of the courts in that country to properly weigh expert evidence, particularly if it serves to corroborate other categories of evidence available, as a breach of judicial responsibility to children, while Salk considers[10]

3 F. Bates "New Trends and Expert Evidence in Child Custody Cases: Some new developments and Further Thoughts from Australia". (1979) 12 C.I.L.S.A. 65.

4 F. Bates "Custody of Children: Towards a New Approach" [1975] A.L.J. 129. See also F. Bates "Expert Evidence in Cases Involving Children", (1975) 12 U.W.A.L.R. 139.

5 Supra, n.3, 82.

6 D. Orthner "Evidence of Single-Father Competence in Child Rearing" (1979) 13 Fam.L.Q. 27, 33.

7 387 N.Y.S. 2d 821, 827 (1976).

8 R. Crouch "An Essay on the Critical and Judicial Reception of 'Beyond the Best Interest of the Child'" (1979) 13 Fam.L.Q. 49, 95-96.

9 J. Muench and M. Levy "Psychological Parentage: A Natural Right' (1979) 13 Fam. L.Q. 129.

10 L. Salk *What Every Child Would Like Parents to Know About Divorce* (New York, 1978) 97.

that "under the present system the legal injustice is bad enough but that the psychological injustice and the potential damage it can create in the life of a child are immeasurable".

The United Kingdom Committee on Parental Rights and Duties and Custody Disputes[11] expressed the opinion that the courts should be prepared to accept the guidance of experts in the field of child welfare, particularly if the expert evidence all pointed in the same direction. However recent decisions continue to re-assert traditional precedents. King in reviewing scientific evidence on parenting showing that there is no empirical support whatsoever for the judicial view of the uniqueness of a biological mother's love for her child, considers[12] that there is "no useful dialogue between the behavioural scientists who study the effects of parental conflicts upon young children, and the Judges whose decisions often determine the course of such conflicts".

In the courts of this country there also remains an essential mistrust of specialist evidence, and an unnecessary sensitivity to the usurping of the judicial prerogative to accept the final responsibility for the custody decision, even if this means taking risks with the long term development of the child. At present there is no guarantee that expert advice will be properly considered by the courts, and no coherent or generally accepted policy has been devised with regard to the role of expert evidence in cases involving children. As a consequence, calls by legal academics for expert evidence to be made available which date back at least a decade remain unactioned.

The value of expert evidence in custody disputes was first discussed by Vaver[13] and then by Mallon,[14] and Henaghan.[15] Vaver proposed that a 'Family Centre' staffed by experts in a number of fields should be established. It was envisaged that when a legal action for custody commenced the judge would refer the issue to centre staff who would undertake any investigation of the circumstances of the family. It was further suggested that the reports should be discussed at a 'round table' conference. She considered that in the custody adjudication area, judges through lack of training in psychology, lacked the expertise to make informed custody decisions.

The central thesis of Mallon's paper was that judicial officers were not suitably qualified to make custody decisions in an area of law which does not lend itself to a strict application of inflexible legal principles, and where every case must turn on its own facts. Mallon submitted that judicial decisions may be based on little more than intuitive guesses, and on the personal and family experience of the judge or magistrate concerned.

11 G. Godfrey, Q.C. *Parental Rights and Duties and Custody Suits* (London, 1976).
12 M. King, "Maternal Love — Fact or Myth?" (1974) 4 J. Fam. Law 61, 64. King's article provides legal practitioners with an excellent resume of current empirical research on the parent-to-child bond.
13 P. Vaver, "Expert Evidence in Custody Disputes in New Zealand". Dissertation, LL.B. (Hons), University of Auckland, 1969.
14 Op.cit.
15 M. Henaghan "Expert Evidence in Custody Proceedings" (1978) 4 Otago L.R.262.

Because of the complexity of decision making in this area particularly where increasing emphasis is being placed not only on the material but on the psychological and emotional wellbeing of children, Mallon considered it at least arguable whether a judge or magistrate untrained in the techniques of communicating with people at the psychological and emotional level had the necessary skills to perform the task.

Mallon argued cogently that[16]

> . . . in an area where the lives and happiness of human beings are so vitally concerned and expert opinion is available then it should be sought and utilised to its fullest advantage. In view of recent developments in child psychology, medical or psychiatric evidence may be of vital importance in helping the Court to assess the likely effect of any partilcular order on any particular child".

Mallon saw no reason why, when expert evidence pointed strongly in one direction, the court should not regard that evidence as the deciding factor. She proposed that a psychologist with a completely independent standing as an officer of the court, should be appointed to investigate every disputed custody issue.

Similarly Henaghan has written extensively on the role of the mental health professional in custody disputes. His position is summarised in the following extract[17]:

> Clinical experts who give evidence in custody disputes must seriously consider their role. If they are going to be effective they must be prepared to give recommendations. They must be willing to commit to the scrutiny of the Court their knowledge of child development, child rearing and family living. They should view the possibility of their conclusions being disputed, not as an excuse for retreating, but as a reason to be thorough and precise. While recognising that inherent in fore-casting is a high risk of error, they should nevertheless be willing to put their prediction on the line. The facts of life are that decisions must be made and the chances of the Courts making them wisely will be considerably enhanced if insights from behavioural scientists are made available to them.

Henaghan concluded that, in custody adjudication, a court should use whatever specialist resources are available in order to formulate a valid judgment based on the individual circumstances of the case before it. He submitted that the court should take a 'robust initiative' with regard to the evidence of clinical experts. Psychologists and psychiatrists were trained to elucidate factors beyond the level of understanding, training and compctence of judicial officers. O'Reilly[18] in a recent paper also stressed the need for legal competence and training in child psychology and the social sciences involved with custody and care cases, and had no hesitation in submitting that the evidence of psychologists, psychiatrists, paediatricians and persons experienced in child development and behaviour could be of vital importance.

16 Mallon, op.cit. n.1 at 201.

17 M. Henaghan "Child Custody Adjudication: A Study of the Standards and Procedures used to Resolve Custody Disputes." Thesis, LL.B. (Hons), University of Otago, 1978, 119.

18 L. O'Reilly, "Children's Advocate". Paper delivered to the International Year of the Child Early Childhood Care and Development Convention, Christchurch, 21 August 1979. See also L. O'Reilly *Custody of Children on Parental Separation,* The Rights of the Child and the Law, Conference, Christchurch, November 1979.

Presenting a personal view Casey J.[19] considered that there was a growing reliance by the courts on the experience of child specialists and social workers, although traditionally courts had been wary of expert witnesses lest the professionals usurp the function of the judge and assume the role of decision-maker. Highlighting the desirability of the specialist giving opinion unfettered by any appearance of partiality, Casey J. saw the value of expert evidence "lying in the ability of a competent and trained professional to explore the emotions and attributes of children and their parents"[20]. He shared however, the Common Law reluctance to hand over decision making in human affairs to professionals, and saw no real alternative to the time-tested probing by cross-examination to elicit the facts on which to base a decision. Casey detected "a less than enthusiastic response"[21] from the law faculties, the law society, and others engaged with the courts in training for the new non-adversary counselling conciliation approaches envisaged by the family court. He called for the early co-operation of law faculties, law societies, child specialists and welfare and support groups.

The beginnings of a dialogue between court and mental health professionals may be traced, not in more conservative recent judgments but in decisions handed down in 1977 and early 1978. In *H.* v. *H.* Richardson J. wrote:[22]

> Study of the psychology of children and of the influences of individual and group behaviour and attitudes has advanced to the point that there can be no question that the Courts can benefit from the evidence of experts in the field. In accepting the assistance of those trained in observing children and analysing the influences that shape them, the Courts do not abdicate their function in determining questions affecting human relations any more than in other areas where expert evidence is adduced.

However, while this statement indicated that the learned judge was prepared to allow experts a share in the making of a custody decision, no expert evidence was called for in this particular case. The court lapsed into its own appraisal of the situation, and the decision turned on his Honour's opinion that it was "an unnecessary complication for a child to live in a de facto association".[23]

In *W.* v. *W.*[24] Quilliam J. was prepared to attach probative weight to a report on the child concerned by a Department of Education Child Psychologist. The Psychological Service was asked to play a direct role in supervising and facilitating the conditions of the access order, and furthermore, a psychologist of that service was directed to lodge with the court annually, a report on the child's welfare. If

19 M.E. Casey "Custody of Children" (1979) 8 N.Z.U.L.R. 345.
20 Ibid. 355.
21 Ibid. 357.
22 *H.* v. *H.* (1977) Unreported, Auckland Registry M. 614/77 at 8; [1977] N.Z. Recent Law 316. His Honour conceded that "people live openly in de facto associations much more freely than they did 25 or 50 or 100 years ago. The fact that one of the parents is living openly in that way does not, in itself disentitle him or her to cusotdy. A de facto association in the household may provide a secure and stable setting for the child." (At 6). Inconsistencies in his Honour's argument on this central point are therefore apparent.
23 Ibid. 6-7.
24 *W.* v. *W.* (22 February 1975) Nelson Registry D. No. 46/77 (Quilliam J.) Reported [1978] N.Z. Recent Law 306.

the psychologist responsible to the child, was later of the opinion that the custody or access arangements were acting in a way detrimental to his welfare, the psychologist was directed, to report forthwith to the court. The underlying impression left by this decision was that the learned judge was of the opinion that psychologists trained in children's behaviour were the most appropriate people to ensure that the welfare of the child was maintained. Since that order was made, no other judge has followed the precedent set by this judgment, which established an important principle that the making of any custody or access order should, be subject to review.

In a number of published and unpublished judgments *D.* v. *D.*[25] *B.* v. *B.*[26] *M.* v. *M.*[27] and *D.* v. *D.*[28] Jeffries J. introduced and discussed the concept of the 'psychological parent' interpreted as being the dominant parent in nurturing the child.

In *B.* v. *B.* the vital question was held to be:[29]

> If there has been a shift in the interpretation of what is in the welfare of a child I think the Courts have been less inclined in recent years to make objective evaluation about what is, or ought to be, for the welfare of the child. The concept is now viewed more closely from the child's standpoint. For that child, which parent has historically done the parenting? Upon which does that child fix psychologically as his or her parent if the child must in future settle for one? The answers to those questions are now recognised as being vital in deciding what is the welfare of a child.

In *M.* v. *M.* psychiatric and psychological evidence was not available to the court but his Honour derived, assistance from a social welfare report which showed that while the child had been used as a pawn by both parties it also indicated that the boy saw his father as his main parent.

In *D.* v. *D.* the respondent mother in this case submitted to five examinations by two psychiatrists and a clinical psychologist. There was a unanimity of professional opinion that the respondent was well-balanced and stable and at least equal to the appellant as a potential custodial parent. However the case rested on the decisive wish of the two elder children to stay in the custody of the father, although neither the father and the children had been subject of clinical eval-

25 *D.* v. *D.* [1978] 1 NZLR 476.

26 *B.* v. *B.* [1978] 1 NZLR 285; [1978] N.Z. Recent Law 184.

27 *M.* v. *M.* (1978) Unreported, Wellington Registry, M.192/77. Access in this case was divided almost equally between father and mother in each week, an unsuccessful arrangement which probably contributed to the child's confusion. The mother's access to the child was fixed at one full day per week with two nights staying on alternate weekends.

28 *D.* v. *D.* (1977) Unreported, Wellington Registry, M.18/77. His Honour regarded it as important to note that no evidence given by the Social Welfare workers or the psychiatrists was based on contact or knowledge of the family prior to the separation. Thus none of the witnesses were able to give any assistance to the Court of the capability of the wife within the home situation when she was caring for the children. The Social Worker concerned was strongly criticised by His Honour for allowing a distinctly judgmental tone to flavour his report which contained not one favourable observation on the father who was entitled to at least as much sympathy and understanding as the respondent mother. His Honour stated that, "both parties are entitled as a right to have their actions and behaviour measured by the same standards." (At 7).

29 [1978] 1 N.Z.L.R. 285, 289.

uations, nor had the wife been examined in relationship to the children. This highlights a difficulty in forming an evaluation of the functioning of a family as a unit, where clinical opinion is available on one spouse only and not on the psychological condition and needs of the children, or where the children are not seen in relationship to both parents.

This problem is also seen in *S.* v. *S.*[30], an unreported judgment of Beattie J. Psychiatric opinion was available testifying to the effect that the respondent mother was a fit and appropriate person to have custody of a two year old boy was available to the court. The psychiatrist concerned had not however seen the father, and conceded that his conclusions to a certain extent lacked objectivity because of this handicap. His Honour adverted to the desirability of a psychiatrist seeing both parents.[31] The case was decided in favour of the father on the grounds of the child's sex and that the father had for eighteen months been the psychological parent to the child. In this case psychological parenthood appears to have been equated with that parent available to administer to the day to day needs of the child revealing some possible misunderstanding of this concept.

Another decision to give major emphasis to the emotional and psychological needs of the children concerned as distinct from their material and physical needs was an unreported decision in the Auckland Magistrate's Court of Callander S.M. in *G.* v. *G.*[32] The emotional and psychological factors affecting the children were held to be of prime importance, and considerable emphasis was placed on the emotional stability, maturity, responsibility, capability, and mental health of the competing parents. His Worship also considered it essential to examine the situation from the point of view of the children. He states:

> If the children were properly able to verbalise their feelings about the question of custody what single statement would they make? I suspect they would say something like this — "We wish to remain with the parent who gives us the most sincere love and secure friendship". Emotional wellbeing is probably more important than physical wellbeing: it strikes me as paramount. The children should remain with the parent with whom they have the strongest emotional relationship.

In this case, which also found in favour of the father, no independent specialist evidence on the psychological and emotional condition of the parties was either

30 *S.* v. *S.* (1978) Unreported, Palmerston North Registry, M.35/78.

31 See also Cross, J. in *Re S.* [1967] 1 All E.R.202, 209 and *B.* (*M*) v. (*R.*) [1968] 3 All E.R. 170, 174 where Willmer, L.J. took the view that parents who are in dispute with each other should co-operate in jointly instructing a doctor, paediatrician, or psychiatrist, if expert opinion was thought desirable.

32 *G.* v. *G.* (1978) Unreported, Auckland Registry, D.P. No. 329/78. The importance to the custody outcome of the child's expressed preference to stay with one parent is also highlighted in *D.* v. *D.* op.cit. n.28. Said Jeffries, J. at 9: "I also think it appropriate to say I consider it hazardous and unwise to look behind the stated preference of children in an endeavour to detect baleful or malevolent influences of one or other parent. It is usually only embarked upon when the child's preference is not in accord with a judgment of the enquirer."
And at 10:
"To my mind of commanding importance in this case is the clearly stated preference of the two older children to remain in the custody of their father. I do not hold that children's preferences are always to be the deciding factor, but they must always be carefully weighed and departed from only for solid reasons."

available or called for however. The children were not represented by children's counsel nor was a social worker report considered necessary to assist the court. In this case the magistrate relied entirely on his own assessment of the children's emotional needs.

In *P.* v. *P.*[33], a decision of O'Regan J. his Honour freely acknowledged the help and assistance he had derived from a psychological report on the child subject of an access dispute.

Casey J. in *B.* v. *B.*[34] was satisfied by the medical, psychological, and psychiatric evidence available, that the appellent mother's mental state was back to normal and that there were no problems of health or personality that would serve as a bar to her sole care of the child. Custody of the 7 year old daughter was restored from the father to the mother, although the father with the help of an older daughter had cared for her for three years prior to the decision which gave effect to a psychiatrist's recommendation, and to the child's own preference to stay with the mother. *F.* v. *F.*[35] also heard by Casey J. was an unusual case because the petitioner father was so convinced that the mother was not a suitable parent, that he made application for custody of the child before its birth. Medical, psychiatric and psychological evidence was before the court, a case eventually decided in favour of the mother, the father having seen his son only on infrequent occasions since his birth. The professional evidence all pointed to custody remaining with the mother and his Honour so ordered. However the specific nature of the expert findings were not detailed or discussed in the judgement. Similar comments apply to *N.* v. *H.*[36] In this case the elder girl had received treatment at a Child Health Clinic and independent psychiatric opinion was also available but not detailed. In his Honour's view, "the decision of the court was in reality written by the actions of the parties themselves, particularly the mother" who had originally left both girls with the father. For three years prior to the hearing a capable surrogate mother had attended to all the children's intellectual, emotional and physical needs. Along with wide-ranging lay evidence, his Honour considered the depositions from highly qualified professional people of assistance to the court in obtaining a feel of the case, but not as an over-riding influence. The psychiatrist

33 *P.* v. *P.* (1977) Palmerston North Registry, D. No. 08/72. Reported in [1978] N.Z. Recent Law 223.

34 *B.* v. *B.* (1978) Unreported Christchurch Registry, M.52/78. His Honour gave much of the credit for the child's present well-being to the devoted care of her 17 year old sister rather than to the father "who lacks full appreciation of just how much he might have imposed on his elder daughter, who fortunately has risen to the challenge" (at 3).

35 *F.* v. *F.* (1979) Unreported, Christchurch Registry D.1392/74.

36 *N.* v. *H.* (1980) Unreported, Wellington Registry, D.5/79. Note that His Honour did not accept the dictum of Glass, J. that a mother's attachment is biologically determined by deep genetic forces which can never apply to fathers, surrogate mothers, step mothers, relatives or other involved persons. See *Epperson* v. *Dampney* (1976) 10 ALR 227, 241. King, op.cit. n.12, at 64 considered that such erroneous concepts were little more than metaphysical notions to reinforce the role which society imposes upon the mothers of young children, notions which effectively inhibited a useful dialogue between the judiciary and the behavioural scientists.

involved was complimented because he carefully avoided usurping the court's function in making the decision.

These decisions reflect a greater awareness of the need to attach proper weight to factors affecting the psychological as well as the material wellbeing of children; to carefully consider specialist evidence although this is usually made available at the initiative of one party to the dispute (but not by order of the court), and in one judgment to recognise that psychologists trained in children's behaviour were the most appropriate people to ensure that the welfare of the child was properly protected. In other judgments cited, psychological constructs of parenthood and the emotional needs of children have been discussed by the judicial officer presiding without, it should be noted, support from corroborative evidence from specialist witnesses, and some psychological constructs such as psychological parenthood, would appear to have been misconstrued. Other constructs and standards of custody decision making introduced principally by Goldstein, Freud, and Solnit[37] have not been discussed or applied.

A reported decision by McMullin J. in *S.* v. *S.*[38] re-asserted the traditional position that the view of the court should remain untrammelled, and that the judicial prerogative in the ultimate determination of custody should not be usurped. His Honour held that a psychiatrist was entitled to express an opinion on the respondent's general stability and state of health and that a paediatrician was entitled to express a view-point on the child's state of health while in the care of the custodial parent. His Honour considered however that[39]

> The evidence of the two doctors can be taken that far and that far only. It is not within the province of either of them to usurp the function of this Court in deciding on all the evidence before it, what is in the best interests of D.

This decision appears to have again severely limited the part played by the behavioural science professional in custody proceedings, although it should be noted that the paediatrician and psychiatrist involved in this case had recommended that the child should remain in the mother's care; the court in fact ordered that the mother be given custody.

In *D.* v. *D.*[40] Davison C. J. de-emphasised the weight attached in other recent decisions to psychological parentage, questioning whether this concept was neces-

37 J. Goldstein, A. Freud, and A. Solnit *Beyond the Best Interests of the Child* (New York, 1973). The authors also introduce the concepts of the least detrimental placement alternative; the need to safeguard the child's continuity of relationships, and placements having regard to the child's (not adult's) sense of time.

38 *S.* v. *S.* (1978), Auckland Registry D. No. 1417/77. Reported [1978] N.Z. Recent Law 266.

39 Ibid. 6.

40 *D.* v. *D.* (1978) Unreported, Wellington Registry, M.111/78. His Honour stated: "I accept the requirement that the welfare of the child must be the first and paramount consideration has meant that questions of custody must necessarily be viewed more closely from the child's standpoint but I do not think that the decision as to which parent has historically done the parenting, or the decision as to the parent upon whom the child fixed psychologically is necessarily a determinant of the welfare of the child. If the learned Judge meant merely that they were factors, albeit strong factors, in any decision to be considered along with others, then I would with respect agree with him". (at 7).

sarily a determinent of the welfare of the child. In this case only social worker reports were available; no specialist evidence was called for. Custody was decided in favour of the father. The Chief Justice also heard *S.* v. *S.*[41] but in this case exercised his discretion to award custody to the mother contrary to the expressed recommendations of children's counsel, a child psychiatrist, and social worker, that the children's welfare would be best served by a decision in favour of the father. Reasons for discounting the weight of specialist evidence were not given.

A case heard in November of the same year is of particular interest because conflicting psychological evidence on two children requiring detailed evaluation by the presiding judge was available. A senior paediatrician also testified. In *J.* v. *J.*[42] an unreported judgment of White J. his Honour authorised a Department of Education Child Psychologist to update his clinical findings on the two children subject of the dispute during the course of the hearing itself.

Eighteen months previously the psychologist concerned had reported the presence of a 'grossly' disturbed relationship between the custodial parent and both children. In the reserved decision no mention was made of the psychologist's findings and the corroborative paediatric and psychiatric evidence that there was a disturbed mother to child relationship did not feature in the decision.

However, contrary psychological opinion questioning the validity of the test measures utilised, and of the degree of severity of the children's presenting symptoms greatly complicated the judge's task of correctly interpreting the specialist findings. The fundamental issues raised by this case relate to the way in which a particular judge decides which expert evidence to follow and the relative weight to be attached to it. White J. dealt with that conflict by not discussing certain expert evidence, and "it is significant that the evidence not discussed in the judgment was in favour of the father's case for custody."[43]

41 *S.* v. *S.* (1978) Unreported Wellington Registry D. 79/77.

42 *J.* v. *J.* (1978) New Plymouth Registry M.19/78. Reported (1978) 1 The Capital Letter 32/6. Factors governing this decision included the wife's alleged proven ability to manage the children, and their need for stability and security based on Court understandings of the Mother-principle. In fact giving viva voce evidence the child psychologist had reported a progressive deterioration in the psychological stability and comfort of both daughter and son, the daughter exhibiting critically severe symptoms of nervous tension, insecurity and anxiety. A psychiatrist had also recommended treatment for the children's psychological maladies. While in the case of a healthy child the Court does not regard itself as constrained or compelled in a decision by the terms of the expert evidence, where the child is not in good mental health, the medical evidence if accepted must weight heavily with the Court. See *Epperson* v. *Dampney* (1976) 10 ALR 229 and 230.
The psychological findings indicated that the children's strongest emotional bonds remained with the father as their 'psychological' parent. Recommendation of children's counsel that custody of the son be given to the father, and that the Psychological Service lodge with the Court a subsequent report on the children's welfare, were not adopted by His Honour. See also M. Henaghan "*J.* v. *J.*: Another Sad Saga of Custody Adjudication: A case note", unpublished, Faculty of Law, University of Otago, 1980.

43 See Henaghan, op.cit. n.42 at 10.

In an earlier decision by O'Regan J. in *McK.* v. *McK.*[44] vital evidence overwhelmingly in support of the male parent was not mentioned similarly easing the rationalisation of the decision to the female parent.

In *G.* v. *G.*[45] an appeal from a decision of Jeffries J. the father retained custody. No specialist evidence in this case appears to have been available to the court either in the earlier or in the appellate court hearing, although it is arguable whether the court may not have derived assistance from specialist findings concerning the psychological and emotional condition of the three children concerned.[46]

Roper J. in *L.* v. *L.*[47] considered testimony from two psychiatrists on the mental condition of each parent, while reports by a Department of Education psychologist were also available. Although the father retained custody his Honour shared the psychologist's concern for the effect on the children of the father's unusual socially eccentric philosophy of life.

B. v. *B.*[48] was another case involving input of both psychiatric and psychological opinion. While there was a conflict of psychiatric evidence, the weight of

44 *McK.* v. *McK.* (1975) Unreported, Wellington Registry, M.63/75. See also *McS.* v. *G.* Unreported, Auckland Registry Thorpe J. (1979). This decision to the mother was made against the strong and decided preference of two of the three children to stay with the father. A psychological report on the family was available to the court in support of the father's case, but the findings were not discussed in the judgment. His Honour held that "only clear evidence of a serious deterioration in the mother's ability and willingness to care for her children would justify a Court in removing them from her care and placing them in their father's care." (at 6).

45 *G.* v. *G.* [1978] 2 NZLR 444. (C.A.) Appeal from a decision of Jeffries J.

46 The two factors especially weighed by Jeffries, J. in deciding to grant custody to the father, were the father's more mature grasp of the onerous task of parenthood, and the advantage of retaining the children in the district in which they had been raised, on the basis of the so-called 'continuity' principle.

47 *L.* v. *L.* (1979) Unreported, Dunedin Registry, M. No. 76/78. In this case both psychologist and judge appeared to have formed value judgments about the father's 'philosophy' of life, a factor not necessarily bearing directly upon his capacities as a parent.

48 *B.* v. *B.* (1 October 1979) Unreported, Wellington Registry, M.425/77. A strong factor deciding against the father was the belief that the child had been 'schooled' by the father to speak disparagingly of the mother; specialist evidence tended to verify this assumption. However, as in *J.* v. *J.* much of the evidence in favour of the father's case failed to rate mention in the judgment of O'Regan, J. This decision was subsequently upheld twelve months later by the Court of Appeal in *N.* v. *N.* [1980] 2 N.Z.L.R. 38. Specialist findings were up-dated but psychiatric opinion was still in conflict as to whether in fact the child's wishes had been artificially manipulated against the mother. The psychiatrist supporting the father expressed an opinion that the child would suffer quite serious psychological damage if he remained in the mother's custody. Basing his opinions on the results derived from an administration of Bene-Anthony Family Relations Test (also applied in *J.* v. *J.*), a clinical psychologist reported similarly. Thus the weight of expert evidence in this case favoured the father. In leaving custody with the mother the Court of Appeal held that psychiatric evidence must be given only such weight as seems appropriate in the context of other relevant evidence. The results of clinical tests could not automatically be regarded as the decisive factor in awarding custody, rather a fine intuitive balancing by the judicial officer of many factors ". . . resting on the Judge's own human experience

specialist evidence in respect of the boy tended by a fine balance to favour the father who had cared for the child for a ten month period. Custody was decided in the mother's favour by O'Regan J. Of the cases cited only in *J.* v. *J.* did the court itself direct that specialist findings be updated, his Honour then disregarding the expressed recommendations of the psychologist concerned.

However in a more recent decision of White J., *R.* v. *R.*[49], a Child Psychologist of the Department of Education Psychological Service presented a report by consent

based on his assessment of the parties and their personalities and the personalities of the children" per McMullin J. at 46.
In this case conflicting specialist evidence has apparently served to obscure the real needs and predicaments of the children. A conflict of specialist opinion situation creates a particular dilemma both for the specialists whose skills and competencies may be called into question and for the judicial officer who, confused by such apparent contradictions, may then either reject such evidence, or follow only such evidence that seems in accord with legal conceptions of parenthood. O'Reilly has argued that much of the criticism of expert evidence arises from the process of involvement of the expert and the incompetence of the legal adviser engaging the expert, as frequently the specialist may see only one party and often not in the presence of the children. Thus expert opinion can be formulated on a one-sided version of the facts. O'Reilly urged that the method of involving the expert and the basis and information on which he proceeds should be critically evaluated. See L. O'Reilly "Custody of Children on Parental Separation" supra n.18 31. The guidelines formulated by the Royal Australian and New Zealand College of Psychiatrists in their position paper on child custody are designed to overcome such difficulties. Under Recommendation 5 at 7 for example conjoint family assessment and psychiatric evaluation of the ex-marital pair is urged as a "routine" procedure. Jackson argues that conflicting specialist opinion arises not because of any intrinsic fault or weakness in such opinion but from the employment of clinicians who are insufficiently trained in this highly specialised and demanding area of work involvement and who may not be free from unrecognised sexist bias in their clinical judgments. See Jackson "Basic Principles in Custody Assessment" Paper presented to the second Department of Education Psychological Service National Conference on Custody Cases and Involvements by Psychologists, Unpublished Mimeo December (1980) at 7. For a discussion of the admissibility of the expert opinion of psychiatrists and psychologists in clinical trials see C. Cato "Psychiatric Testimony: The ultimate issue rule and the rule in Rowton's Case" [1980] N.Z.L.J. 288 and "Forensic Psychology: Principles, Practice and Training" in W.A.M. Black and A.J.W. Taylor (eds) *Deviant Behaviour: New Zealand Studies* (Auckland, Heinemann 1979) 3-8.

49 *R.* v. *R.* (1980) Wanganui Registry, M.56/79. Reported in (1980) 3 The Capital Letter 8/3. And in *F.* v. *F.* (1980) Unreported, Hamilton Registry, M.42/80. Bisson J. was particularly impressed with a conclusion of a clinical psychologist who gave both written and viva voce evidence, concerning the unequivocal preference of a 13 year old daughter to remain with her father. Appropriate weight was also accorded to the specialist evidence in *R.* v. *R.* (1980) Unreported, Wellington Registry, M.191/80. Said Hardie Boys J. at 25: "Evidence of this kind is valuable. It is of course not conclusive. It is for the Judge, not the experts, to decide the question in issue. The topics to which the experts are able to address themselves are but some of the many topics which are relevant to the final judicial decision. However, they can be, and in this case in my opinion are, very important topics indeed, and a Judge is unwise in the extreme not to heed the expert, or to regard himself as more expert in the expert's field than is the expert himself." This decision was subsequently upheld on appeal (C.A. 101/80).
Detailed psychological reports on three children subject of *M.* v. *M.* (1980) Blenheim District Court, D. No. 1/78 were available and carefully considered and discussed

of the parties and was also called to give evidence. In the lower court hearing the magistrate had requested the psychologist to maintain counselling contact with the parties for the benefit of the children. As a consequence the psychologist was able to present a report based on contact with the family throughout the previous year.

His findings and recommendations were reported at length. He concluded that the present custody and access arrangements were most equitable given some minor modifications, and that the children benefited from having two psychological parents, who, in effect, enjoyed because of liberal access provisions, a shared or joint custody arrangement. His Honour considered that the psychologist had helped to bring about a settled atmosphere. He carefully weighed the psychologist's opinions together with the other submissions and evidence before the court.

A comparison of these recent judgments in which expert evidence has featured allows no clear-cut direction or trend to be discerned in respect to the weight given to the evidence of professionals trained in child behaviour and development. As in the ultimate custody determination much would appear to depend on the attitudes of the particular judge or magistrate hearing a given case.[50]

Presenting an orthodox and conservative argument Webb[51], a leading New Zealand authority in family law and Professor of Law at the University of Auckland, considered it "fortunate" that the courts of this country had been spared the need to make extensive observations on the significance of evidence given by child psychologists and psychiatrists in child custody disputes. He held that[52]

> claims for the custody of physically and mentally hale and hearty children are not to be buttressed by calling expert psychological and/or psychiatric evidence and the day of "trial" by experts in this area instead of by the Judge has not yet dawned.

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at some length in the reserved judgment of Judge Headifen. Custody to the mother was in accord therefore with recommendations of children's counsel and child psychologist, and the children's own expressed preference to remain with the mother. In *G.* v. *G.* (1980) Unreported, Wellington Registry M.668/79, Greig J. had the advantage of lengthy and careful evidence from both a psychologist and a psychiatrist who together with his Honour placed considerable emphasis upon the decided preference of the three boys concerned to stay with the father. He stated at 6 that "Experts in psychology or psychiatry cannot make the decision for the court nor can their opinions take the place of the Court's opinion and decision. Their opinions must necessarily have some considerable influence on the Court particularly where, as in this case, there is no clear merit or demerit on one side or the other."

50 See M. Henaghan, op.cit, n.42, Henaghan has submitted that it is difficult to see clear judicial patterns in custody decision-making emerging because, over a number of cases, the analysis and reasons for the decision are not presented fully. Given more comprehensive discussion it would then be possible to test decisions against the findings of modern science to ensure that custody adjudication was in line with current developments in child care. (At 14). Similarly O'Reilly has observed that "it is sometimes difficult to recognise in the evidence or pleadings in Court proceedings any significant body of evidence directed to an assessment of the child himself or his special needs and circumstances". c.f. "Custody of Children on Parental Separation", op.cit. n.18, at 2,3.

51 P. Webb "Forensic Psychiatry and Psychology" [1977] N.Z.L.J. 94.

52 Ibid. at 96.

As reflected in recent decisions this view-point would appear to have largely gained prominence — paradoxically, at a time when increasing interest is being taken by mental health professionals in the potentially valuable expert contribution to be made in this most important area of family law.

Both the New Zealand Branch of the Australian and New Zealand College of Psychiatrists, and the New Zealand Psychological Society have recently established Working Parties on Child Custody and Access. As one outcome the College of Psychiatrists[53] has issued a position statement on child custody and access for the guidance of its members. Position papers have also been issued by the New Zealand Psychological Society[54] while the Department of Education is in the process of formulating policy in respect to the involvement of its educational psychologists in matrimonial and custody disputes.[55] The New Zealand Psychological Society has strongly recommended that psychologists should be fully involved in assessing evidence concerning parental adequacy in cases involving disputes over child custody. The society argued that psychologists, by virtue of their training and experience, could bring to bear knowledge and skills in areas such as human relationships, child development, and the assessment and analysis of behaviour, the role of the psychologist also including observations and analysis of parent-child interactions, assessment of the adequacy of care-giving and child management skills, and determination of the child's wishes. It was therefore recommended that the court be given power to call for reports not only from social workers, but from paediatricians, psychiatrists, psychologists, and other allied medical professionals.

The College of Psychiatrists similarly considered that the psychiatric consultant had a valuable role to play in proffering expert advice, providing that the psychiatrist was able to maintain his professional credibility within the court framework. The college upheld the principle by responding whenever possible to requests for psychiatric evaluation from children's counsel. It laid down the general principle that psychiatric reports for custody purposes could usefully be augmented by psychological investigations. Psychiatric reports were to be regarded as opinions to be placed alongside the evidence and opinions of others in a process that will ultimately lead to decisions reflecting the best interests of the child.

53 D. Kippax "Role of the Psychiatric Consultant in Matters Relating to Custody and Access". Position Statement of the New Zealand branch of the Royal Australian and New Zealand College of Psychiatrists, Unpublished, Department of Psychological Medicine, University of Otago, 1979.

54 B. Parsonson "Submission to the Select Parliamentary Committee on The Family Proceedings Bill on behalf of the Social Issues Committee of the New Zealand Psychological Society", Unpublished, Department of Psychology, University of Waikato, 1979. Also Wellington Branch, New Zealand Psychological Society, "The Psychologist and changes in Family Law: 1. Implication of changes in Family Law, and 2. Psychological Practice and the New Laws", Victoria University of Wellington, 1980.

55 Department of Education, Wellington. "Psychological Examination of Children with Separated or Divorced Parents", Draft Policy Statement No. 5 Head Office Special and Advisory Section, 1980. *Custody Cases and Involvements by Psychologists* National Conference. Auckland: 2-4 July (1980).

The Wellington Regional Working Party on Child Custody and Access of the International Year of the Child in a submission[56] also stressed the need for the involvement of specialists highly and specially trained in the particular field of marital disruption and family relationships. Lawyers, magistrates and judges could not be expected to act as social scientists in areas which required specialised training in child development, family dynamics and psychological distress. Where proper expert assessment of the relevant psychological, social, cultural and economic factors had been carried out, judgements could then be made on the individual circumstances of each case without reference to generalities or rules of thumb, which could be erroneously applied, due to lack of expert knowledge. The primary purpose therefore was to lay before the courts better evidence on which to base judgments. This working party saw the need for frank and continuing dialogue between the judiciary and psychological experts to bring about mutual understanding in the best interests of parent and child. That theme was also highlighted in a number of papers presented by psychiatrists and psychologists to the Custody of Children Workshop held during the International Year of the Child/ Human Rights Commission Conference on 'The Rights of the Child and the Law'.[57]

Davidson[58] saw the role of the psychological expert witness as a 'voice' for children in order to re-assure the child that his interests were being taken seriously. Using his special skills in psychometric assessment, developmental psychology, and family process, and his abilities as interviewer, counsellor and therapist, the psychologist could then work towards the goal of advising that course of action best able to meet the needs of the children. The desirability of a close working relationship between psychologist and children's counsel was stressed. All groups in a seminar "Lawyers for Children" similarly advocated the involvement of multi-disciplinary experts at the earliest stages of the proceedings, not only in an advisory capacity, but also in a positive attempt to arrive at conciliation of the disputing parties.[59]

CONCLUSION

It is submitted that the task of reaching an appropriate custody decision without prejudice as to the sex of the parent, and in accord with the psychological

56 J. Williams "Submissions to the Select Committee on The Family Proceedings Bill", I.Y.C. Wellington Regional Working Party on Child Custody and Access, 1979. See also J. Williams, "Factors in Custody and Access Cases", Paper prepared for the I.Y.C./Human Rights Commission Rights of the child and the Law Conference, Christchurch, November 1979.

57 See in particular, R. Hewland "Who Speaks for the Child?" K. Zelas "Who Speaks for the Child when Adults Around Him are in Turmoil?"; A. Binnie "R.A.N.Z.C.P. Submission on the Family Proceedings Bill: An Elaboration of Principles." Papers prepared for the I.Y.C./Human Rights Commission Rights of the Child and the Law Conference, Christchurch, November 1979.

58 G. Davidson "Counsel for the Child and Psychological Expert Witness in Custody and Access Cases" [1980] N.Z.L.J. 177. See also R. Ludbrook "The Role of Counsel Appointed to Represent the Child" [1979] N.Z. Recent Law 262 .J.W. Gendall "Counsel for Children", Paper presented to the Lawyers for Children Seminar, Department of University Extension, Victoria University of Wellington, November 1979. And see Devine 'The Role of Child Counsel', unpublished, Faculty of Law, University of Otago, 1978.

59 Report on the Lawyers for Children Seminar, op.cit, n.58, at 2.

and emotional needs of the child, is a highly complex task requiring a very high degree of specialist competence, expertise, and skill, based on what is currently known about the nature of the parent to child relationship. A reluctance to call for or to accept specialist evidence because of sensitivities to the usurping of the judicial function could be regarded as tantamount to professional insularity if not irresponsibility to children. In civil and criminal cases the courts have recognised evidence given by expert witnesses, on the grounds that in certain areas of specialist knowledge expert witnesses will be better able to draw inferences available than will the court, particularly where the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment without such expert assistance.

As expressed by Diamond and Louisell[60]

> The value of clinical evidence cannot truly be determined by the exactness or infallibility of the evidence given, but rather by the probability that what the psychologist has to say offers more information and better comprehension of the human behaviour which the Law wishes to understand.

Decisions made contrary to the weight of evidence, a trend apparent in some recent decisions whether expert or from the layman observer, constitute not only an abuse of the judicial prerogative and of due process of law, if not of rational decision-making, but of the rights and real interests of the dependent children subject of a custody dispute. Decisions which ease the rationalisation of a custody decision in favour of one parent by disregarding vital evidence in favour of the other, or by very selectively evaluating the evidence in toto, are also worthy of strong criticism.

Henaghan[61] has argued that wherever expert evidence is introduced in a custody dispute, such evidence should be deemed to be relevant, and if it was not discussed in the judgment, then there would be automatic grounds for appeal. He considered that at present the judiciary are in the position where they can choose to follow expert evidence, if it accords with their own judgement, and ignore or dismiss it if it does not.

A much more positive and rigorous approach to this problem is required. Thus conservative but irregular decisions may protect well-settled principles of precedent law, but fail to properly protect the best interests of the child as the first and paramount consideration.

If an appropriate custody decision is to be made fully in accord with the paramouncy of the child's best interests, then it is essential that the guidelines, rules, and assumptions upon which that decision is reached should be valid and furthermore, bear direct relationship to principles derived from current empirical research findings into child development and the nature of the parent to child relationship. If these assumptions are either outdated or invalid then it follows that the custody decisions based on outmoded understandings, are likely to be inappropriate, and disadvantageous to the best interests of the child, whether that decision finds in favour of the mother or of the father.

60 B. Diamond, and D. Louisell "The Psychiatrist as an Expert Witness: Some Ruminations and Speculations" (1965) 63 Michigan L.R. 1335.

61 Op.cit. n.42, at 9.

An important consideration is whether the current legal 'guidelines' and principles upon which custody decision making is based do have any 'validity' viewed from a psychological and psychiatric perspective and from what is currently known about child development, and disturbances in the mother to child, as well as father to child relationship.[62] Unfortunately legitimate criticisms can be made of all such legal constructs including in particular the 'mother principle'; the 'father principle'; the 'tender years' presumption; 'schooling', and the age at which greater weight is attached by the court to the child's nominated choice of parent. There is in fact no general principle that can be invoked to suggest, based on considerations of gender alone, that one parent or the other is the more appropriate custodian: the younger the child the more suspectible it is to the consequences of inappropriate or pathological parenting thus countering the tender years presumption; whether or not children should be held together as a family or separated is a decision requiring a detailed evaluation of the dynamics of the family as a unit and no absolute standards apply; children may give a reliable indication of parental preference at a much younger age than assumed by the court. And while there is some validity to the commonly held assumption that a parent has schooled or briefed a child into the expression of loyalties and sentiments not of its making, this is not invariably the case and can be most disadvantageous to the child if the expression of parental preference, whether to mother or to father is in fact genuine. Current legal standards of custody decision-making are not only internally contradictory and inconsistent; their application varies greatly from judgment to judgment, giving rise to different outcomes in same fact situations.

There is a tendency to rely on generalities and principles when the specifics are unknown, and where the court lacks the tools and techniques of investigation to form a comprehensive picture of the individual personality, needs, and characteristics of the children subject of the dispute. As O'Reilly has noted, in most cases issues affecting the child's interests and welfare are lost in an ocean of unsubstantiated and often over-exaggerated parental allegation and counter-allegation. If the courts also focus on matters not directly relevant to his wellbeing, this will also profoundly dis-service the child's interests. Religious belief, sexual misconduct, de facto associations, or the material and financial circumstances of the competing parties may all be extraneous considerations in deciding which parent may better maintain the child's emotional stability and security in an atmosphere of love and affection. To apply the continuity principle may also be inappropriate if the original custody order whether by court order or consent has been in error, particularly if the child has been left in the sole custody of a rejecting, unstable or unloving parent.

While the courts have recognised that each custody case must turn on its own facts, much evidence from lay witnesses may be unreliable and sharply polarised and neither the parties themselves, nor friends or relatives appearing in their

62 C. Jackson "The Contested Custody of Children" [1977] N.Z.L.J. 356. Also see Jackson "Submission on Child Custody and Access to the Parliamentary Statutes Revision Committee Considering the Family Proceedings Bill". Families Need Fathers Society (N.Z.) Inc., 1979, 1980.

support may offer the court depositions of sufficient quality or objectivity, to properly represent the child's interests. If the presiding judge then forms a stereotyped picture based on legal rules and guidelines, the real needs of the child can be further obscured. While greater protection for the child is afforded by the appointment of counsel for the child he also lacks training in child development and parenthood, and his perceptions of the situation may also be coloured by the application of out-moded legal understandings of the parent to child bond. On the other hand a highly trained child psychologist, psychiatrist, psychotherapist or social worker whose speciality it is to understand to help troubled families in crisis, may bring to bear perceptions and insights, based on current research knowledge of child psychology and family relationships. In this way a more accurate evaluation of the predicaments affecting the child, and of his individual specific custodial wants and requirements will be formed. It is no longer sufficient when the necessary expertise is already available for custody decisions, which one authority has described as "accidents of litigation",[63] to be made on the basis of hunches, surmises, guesses, sentimental and old-fashioned notions of parenthood, or irrational prejudices and biases to a parent by virtue of sex.

It is submitted therefore, that with reforms in this area of family law, firstly, specialist opinion either on the functioning of the family as a unit or on the parties themselves and their children be available to assist the courts in its custody adjudication function, and that the court itself, through children's counsel should direct that this evidence be made available with the co-operation of both parties, and with their full involvement.

Secondly, that the evaluation of the family should be a multi-disciplinary one in order that any differences in perception of the family dynamics and loyalty structure be resolved by consensus discussion in case conference before a custody recommendation is made.

And finally, that if data secured from psychiatric or psychological investigation is to be regarded as admissible evidence it is submitted that the courts' discretion should be narrowed to preclude the total disregard of such evidence, and that 'proper weight' be attached to it. This implies an informed understanding by the judicial officer concerned of the techniques, and procedures of specialist custody investigation.

In considering the long-term emotional welfare of children to protect them as far as possible from 'the wreckage of shattered emotions' the essential question must again be posed: If the legal criteria on which custody decisions are based are of doubtful validity and rest on the false support of precedent and traditional assumptions and beliefs, not upheld by current research findings, how many custody decisions may have run contrary to the real emotional interests of the child concerned? In this important area there can be no place for out-dated, sectional, or partisan attitudes. If the welfare of the child is to be held paramount and the confidence of the public in the competency of the courts to adjudicate in this sensitive area is to be maintained, the courts should use whatever specialist resources are available to it to ensure that just, impartial, and above all valid decisions are made in accord with the best interests of our 'throw-away' children.

63 A. Derdeyn "Child Custody Consultation" (1975) 45 Am.J. Orthopsychiatry 791.

LEPROSY RELIEF

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It was founded by **P. J. Twomey,** universally known as **"The Leper Man"**

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