Family Court Decisions

BETWEEN: WILLIAM MALCOLM FIRTH RESPONDENT/HUSBAND AND MARILYN KNIEST FIRTH RESPONDENT/WIFE AND HERMAN GEORGE BOYER AND ANNIE KNIEST BOYER APPELLANT/INTERVENERS Appeal No. 274 of 1987 12 FAM LR 547 (1988) FLC 91-971

IN THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA
Simpson(1), Joske(1) and McCall(1) JJ.

HRNG

SYDNEY
#DATE 16:9:1988
Appearances: Mr. McAlary, QC, and Mr. Barry, instructed by Messrs. Heaney Richardson, solicitors, for the Appellant.
Mr Firth, the Respondent Husband, appeared on his own behalf.
Mr. Blackburn-Hart, instructed by Messrs. Trenches, Solicitors, for the Respondent Wife.

ORDER

Order 7 be varied by deleting from line 3 the words, "and all members of the **said Brethren**".
Order 8 be discharged, and in lieu thereof the following order:
"That until further order of the court the interveners and the husband are restrained from permitting the children to be subject to the religious influences of **the Brethren** sect".
The appeal by the interveners otherwise be dismissed.
The cross-appeal by the husband be dismissed.
At the conclusion of the hearing of the appeal submissions were received from all parties on the question of costs. The interveners opposed any order for costs being made against them or against the husband and said they were not seeking costs against the wife.
If the appeal was dismissed and the wife was successful she sought an order for her costs of the appeal. She was legally aided and it was a condition of the granting of legal aid that she sought an order for costs if she were successful.
Apart from varying the width of the injunctions granted by his Honour the wife has otherwise been wholly successful. In particular upon the major issue raised on the appeal, namely the question of custody.

We have taken into account the relevant considerations under sec. 117 of the Family Law Act and in our view in all the circumstances of this case it is appropriate that an order for costs should be made against the interveners in favour of the wife.

Accordingly, there will be an order:

That the wife's costs of the appeal be taxed by the Registrar and be paid by the interveners.

JUDGE1

This is an appeal by the Interveners and the husband against orders made by the Honourable Justice Cook in the Family Court of Australia, sitting at Sydney, on the 23 December 1987. By his orders, His Honour dismissed applications by the husband and the Interveners (the maternal grandparents) for the custody of two children of the marriage and gave the wife the sole guardianship and custody of the children. He then went on to make detailed orders restricting access and contact between various persons and the children.

2. The precise orders made by His Honour were as follows:

1. That the application of the husband and the application of the interveners be dismissed.
2. That the wife have the sole guardianship and sole custody of Wendy Susan Firth and Ian Ronald Firth the children of the marriage.
3. That by no later than noon on the 24th day of December 1987 the interveners deliver the said children to the wife at her usual place of residence together with all clothing personal possessions toys and belongings as will reasonably enable the wife to care for such children from day to day.
4. That at any subsequent time upon being informed in writing by the wife of the needs for or the desire of the said children to have with them any particular item of clothing or personal belongings and possessions usually in the possession of such children and belongings to the wife at her usual place of residence no later than two (2) days after receipt by them of such written request.
5. That all access by the said children to the husband, the interveners, Roger William Firth and any other members of **the Brethren** be suspended for not less than twelve (12) months from noon on the 24th day of December 1987 unless the wife provides her consent in writing to any such access.
6. That after the expiration of twelve (12) months from this date the interveners an the husband be at liberty to apply herein on twenty one (21) days in respect of access.
7. That afternoon on the 24th day of December 1987 and until further order of the Court the husband and the interveners and all members of the **said Brethren** be restrained from attempting to approach the said children for the purpose of speaking to such children

or from delivery to them any written material wherever such children might be.

8. That the interveners cause these orders and in particular order number 7 herein to be published at three (3) consecutive meetings of the **said Brethren** at Tamworth which immediately follow noon on the 24th day of December 1987 and that such publication may be carried out by exhibiting such order in writing or by stating aloud the words of such orders at an appropriate time in such meetings.
9. That the husband pay to the Clerk of the Local Court for payment out to the wife by way of maintenance for each of the said children of the marriage the sum of $20.00 per week until each of such children respectively shall have attained the age of eighteen (18) years or until the death of the husband whichever event shall first occur and that the first of such payments of $40.00 in total be made on or before the 31st day of December 1987 and that such payments be made weekly thereafter.
10. That the wife be at liberty to apply herein on not less than fourteen (14) days notice after the expiration of three (3) months from this date for the variation or increase of the said sum of maintenance.
11. That the parties and the interveners be at liberty to to apply herein on seven (7) days notice in respect of any orders consequential on the orders made herein.

3. The Interveners appealed against these orders and sought in lieu thereof orders that they have the joint guardianship and joint custody of the two children with reasonable access to the wife. The husband filed a cross appeal seeking orders that the Interveners and the husband have the joint guardianship of the children with custody to the Interveners and reasonable access to the husband. Alternatively, he sought orders that he have the sole guardianship and custody of the two children with reasonable access to the Interveners.

4. The case which His Honour heard was commenced by an application filed by the wife on the 14 August 1984 in which she sought the custody and guardianship of three children of the marriage, Deborah, Wendy and Ian. However, by the time of the hearing, she no longer sought custody of Deborah, as that child was living with her and had reached 18 years of age. After the application was served on the husband, he apparently brought it to the notice of the maternal grandparents of the two children with whom they were living, and the grandparents, Mr and Mrs Boyer, then intervened in the proceedings and sought orders that they be granted the custody and guardianship of the two children with access to the husband and wife. Apparently, late in the proceedings the husband filed a cross-application, but it appears that in his affidavit supporting the application, the order he sought was that the Interveners be granted custody of the two children or in the alternative, custody be given to him. He did not seek any order as to access of the children to the wife.

5. The result of the hearing before His Honour, which lasted for some 13 days, was that the husband and Interveners' applications were dismissed, and

custody was given to the wife. It was against these orders that the Interveners appealed.

6. The facts giving rise to the proceedings can be summarised as follows. The husband and wife were married in August 1965 in Western Australia. The husband is 46 years of age, and the wife is 40 years of age. The Interveners, who are the wife's parents, are 75 years of age (the grandmother), and nearly 76 years of age (the grandfather).

7. Soon after the marriage, the parties moved from Western Australia to live at Tamworth in New South Wales. Whilst they were living there, they had 4 children. The oldest, Deborah, now aged 21; a boy, Roger, born in February 1968, now 19 years of age and who had for some time prior to the hearing been residing with the husband. The two youngest children were a boy, Ian, born on the 26 December 1975, and at the time of the hearing, nearly 12 years of age; and a girl, Wendy, born on the 24 February 1978, and at the time of hearing aged 10 years. It was these last 2 children who were the subject of the proceedings before the Court.

8. In 1971 the Interveners moved from Western Australia to live at Tamworth.

9. The husband and wife separated on the 21 May 1983 when the wife left the matrimonial home. The eldest girl, Deborah, left with her and had resided with the wife to the time of the proceedings. The next boy, Roger, remained living with the husband. The two youngest children remained with the husband for about 3 weeks after the separation, when the husband placed them into the care of the Interveners, and these two children had lived with the Interveners from then until the date of His Honour's orders. According to His Honour, the wife from an early stage after separation endeavoured to have these 2 children live with her. She obtained access to the children from November 1983 and by August 1984 had filed her application for custody. A decree nisi of dissolution of the marriage of the parties was pronounced on the 20 November 1984, and presumably became absolute in December 1984.

10. The Interveners originally belonged to the Baptist Church in Western Australia. However, about 45 years ago they joined the religion known as **the Brethren** or the **Exclusive Brethren**. From then on, they had remained staunch adherents to that particular religion. The wife was their only child. She was brought up by the Interveners as a member of their religion, and she was a practising member until 1981 when, upon the refusal of the husband to receive superannuation payment from his brother on cessation of his employment with him, he incurred the disapproval of **the Brethren**. The whole family, which included the husband, wife and the 4 children, were described as "shut up" by **the Brethren**. This was a mark of disapproval of his behaviour by **the Brethren**
and this continued until about early 1983 when the husband and wife and whole family were effectively "withdrawn from". During the period when the family was shut up, they were not able to practice publicly the teachings of **the Brethren** or to attend meetings. There was in effect no communication by members of **the Brethren** with them.

11. The parties separated in May 1983. Since then, the husband has remained "withdrawn from" and so has the wife. The wife however has by her own actions entirely terminated her membership of **the Brethren**. On separation she made it clear that she no longer wished to be any part of that religion. The child, Deborah, who left with her, also has made a clear determination to no longer

belong to **the Brethren**.

12. The boy, Roger, remained with the husband for a period of time after the separation, then lived with the Interveners and other relatives but returned to live with the husband. He has also made no attempt to regain membership of the Church.

13. The two youngest children, since they came to the care of the Interveners, have been constantly and regularly involved in the religion at Tamworth under the guidance and leadership of the Interveners.

14. His Honour found that, following the separation, the wife made constant efforts to maintain contact with the children. She apparently ran into considerable difficulties with respect to access once the children were placed in the care of the Interveners, despite the fact that the Interveners were her own parents. In November 1983, a limited form of access was arranged through her solicitors and as a result of Court applications, she had some limited periods of continuous access. This position continued until May 1987. The two children then expressed to the wife a wish not to see her again or have any contact with her until she ceased to be "withdrawn from" or took appropriate steps to rejoin **the Brethren** and to "get right" within **the Brethren**. From then access ceased, and no access was enjoyed by the wife for the balance of the year 1987.

15. His Honour said that the case of the wife centred very strongly around her desire that the children be taken away from the practise of the religion with **the Brethren**. His Honour outlined the case advanced by the wife in the following passage.

> "She has expressed her concern - her wish that the children, growing up and developing within the general community in which they live, have a proper freedom of choice. To be able to choose not only the religion they might practise in their later life, but also the way in which they might live within the community, because of the very many strictures placed upon normal day activities by **the Brethren**, upon members of **the Brethren**. She says that her concern for the children, in wanting to effectively take them away from the religion, relates very much to her own particular experience, her own appreciation of the wider opportunities for emotional and spiritual development in the children, which are available to them in the general community. To deprive the children of that opportunity would be a serious block to their future development in every way and particularly, as she sees it, their future educational opportunities and matters of that kind." (Appeal Book p 27)

16. Next, His Honour summarised the Interveners' case in the following passage:

> "The Interveners, of course, claim that the children are well-settled in the situation with them, that the children are very strong and faithful adherents to the tenets of the religion, that they have no other life, they have been attending up to four or five meetings a week now with **the Brethren**, that their friends and all

> their association, all their activities, are centred upon and turn upon the religion.
> It is simply said by the Interveners that whilst the wife remains outside the church, as I also call **the Brethren** (simply for the sake of convenience) it is more advantageous to the children, because of their strong feelings at the present time, that the children not have any effective access to the mother until the mother "gets right" with the church and can return to the church. Then the children can have access to the mother."

17. And finally, the husband's case was set out in the following passage from His Honour's judgment:

> "The husband has, as already stated, maintained that the children should remain with the inteveners. He claims it is in their interests to remain in the church. That is why he wished them to be with the interveners at that point of time. He believed the children ought to remain with the interveners and claims it was in their interests to remain in the church and that is why he delivered them to the interveners at that point of time. He believed the children ought to go back into the church. He maintains the children should stay in that situation, that was their feelings and wishes as he deduced them from their conversations. They had been there long enough to suffer quite some serious disadvantages if they were removed therefrom. He says, in any event, if the Court considered the children should not stay with the interveners then they should come to him and that he should have the care of the children. He, in due course, would intend to "get right" within the church and he would endeavour to ensure the children would continue their relationships within **the Brethren**." (Appeal Book pp 29-30)

18. The hearing before His Honour lasted for some 13 days, ending on the 11 September 1987, on which day His Honour reserved his decision. On 23 December 1987 His Honour delivered his reasons orally and made the orders referred to above. The Interveners then made an oral application for a stay which His Honour refused. We were informed that the written reasons for judgment were not made available to the parties until 6 weeks after they had been delivered orally.

19. It was against these orders that the Interveners appealed, seeking in lieu of the orders made, orders that they be given the joint guardianship and joint custody of the 2 children with reasonable access to both the wife and to the husband.

20. The husband filed an appeal against the orders, in which he sought, in lieu of the orders made, that the Interveners and himself have the joint guardianship of the 2 children, with custody to the Interveners and access to himself. Alternatively, he sought the sole guardianship of the 2 children with access to the Interveners. In his Notice of Appeal, he did not concede that the wife should have access to the children, although at the hearing he was then prepared to concede that if either he or the Interveners had the custody of the children, that the wife should have access.

21. At the hearing before us, the Interveners tendered an amended notice of

appeal (notice of which had been given to the respondent wife's solicitors). However, when Counsel for the Interveners opened, he tendered 3 submissions which he agreed should replace all the prior grounds of appeal and it was on the basis of these submissions that his argument was presented and that the Court heard the Interveners' appeal. The grounds of appeal therefore were treated as follows:-

1. That the learned trial judge erred in granting custody to the wife in that his decision was based substantially, if not solely, on his decision that the children should be given a libertarian oriented upbringing rather than an exclusively religious upbringing, to the substantial, if not total, exclusion of all other relevant considerations.
2. That the orders of the learned trial judge breached S.116 of the Constitution in that the orders directly denied the children, the interveners and others the right to freely exercise their religion.
3. That instead of the court maintaining a strict and objective neutrality between competing religions and philosophical doctrines the learned trial judge's personal lead to:
   (i) a bias in favour of the wife and
   (ii) his adoption of the role of an advocate for that case,
   contrary to his duty as a judge.

22. Ground 1:- In short, this ground alleged that His Honour's discretion miscarried because his decision was based on one consideration substantially, if not totally, to the exclusion of all other relevant considerations. In particular, it was said that the trial judge had not given sufficient consideration to the children's present situation which in turn included the length of time they have lived with their grandparents, their health, their accommodation, their progress at school, their general education and development, contact with the extended family and their close bonds with their grandparents. Secondly, the attack related to insufficient weight being given to the evidence regarding the children's wishes in that they desired to remain with their grandparents, and refused to go to the wife, and their desire to continue in their present faith. Thirdly, that the trial judge had failed to give sufficient (if any) weight to the disruptive effects of change.

23. It is clear that, as the case was presented before His Honour, the question of the lifestyle that the children were enjoying and would enjoy in the future if they remained with their grandparents and in the faith, as opposed to the lifestyle they would enjoy if they went to the custody of their mother, became an important issue, and warranted close attention by the trial judge. This was recognised by him in the following passage from his reasons:

> "There can be no doubt as the case emerged before the Court that if custody of the children was granted to the wife effectively they would cease to have the opportunity to practice the faith that is practised by the members of **the Brethren**. This was a factor, of course, which emerged largely in the case and led to the description of the possible situation of the children either being with the wife or being with the interveners as being a "black and white" situation in which there could be no intermediate

> ground taken so far as the children's continuance in the religion or the children's affection contact with the mother while she remained "withdrawn from" by members of **the Brethren**." (Appeal Book p 33)

24. But even from this quotation it is clear that it was not the sole determinant, but a factor.

25. His Honour made reference to his own judgment in Paisio's case (1978 unreported). He pointed out that "to single out the concept of religious education and upbringing might create problems that tend to take things out of their context". He recognised that this was one factor with other matters to be considered. His Honour's judgment was considered by the Full Court in Paisio and Paisio (1979) FLC 90,659 where, on this question, the Full Court said,

> At a later point his Honour returned to this question and expressed the view that there were elements in the faith which result in the child being separated out from reasonably normal contact with its peer group. There might be a tendency for the child to withdraw to a greater extent in puberty or later adolescence, from contact outside the faith.
>
> It is clear that these factors were considered by his Honour together with all the other relevant factors relating to the circumstances of the child in the mother's household. His Honour was right to consider them. It must be a question of degree whether the exercise of a particular religion and the bringing up of a child in that religion could be seen as a denial of the child's right to a free choice in matters of religion.

26. It is clear then that the question of the lifestyle that would arise from being brought up in a particular religion was a factor which he was entitled to take into account, but he recognised that it was not the only factor.

27. Section 64(1) of the Family Law Act sets out a number of factors which the Court shall consider in proceedings relating to the custody, guardianship or welfare of or access to a child. An examination of His Honour's judgment leads us to the conclusion that without expressly going through those considerations seriatim, nevertheless it is difficult to see what considerations contained in Section 64(1) His Honour has overlooked.

28. The case lasted for 13 days, and there were over 1,000 pages of transcript. His Honour recognised that in his reasons for judgment it was not possible to traverse the whole of the material before him. However, His Honour referred to the wishes of the children (at page 18) and, apart from some doubts as to how the wishes or the attitudes of the children had been acquired by them, he recognised that despite these wishes, it was in the interests of the children to live with their mother, as he was "satisfied that the wife is well and adequately equipped to rebuild in the children their full confidence and trust in her, and there has been some detraction to that trust".

29. His Honour considered the age and health of all parties. The relationship between the wife and the children had been a close one prior to the separation. He considered and gave credit to the Interveners for having cared for the children in a satisfactory and appropriate way in the home that they had available for the children (page 51). His adverse comments relating to the attitude of the husband towards the children did not necessarily relate solely

to the husband's former adherence to the faith. He was satisfied that the husband had shown a marked disregard for essential matters relating to the welfare of the children. His motivation, His Honour found, was dictated by malice and desire to hurt the wife rather than to advance in any real or effective way the welfare of the children. He was a person of no credibility and His Honour's findings regarding the husband, in our view, have not in any way been successfully attacked.

30. His Honour dealt with the responsibility demonstrated by the parties towards parenthood. The wife throughout the period of separation had endeavoured to maintain contact with the children and continued to seek extended access. The Interveners had made this difficult for her. Future educational opportunities and the capacity of the opposing proposed custodial parents to provide for the emotional and intellectual needs of the children were dealt with in His Honour's description of the restrictions on the one hand that would be imposed on the children's educational opportunities as compared to those offered on the other hand.

31. The question of the status quo was considered, together with the disruption in the lives of the children, should His Honour change the present arrangements for the care of the children. The long-term benefits as seen by His Honour on the basis of the evidence before him, including the evidence of the psychologist Briggs, was balanced against any short-term disruption caused to the children by a change in the status quo.

32. Included in all these factors considered by His Honour was the general restricted lifestyle and separateness of  **the Brethren**  from the normally-accepted community activities. His Honour specifically referred to this as a factor which arose for consideration (see page 43). It is understandable, however, that in the light of all the evidence given, this factor, touching on so many aspects of the children's lives, was given a considerable amount of consideration in His Honour's reasons. It is, however, not possible to say that this factor outweighed all other factors. In our view, His Honour gave this factor the appropriate weight and consideration in the context of the other factors that he took into account, and that he ascribed to it appropriate weight.

33. His Honour's reasons commenced with an appreciation of the proper place in which to place the question of the restrictive lifestyle dictated by the religion of the Interveners, and on a reading of the whole Judgment, in our view it is not possible to say that his discretion miscarried because he failed to give appropriate weight to all other relevant considerations.

34. Ground 2: This ground was argued in conjunction with ground 1. It was submitted that His Honour's judgment proceeded on the basis of whether the children should be in or out of  **the Brethren**  . In addition, the suspension of access and the orders ensuring no contact between the children and members of  **the Brethren**  all prevented the freedom of choice of the children to pursue their religious beliefs, and accordingly, such orders were contrary to Section 116 of the Constitution. It was said that in the past the Courts had adopted a neutral position with respect to religion, being careful not to prefer one against the other, or to discriminate against freedom of religion, and in Australia the Constitution provided this guarantee. In support reliance was placed upon McKinlay v. McKinlay (1947) VLR 149; re Collins (an infant) (1950) CH 498; Evers v. Evers (1972) 19 FLR 296; Adelaide Company of Jehovah's Witnesses Inc. v. the Commonwealth, (1943) 67 CLR 116.

35. With this general proposition that it is not for a Court to prefer one religion to another we do not disagree. However, in determining questions of custody and access, depending upon, as they do, a determination of what is in the best interests of the child, or, what future proposals put forward by the parties to a suit will best promote the welfare of the child, it is permissible for a Court to examine the tenets and practices of a particular faith for the purpose of deciding these questions. It is in our view a proper exercise of the discretion vested in a Judge hearing a custody case to take these factors into account and weigh them in the balance together with all other relevant factors in the case. If, when following this approach a court decides that it is detrimental to the welfare of the children for them to be brought up adhering to such practices, this does not constitute a breach of Section 116 of the Constitution, thereby rendering the orders made in consequence invalid.

36. The Courts have for many years been faced with this question. In Kiorgaard v. Kiorgaard and Lange (1967) QdR. 162, the Full Court of the Supreme Court of Queensland had to consider whether an order that restrained the access parent from instructing the child in scripture or religious matters and requiring that the access parent should secure the child from any instruction from any members of the religious group, was an order that infringed Section 116 of the Constitution. Hoare J. with whom the other two members of the Court agreed, at pp 166-167 went on to say,

> "This part of the appellant's argument implies that an Order for custody of a child made in favour of one parent who intends to bring the child up in his religious faith, cannot enjoin the other spouse, who insists on inculcating in the child the doctrines and practices of the other parent's religion, (be it Christian or otherwise), from so doing. Fortunately, instances where the broad principles of one Christian religion are likely to seriously conflict with those of another Christian religion, are likely to be few but there are clearly some cases where it can be seen that it would be contrary to the welfare of a child to have the parents endeavouring to indoctrinate the child in different religions. In these circumstances it appears to me to be patently absurd to suggest that in such cases the Court must take some middle course and permit each parent to endeavour to indoctrinate the child in his or her particular religion even though it can be seen that such a course is likely to be greatly disturbing to and contrary to the welfare of the child.
>
> Even if one assumes that the making of such an Order might be said in some way to indirectly restrict the father from the full exercise of his own religion and religious practices, the making of such an Order as was made in the present case does not infringe the provisions of S.51 (xxii) any more than the forfeiture provisions in the Customs Act infringe the provisions of S.51 (xxxi) of the Commonwealth Constitution: Burton v. Honan (1952) 86 CLR 169.
>
> The placing of a child in the custody of one parent and in effect giving that parent the sole responsibility for the

> religious upbringing of that child to the exclusion of the other parent involves no constitutional infringement. The parent so restrained is not in any way prevented from practising his or her own religion. When the child attains some degree of maturity he or she can make his or her own choice but in the meanwhile the Court is doing no more than endeavouring to ensure that the child is protected from actions, which, however well intentioned, are considered by the Court to be contrary to the best interests of the child."

37. The Family Court has had cause to consider the question in a number of cases. See Paisio and Paisio (1979) FLC 90,659; Plows and Plows (1979) FLC 90,712; Grimshaw and Grimshaw (1981) FLC 91-090. It is clear from these cases that a trial judge in the course of assessing the competing claims for the custody of the child, is entitled to look at the religious practices of one of the parties, which are put in issue by the other party as being detrimental to the welfare of the children, and in doing so, he is entitled to take into account these practices as relevant factors together with all the other relevant factors in the case in coming to a conclusion regarding the future custody of a child.

38. It can, of course, be, as in Grimshaw, that a trial judge places too great an emphasis upon religious practices so that he disqualifies a person who adheres to such practices without considering all the other factors and balancing them accordingly. In such circumstances, a trial judge's discretion may miscarry. In this case, however, for the reasons already given when considering ground 1, in our view, His Honour has not fallen into this error. Before His Honour went on to consider the various factors for or against the competing parties in this case, he said,

> "If at any stage in dealing with these reasons for judgment the Court refers to any particular attitudes or tenets or methods of conduct within  **the Brethren**  it is not intended to be critical of those matters as such. It may be necessary to refer to those matters where they touch upon matters relating to the welfare of the children if the children remain, practising in a sense, adherents to that faith. That is a necessary exercise which has to be engaged in by the Court. While the Court does recognise, and does not in the slightest way depart from its obligation to ensure that in no way it is critical of or in any way passing a form of judgment upon the actual tenets of the faith itself, in the case of Paisio the Court had reason itself, in its judgment given in February 1978, to refer to matters relating to the freedom of practice of religion within the community. The Court's reference to those matters was fully supported by the later Full Court judgment dismissing an appeal from the judgment of this Court. I do not consider it necessary for me to restate any of those principles other than to refer to what I said in Paisio's case on 24th February 1978 and what the Full Court of this Court subsequently said in its unanimous judgment on 12th June 1978 about those matters.

39. It appears to us that from the outset that His Honour had in mind the proper approach to be adopted in determining the custody case and the proper way in which to take into account the practices of the husband and the Interveners.

40. The passage relied on in particular by the appellants appears at page 53 of the Appeal Book. It reads,

> "The matter came down in essence as already stated as to whether the children by reason of the firm views conveyed to the court should be allowed to remain with the interveners and therefore to continue in the constant practices and the faith of **the Brethren** and to have possible ultimate developments or lack of opportunities of development which could come about through that situation - all of which has been touched upon by the Court and dealt with adequately in the evidence before the Court, particularly from the evidence of Mr. Briggs. Should the children go, with some obvious immediate disruption to their lives and their emotional attitudes and opportunities of contact with the grandparents and members of **the Brethren** (and also the husband and the child Roger) to live with the wife and to experience through her a variety of lifestyles and attitudes which would normally be accepted within our community as being quite appropriate to young children?"

41. But this passage must be taken in its context. It appears at page 46 of His Honour's judgment. It appears after he has considered all the relevant factors that he is required to take into account pursuant to Section 64 of the Act. It is, in short, a summary of the alternatives produced by a consideration of the relevant factors. It does not purport to be a statement made at the outset of his reasons as a statement of principle upon which he is then determining the issues before him. It can be regarded, in our view, as a concluding summary only, and, a few pages later (at 58) when he came to his decision, it was clearly based on a consideration of the welfare of the children. His decision was expressed in these terms,

> "The decision that I have come to, firmly and strongly is that the best and most appropriate interests of these children, certainly on a long-term basis and accepting a short term disruption (as must certainly arise) are served by the children being with their mother."

42. For these reasons, therefore, in our view, ground 2 must fail.

43. Ground 3. The first submission made to us under this ground was that the Judge had asked an unusual number of questions of each witness at the end of their evidence, to such an extent that this constituted such an intervention in the trial that it took the Judge out of the normal judicial role. Reliance was placed upon the well-known passages, firstly from the judgment of Lord Greene M.R. in Yuill and Yuill (1945) P 15, at 20, that if a Judge himself conducts the examination, "he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict", And, secondly, the passage from the judgment of Lord Denning in Jones v. The National Coal Board (1957) 2 QB 55, at 64,

> "The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses

> overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well."

44. The transcript of the evidence covered just over 1,000 pages. Nearly 170 pages of this transcript was devoted to recording questions asked by His Honour of the various witnesses. At the conclusion of the re-examination of the wife, who was the first witness, His Honour indicated that he intended to ask her questions himself, which he did at the conclusion of the evidence that she gave in rebuttal at the end of the hearing. He indicated, however, at this early stage in the proceedings, that he would adopt the same course and ask questions of the husband and the Interveners at the conclusion of their evidence. His Honour then, at the conclusion of the evidence of the wife, the psychologist Briggs, the two Interveners, the husband and the husband's sister, engaged in a long examination of each of them. In most instances, he prefaced his questions by indicating that his purpose was not to conduct a cross-examination but to seek additional material from the witness or to communicate directly with them. It appeared that from the outset that His Honour felt he was obliged to conduct his own examination of the witnesses. These examinations on occasions touched on matters not dealt with in their earlier evidence, but on other occasions they appear to be repetitious and unnecessary.

45. The submission began by complaining about the quantity of the questioning by the trial judge and that many of his questions were leading. In R. v. Power (1940), State R Qd, Blair C.J. said,

> "It cannot be denied that a Judge has a right to ask witnesses questions, and there is certainly no numerical limitation upon such right. If the record be carefully examined it will show that most of the Judge's questions followed upon the cross-examination of Mr. Timbury, and were designed to explain and supplement answers already given in order to eliminate possible confusion in the minds of the jury."

46. And later in the same judgment it was pointed out that there may be occasions when leading questions should not be put to witnesses by a Judge, but there is no rule that goes so far as to say that in all cases leading questions must not be asked. In the later case of The Queen v. Olasiuk (1973) 6 SASR 255, the Full Court of South Australia had cause to consider the question of the extent of a Judge's questioning of witnesses and said,

> "There were complaints that the learned Judge "unduly and unnecessarily interfered in the conduct of the trial". Ever since the decision in Jones v. The National Coal Board there has been a growing tendency to make such complaints to courts of appeal. It seems necessary to say again that a judge is entitled to ask questions of witnesses if he thinks fit, not merely questions directed to clearing up ambiguities, but questions, and searching

> questions at that, directed to the merits of the case, so long as he does not take the examination, or even more importantly, the cross-examination, out of the hands of counsel and prevent the proper conduct or presentation by them of their respective cases (R. v. Clewer, R.v. Van Beelen). In extreme cases an appellate court will interfere but extreme cases are by definition extreme cases, and complaints of this nature should be reserved for them and not made common form."

47. A similar attitude seems to have been taken in the United States. In US v. Ostendorff 371 F 2d 729-732 (1966) it was said the Judge, "is not a bump on a log, nor even a referee at a prize fight. He has not only the right, but he has the duty to participate in the examination of witnesses when necessary to bring out matters that have been insufficiently developed by Counsel". (See Cross on Evidence 3rd Aust. Ed. (1986).)

48. It seems clear that it is not the quantity of questions asked but the quality of the questions and the nature and timing of the interruptions that is important to determine whether a trial should be re-heard on this ground. (See Shetreet, Judges on Trial (1976) p 209 for an examination of a number of cases and the quantity of questions asked in them, and also Denning, The Due Process of Law (1980) p 62).

49. In this case, there was no complaint that the Judge's questioning had interrupted the free flow of cross-examination or had prevented proper presentation of the Interveners' case, and thus fell within the proscription of Jones v. The National Coal Board. The quantity of questioning must be a question of degree before it offends the principle of Jones' case. The fact that 17% of the transcript was devoted to the Judge's questioning would not of itself lead to this conclusion and constitute a miscarriage of justice. In our view, however, the long and at times repetitious examination of witnesses undertaken in this case by the Trial Judge apparently as a matter of course is undesirable and not to be encouraged. This does not in any way inhibit the proper role of a Judge, but excessive questioning for its own sake can lead to the dangers outlined by Lord Denning in his judgment.

50. The next submission was that the questioning of the wife was not objective. The complaint was that the Trial Judge had himself introduced the question of the desirability of the children being brought up in a more libertarian lifestyle such as that enjoyed by the majority of children in Australia today, rather than in the more restrictive lifestyle which would be imposed upon them if they were brought up by the Interveners within **the Brethren** religion. Further, it was alleged that this approach was pursued therafter by the Trial Judge in his subsequent questioning. In particular, it was said that this became evident in the questioning of the wife at the conclusion of her evidence in rebuttal. The transcript is lengthy and it is not practicable here to point to any particular portions of the transcript that either support or deny this proposition. Necessarily, comments made in this Judgment can only be of a general nature.

51. Having read the totality of the transcript as we were invited to do by Counsel, this does not appear to us to be a complaint that can be justified. The question of the lifestyle that the children would lead whether being brought up by the wife or by the Interveners was the subject of considerable evidence, both in the affidavits filed and in the oral evidence given at the hearing by both the wife and her daughter. It was part of the wife's case from

the very outset. She and her daughter, both of whom had been brought up in **the Brethren** religion, gave evidence on the various restrictions on the activities that a child was permitted to undertake or participate in if brought up within **the Brethren** religion. We do not propose to outline them all here. In our view, an examination of the transcript shows that this question was introduced by the wife and was then explored further by the Judge in his questioning.

52. In the circumstances, for the Judge to do so was a legitimate exercise of his function within the principles of the cases referred to above. This was not a case in which the Judge, in our view, introduced the question of the comparative future lifestyles that the children might be brought up in. This had been part of the wife's case from the very outset. In our view, therefore, it would not be possible to say that the Judge had displayed a bias or had not kept within the proper bounds of his questioning by embarking upon the course that he did, even though he may have gone to extraordinary lengths.

53. The final submission under ground 3 was that the Trial Judge had displayed bias against the interveners, which was evidenced by a combination of matters. These were his excessive questioning and the nature of his questioning. In addition, at the end of the hearing on 11 September, his judgment was reserved and then delivered orally on the 23 December. At the conclusion of delivering his reasons, he made an order that the children were to be given to the wife at 12 noon on the following day, 24 December, and that access to the husband and interveners and other members of **the Brethren** was then to cease for the ensuing 12 months. A stay of proceedings was immediately sought and refused. Finally, written reasons for judgment were not provided for a further 6 weeks. It was said on behalf of the interveners that the combination of all of these matters indicated a bias on behalf of the Trial Judge against the interveners and in favour of the wife.

54. The question of bias has been dealt with in a line of High Court cases in recent times. In particular, in Re Watson; Ex parte Armstrong (1976) FLC 90,059; Re: Lusink; Ex parte Shaw (1980) FLC 90-884; Livesey v. The New South Wales Bar Association (1983) 57 ALJR 420; Re: Renaud; Ex parte C.J. (1986) 60 ALJR 528; Re: Smithers; Ex parte Adamopoulos (1987) 61 ALJR 523. In Re: Renaud, Wilson J. at p 535 said,

> The principle of law governing this matter is not in doubt. It is that a judge should not sit to hear a case if, in all the circumstances, the parties or the public might entertain a reasonable apprehension that he or she might not bring an impartial or unprejudiced mind to the resolution of the question involved in it: Reg v. Watson; Ex parte Armstrong (1976) 136 CLR 248 at 258-263; Livesey v. New South Wales Bar Association (183) 151 CLR 288 at 293-294. It has been recognised that in a case such as the present, where there is no allegation of actual bias, the test of reasonable suspicion may be a difficult one to apply involving questions of degree and particular circumstances which may strike different minds in different ways: Re Shaw; Ex parte Shaw (1980) 55 ALJR 12 at 16; 32 ALR 47 at 54; Livesey at 294.
>
> A court of review must be careful not to exaggerate the signifiance of actions or statements made by a judge in the course of a proceeding. There must be "strong

> grounds": Reg. v. Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co. Pty Ltd (1953) 88 CLR 100 at 116 for inferring the existence of a reasonable suspicion.

55. In our view, taken individually, none of the complaints raised would give ground for the Judge disqualifying himself because of bias. The nature of the questioning has already been dealt with. In any event, the questioning was of each of the significant witnesses and no particular one was singled out. His Honour was at pains before embarking upon his questioning to point out what he was doing, namely seeking additional information, and seeking the assistance of the particular witness.

56. The fact that His Honour reserved judgment is of no significance. The case was complex and had many aspects which His Honour had to consider. The hearing had lasted some 13 days with 1,000 pages of transcript. It would be unusual in the circumstances if His Honour had not reserved judgment. The period for which it was reserved was also by no means out of the ordinary. Again, the fact that he required immediate implementation of his orders, in our view, is of no significance. It was said that the change in custody took place on Christmas Eve, but the evidence before His Honour was that Christmas Day was not a day of any particular significance to **the Brethren**. His Honour after due consideration came to the conclusion that the early delivery of the children by the Interveners to the wife was in their best interests. He refused an application for a stay of proceedings because, as he said:

> "I would not have believed it appropriate to have made the orders that the Court has made in this matter, requiring early delivery of the children, if I had thought in any possible way any benefit could be obtained by some delay in the children coming into the care of the mother. I am satisifed that harm may well come to them if there is such delay".

57. This was an exercise of His Honour's discretion and reflected the view that he had come to after due consideration of all the evidence. Having come to the conclusion that he did, it could not, in our view, be said that to implement his decision immediately and to sever contact with those members of the family associated with **the Brethren**, in the light of his judgment would in the eyes of a fair-minded observer, create a reasonable apprehension that the Judge was biased. He was fulfilling his duty as he saw it in the best interests of the children.

58. And finally, the question of the delay in the delivery of the written reasons. There was no suggestion that this was a deliberate act on the part of His Honour, and in fact was probably something beyond his control. Accordingly we cannot see that any question of bias can arise from this fact.

59. It seems to us that the real complaint in this matter was the extent and nature of the questioning by the Trial Judge. If this was so, an objection should have been taken at the time (see Re: Alley; ex parte Australian Building Construction Employees' and Builders Labourers' Federation (1985-86) 64 ALR 6). No such objection was taken at the time of His Honour's questioning. We appreciate that the ground of bias as finally argued was a combination of questioning and other matters. This combination of circumstances was not completed until after the judgment had been delivered and the hearing closed. It was then of course too late to take an objection. However, in our view, just as the matters raised individually do not constitute bias nor do they taken collectively so constitute bias. As we have

said, the principal complaint appears to have been the Judge's questioning and the subsequent matters add nothing to that complaint.

60. Accordingly, in our view, ground 3 of the appeal is not established and the appeal should be dismissed.

61. The final matter raised on the appeal was the breadth of the injunction contained in order 7 of His Honour's order made on 23 December 1987. The husband and the Interveners, being party to the proceedings, the injunction against them was well within both His Honour's jurisdiction and his discretion. The injunction, however, included "all members of the **said Brethren**" and they, together with the husband and the Interveners, were "restrained from attempting to approach the said children for the purpose of speaking to such children or from delivering to them any written material wherever such children might be".

62. In our view, an injunction against third parties who were not parties to the proceedings was not justified and was not aproper exercise of His Honour's discretion in this case. That this is so is made clear by an examination of the decision of the House of Lords in Marengo v. Daily Sketch Ltd. (1984) 1 All ER 406 in which the problem of enjoining not only the defendants but also their "staff servants and agents" from doing prohibited acts was discussed. During the course of his speech Lord Uthwatt at p 407 said:

> "The reference to servants, workmen and agents in the common form has not the result that those persons are enjoined, for as Lord Eldon L.C. pointed out in Iveson v. Harris (1802) 2 Ves 251 at p 256, it was not competent to the court '....to hold a man bound by an injunction, who is not a party in the cause for the purpose of the cause.'"

63. See also Colbeam Palmer Ltd. v. Stock Affiliates Pty Ltd. 122 CLR 25 at p 47 per Windeyer J.

64. In our view, it would have been sufficient for His Honour to have made an order in similar terms to that made by Toose J. in K v. K (1979) FLC 90-680 at p 78,635 which would have restrained the husband and Interveners from permitting the children to be subject to the religious influences of **the Brethren** sect.

65. In our view, therefore, order 7 should be amended by deleting reference to all members of **the Brethren**, and in turn therefore, order 8 should be discharged.

66. The husband filed a cross-appeal which raised some seven grounds. In our view, it is unnecessary to set them out in detail, but each one related to the weight to be given to various aspects of the evidence. In addition to these grounds, the husband in effect adopted the arguments advanced by the Interveners. In Lovell v. Lovell (1950) 81 CLR 513 at 519, Latham C.J. referred to the position of an appellate tribunal when considering questions of weight being given to evidence before a Trial Judge. He said:-

> "But when the appellate tribunal is considering questions of weight it should not regard itself as being in the same position as the learned trial judge. In the absence of exclusion of relevant considerations or the admission of irrelevant considerations an appellate tribunal should not set aside an order made in the exercise of a judicial discretion (as to which see Sharp v. Wakefield (2) unless

> the failure to give adequate weight to relevant considerations really amounts to a failure to exercise the discretion actually entrusted to the court."

67. In our view, having examined the evidence in some detail for the purpose of dealing with the appeal by the Interveners, We are satisfied that His Honour took into account all the relevant considerations, and no case has been advanced which would justify this Court from interfering with His Honour's findings based on submissions of insufficient weight or too much weight being attached to various aspects of the evidence. In our view, accordingly, the husband's cross-appeal should be dismissed.