

THE SPECIAL POSITION OF THE CHILD WITHIN THE LEGAL SYSTEM

MODELS OF REPRESENTATION FOR CHILDREN

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This paper is dedicated to the memory of Barry Keith Woolger (26.12.1946 - 25.07.1994) who spent some six years as a child in foster care in the United Kingdom in some nineteen different homes. Like Harry Potter he was regularly locked in the cupboard under the stairs but sadly did not have a friend like Hagrid to advocate on his behalf.

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EXECUTIVE REPORT

Title: The Special Position of the Child within the Legal System

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The aim of the project is to promote debate and to summarize and compare the models of child representation utilized in the United States, the United Kingdom and Australia and to make recommendations based on research obtained during the course of the Fellowship program.

The project has been designed in two parts. The paper "*The Special Position of the Child within the Legal System*" has been written as an academic paper based on research carried out during the course of the Fellowship and since my return to Australia. The recommendations contained within the conclusion and discussion of the paper essentially suggest that the division between state courts having jurisdiction for child welfare matters and the Commonwealth Family Court which also has jurisdiction in similar cases mitigates against the effective representation of children in child abuse cases.

In the United Kingdom the introduction of the *Children Act 1989* enacted on 14 October 1991 provided a unified structure both of law and jurisdiction relating to all aspects of the care and development of children whether they be residency and contact cases or cases involving the abuse of children. The unified structure is a sophisticated and thoughtful response to the plight of children and families and is aimed at ensuring the best possible means of representation of children within the legal system.

In the United States the federal *Adoption and Safe Families Act 1997* was designed to prevent children languishing in foster care with no prospect of permanency. The legislation has had the effect of ensuring that every child who is the subject of a care and protection application is legally represented. There is an extensive body of literature on the role of the child representative with the US system and the debate is itself indicative of the importance placed on the development of children by the United States people, their elected representatives and the legal fraternity comprised of counsel the judiciary and associated professionals.

The second part of the project is a summary of the travel program and more general observations.

The Special Position of the Child within the Legal System.

The tension between encouraging independence in children and protecting them from harm is one which is reflected in the status of children within the legal system. The law treats children differently to adults because adults are viewed as having the reasoning capacity to make decisions for themselves; children do not. Children require nurture and it is not necessary nor desirable for them to make decisions for themselves. In certain circumstances the law grants children the same autonomy rights as adults as for example in the criminal jurisdiction. In those circumstances it is only necessary to have regard to the existing model for legal representation of adults in order to define the appropriate model for counsel.

Not only does the law in many circumstances not empower children it actively disempowers them in an effort to protect them. Among the many circumstances in which a young child's views are either considered irrelevant or accorded relatively insignificant weight even though the child's future is directly involved are child protection proceedings (at least in the initial phase), child residency and contact cases albeit the legal representation of children has become increasingly common in these jurisdictions and the weight accorded to the child's wishes assessed according to the maturity of the child.¹

The aim of this paper is to provoke discussion and to summarize and compare the models of child representation utilized in the jurisdictions visited by the writer during the course of her Churchill Fellowship with the model adopted in Australia. The writer visited the United States and the United Kingdom in 2000 and the research has spanned a two and a half year period.

The American Bar Association Model Rules for Professional Conduct differentiate between the capacity of children on the basis of age. There is a rebuttable presumption that children aged 12 and over have the capacity to instruct their counsel and that children under the age of 12 do not. If a child does not have the capacity to

¹ Guggenheim Professor Martin (New York University School of Law) "*A Paradigm for Determining the Role of Counsel for Children*", Fordham Law Review Volume 64 March 1996 pp 1408 & 1409)

instruct their counsel the issue is: What is the role of Counsel? What are the rights of the child and what duties professionally and ethically does Counsel have to the child? Is it ethically and morally acceptable for Counsel to actively advocate for the return of a child to an abusive parent because she is aged 14 is of fair intelligence and wishes to return to live with the abuser? In contrast is it ethically and morally acceptable for Counsel to advocate and recommend a specific outcome given that there is no way a meaningful enquiry can be conducted into the manner in which they have reached their conclusion. Is the child advocate in that circumstance usurping the role of the judge by advocating a particular outcome which she or he considers desirable? Surely the child has a right to have a judge make a considered decision based on the information available without her representative actively advocating a position based on her understanding of the best interests of the child.

In Australia there has been relatively little debate as to what constitutes the best model for the representation of children particularly in regard to child abuse and neglect. The model of representation utilized in Australia has developed through case law primarily in the Family Court of Australia where the Full Court of the Family Court has considered the role function and responsibilities of the Separate Representative.² In the welfare jurisdiction exercised by the state courts of summary jurisdiction, no firm model of representation has been adopted. Similarly there is no standardized procedure from state to state for the appointment of child representatives nor for their training.

In the United States and the United Kingdom there has been extensive research into the legal and ethical issues which arise and there is a substantial body of literature available on the subject.³ The Law Society in England provides that before Solicitors can represent children in care proceedings they must undertake special training and pass an examination.

² *Re K* (1994) FLC 92-461
P v P (1995) FLC 92-615
T & Anor v P v Anor (2000) FLC 93-049

³ In the US see for example: "*The National Court Improvement Catalogue - Material Developed by State Court Projects to improve Child Abuse and Neglect Litigation*" published by American Bar Association Center on Children and the Law.

In Australia the model of representation developed by the Family Court appears to have been adopted within the Welfare jurisdiction. There appears to be a general acceptance that Solicitors acting for children should “act in the best interests of the children” that is should not be bound by the instructions or wishes of the children in regard to the recommendations which they make to the court on behalf of their clients albeit they are under a duty to inform the court of the wishes of the children. This mode of representation is akin to the role of the Guardian ad Litem within the UK and the US legal systems. There needs to be a careful analysis of the adoption of the model within the welfare jurisdiction. There is a pressing need for an assessment of the needs and rights of children within the welfare jurisdiction. “Where the child’s welfare is claimed as a basis for a decision, the advantages to the child should be tested against those of the decision maker and the system.”⁴

The United States (there is great disparity between states) differentiates between the role and function of the Guardian ad Litem and the role and function of the Child Advocate. The American Bar Association Model Rules of Professional Responsibility support what I shall refer to as the “Due Process” model of representation. In *Re: Gault*⁵ was a landmark case and is the starting point for an examination of child advocacy in the United States. It announced that children have a due process right to be represented in criminal or juvenile court. It held that children have the right to remain silent “constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults”.⁶ It did away with the patriarchal view that children accused of wrongdoing should explain their conduct to police officers and judges. In *Re: Gault* effectively says that the only correct view of counsel’s role must be based on the law’s definition of a child’s rights. “Lawyers are, first and foremost, law enforcers. They are no more free to act upon their disagreement with the Supreme Court’s pronouncements of law in the exercise of their duties when representing children than a government official”.⁷

The models of Child Representation adopted in Australia, the United Kingdom and the United States in the Family Law and welfare jurisdictions differ substantially.

⁴ Mason J and Oakley M “*Out of Hearing Representing Children in Care Proceedings*” page 13

⁵ 387 U.S.1 (1967)

⁶ *Ibid*

⁷ Supra Note at p 1423

Separate Representation in the United Kingdom

The Children Act 1989 which came into force on 14 October 1991 governs the representation of children in the United Kingdom. It provides a unified structure both of law and jurisdiction relating to all aspects of the care and development of children whether they be private disputes (private law) or public law disputes (those involving a public policy element such as the abuse of children or the provision of services to families and children). It granted generally concurrent jurisdiction to all courts, a matter can be transferred from a Magistrates Court to the High Court or County Court or vice versa.

The arrangements for representation of a child are different dependent upon whether the proceedings are private under Part II of the Act or whether they are “specified proceedings” under Parts IV and V. Part II of the Act is akin to Part VII of the Family Law Act 1975 (as amended) in that deals with the rights and responsibilities attaching to parenthood and the concepts of Residency and Contact which have effectively been adopted in Australia under the 1991 amendments to our act. A Section 8 Application is an application for Residency Contact or a Special Purposes Order.

Article 12.2 of the *UN Convention on the Rights of the Child* provides:

The child shall in particular be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The Children Act complies with this requirement in a number of ways. *Section 7* of the Act provides that a court considering any question with respect to a child under the Act may ask a probation officer or a local authority to report to the court on such matters relating to the welfare of the child as are required to be dealt with in the report. As a matter of practice many courts arrange their business so that the first direction hearing in respect of an application under Part II will come before a judge and a court welfare officer. Statements (affidavits) may not be filed so as to prevent

the entrenchment of positions until the possibilities of settlement have been fully explored through mediation if appropriate. If attempts at mediation prove fruitless the court may order a welfare report which will be commissioned from an officer who has not participated in any mediation. The report may be oral or in writing and must be filed at the direction of the court or 14 days prior to any hearing.

The functions of a guardian ad litem and a welfare officer are different and it is rare for the court to appoint both in relation to *Section 8* applications. The difference between their functions was defined in *Re S (a minor) (guardian ad litem: welfare officer)*⁸ where Butler-Sloss LJ noted:

'Each has a duty to report to the court each has a duty to consider the welfare or the interests of the child; each may be cross-examined on any report which they give. However, a court welfare officer is not a party to the proceedings whereas the guardian ad litem is, through his representation on behalf of the child. Nonetheless, each has a similar duty to the court, which is to advise the court as to what is best for the child independently of the other parties to the proceedings... the distinction between the two is that the guardian has the added duty of representing the child in court and if necessary instructing legal representation for the child.'

The three options for the representation of children in court in private law proceedings are court welfare officer or guardian ad litem, next friend or guardian instructing a solicitor, and child as party instructing a solicitor. In the event that a guardian ad litem represents a mature child whose instructions differ from the recommendations of the guardian, the guardian may appoint a solicitor who will thereafter be bound by the child's instructions. It is noted that in spite of the idea that mature children should be able to influence their own life, the courts are reluctant to allow this to go too far in legal proceedings. "They have not yet found the balance between permitting self-determination through instruction to a legal representative and requiring the child who

⁸ (1993) 1 FLR 110

is made a party to give instructions on all of the sordid material which is often contained in family law cases.”⁹

The Office of the Official Solicitor to the Supreme Court of Judicature was created in 1875 by statute. The Official Solicitor is independent although controlled financially by the Lord Chancellor’s Department. The Official Solicitor will be appointed to act on behalf of a child in certain specified circumstances which include proceedings under the Children Act where he may act as amicus curiae where an issue of general public importance has arisen or may arise. He may be appointed as a guardian ad litem in “specified proceedings” (care and associated applications under the *Community Welfare Act (Children Act Part IV & V applications)*), in cases involving a foreign element or where there are exceptional circumstances. The Official Solicitor acts not only as guardian ad litem but also as solicitor and may brief counsel as they see fit.

Specified proceedings are essentially proceedings under *The Children Act* which would in Australia be dealt with under the relevant state legislation concerning the care and protection of children. *Section 41 of The Children Act* requires the court to appoint a guardian ad litem unless satisfied that it is not necessary to do so in order to safeguard its interests. It is unusual for a guardian not to be appointed. The guardian is under a duty to safeguard the interests of the child as prescribed by rules of court. The guardian unless excused by the court should attend all directions appointments and hearings of proceedings and advise on the following matters: the level of understanding of the child for any purpose in regard to assessments which the court has power to direct require or order, the wishes of the child in respect of any matter relevant to the court proceedings, the forum for the proceedings, the timing of the proceedings, the options available to the court in respect of the child and the suitability of each such option including what order should be made in determining the application and any other matter on which the court seeks his advice or about which he considers that the court should be informed.¹⁰

⁹ White Carr and Lowe *“The Children Act in Practice”* Butterworths 2nd edition 1995 (Para 10.20 p 240)

¹⁰ (Section 41 (2) *Children Act*).

The guardian is required to investigate the case to contact and interview such persons as he thinks appropriate and to bring to the attention of the court records and documents which may assist the court. The guardian has the right to obtain such professional assistance which he thinks appropriate or which the court directs him to obtain. The guardian has the right to examine and photocopy any records held by the local authority welfare workers even if public interest immunity exists this does not prevail over the express powers of the guardian.¹¹ It was held in *Re T* that the extensive powers of the guardian were justified because he is an officer of the court who could be relied upon to safeguard the interests of the child and ensure that confidential information was kept secure. The guardian does not have the right to see Crown Prosecution Service files, but the court may order disclosure.

The local authority is a party to the care proceedings in the same manner that Family and Community Services is in Australia. Implicit to the compulsory appointment of an officer of the court independent of the relevant government department is an acknowledgment that the local authority as a party to the proceedings has its own agenda albeit that agenda is also defined as furthering the best interests of the child. The guardian is the court's source of independent information albeit that in most circumstances the guardian is appointed from a panel of guardian ad litem who are paid by and administered by the Local Authority. Local Authorities have been warned judicially that no action should be taken by them which might compromise the independence of the guardian.¹² There is a consensus that a new body should be established to provide a separately funded and wholly independent organization for the provision of representation of children by guardian ad litem.

The guardian is required to appoint a solicitor to act for the child unless already appointed and shall instruct the solicitor on all matters relevant to the interests of the child including appeal in the course of the proceedings. The court may appoint a solicitor if there is no guardian or if the child has sufficient understanding to instruct a solicitor and wishes to do so or if it appears to the court that it is in the child's interests for him to be represented by a solicitor.

¹¹ *Re T (a minor) (guardian ad litem)* (1994) 1 FLR 632, CA

¹² *R v Cornwall county Council, ex p G* (1992) 1 FLR 270

Where the guardian considers that the child has the capacity to instruct his own solicitor, or intends to instruct his own solicitor the guardian is under a duty to inform the court. The guardian then carries on with his own investigative duties and may with leave instruct his own legal representative. If a child wishes to instruct his solicitor in a manner which conflicts with the instructions of the guardian and, having regard to the child's understanding, is able to give such instructions on his own behalf, the solicitor is required to conduct the case in accordance with the instructions received from the child leaving the protective function to the guardian.

In summary, in specified proceedings under the *Children Act* a child has a right to independent representation in the form of both a Guardian Ad Litem and a solicitor and in circumstances where the child's wishes conflict with those of the Guardian the Court has the benefit of two legal representatives, one advocating the "best interests" of the child and the other articulating the child's instructions.

Separate Representation of Children in the United States

Debate continues to rage in the United States as to the proper role of the Child's Attorney or Counsel. The issue central to the debate is: Is a lawyer free to advocate what he considers to be in the best interests of the child or is he like other lawyers bound by rules of professional conduct?

Rule 1.14 of the American Bar Association's model rules for professional conduct makes clear that a lawyer's role and responsibilities vary sharply, depending upon whether the client is "impaired" or "unimpaired".¹³ Children can be impaired or unimpaired depending upon their age, degree of maturity, intelligence, level of comprehension, ability to communicate, and other similar factors.¹⁴ The *Model Rules* assign responsibility to the advocate to decide whether the child should be treated as impaired or unimpaired. Under the *Model Rules* the qualities distinguishing

¹³ The Model Rules are not binding on counsel unless they are adopted in a particular jurisdiction but reflect the current thinking of the American Bar Association)

¹⁴ "*Representing Children*" Standards for attorneys and Guardians ad Litem in Custody or Visitation Proceedings With Commentary published by American Academy of Matrimonial Lawyers : American Academy of Matrimonial Lawyers As Approved by Board of Governors on November 4, 1994) Page 16

an unimpaired client from an impaired one is the capacity to comprehend the issues involved in the litigation, to speak thoughtfully about the case and the client's interests at stake, and to appreciate the consequences of the available alternatives.

The standard in relation to impairment is directed solely to the nature of the relationship between counsel and client. The Standard's use of age 12 a dividing line for assessing capacity of children is not intended to apply to the weight which should be given to a child's wishes by a judge it is concerned solely with the type of relationship an attorney should have with his or her child client. The literature on cognitive development suggests that children reach the highest stage of cognitive development between the ages of eleven and fourteen.¹⁵

The assessment of capacity by a lawyer must be undertaken on a case by case basis. Elderly persons, the mentally ill and the non English speaking client often seek the services of lawyers and it is up to the lawyer concerned to make a decision in relation to capacity. Rule 1.2(a) of the *Model Rules* require that lawyers representing unimpaired clients abide by a client's decisions concerning the objectives of representation. Accordingly it is argued that lawyers representing children must accord them the same ultimate authority to determine the objectives of the litigation, unless the child's ability to make decisions is impaired. Ethically, counsel may seek leave to withdraw if asked to pursue an outcome considered to be imprudent or repugnant. It is to be remembered that inherent to the role of the lawyer is the duty to advise in order to assist clients to sort out the advantages and disadvantages of the choices before them.

The Standards for Matrimonial Lawyers endorsed by the Academy of Matrimonial Lawyers go further than the Model Rules by requiring counsel for a child to encourage the settlement of marital disputes through negotiation, mediation, or arbitration. This Standard requires counsel to try consistent with the client's instructions to resolve the dispute in the least contentious manner; to resolve the

¹⁵ Louis A. Weithorn & Susan A Campbell, "The Competency of Children and Adolescents to Make Informed Treatment Decisions", 53 Child Dev. 1589, 1590-91 (1982); Barbel Inhelder & Jean Piaget, *The Growth of Logical Thinking* (1958)

dispute in the most expeditious manner; and to expose the child to as little of the controversy as possible.

Standard 2.7 of Standards adopted by the American Academy of Matrimonial Lawyers states: “ when a child client, by virtue of his or her impairment, is unable to set the goals of representation, the child’s lawyer shall not advocate a position with regard to the outcome of the proceeding or issues contested during the litigation” Commentary adopted by the Academy states: “When counsel is free to determine what is the best outcome for the client and then to develop a litigation strategy to obtain that outcome, discrepant results will be sought by the child’s counsel depending on the values and beliefs of the attorney fulfilling that role” “This arbitrariness is the antithesis of the rule of law.”¹⁶

A clear example of the possible arbitrariness of outcome in sexual abuse cases lies in the widespread belief by many that sexual abuse of a very young child by a natural father is rare and that such allegations by women in custody cases are invariably false and aimed at preventing contact between the child and the father. An appointment of such a lawyer would be clearly inappropriate as would the appointment of a lawyer who believes that sexual abuse of young children by natural fathers is a commonplace event.

In summary the American Academy of Matrimonial Lawyers takes the view that counsel, acting for an impaired child should perform the role of fact finder, investigator mediator and protector of the child without advocating a specific outcome for a child. It is to be noted that this standard goes further than the standards set by the Model Rules which arguably allow lawyers acting as “de facto” guardians to advocate a position based on the lawyer’s personal opinion of what is best for the child. The Standards adopted by the Academy of Matrimonial Lawyers prohibit such action. They also prohibit counsel for an impaired child or Guardian Ad Litem from making closing argument.

¹⁶ “*Representing Children*” Standards for attorneys and Guardians ad Litem in Custody or Visitation Proceedings With Commentary published by American Academy of Matrimonial Lawyers : American Academy of Matrimonial Lawyers As Approved by Board of Governors on November 4, 1994) (p 29

It is argued by the Academy that the prohibition against guardians or counsel for impaired children is best explained by dividing cases into two categories: easy cases and hard cases. In easy cases the evidence speaks for itself and the court will almost invariably achieve the correct outcome for the child. In hard cases a decision is by definition difficult and “Paradoxically although it would appear that children particularly deserve advocates in difficult cases precisely to ensure that the “right” outcome is reached, these are the cases in which the risk of a guardian’s arbitrary behaviour is greatest; in these cases different guardians are most likely to recommend different outcomes. Moreover the danger is compounded. Not only is it likely that different guardians will advocate different results in close cases, but it is to be expected that in close cases judges will be grateful to have the opinion of the child’s guardian to help decide the case. It is therefore quite possible that the deciding factor in the court’s decision will be the guardian’s advocacy. This is inconsistent with the rule of law. For these reasons, these Standards prohibit representatives from providing their opinion or from seeking to obtain a particular outcome”.¹⁷

Representation of children in the Welfare Jurisdiction in the United States

The Federal Government in the United States enacted the *Adoption and Safe Families Act 1997* in attempt to create uniformity of process throughout the States in relation to children in the welfare jurisdiction. The act brought about an important change of policy in relation to the nation’s abused children with the emphasis being altered from reunification of families at any cost to a focus on permanency of placement for children caught in the care system. Funding is provided to each of the States by the Federal Government to assist with the implementation of the legislation.

The term “concurrent planning” is used to describe the double pronged approach taken by the Courts and the child protection team to the children who are the subject of applications by the Department charged with child protection. From commencement of any such application the aim is to work toward ensuring that the

¹⁷ “*Representing Children*” Standards for attorneys and Guardians ad Litem in Custody or Visitation Proceedings With Commentary published by American Academy of Matrimonial Lawyers : American Academy of Matrimonial Lawyers As Approved by Board of Governors on November 4, 1994 (p 40 16)

family is strengthened to the point where the child can be returned to his or her family whilst at the same time ensuring that if this is not a viable option within a year that the child will have available a suitable long term placement or an adoptive family.

Under the *Adoption and Safe Families Act 1997* a neglectful or abusive parent has twelve months to convince the court that they are capable of providing a safe and nurturing environment for a child or the Department will apply to the court to terminate parental rights thus making the child available for adoption. During the twelve month grace period the parents must demonstrate their commitment to the child by exercising regular contact and carrying out any courses ordered by the court which are aimed at improving their parenting skills. Courts routinely order random drug and alcohol testing to ensure that parents participating in a rehabilitation program are fulfilling their obligations.

In the event that parents do not comply with the orders of the court or the recommendations of the relevant child protection department and make a measurable attempt to ensure that they are capable of providing a safe and nurturing environment for the child, the Department will make application to the court to terminate parental rights.

Within this system the fostering of children is often a path to a subsequent adoption of the child. Foster parents are afforded a more important role in care proceedings than in Australia. Foster parents can provide an important source of information for the court and in the case of long term foster placements as apart from adoptions the foster parents are often requested to attend at court to inform the court of the child's day to day progress. They are often witnesses at the hearing of applications for the termination of parental rights.

Each child who is the subject of a court application in the welfare jurisdiction in the United States is appointed their own counsel. The method of appointment varies from State to State. In Connecticut Counsel for the children were appointed from a panel of lawyers appointed by the court administration. Each parent involved also has the right to representation and is represented from the same panel of lawyers practising in the jurisdiction.

Each child also has nominated a Court Appointed Special Advocate (CASA). The role of the CASA is essentially that of advocate for the child and fact finder for the judge and will usually submit a written report to the judge three days before any court hearing. The special role of the CASA is enshrined in legislation which enables the CASA access to otherwise confidential information, police and medical records and access to the Departmental files held at the relevant child protection body. The CASA attends all court hearings with the child who will usually be at the court but not in the courtroom, keeps the child informed and visits the child during the period he or she is in care and monitors the progress of the child. Ideally the child will only have one CASA who will follow them for the whole period that they are in care.

All CASA are trained volunteers drawn from the community. Prior to acceptance in the role they must submit to a criminal record check and a check of the child abuse and adult protection registry maintained by the cabinet. They must be assessed by the CASA program staff as being suitable, submit references and undergo a minimum of 15 hours of initial training and take an oath of confidentiality.

The phenomena of the CASA was founded by a Judge working in the area of care and protection who felt that information provided to him was not sufficiently comprehensive. The aim was to give the child a representative who was drawn from the community and whose volunteer status would itself be a protection for the child and provide for the child throughout the care proceedings. The role of the CASA is akin to that of Guardian Ad Litem. The CASA is under a duty to keep the court informed of the child's progress and to advise all concerned parties if there is anything which needs to be attended to on behalf of the child. In the event that the problem is not addressed by the Department or the child's lawyer the CASA may write to the Court and requesting a hearing in relation to the issue. The CASA aims to establish a relationship with the child, to review medical and school records, to monitor compliance with court orders and to communicate with the court.

The CASA perform an important function in the welfare jurisdiction and are now established in most states in the United States.¹⁸ They provide an important additional

¹⁸ See Appendix B "*National CASA Association National Statistics*"

resource for the children and for the courts charged with making decisions about their care. The difficulty for the courts is that Child Protection caseworkers have a high attrition rate and the monitoring of children caught in the welfare system suffers as a result. Child protection workers usually have big caseloads and time constraints which do not affect the CASA. Child protection caseworkers are often viewed by the child as “the enemy” being the agent who has brought about their removal from home and this too mitigates against the building of a relationship between the child and the caseworker. Lawyers for children similarly have time constraints which do not enable them to build relationships with their child clients which will provide the detail necessary to ensure that the Court is made aware of the individual needs of the child although in my view it is incumbent upon a lawyer acting for a child to develop a lawyer client relationship with each child that they represent albeit it may be different to that with an adult client.

The CASA, a concerned volunteer brings a fresh viewpoint and focus to the child’s situation.

Ideally one lawyer, one CASA and one Judge should follow a child throughout the period he or she is in care so as to provide continuity for the child.

In August 1995 the American Bar Association endorsed a set of Resource Guidelines: *“Improving Court Practice in Child Abuse & Neglect Cases produced by the National Council of Juvenile and Family Court Judges.”* The Resource Guidelines are divided into two parts. Part 1 addresses the specific roles and responsibilities of a lawyer appointed to represent a child in an abuse and neglect case. Part 11 provides a set of standards for judicial administrators and trial judges to assure high quality legal representation. (Reproduced in the Appendix A)

The quality of legal representation provided to children varies. It is an area of law which in comparison to other jurisdictions is poorly paid and emotionally and psychologically draining. Lawyers working in the jurisdiction need specific training in order to provide proper representation for their child clients. In the United States children have additional representation in the form of their CASA and their

appointment should not entitle them to advocate for a position which they consider to be in the best interests of their child client against their client's express instructions.

CONCLUSION AND RECOMMENDATIONS

In Australia the dual system of courts mitigates against the effective representation of children. There is an accepted model of representation in the Family Court of Australia but no model has been formally adopted in relation to the welfare jurisdiction. The Family Court regularly decides cases which involve issues of child protection. Judges are confronted by residency disputes involving evidence and allegations of child sexual abuse, physical abuse and domestic violence. The state departments responsible for the protection of children are invited to intervene and often decline. The judges are faced with making a decision concerning the placement of a child when the child should probably be removed from both parents and placed in a long term foster placement. The current state welfare jurisdiction does not allow that option to the bench if the Department will not participate in the proceedings.¹⁹ Child abuse cases frequently commence in the state court and are then transferred to the Family Court.

In order to ensure independent and effective legal representation a model of what constitutes the role of the Child Representative needs to be agreed upon taking account of the difference between the welfare jurisdiction and the Family Court. The Family Court model having developed through case law provides effective representation for children in residency and contact cases but should not be adopted without further refinement as appropriate in the welfare jurisdiction.

In 2002 the Family Court of Australia released a detailed paper "*Guidelines for child representatives*" in draft and called for submissions to be submitted prior to 1 August 2002. The model adopted by the Family Court is essentially a combination of Guardian Ad Litem and Lawyer. The client has no guarantee of confidentiality and the Child Representative is at liberty to advocate an outcome different to that proposed by the child although the Child Representative has a duty to place the

¹⁹ Parkinson P, "*Family Law and Parent-Child Contact: Assessing the Risk of Sexual Abuse*" p1 para 2)

wishes of the child before the court in properly admissible form. In practice it is rare for a Child Representative to make recommendations which do not give effect to the wishes of a mature child of age twelve or over however I note that at 3.11 of the Draft Guidelines states that: “Where a child of sufficient maturity wishes to have a direct representative who will act on the child’s instructions, the Child’s Representative should inform the child of the possibility of applying to become a party to the proceedings and of giving instructions to a legal representative through a next friend to be appointed by the Court”.

The effectiveness of the individual Child Representative within the context of the Family Court is largely dependent upon the representative developing a relationship of trust with their child client and ascertaining the child’s level of understanding of the litigation. The capacity of children to understand the litigation varies greatly. If the child representative does not have a grasp of the level of the child’s maturity then the system will not necessarily facilitate a voice for the child. An arbitrary example is the situation of the intelligent and thoughtful nine year old. If the Child Representative either directly or through a psychologist does not develop a professional relationship of trust with the child, the likelihood is that the child’s wishes and the logic behind them will not be properly placed before the court. There will in all likelihood be a Family Report with perhaps a one hour attendance with a Counsellor with each parent and a one hour attendance alone or with siblings. That will be the child’s only opportunity to express him or herself if the Child Representative does not facilitate further professional contact.

The Draft Guidelines also set out clearly the nature of the communications which should take place between the Child Representative and the child regarding the role of the representative and the lack of confidentiality which attaches to communications between the child and the legal representative.

It would have been helpful to practitioners if the Draft Guidelines had particularized a set of guidelines for practitioners representing children in cases where sexual abuse has been alleged. The writer was involved in a case in 2001 which involved allegations of sexual abuse of a six year old female child. The child had hymeneal

scarring “consistent with sexual abuse”. Territory Health Services had investigated and substantiated the abuse.

At no time did the Child Representative brief a psychiatrist or psychologist to carry out an investigation as to whether in fact the child had been sexually abused. Such a report would have been of great value to the court and one would think it would be fundamental to a decision as to the child’s placement. In that particular case there was physical evidence which supported the allegation of abuse. In many cases the only scarring is psychological and such that only an expert in the area would be able to determine whether or not the child had been sexually abused.

The child attended counselling at a sexual abuse service at the recommendation of the Department however the court found that the counsellor was inexperienced and that in her evidence was not to be relied upon. The counselling process had been founded upon the premise that abuse had in fact taken place.

At final hearing the Department refused to allow the workers who substantiated the abuse to give evidence. The Department subsequently withdrew its substantiation and supported the father’s allegation that the mother of the child had emotionally abused the child. The court found that the child may have been sexually abused but found on the balance of probabilities that if the child was sexually abused it was not by the father. The child was placed in the care of the father despite the fact that the only persons who had carried out an investigation as to whether abuse had taken place, were not permitted by the Department to give evidence. At no time in that particular case did the Child Representative meet the child.

The case was heard in the Family Court. It highlighted the unsatisfactory inter-relationship between the Family Court and Territory Health Services. Territory Health Services does not have to produce its file to the Family Court under subpoena. It is the only State Government Department in Australia which regularly refuses to allow workers to give evidence and which refuses to produce its file in cases in the Family Court which involve the abuse and neglect of children. In every other state in Australia it is possible to subpoena and obtain a copy of the confidential file maintained by the Department in relation to the child.

Since *Northern Territory of Australia v GPAO*²⁰ a culture of non-accountability in Territory Health Services has developed to a point where children are placed at risk as a result of there being no effective system of checks and balances upon the power of the Department.

Recommendation: That the Family Court make representations to Territory Health Services and to other state departments charged with the care and protection of children in regard to the provision of information and availability of witnesses which concern the placement of a child whom it is alleged has been abused or neglected.

Recommendation: That Child Representatives ensure that a psychiatrist or psychologist with experience in the area of sexual abuse is briefed to investigate whether or not sexual abuse has taken place in every case in which allegations of sexual abuse are made against a child and only thereafter to make recommendations as to whether contact with the alleged abuser is in the best interests of the child

The Draft Guidelines are long overdue and will be most useful to Child Representatives.

In the Northern Territory children who are the subject of Care and Protection Applications are frequently appointed a legal representative particularly if the parents are contesting the application by the Department. The mode of appointment of Separate Representatives for Children is currently highly unsatisfactory. Lawyers tender at an hourly rate to carry out the work either as a legal representative of Territory Health Services or as a Child Representative. Once the tender is accepted they routinely receive instructions from Territory Health Services. The lawyer is paid at the contracted rate by Territory Health Services. In each such application Family and Community Services a division of Territory Health Services is a party to the proceedings.

²⁰ [1997] HCH8

As the Department controls the funding it is in a position to dictate what investigations will be made and which assessments will be carried out. The Department has in the past taken umbrage at the child representative making recommendations to the court not in accord with the Department's view of the desirable outcome.

It is clear that the starting point for an independent legal representative for a child should be an independent appointment and payment by a non-party to the proceedings. In South Australia the Legal Services Commission of South Australia usually provides legal representation. In Western Australia they are appointed and paid by the Legal Aid Commission. If it is a question of an allocation of funding in the Northern Territory then surely the NT Legal Aid Commission could invoice Territory Health Services for the cost of the representation.

Recommendation: That Child Representatives be appointed by the Northern Territory Legal Aid Commission and paid by them with funding arrangements to be made between the Northern Territory Government and the Commission.

Adoption of an appropriate model for the representation of children in the welfare jurisdiction is crucial for the protection of children. The abused or neglected child in the welfare jurisdiction is in a very different position to that of the child in the Family Court. Children need to be heard particularly children who have been neglected or abused. The most neglected of our community's children often have nobody in attendance at the hearing bar for their abuser, the Department and their lawyer. If their lawyer does not advocate the child's position who will?

Recommendation: That lawyers representing children in the Welfare Jurisdiction set aside time in order to develop a relationship with their clients and participate in the development of an appropriate model for the representation of children.

In the greater Los Angeles area there are over 50,000 children in care. At the end of March 1999 there were approximately 547,000 children in the United States in foster care. The Federal Government in the United States has carried out extensive research into the cost to the community and the Safe Children and Families Act 1997 has been

the legislative response in an attempt to provide safe long term placement or adoptive homes for children who are neglected or abused. With the breakdown of the family unit and the increasing use of drugs and alcohol the numbers of abused and neglected children in Australia are growing. In the United States research indicates that an increase in parental substance abuse has contributed to the influx of children entering foster care.²¹

There have been calls for a unified system of juvenile justice by senior members of the judiciary. To date there has been no response from the politicians. There are numerous children within our society who are neglected or abused, who come under the care of the relevant state ministers then bounce around various foster placements prior to hitting the streets.

There needs to be a Federal Government investigation into the best way of providing a nationwide standard of care and system of representation for society's neglected and abused children. In my limited experience within the welfare jurisdiction I have observed that the same children come before the Family Matters Court repeatedly. The children spend time in care or under a supervision order and are then returned to their parents and Departmental involvement ceases. They are subsequently the subject of further notifications of abuse and the process commences again as does the physical emotional or psychological abuse as the case may be. These are often the same children who subsequently appear on criminal charges in the Children's Court. The United States would appear to have got it right in that the *Children and Safe Families Act 1997* aims to find permanent placements for children by making them available for adoption or a permanent foster placement if the parents are unable to satisfy the court within twelve months that they are able to nurture the children.

Recommendation: That the Federal Government review the current standards of child protection provided by the States and examine the practicability of introducing at a National level a policy initiative aimed at providing a nationwide standard of

²¹ Christian Steve and Ekman Lisa, "A Place to Call Home Adoption and Guardianship for children in Foster Care" p 5

acceptable care for children so as to facilitate the long term foster placement or adoption of neglected or abused children

In the United States many states have established an Ombudsman for children called the Office of the Child Advocate. The aim of the Office of the Child Advocate is to monitor existing services, advocate for improved services for children in the public sector, promote coordination between state agencies that serve children with special needs and respond quickly to complaints or inquiries involving children, identify and remedy systemic defects in the system of care for children, provide training to government bodies, respond with the provision of assistance to a child or family who the Child Advocate determines is in need of such assistance, periodically review facilities and procedures of any and all institutions or residences, where a juvenile has been placed by any agency or department.

In Connecticut the Child Advocate also serves as a member of the child fatality review panel which is comprised of seven permanent members, a paediatrician, a child welfare practitioner, a police officer and various other community representatives with specific nominations being provided by both the political party in power and the opposition. The legislation which brought into being the Office of the Child Advocate in Connecticut also established the child fatality review panel. The role of the panel is to review the circumstances of the death of a child placed in out-of-home care or whose death was due to unexpected or unexplained causes to facilitate the development of prevention strategies to address identified trends and patterns of risk and to improve coordination of services for children and families in the state.

The Child Advocate is an excellent point of reference for the community in relation to children in care. The investigative officers are often able to quickly solve problems which have arisen simply by telephoning the appropriate person in the Department and by referring to appropriate resource bodies. The Child Advocate has the power to access all confidential files in relation to a child and to make an inquiries he or she deems fit. The Child Advocate is authorized by legislation if he or she deems it appropriate to brief the press on specific investigations and complaints and is

protected from removal from office, the aim being to prevent political whitewashing in relation to any given issue.

Recommendation: That the Federal Government establish the office of Child Ombudsman for the purpose of monitoring existing child protection services, advocating for improved services for children in the public sector, promoting coordination between state agencies that serve children with special needs and respond quickly to complaints or inquiries involving children, identifying and remedying systemic defects in the system of care for children, providing training to government bodies, responding with the provision of assistance to a child or family who the Child Advocate determines is in need of such assistance, periodically review facilities and procedures of any and all institutions or residences, where a juvenile has been placed by any agency or department.

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APPENDIX A

APPENDIX B

PROGRAM

I was hosted in Connecticut by Marilou Giovanucci, Manager of Court Services Judicial Branch. Ms Giovanucci made arrangements with Justice Christine Keller, the Justice in charge of the Hartford Superior Court for Juvenile Matters located at Broad Street, Hartford. Justices Keller and Swienton and their colleagues made me welcome and enabled me to observe cases conferences and the day to day business of their extremely busy court. They introduced me to counsel operating on a day to day basis within the Juvenile Matters Court. They were informative and greatly assisted me with the provision of case law and legislation and made themselves available for discussion. The ingrained habit of bowing as I entered and left a courtroom in the presence of a sitting judge afforded some amusement as it is not the practice in the United States. I was asked if I wore the quaint black robes and wig and had to admit that I did from time to time.

The Juvenile Matters Court dealt with serious criminal matters committed by juveniles, truancy matters and all manner of welfare matters including Care and Protection Orders, Supervision orders and Termination of Parental rights cases. The Hartford Superior Court for Juvenile Matters is an old building in a depressed area of Hartford. At 9.30 am in the morning it teems with lawyers clients and security staff. Security is tight and it is necessary to submit to a weapons scan when entering the building. Accommodation for the Judges and administration staff is cramped. Plans were on the drawing board during my visit for an extension to the existing courthouse and attached jail for juveniles.

One of my concerns when appearing as Counsel for children in the Family Matters Court in Darwin was the difficulty in obtaining background information on the adults living with or interacting closely with the children who had been abused. In Connecticut discussions were being held with the government and the judges concerning the possible installation of a computer system which would enable the presiding judge to access the criminal history of significant persons within the child's life. Access to any previous history of involvement by a child protection department in another state would also be of great assistance to judges. Medical records should

be subpoenaed as a standard procedure by the Department investigating an allegation of abuse against a child albeit in many cases children have attended at various GP's and lived at different locations.

I had the opportunity to sit in on a number of case conferences conducted by a Registrar in care and protections proceedings. On each occasion the consent of the parents and the Department was sought and granted so that I could attend as the Dependency Court is a closed court. The case conferences are aimed at defining issues and mediating solutions where possible. The case conferences are held after a temporary order has been made placing a child in care but prior to the defended hearing. They are attended by the parent or parents and their respective lawyers, the prosecutor from the Department, the caseworker for the child and the child's legal representative and CASA if one has been appointed. Extended family members can also attend if they wish to. The Caseworker is asked to provide the conference with a summary of her investigations and the issues which concern the safety of the child which need to be addressed. Each party then has the opportunity to present their viewpoint. The registrar was a skilled mediator and was able to effectively defuse the sometimes heated debates which took place. In each of the cases I viewed there was no possibility of the children being returned home without further investigation and enquiry.

Some the notifications were against parents others were against existing foster parents and concerned children who had been in care for some time. The case conferences were valuable in that they took place in an informal atmosphere, the parents and the lawyer for the child and the Department had the opportunity to discuss and resolve issues such as visitation for the child and any special needs of the child which needed to be addressed on an urgent basis. Children placed in care need ongoing contact with their parents and siblings even if it is necessary for the contact to be supervised.

I also had the opportunity to observe pre-hearing conference conducted by a Judge in a termination of parental rights case. The case concerned the four children of a single mother who suffered from mental illness and the effects of substance abuse. The four children had been jointly fostered by a family who wished to adopt them. The mother of the four children was legally represented as were the children, the Department and

the Foster Parents. The case settled on that day. The mother of the children had exercised contact with the children during the period that they had been in the care of the Foster Parents. It was proposed by the Foster Parents that if the mother agreed to the adoption of the four children by them that the mother should have regular and ongoing contact with the children. The mother of the children agreed that the four children should be adopted. The conference was conducted in a sensitive and respectful manner and the outcome was a positive one for the children who were fortunate to have found foster parents who were able to adopt the four children so as to prevent their separation.

I was impressed by the knowledge the Judges had of each case and the pro-active approach taken by them in their enquiries regarding the children, the Department's monitoring of the child and the CASA's knowledge of the child and his or her progress. Foster parents are an integral part of the planning process for children.

I sat in on the "Truancy Docket" one morning. Teenagers are charged with truancy in the event that they do not attend school. The judge who presided over the truancy docket on the day that I sat in was caring and interactive with the young people who appeared before him. He had available to him the school reports for the children being charged and their record of any prior prosecutions. He emphasized the talents and abilities of the young people in dealing with their misdemeanors. In one particular case he told the young man "You are bright enough to be sitting up here in a few years time!" and then proceeded to inform him of the dire consequences which would ensue if he appeared before him again. The present system in Australia whereby young people are able to "hit the streets" at age 12 or 14 without fear of prosecution by themselves or their parents if they do not attend school requires attention. The United States approach may be labelled authoritarian and patriarchal however without a basic high school education and the concomitant discipline which attaches to attendance at school, young people are headed for a life on the dole. Repeat offenders are sentenced to live in supervised situations where their progress is monitored and where support services can be accessed.

Observation of cases on a random basis is similar to viewing still photos extracted from a complex drama and I wonder from time to time how the children are faring.

Justice Ian McLachlan, Presiding Judge, kindly facilitated my attendance at the Superior Court Family Division at New Haven Connecticut. I was able to attend in court to observe a duty day and on another to observe one day of a hearing concerning child support.

The matter was heard by Judge Antonio Robaina. The parties were self represented hardened litigants. There were two children of the relationship. The self-represented litigants had a long background in litigation and were well known to the judges and Counsel for the children Mr Louis Parley. There had been a 14 day contested custody case some two years previously when custody had been awarded to the mother. The mother had then consistently refused to facilitate contact between the children and their father. Various orders had been made all of which were not complied with and the matter had gone to a further hearing where the children had been placed in the custody of the father. Mr Parley had represented the children during the course of the contested custody hearings and his appointment had been continued to assist the court during the conduct of the child support dispute. There was also a Guardian Ad Litem in Court appointed for the children.

Procedures and practices with the Superior Court Family Division appeared similar to those found in the Family Court of Australia. There exists a Family Court Counselling Service who carry out both confidential counselling and also prepare court reports for final hearings. As a matter of practice children are separately represented in the Superior Court Family Division in similar circumstances to those in which Separate Representatives are appointed in the Family Court of Australia. Parents share the cost of the representation except in exceptional circumstances when the court administration authority provides the funding. In the case of very young children or in circumstances where Counsel cannot ethically act in accordance with the instructions provided by their client, a Guardian Ad Litem is appointed. In Connecticut Guardian Ad Litem are often retired legal practitioners who receive nominal payment. Appointment of separate representatives in custody and visitation cases is reserved for unusual circumstances similar to the circumstances in which separate representatives are appointed in the Family Court of Australia.

Whilst in New Haven I was fortunate to meet with Justice Linda Pierce Prestly of the Probate Court who had held office previously as Child Advocate for the State of Connecticut who in turn referred me to the Associate Child Advocate Ms Christy Scott. The Office of the Child Advocate is well established throughout the United States. The establishment of the office of a Child Ombudsman forms part of the recommendations arising from the fellowship.

The program took me next to the AFCC Conference in New Orleans which I attended over a three day period. Practitioners judges and associated professionals attended from all over the United States and from a variety of other nations. The papers were cutting edge in the main and of great interest. Whilst in New Orleans a court observation was arranged and I was fortunate to attend at the Juvenile Court situated in Loyola Avenue New Orleans. Justice Ernestine Gray presided on that particular day. One of the applications concerned the ongoing supervision of a child in foster care. Justice Gray had previously issued subpoenas from the bench requiring the attendance in court of all persons responsible for the day to day care and supervision of the child. The persons subpoenaed included the child's CASA, the child's foster parents, the caseworker from the Department and to the best of my memory an officer from the relevant department of education. Directions which Justice Gray had previously made concerning the supervision and care of the child had not been complied with and that particular afternoon the Judge required reasons from each of the individuals responsible. The concern care and attention to detail evidenced on the part of the judge on behalf of the child was inspirational. The review of the child's circumstances was a detailed one.

In Los Angeles I attended at the Edmund D Edelman children's Court, "the first courthouse in the United States exclusively dedicated to hearing child abuse cases." "The courtrooms are scaled to half the size of traditional courtrooms". The building is enormous but designed to be light pleasant and "child friendly". Children awaiting appearances in court have an enormous play area consisting of video rooms, lego rooms, gymnastic and physical play rooms. Crucial services are represented in the building and include the Child Advocates Office (CASA), Department of Mental Health Unit, Public Counsel Law Centre, Mediation Services and an Education

Department Liason Unit. There is also a drug testing service available at the court. The building held 25 courts most of which were in use whilst I was visiting. All of the children who are the subject of applications are given a teddy bear upon attendance at the court. (See Appendix B for information on this amazing court.)

In the United Kingdom I attended at the office of the Official Solicitor and was hosted by Mr Michael Hinchcliffe. I subsequently attended for a court observation. I was also hosted in London by Mr James Marcus and his colleagues who at that time was the Solicitor in charge of Family Law at Witters solicitors. It was interesting hearing of the formation of the European Court and having the opportunity to talk to a solicitor in private practice.

I attended at the War Rooms in London and at Winston Churchill's home at Chartwell, where unless my imagination was playing tricks I could feel the presence of Sir Winston and Lady Churchill.

In Finland I spent time researching in the Law Library at the University of Helsinki. It was by that time the height of summer and it seemed that most of the inhabitants of Helsinki's legal offices and departments had disappeared on their summer holidays. I was hosted in Helsinki by a childhood friend at that time Acting Professor Susanna Shore an ex-patriate Australian now resident in Finland.

The opportunity to visit other jurisdictions and to observe the courts in action, to meet and communicate with individuals charged with implementing the law in their jurisdictions and with other practicing lawyers and allied professionals was an invaluable experience.

I thank the Sir Winston Churchill Foundation for their patience and support.

APPENDIX C

FUTURE DIRECTIONS

Churchill Fellowship 2000 Study

Information gained from the study is being disseminated in the following manner:

- (i) Distribution of the paper “The Special Position of the Child in the Legal System” to lawyers and members of the judiciary;
- (ii) Submission of the paper to the national publication: “Australian Family Lawyer” for publication;
- (iii) Distribution to the Chief Executive Officer Department of Justice NT for consideration in relation to the recommendations;
- (iv) Distribution to the Minister for Health (NT) and the Attorney General (NT) for consideration in relation to the recommendations;
- (v) Presentation to the Women Lawyers group in the NT.