

58/78

FAMILY COURT OF AUSTRALIA at MELBOURNE

*In the Marriage of HARRIS (M & D)*

Fogarty J

25 August 1977

(1977) 29 FLR 285; [1977] FLC 76,471 (¶90-276)

**FAMILY LAW – WELFARE OFFICERS – ROLE, POSITION, POWERS OF – WHETHER WELFARE OFFICERS MAY BE CROSS-EXAMINED AS TO THE CONTENTS OF THEIR REPORTS – WHETHER PARTY'S REPRESENTATIVE MAY SUBJECT A CHILD TO PSYCHOLOGICAL/PSYCHIATRIC TESTS WITHOUT THE KNOWLEDGE OF THE OTHER PARTY'S REPRESENTATIVE: FAMILY LAW ACT 1975, S37.**

1. A welfare officer is in no special or privileged position. He/she is in the nature of a particularly qualified expert who has prepared a report as a consequence of the application by him of that expertise to the facts of the particular case and, may, in a proper case, be cross-examined by a party in much the same way as any other expert would have his/her views or opinions tested within the court process.
2. The question remains whether in proceedings where a separate representative has been appointed to act for a child either of the parties may subject that child to tests or examinations for the purposes of that litigation without the knowledge and/or consent of the separate representative. It would be inappropriate for a party or a party's representative to subject a child to such tests without at least the prior knowledge of the separate representative.
3. In either situation the matter would be determined by the ultimate welfare of the child, the court giving proper weight to the right of litigants to fully and properly present their own case. Reference should also in this regard be had to the provisions of reg 116(4).

**FOGARTY J:** My decision in this matter differs from the opinion or recommendation contained in the report of the welfare officer. That report was furnished to the court pursuant to the provisions of s62(4) and was admitted into evidence pursuant to the provisions of reg 117(b). Once admitted into evidence it becomes part of the evidential material which the court may consider in determining the matter. Welfare officers because of their experience in these custodial fields are entitled to put forward views or opinions, and such views or opinions are admissible in the same way as are the views or opinions of any expert in his particular field and are to be accorded such weight as the circumstances justify. The fact that the opinion emanates from a welfare officer or counsellor attached to the court does not give that opinion any greater validity or weight as such. Such opinions do not occupy any special or privileged position, other than arising from the obvious fact that the counsellors have great day-to-day experience and expertise in this jurisdiction together with their obviously neutral and unbiased position. In all cases the ultimate duty and responsibility rests with the judge upon an assessment of the whole of the evidential material.

This case, shorn of its irrelevancies, is a straightforward and what one might otherwise describe as a rather 'ordinary' custody case.

Further to that there were several aspects of the welfare officer's report which were adverse to the wife which I was not myself able to accept. The first related to what appeared to be criticisms of her for not applying to the court to have access reduced when it became apparent that it was too frequent and was having an adverse effect on the children. The report seemed to suggest that this showed a lack of real interest or concern by the wife or perhaps a lack of appreciation by her of the problem. She believed, wrongly as it turned out, that the case would come on for hearing in this Court in 1976 or early 1977 and in the circumstances and on legal advice she considered it undesirable to raise this issue in the meantime especially as it would be strenuously contested. Further the report places particular emphasis upon the welfare officer's assessment that the wife was ambivalent about her claim and that in a sense she considered the husband may be the

preferable custodian. That apparently was the impression that the welfare officer got but it was not the impression that I got and it appears to me to be inconsistent with the whole atmosphere of this case, which throughout has been bitterly contested. I accept the wife's view that the counsellor saw her in the home with the children in strained and unusual circumstances.

In this matter I permitted cross-examination of the welfare officer upon his report. I did so notwithstanding that such a step was inconsistent with the views expressed by Wood J in the recent case *In the Marriage of Howe* (1978) 29 FLR p186. There His Honour expressed the view, for reasons that he there set out, that welfare officers ought not to be cross-examined upon their report.

I hold the firm view that the court ought, in a proper case exercise its discretion under reg 117(c) to permit a welfare officer to be examined upon his report. Indeed on the particular facts of this case it would have been impossible to have determined a number of important issues without adopting that course. As a consequence of the wording of s37 of the Act welfare officers are 'officers of the Court'. However it ought not to be thought that they occupy any special or privileged position in relation to the contents of their reports as a consequence of that. Indeed, the term 'officer of the Court' is a frequently misunderstood term. 'Officers' of a particular court are usually defined by the statute which sets up that court and such persons have as a consequence certain additional powers and duties, but they do not as such occupy any special or privileged position in the giving of evidence or in the ordinary judicial process. Perhaps I should add for completeness that not all welfare officers are necessarily 'officers' of this Court (see the definition of 'welfare Officer' in s4). Custodial proceedings still basically fall to be determined by the court in accordance with the traditional system of determining cases. Where a welfare report is delivered which contains either factual matters or matters of opinion which a party desires to challenge but is not permitted to do so that party may be pardoned for feeling that justice has not been seen to be done.

A welfare officer is, in my view, in no special or privileged position. He is in the nature of a particularly qualified expert who has prepared a report as a consequence of the application by him of that expertise to the facts of the particular case and, in my view, may, in a proper case, be cross-examined by a party in much the same way as any other expert would have his views or opinions tested within the court process.

The children have been subjected to psychological and psychiatric assessments. It is nowhere suggested that the children have any psychological or other similar disorder which required them to be examined or evidence to be given in this Court. In fact they were seen by two psychiatrists, two psychologists and one social worker on well over twenty occasions per child, at any of those occasions lasting for several hours, in addition to seeing the welfare officer several times. They were put through a variety of intellectual and behavioural tests all of which demonstrated that despite all of these testings the children were decidedly normal. It appeared that the children protested at continually being subjected to these tests and I must say that I protest on their behalf as well. These children are aged approximately six and eight. I accept that at least the girl expressed wishes in relation to custody, but it appears to me that having regard to the circumstances of this fairly ordinary case and the perfect normality of the children the intensity of the procedures adopted were entirely inappropriate and contrary to the welfare of the children.

The provisions of s65 by which children may be separately represented was one of the most significant features of the *Family Law Act* and has in proper cases been of very considerable value to the children and to the court in custodial proceedings.

Nor in my opinion is the separate representative under s65 the servant of the court nor an 'officer of the Court'. In *Demetriou's case* Asche SJ said: 'To my mind the answer is clear that counsel appointed for the child is there to assist the court and consequently the child, in assessing the broad interest of the child in respect of which the wishes of the child is only, albeit often an important factor, in assessing those interests. (1976) 27 FLR 98'

I do not consider that his Honour was suggesting that the advocate separately representing the child is in any way attached to the court or that in the conduct of his case he is subject to the control or direction of the court as such.

As to the term 'officer of the Court' I have already referred to that and it should also be noted that in the judgment in *Demetriou's case* Asche SJ contrasted the position of a separate representative with that of a welfare officer whom he referred to as being 'an officer of the Court'.

Such a person appearing for a particular party has about it certain unusual features including (i) that he is not appointed by the party whom he represents; (ii) that he may not be removed by that person; and (iii) that he does not necessarily advance what the 'client' wants but what in his view is in the best interests of that 'client' and to that extent exercises an independent judgment quite out of character with the position ordinarily occupied by an advocate.

Nevertheless it appears to me that the powers contained in s64 together with the direction contained in s43(c) give the Family Court very wide powers indeed in relation to children who are properly the subject of proceedings before it. Blood tests have always occupied a special and peculiar position, but in my view it would be mistaken to take too narrow a view of the overall power and jurisdiction of this Court in relation to the control of the welfare of infants who are the subject of proceedings before it.

The question therefore remains whether in proceedings where a separate representative has been appointed to act for a child either of the parties may subject that child to tests or examinations for the purposes of that litigation without the knowledge and/or consent of the separate representative. In my view it would be inappropriate for a party or a party's representative to subject a child to such tests without at least the prior knowledge of the separate representative.

In either situation the matter would be determined by the ultimate welfare of the child, the court giving proper weight to the right of litigants to fully and properly present their own case. Reference should also in this regard be had to the provisions of reg 116(4).

Either view would in my opinion produce a desirable reform in this jurisdiction. All too often one is conscious of children having been 'hawked' around from one psychologist or psychiatrist to another by a party until that party finds some opinion which is compatible with the view that party wishes to advance, and all too often any such opinion does not come up to expectations that person is not called as a witness and neither the court nor the other party is even informed of that event. This practice would at least ensure that where children are separately represented that circumstance is clearly known and proper weight can be attached to it at the hearing.

However it is only in a minority of cases that children are separately represented. The practice of parties subjecting children to a number of tests and then presenting to the court only such of the results as suit their particular viewpoint and without regard to the either short-term or long-term welfare of the children involved is a situation which cannot in my view be allowed to continue. Custody cases are still conducted within the broad confines of the adversary system but that is in my view clearly subject to the overall fundamental principle of the welfare of the child.