

# **Re W and W : (Abuse allegations; Expert evidence) [2001] FamCA 216 (14 March 2001)**

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[\[2001\] FamCA 216](#)

## **FAMILY LAW ACT 1975**

### **IN THE FULL COURT**

**OF THE FAMILY COURT OF AUSTRALIA Appeal No WA14 and 15 of 2000**

**AT MELBOURNE File No PT6099 of 1998**

**BETWEEN:**

**RE W AND W : (ABUSE ALLEGATIONS; EXPERT EVIDENCE)**

**EDITED REASONS FOR JUDGMENT OF**

**CHIEF JUSTICE NICHOLSON & JUSTICES KAY & O'RYAN**

**CORAM: NICHOLSON CJ, KAY & O'RYAN JJ**

**DATE OF HEARING: 5 and 6 September 2000**

**DATE OF JUDGMENT: 14 March 2001**

**APPEARANCES:**

**Mr Ackman, one of Her Majesty's Counsel, and Ms Crisford of Counsel**, instructed by DCH Legal Group, 15 Hay Street, Subiaco WA 6008, appeared on behalf of the Appellant Wife.

**Mr Dowding of Counsel**, instructed by Bowen Buchbinder Vilensky, 12/251 Adelaide Terrace, Perth WA 6000, appeared on behalf of the Respondent Husband.

**Mr Hooper of Counsel**, instructed by Hossen & Co., Solicitors, PO Box 1069, South Perth WA 6951, appeared on behalf of the child representative.

**Mr Dickey, one of Her Majesty's Counsel**, instructed by Legal Services, Family & Children's Services, 2/189 Royal Street, East Perth WA 6004, appeared on behalf of the Intervener.

**Re: W (Abuse Allegations; Expert Evidence)**

**WA 14 and 15 of 2000**

**Coram: Nicholson CJ, Kay and O’Ryan JJ**

**Dates of hearing: 5 & 6 September 2000**

**Date of judgment: 14 March 2001**

**CATCHWORDS:** CHILDREN - Parenting Orders - Residence - In favour of husband.

CHILD ABUSE - Sexual abuse by husband and paternal; grandparents alleged by wife - Wife maintained her position at the close of evidence - No abuse found to have occurred by trial Judge - The Wife's attitude and expert evidence relied upon by the trial Judge.

EVIDENCE - Expert Evidence - Child psychiatry - Role and function - - Whether the expert for the husband assumed the role of advocate.

The parties were married overseas in 1986 and moved to Perth in 1990. There were three daughters born of the relationship, T (born 1988), S (born 1990) and O (born 1995.) T exhibited behavioural problems from a young age and was referred to a number of psychologists.

In February 1997, the Wife became interested in “New Age beliefs” and encouraged T to also become interested in these beliefs.

In October 1998, T told the Wife that she had been sexually assaulted by the Husband. The Husband was consequently charged with two counts of sexual penetration of a lineal relative and four counts of indecent dealing. The Husband pleaded not guilty to these charges. According to the Wife, T further disclosed that she had witnessed the Husband sexually abusing S and that her paternal grandparents also sexually abused her.

In November 1998, the Husband commenced proceedings seeking orders for residence and alteration of property interests. The Husband essentially argued that the Wife’s spiritual beliefs had influenced T to make false allegations and that they affected M’s ability to appropriately parent the children.

In August 1999, after T had been extensively cross-examined in the criminal proceedings, the Crown filed a *nolle prosequi* in relation to the charges brought against the Husband.

The residence and property hearing took place over ten days. On 3 April 2000, two months after the hearing had concluded, the trial Judge, Barlow J, asked the Wife through her Counsel whether she still held her beliefs concerning T's allegations. The Wife responded that she did not know.

In his Honour's reasons for judgment, the trial Judge did not accept T's allegations of sexual abuse. His Honour made adverse findings against the Wife's credit, holding *inter alia* that she sought to minimise her behaviour in relation to her spiritual beliefs which she conceded could be considered "bizarre". The trial Judge found that the Wife had actively encouraged T to become involved in her beliefs, and that they influenced T's sexual abuse allegations.

His Honour considered that the Wife could not appropriately provide for the emotional needs of the children. As the Wife continued to accept the veracity of T's allegations, there was a possibility that she would not attempt to dissuade T from her belief that sexual abuse had occurred. His Honour perceived that if the children were to reside with the Wife, they would grow up believing that their father and paternal grandparents had sexually abused T, and as such, there was a real danger that they would be subjected to psychological harm.

His Honour ordered that the children reside with the Husband and the Wife to have weekly supervised contact.

*On appeal*, the Wife asserted that the trial Judge had wrongly placed emphasis on evidence of a psychiatrist called by the husband who had not seen the wife or the children.

The Wife attacked his Honour's reliance upon her attitude as expressed through her Counsel on 3 April 2000 as evidencing the likelihood that she would be unable to accept his finding that there had been no sexual abuse. The Wife asserted that once the finding of no sexual abuse had been made, the Wife should have been given the opportunity to demonstrate her capacity to come to grips with the reality of that finding (as was allowed in *R and B* (1996) FLC 92-658). The Wife and the Child Representative suggested that after announcing his finding, his Honour should have then adjourned the matter for a period to enable further evidence to be put as to:

- 1) the effect of the finding upon the relationship between the children and the Husband; and
- 2) the Wife's capacity to dissuade T from her unfounded beliefs.

### **Further evidence application of Intervenor**

The Department of Family and Children's Services sought to intervene, seeking leave to admit into evidence an affidavit sworn by a counsellor who had interviewed the Husband.

The Department said that the evidence of the Counsellor contained alleged admissions by the husband of inappropriate sexual behaviour, which if admitted into evidence, may have influenced the trial judge's decision. The Department claimed that it had not intervened at the trial stage because it expected that this evidence would have been called. The Child Representative indicated that this evidence was not called at trial because it believed at the time of the trial that the evidence would be rendered inadmissible pursuant to s 19N of the *Family Law Act*. The Department now contended that s 67ZB(4) of the Act rendered the evidence admissible. The Department asserted also that the Oath or Affirmation of Office of the Family and Child Counsellor indicated that such evidence was deemed admissible.

The respondent objected to the application, asserting that the evidence would not have been admitted at trial due to s 19N.

**Held: *per curiam*, dismissing the application for leave to adduce further evidence; by a majority (Nicholson CJ and O'Ryan J; Kay J dissenting), allowing the appeal and ordering that the matter be listed before the same Full Court for directions:**

#### Further evidence

(per curiam)

- The provisions of the Oath or Affirmation of Office of the Family and Child Counsellor permit the counsellor to comply with the mandatory reporting requirements now contained in s 70ZB. The further investigation of the matters raised by a counsellor in such a notification then falls to the relevant authorities to whom the notification is made.
- The legislation does not render admissible that which is otherwise the subject of a prohibition as to its admissibility. Section 67ZB(4) has the effect of ensuring that if the evidence is otherwise admissible it can only be given by the maker of the notification and not via second-hand or hearsay evidence.
- Application for leave to adduce further evidence dismissed

(per Nicholson CJ and O'Ryan J)

- It is most unfortunate that the legislation contains no exception to the legislative prohibition to the giving of such evidence in circumstances where its non-receipt may impinge on the best interests of children

#### The substantive appeal

(per Nicholson CJ and O'Ryan J)

- Their Honours doubted that a trial Judge would usually be assisted by pressing Counsel for a party at the close of evidence but before the giving of judgment, whether that party still maintains his or her position at trial. In this case they thought that it was unfair to the wife for his Honour to have done so in circumstances where her whole case was predicated upon the issue of sexual abuse having occurred. In effect, at a stage where his Honour had not made any findings, she was being called upon to abandon her case and by failing to do so, negative inferences were drawn against her.
- Their Honours considered that the trial judge was wrong in drawing an adverse inference against the wife in any event, because the wife, in forming her belief that sexual abuse was likely to have occurred was aware of the contents of the inadmissible statements made by the husband to the counsellor.
- There were findings in the case in relation to the Wife's ability to provide for the emotional needs of the eldest child and that there was a very real danger that the children and in particular the eldest child would suffer psychological harm if they resided with the mother. These findings were dependent upon a finding by the trial judge that the allegations of sexual abuse were false and that falsity was probably brought about by the wife, as a result of her new age beliefs, having unconsciously influenced the child to make the false allegations. Although the trial judge's finding that sexual abuse had not occurred were not the subject of direct attack, the link between that finding and a finding adverse to the wife was dependent upon the evidence of an expert called by the Husband, Dr W. In substance Dr W asserted that the wife, by involving the child in her new age beliefs had effectively brainwashed the child into a state of mind where she was likely to make false allegations against the husband. He also asserted that she was likely to continue to do so. He further claimed that if the husband made admissions to a counsellor about aberrant behaviour on his part, this was likely to have been a false admission brought about by *folie a deux* as a result of the wife's influence and that of the counsellor.
- The trial judge had found that the Wife was genuinely concerned about the welfare of the children and found that the mother had not acted maliciously. Therefore to support the findings about the Wife's ability to provide for the emotional needs of the children and danger to the children it was necessary to link the mother's attitude to the issue of false allegations of sexual abuse with her New Age beliefs and it was only Dr W who did this.
- Their Honours were of the opinion that Dr W had demonstrated bias and thus little, if any weight, should have been attached to his opinion. He was brought into the matter at an extremely late stage, had seen none of the parties or the children and had stepped out of the role of an expert witness and assumed the role of advocate for the husband.
- Discussion of the need for reform in the area of expert evidence and proposals on this matter.

(per Kay J)

- In this case, nobody asked the trial Judge to make an order as made in *R and B (1996) FLC 92-658*. The Wife firmly believed that the children were at risk of abuse in the Husband's care, and at best she would examine her position if the trial Judge found otherwise.
- It was clearly open for the trial Judge to make his own evaluation as to the likelihood of the Wife changing her position in light of his Honour's findings. No issue of a denial of natural

justice or oppression arises. If the Wife's counsel had thought it appropriate, an application could have been made to reopen the evidence on the issue. No such application was forthcoming.

- Given the test that had been clearly propounded by expert witness Dr Lord, namely both the need and the capacity to move from a fixed position, it was entirely appropriate for the trial Judge to make an inquiry in April, some two months after the evidence had concluded.
- The evidence indicated that once the sexual abuse issue had been determined, it would be better for T to be immediately placed into a position that would begin to rehabilitate her from her present position. His Honour identified each of the competing and relevant issues, weighed them up and reached a conclusion that the best interests of the children would be best advanced if they were placed in the Husband's care.
- Apart from the court appointed counsellor, none of the expert witnesses had seen T. Each was speculating as to the case based on the material available to them. The choice of one witness' views in preference to another was clearly within the trial Judge's province. In any event there was nothing particularly contentious about the generalised statements of the witnesses. The judgment was not affected by any of Dr W' evidence that delved into the realms of mere speculation.

*(per curiam)*

- Discussion of the proper role of an expert witness and the principles to be borne in mind.

## **REPORTABLE**

### **NICHOLSON CJ AND O'RYAN J:**

#### **INTRODUCTION**

1. This is an appeal against the orders of Barlow J made on 21<sup>st</sup> June 2000. His Honour ordered that the three [daughters] of the marriage [we will refer to as], [T] [born in] 1988, and now aged 12, [S] [born in] June 1990 and now aged 10, and [O] [born in] January 1995 and now aged 6, should reside with [the husband].
2. His Honour further ordered that [the husband] should have sole responsibility for the day to day and long term decisions concerning the care, welfare and development of the children.
3. He made contact orders in favour of the wife from 9am to 4pm each Sunday to be supervised by a professional service.
4. These orders were made after a hearing occupying nine days in February 2000. Written submissions were subsequently filed and a further hearing was held on 3 April 2000 and his Honour delivered judgment on 21 June 2000. The orders made by his Honour were not put into effect as they were stayed pending the determination of this appeal.
5. In addition, his Honour determined property proceedings between the parties and the wife

has also appealed against those orders. Before us the parties conceded that the property appeal would only proceed if the wife succeeded with this appeal and it was also agreed that this could proceed by way of written submissions if this appeal were determined in favour of the wife.

6. It can be seen that the orders made by his Honour have a major impact insofar as the wife and children are concerned, since she has been their primary care-giver since birth and their sole care-giver since the parties separated in October 1998.
7. By her appeal, the wife in effect seeks to reverse his Honour's orders as to residence and to substitute orders that the husband have contact with the children as recommended by a psychiatrist, Dr Hagan.
8. We have had the opportunity of reading the reasons for judgment of Kay J in draft form. Full details of Barlow J's orders and the orders sought in the wife's third amended notice of appeal are conveniently set out in his Honour's reasons for judgment and need not be repeated here.
9. The amended notice of appeal of the wife contains some thirty grounds, but in fact her arguments on the appeal were in a comparatively short compass. Before turning to them however, it is necessary to examine the background in some detail and his Honour's decision in light of that background.

## **BACKGROUND**

10. The husband was born in Perth in 1965 and is now aged 35 and the wife was born in [another country] in 1967 and is now aged 33. They met while on military service in the Armed Forces [of the other country] and married in 1986. As a result of the marriage the wife was discharged from the armed forces and the husband eventually returned to civilian life in 1988, just after the birth of [T]... .
11. In 1989 the husband commenced studies for an engineering degree in [the other country]. The child [S] was born in [the other country] in July 1990 and in September of that year the parties moved to Perth. They made a visit to [the other country] in 1991 returning to Australia in July 1991. Later that year the wife began to suffer from chronic fatigue syndrome, which apparently lasted in an acute form until April 1992.
12. By mid 1992, the child [T] was experiencing behavioural difficulties that required the assistance of a psychologist.
13. The wife was treated for depression between June and November 1992. In 1993 the wife commenced, but did not continue, with several educational courses and again had a recurrence of chronic fatigue syndrome.
14. [T] commenced pre-school in late 1993 and in January 1994 commenced year 1 at [a school in] Perth. Later that year, she was again seen by a psychologist concerning difficulties that she was experiencing. In July 1994 she commenced at [another school] and was joined at that school by her sister [S] approximately one month later.
15. In October 1994 the husband successfully completed his engineering studies and commenced employment. [O] was born in 1995. Later that year the parties decided to return to [the other country] to live, which they did in early 1996.
16. By mid 1996 they were attending Marriage Guidance Counselling in [the other country] during which time [T] continued to experience some difficulties. The family returned to Perth in December 1996 and the older children recommenced at [the first school] in February 1997. It appears that in 1997 the wife commenced to develop an interest in

“New Age” beliefs and in April 1997 undertook a course in "Reiki".

17. His Honour records that according to the wife, the object of the Reiki course was to train participants in the transference of Reiki, which translates as “universal energy”.
18. In the wife’s first affidavit she went on to explain that Reiki was “based on the belief that there is a positive energy in the universe which can be utilised for healing and wellbeing”. The practice described the “opening” of a person's "Crown Chakra" which is an energy centre. The wife said that "Chakras" are well known in many cultures, even in Judaism.
19. His Honour found that by April 1997 the wife was deeply engrossed in her discovery of the beliefs and practices known as "New Age", which she described as explorations of spiritual beliefs. His Honour recorded that the wife then became interested in "Channelling", which she had described in her affidavit as “a process whereby a medium allows another entity to channel energy and to speak through the medium”. She said that it is a positive and spiritual exercise with none of the implications of “the after life”, or “the other side” which comes from seances.
20. His Honour records that during 1997 the wife came to believe that she could communicate with spirits and past lives, although she did not hear or converse with such spirits, but described it as "more like an inner feeling".
21. In August 1997 she commenced a "Channelling" course and his Honour referred in the course of his judgment to a letter that she wrote to her sister on 27 August 1997 in which she referred in some detail to her spiritual experiences and to the child [T] as a medium. The wife informed her sister that the child [T] was “able in the most natural way, to hear and to see and to have dialogue with the spirit world”.
22. His Honour records that the wife acknowledged that in 1997 and in 1998 she became absolutely immersed in spiritual matters.
23. The wife accepted in evidence that some of the beliefs that she once held could be described as bizarre. She did not however believe that her beliefs had any effect on [T], although she agreed that in 1997 and 1998 [T] was living in a fantasy world.
24. His Honour records that part of the contents of an application form prepared by the wife in 1998 in which she said:-

*“As a result of my own development, my eldest child has started accessing deeper levels of knowledge and is sharing it with me. Although all but nine years of age, she is of great influence to me, and is a great teacher. She has by far had the most influence on my metaphysical interest.*

*In the beginning of 1997, my eldest daughter told me that my mission in this life is ‘to learn to speak to my Inner-Self and teach the same to others’ also, ‘to show the world that in reality there is only One God’ I believe and trust (or rather KNOW) that this training will assist me to achieve these goals. The stream that I am interested in is therefore, the Teacher/ Facilitator, as it will give me the tools to share the information with others.”*

25. His Honour concluded that it was apparent from the evidence that the wife involved [T] in her developing beliefs to a considerable extent.
26. His Honour said that the husband appeared to have made no particular complaint about the wife’s involvement in this area but said that he did object to the involvement of [T].



27. His Honour records that the husband did become involved in the wife's spiritual activities and that in mid 1998, after he began to experience health difficulties, he permitted the wife to perform Reiki or spiritual healing on him which, although he did not believe in it, he said that he enjoyed as somewhat relaxing.
28. In October 1997 [T] and [S] were transferred to [another primary school in Perth]
29. From mid-1997 the relationship between [T] and the husband became strained. The relationship between the husband and wife also continued to deteriorate.
30. In April 1998 the wife attended a workshop concerning sexuality and sensuality. She says that she discussed her concerns with the husband about their relationship following this workshop and that the husband agreed to work on the issue with her. A high and we think undue, degree of emphasis was placed by Dr W and his Honour on this workshop as hereafter appears.
31. In early September 1998 the husband made arrangements for an appointment at Relationships Australia, with a counsellor, Mr Katsibardis, and the wife later attended on Mr Katsibardis with the husband on 11 September 1998. We think it noteworthy that this approach for counselling assistance was initiated by the husband.
32. On 25 September 1998 it appears that the husband had a further attendance on Mr Katsibardis at which the wife was not present.
33. It is at or about this date that the issue of sexual abuse of [T] first arose in any serious sense. It is, we think, important to examine the sequence of events so far as that is possible from the evidence in this regard.
34. It seems clear that on 25 September 1998 the wife had a conversation with [T]'s teacher, in which the wife complained that [T] was being emotionally and sexually abused by the husband.
35. Details of the cross-examination of [the school teacher] are set out in the judgment of Kay J at paragraph 211. Following this conversation, [the school teacher] drew the matter to the attention of the school principal, who made a formal notification to the Department of Family and Children Services.
36. It is, we think, clear that [the school teacher] had difficulty remembering the detail of this particular conversation, as is apparent from the cross-examination. It appears, as is noted by the trial Judge, that there were several conversations between the wife and [the school teacher] concerning alleged abuse of [T] and she had some difficulty in recalling precisely what was said on each occasion.
37. Further information as to the nature of the disclosure made by the wife to [the school teacher] on 25 September 1998 emerges from the report of Dr Lord, a Court appointed psychiatric expert, who notes that the Department file recorded a complaint by the principal of the children's school on 25 September that the husband had exposed himself to [T] and [S] with an erect penis. This was consistent with general allegations made by the wife of sexualised behaviour, but did not amount to the wife actually making a complaint of physical sexual abuse by the husband of the child.
38. It appears that the weekend after this conversation took place, the wife left the children in the care of the husband for four days while she attended a course in relation to her new age beliefs.
39. This fact is referred to by Kay J, we take it critically of the wife, although we note that the trial Judge did not make the same criticism. We think that a fairer assessment is that at that stage, the wife was expressing a generalised concern based upon what she said was the husband's unusual sexualised behaviour over a period. We do not think that at this

time the wife was approaching the matter upon the basis of the particular allegations of physical sexual abuse that were later made by [T].

40. His Honour's findings as to this matter appear at paragraph 55 of his judgment where he said:-

*“As a result of what the wife told her, [the school teacher] reported the matter to the Principal of the school. [The school teacher] believed the Principal of the school in turn reported the matter to the Department of Family and Children Services. It appears that the wife and [the school teacher] had more than one conversation about the husband's alleged abuse of the children. [the school teacher] referred to a conversation, where she suggested to the wife that she ask the child [T] to demonstrate what the husband had done to her. Subsequently the wife told her, that [T] had said that he had touched her everywhere. Also, during one conversation the wife told [the school teacher] that the husband would want to go into the shower with [T]. According to [the school teacher] the wife was alarmed and upset by this aspect of the husband's behaviour.*

41. The husband finally left the matrimonial home on 3 October 1998.

42. The Relationships Australia counsellor, Mr Katsibardis, made a telephone notification to the Department of his own volition on 13 October 1998 as he was of the opinion that the children were at risk of being abused. He did so independently of the wife. He presumably did so as a result of what he had been told by the husband in the course of his interviews with him. Later, on 11 January 1999, he provided a written report to the Department as part of the notification.

43. In written submissions to this Court, the Child Representative submitted (at para 32), and we agree, that:

*“It is plain that Mr Katsibardis, the Relationships Australia counsellor, who firstly counselled the parties and then subsequently (October – November 1998) counselled the husband, was pivotal in the process by which the Husband came to leave the home and the process by which the Department of Family and Children's Services and the Police, were notified of and then investigated the allegations of the child [T]. These statements were also pivotal in the formation of the wife's views concerning the child's disclosures.”*

44. On 11 October 1998, the wife gave a list of her concerns in relation to the husband concerning his sexualised behaviours to Mr Katsibardis, which was Exhibit H to her affidavit. None of these involved actual allegations of physical sexual abuse of the type later alleged by [T].

45. The fact that the husband may have made admissions of inappropriate sexual behaviour to Mr Katsibardis was later described by a psychiatrist, Dr W, as a situation of *folie a deux*, meaning, according to Dr W, that the husband had been induced by the actions of the wife and/or [T] to believe that he had been guilty of improper sexual behaviour towards the child and to make admissions accordingly. As hereafter appears, we find this evidence of Dr W to be fanciful.

46. As a result of the notification by Mr Katsibardis, the Department formally opened a file on 20 October 1998, some 7 days before [T] commenced to make detailed disclosures of sexual abuse to the wife.

47. On 20 October 1998, the husband and wife attended a general medical practitioner, Dr Cecchini, whom they had earlier consulted on 10 July 1998, when Dr Cecchini formed the view that the husband was suffering from depression and prescribed medication.

48. The husband had again attended him on 1 September 1998. On that occasion Dr Cecchini considered that his overall condition had improved.

49. On 20 October 1998, Dr Cecchini recorded that the parties referred to the fact of their attendance on Relationships Australia. During the consultation it appears that the wife referred to inappropriate sexual behaviour by the husband. The doctor said that there was no comment or strong reaction by the husband to the wife's statement. He detected no hostility between husband and wife, who appeared to him to be a couple trying to help each other and who appeared to be making a genuine attempt to resolve their difficulties.
50. The evidence of Dr Cecchini supports the view that the husband had made admissions of some inappropriate sexual behaviour to Mr Katsibardis, of which the wife was aware and that she was attempting to help him overcome the problem.
51. This again suggests that although the wife had expressed concerns to the school teacher on 25 September 1998, it was not until [T] made detailed disclosures to her on 27 - 28 October 1998 and in early November 1998 that she became extremely concerned about the matter and hostile to the husband.
52. Details of the wife's evidence as to the disclosures that were then made are summarised at paragraphs 58 to 61 of his Honour's judgment. It can be seen that they consisted of detailed allegations that the husband had felt [T]'s breasts and digitally penetrated her vagina on numerous occasions over many years.
53. [T] was interviewed by Departmental officers on 28 October 1998 and by Police on a number of subsequent occasions. As his Honour recounts, in addition to her allegations of sexual abuse of her by the husband, [T] also made allegations of sexual abuse of her by the husband's parents, sexual abuse by the husband directed towards [S] and sexual abuse by an uncle.
54. It appears that some months later, on 5 February 1999, [T] also told her mother that the husband had sexually abused [S].
55. Details of the Department's first interview with [T] are set out in paragraph 69 of his Honour's judgment. In the course of it [T] repeated the allegation that her father had digitally penetrated her vagina and felt her breasts and said that it had occurred "maybe ten times".
56. This interview was the subject of criticism by his Honour and Dr W, mainly, as we understand it, because the interviewer praised [T] for making the disclosure on several occasions. It is to be noted however that the praise was only offered after [T] had made the disclosure. The questions that led up to the disclosure were neutral.
57. Her statements to the Police on 4 November 1998 and 8 December 1998 are summarised at paragraph 71 and 72 of his Honour's judgment. In the statement of 8 November, she also alleged digital penetration of her vagina by her paternal grandparents on a number of occasions.
58. A signed statement by the child made at the Police Child Abuse Unit on 11 November 1998 is summarised at paragraph 73 of his Honour's judgment and repeats the allegation of multiple digital penetrations by her father.
59. The child [S] was also interviewed by officers of the Department on 29 October 1998, but made no disclosure of abuse.
60. On 4 November 1998, the husband was arrested by Police at the airport immediately prior to his anticipated departure to [the other country] and was then charged with various offences against [T].
61. The husband commenced these proceedings in the Family Court of Western Australia on 13 November 1998.

62. Between 30 December 1998 and 2 February 1999, the wife was hospitalised suffering from depression, which she considered was brought about the preceding events. She was treated for this condition by a psychiatrist, Dr Dixon, who also gave evidence before his Honour.
63. On 28 and 29 July 1999, [T] gave evidence in the District Court at Perth in relation to the charges brought against the husband. Her evidence was taken by means of closed circuit television from another room in the Courthouse. Details of her evidence in these proceedings are set out in paragraph 74 of his Honour's judgment. His Honour records that although in her evidence in chief the child answered questions put to her in a confident manner, and for the most part without hesitation, her demeanour changed in cross-examination. He said that on occasions in answer to questions she said that she could not remember or could not understand the question and eventually refused to answer any questions. He recorded that in re-examination she reverted to the confident manner of examination in chief.
64. In the result, the Prosecution filed a *nolle prosequi* and the prosecution was terminated. It may be of some significance that the charges were not dismissed. One would have thought that had the prosecuting authorities thought that the charges were without any foundation they would have sought dismissal.
65. His Honour referred to the fact that a Child Witness Preparation Officer, Ms Pattison, had given evidence that during the course of the child's evidence in the District Court she had become distressed because the cross-examiner did not believe what she was saying and was being mean to her.
66. Ms Pattison's evidence before his Honour was to the effect that she was present with the child when she was giving her evidence and had conducted a number of interviews with her prior to the hearing in order to prepare her for it. She also had the opportunity of observing and talking with the child during breaks in the proceedings.
67. She was the subject of a strong and we think unnecessary attack by Counsel for the husband during cross-examination. We think that any assessment of the child's evidence before the District Court should be made in light of Ms Pattison's evidence.
68. On any view it appears that [T] was subjected to an extremely wide ranging cross-examination in the District Court proceedings which extended to a detailed examination of the child and her mother's spiritual beliefs as well as the allegations of abuse made by the child. Ms Pattison described the cross-examination as very distressing to the child.
69. His Honour appears to have attached significance to his views as to the evidence given by the child in the District Court in making his finding that no sexual abuse had occurred. While we have reservations about his interpretation of her evidence, that particular finding is not under attack in this appeal.
70. However, the issue of the wife's attitude to the acceptance or otherwise of the validity of his Honour's findings that no sexual abuse occurred is of critical significance so far as this appeal is concerned. She was we think, unfairly criticised by his Honour for having described the child's evidence before the District Court in positive terms.
71. As we have mentioned in the District Court proceedings the child was extensively cross-examined about her knowledge of and involvement in spiritualism and related matters and her mother's involvement in the same. Again, we have difficulty understanding the relevance of these matters to the proceedings before his Honour or the District Court. However, it might go a long way towards explaining the child's reaction to the cross-examination in the District Court proceedings and her reaction to Dr Lord's subsequent

questioning.

72. In any event despite the opinion of Dr Lord, to which his Honour also refers, we think that the wife's interpretation of the child's evidence was open to her and should not have been a matter of criticism. In this regard we accept a submission of Counsel for the Child Representative that the reference to the change of the demeanour of the child in the District Court proceedings should be seen in the context of the entire process and the derisive manner in which the child was cross-examined about her and her mother's spiritual beliefs. We agree with the submission of the Child Representative that the evidence of Ms Pattison supports the view that it was the nature of the cross-examination that produced a negative reaction from the child and not any consciousness on her part that she had been caught out in telling lies.
73. We have no doubt that the giving of evidence against a father in proceedings such as this would constitute a traumatic experience for any child and the traumatic nature of the experience could only be exacerbated by a searching cross-examination.
74. While it may be necessary for a child to give evidence in order to determine whether guilt has been established beyond reasonable doubt, it does not surprise us that a mother might take a different view of the performance of a child witness in such circumstances than would experienced lawyers and psychiatrists or a trial judge.
75. Between the time of separation and the trial there were a number of interlocutory disputes concerning contact. In fact no contact took place between the husband and [T] from the date of separation until the time of trial except for one occasion when they met at the behest of the Court appointed expert Dr Lord.

#### **EVENTS LEADING UP TO THE TRIAL**

76. Counsel for the Child Representative submitted that this case was brought to trial and the trial was conducted in a way that was only likely to lead to unfairness to one or more of the parties and which was less than helpful to the trial Judge.
77. The trial was listed to commence and did commence on 7 February 2000.
78. The wife's affidavit and the affidavits of the bulk of her witnesses were sworn and filed in the period of 21 to 24 January 2000 and similar material for the husband was sworn and filed in the period of 27 to 31 January 2000.
79. Importantly, an outline of the evidence of the husband's expert, Dr W was not made available until 11 February 2000, four days after the trial had started.
80. It is apparent that the above matters and particularly the late production of an outline of the evidence of Dr W are of some significance. His Honour, in the course of his judgment, placed considerable significance upon the evidence of Dr W and we think it extremely unsatisfactory that the production of his report took place at such a late stage.

#### **THE TRIAL**

81. The wife's evidence on the issue of acceptance or otherwise of a finding that no sexual abuse occurred is conveniently set out in the reasons for judgment of Kay J at paragraphs 265-270.
82. Dr Lord's evidence on this issue is also summarised in paragraphs 271-2 of the reasons for judgment of Kay J.

## **The Findings of the trial Judge**

83. The trial Judge's findings as to residency are set out in paragraph 298 of his Judgment.

84. These may be summarised as follows:-

- As to credibility, his Honour rejected an attack on the husband's credibility by counsel for the wife and the child representative, and assessed him as a reliable witness.
- He thought that the wife was not a reliable witness and that in relation to some matters, her evidence was exaggerated.
- He thought that [T] was a most unreliable witness, not only because of the manner in which she gave her evidence in the District Court proceedings, but also because of the conflicting content and contents of the various statements that she had made.
- He accepted the evidence of the paternal grandmother.
- He described Dr Lord as an objective and cautious witness and considered that Dr W approached his task with objectivity.
- He rejected the evidence of the wife's psychiatrist, Dr Dixon as lacking in objectivity.
- He found that the husband did not sexually abuse [T] or [S].
- He found that the paternal grandparents did not sexually abuse [T].
- He found that the children are not at risk of sexual abuse from the husband or his parents.
- He found that the wife's New Age and/or spiritual beliefs and practices were relevant to the effect, if any, those beliefs and practices had, or were likely to have on the children and the wife's ability to properly and appropriately provide for their physical and other needs, particularly their emotional needs. In this context he referred to the wife's acceptance of the proposition that some of the beliefs that she held in 1997-8 were bizarre and his agreement with that proposition.
- Thereafter, his Honour made detailed findings relating to this issue which are set out in subparagraphs 3.1 to 6.1 of paragraph 298. These include findings as to the involvement by the wife of [T] in these beliefs leading to a finding that the wife's beliefs about [T]'s powers had given rise to an inappropriate balance of power in her relationship with [T]. He said that unless and until the wife had a change of view and attitude, the imbalance was likely to continue to affect her ability to care for and control the child.
- In conclusion on this issue his Honour said at AB 111-113:-

*“6.1 In my view, the child [T]’s allegations of sexual abuse should be viewed not in isolation, but in the context of what had happened in the child’s life during 1997 and 1998.*

*6.2 Contrary to Dr Dixon’s opinion, I think it more likely than not, there was a connection between the child [T]’s involvement in New Age beliefs and spiritual matters and her allegations of sexual abuse. In relation to this aspect of the matter I accept the evidence of Dr W.*

*6.3 It is apparent that whatever the child [T]’s claims, in relation to sexual abuse and however exaggerated and unlikely they might seem, the wife accepted and continued to accept the accuracy and truthfulness of such claims. In this context I note that the wife accepted, without demur the child’s claim to have remembered many occasions of sexual abuse numbering in the hundreds. The complete lack of objectivity of the wife, in relation to the child [T]’s claims relating to sexual abuse, may in part be illustrated by the wife’s*

*assessment of the manner in which the child gave her evidence in the District Court proceedings. As I have noted the wife stated that she was struck by the child's honesty and the straightforwardness of her answers. I am of the view, that Dr Lord's assessment of the manner in which the child gave evidence was a more accurate one namely evasive, defensive, challenging and hostile.*

*6.4 If one had any doubts about the reliability of the allegations of sexual abuse made by the child [T], one need go no further than to consider her allegations made against [the paternal grandparents]. It is relevant to note again, that the allegations went beyond mere touching. Thus the child thought that [the paternal grandmother] had digitally penetrated her.*

*6.5 Counsel for the wife submitted, that the wife's position in relation to [the paternal grandparents], was and had been ambivalent. Whilst the wife believed the disclosures made by the child [T], she accepted that they defied logic and that she had not seen any behaviour by [the paternal grandparents] towards the child that would indicate abuse.*

*6.6 The wife's attitude, to the child's allegations of sexual abuse made against [the paternal grandparents], provides an insight into the wife's present beliefs and attitudes. On the one hand it was submitted she found it difficult to believe that [the paternal grandparents] had sexually abused the child. On the other hand the wife was unable or unwilling to accept the child had fabricated these allegations. It is also relevant to note, the wife's statement in Dr Dixon's report dated 24 January 2000 to the effect that [the paternal grandparents] condoned sexual abuse. The contents of that report, which were settled by the wife, indicates the strength of the wife's views about [the paternal grandparents] being involved in the sexual abuse of the child [T]. In the circumstances there must be some doubt about the concession made by the wife, via her Counsel, to the effect that the allegation against [the paternal grandparents] was only of inappropriate touching."*

85. We would interpose at this point, that we think that the trial Judge overstated the wife's involvement in the report prepared by Dr Dixon when he said that the contents of the report were "settled" by the wife. As we understand it, Dr Dixon consulted with the wife concerning aspects of the history that he recounted in his report and the wife corrected Dr Dixon in certain respects.

86. Turning again to the trial Judge's reasons, in the next paragraphs he said:-

*7.1 "It is apparent from the evidence, that from the beginning of the marriage, the husband had a fairly open attitude to nudity within the house. The evidence led me to conclude, that the wife, after some initial reservations, adopted the practices of the husband. I was also satisfied that after the children were born, the parties continued to behave in a fairly open manner, in relation to this aspect of their lives.*

*7.2 I think it more likely than not, that the genesis for the child's [T]'s allegations of sexual abuse are to be found in one or more of the following;*

*(a) the belief systems adopted by the wife in 1997 and 1998 and passed on to the child*

*(b) a sexual aspect of those belief systems, namely the wife's growing preoccupation with aspects of those systems which might fairly be described as appearing to have a sexual component*

*(c) a change of view by the wife, which she probably passed onto the child [T], in relation to conduct and in particular conduct by the husband, which she and the child had previously*

*regarded as acceptable*

*(d) a lack of sensitivity by the husband to changing attitudes by the wife and the child [T], in relation to conduct, which was previously regarded as normal.”*

- After finding that the reason for the allegations of sexual abuse having been made arose from a combination of the various factors including the wife's new age beliefs and her unjustified concerns in relation to the husband's sexual behaviour towards her, his Honour concluded, at AB 113 – 115:-

*“7.8 I am not satisfied that the wife maliciously planted into the child [T]’s mind the belief that the husband had sexually abused her. I think it more likely the implant of this belief, related to the wife’s adoption of an interest in New Age beliefs and Spiritualism. In other words, what the wife did, she did deliberately, but not maliciously. I accept that in her own mind, the wife has probably always acted in what she believed to be in the best interests of the children.*

*7.9 I accept it is possible, that the child [T] made the complaint of sexual abuse either believing it, or to serve some perceived purpose of her own, and /or believing it would in some way assist the wife.*

*7.10 I note that the husband was not cross examined about any of the most serious allegations of sexual abuse made by the child [T]. Likewise [the paternal grandparents] were not cross examined about any of the allegations of sexual abuse made against them by the child [T].*

*8. Counsel for the separate representative made the point, that the allegations of sexual abuse having being made by the child [T], the wife thereafter acted under the advice and guidance of amongst others, the Department of Family and Children’s Services, the West Australian Police Service and professional counsellors. In other words, it was submitted in effect, that the wife could not be blamed for following appropriate professional advice. The problem with this submission is that it overlooks the fact, that the wife did not provide anyone with the complete picture. In particular the wife did not acquaint anyone with the fact, that both she and the child had entertained belief systems which, on her own admission, were in some respect bizarre. The wife’s failure to provide the various parties with all relevant facts was due no doubt to her being unable, or unwilling to accept even the possibility of there being a relationship between such beliefs and the child’s allegations.*

*9. I have no doubt that in the context of this particular case, the method of questioning of the child by Ms Crerar and Ms Hill and probably the method of questioning adopted by police officers at the Police Child Abuse Unit, was inappropriate in that it probably reinforced and encouraged the child to make false and exaggerated statements, relating to the husband’s alleged sexual abuse of her.*

*10. The husband and wife are each genuinely concerned about the welfare of the children. I am satisfied that they have in the past, in their own way, attempted to discharge their obligations as parents to the best of their ability. Unfortunately in the wife’s case, her ability to properly and appropriately discharge her obligations to the children, has in my view been adversely affected by her involvement in New Age beliefs and her involvement of the child [T] in those beliefs, in the manner in which I have previously referred.*



11. It is apparent from the evidence, that the wishes of the children [T] and [S] are that they continue to reside with the wife. Having regard to their ages, it is appropriate that some weight be given to those wishes. However the weight to be given to those wishes must be balanced against other matters relevant to the welfare of the children.

• His Honour then gave the following reasons for making the order changing the residence of the children, at AB 116:-

*“13.3 The wife had a very negative attitude towards the husband. That she should have this attitude is not surprising, having regard to the fact she believed and continues to believe, that the husband sexually abused the children [T] and [S]. The extent of the wife’s negativity towards the husband is in part illustrated by the wife’s many complaints and criticisms of the husband contained in her first affidavit.*

*13.4 The wife’s negative attitude towards the husband has undoubtedly affected his relationship with the child [T]. To date it does not appear to have significantly affected the relationship between the husband and the other children. However if the children continue to reside with the wife, I think it more likely than not, that in the medium to long term, the wife’s attitude towards the husband will not only continue to adversely impact on his relationship with the child [T], but could also adversely impact on his relationship with the children [S] and [O].*

*13.5 As I have already noted according to Dr Lord, the husband spoke positively about the wife and demonstrated no anger or bitterness towards her. However my assessment of the husband leads me to conclude, that probably his attitude towards the wife is somewhat more negative and distrustful than he would have me believe. However relatively speaking I am of the view, that the degree of negativity which he holds towards him. I also think, that with the assistance of counselling, there is a reasonable chance that negative feelings the husband feels towards the wife will ameliorate at least to a degree.*

*13.6 In the result I conclude that the husband, more likely than the wife, to be able to promote a positive relationship between the children and the non-residence parent.”*

87. His Honour then turned to the issue of the effect of the wife's belief in the truth of the allegations of sexual abuse. He had earlier noted that when cross examined about this issue by the child representative, the wife after a pause, said that she would always have mixed feelings and that she would take some time to accept such a finding. She said she would have great difficulty obeying orders for contact made in favour of the husband, but would do so.

88. His Honour's findings on this issue were as follows, at AB 118 – 119:-

*“15.4 The wife continues to accept, without reservation, the truth and accuracy of the child [T]’s allegations, that she was sexually abused by the husband. For so long as the wife retains her views, in relation to the child [T]’s allegations of sexual abuse, I think it unlikely she will be able to appropriately and properly provide for the children’s, and in particular the child [T]’s emotional needs. For as long the wife retains these views, it is likely those views will effect (sic) not only the child [T], but all of the children.*

*15.5 In particular, for so long as the wife holds these views, it is unlikely she will make any attempt to dissuade the child [T] from her belief that she has been subjected to sexual abuse by the husband and [the paternal grandparents]. In relation to this aspect of the matter I again note the wife’s evidence in relation to the child [T]’s claims relating to sexual abuse,*

*namely that what mattered was what the child believed that she would never encourage the child to think otherwise. Given the fact that I accept the wife's concern is well intentioned, it is relevant to note Dr W' comment, that she was likely to be persistent and persuasive in her beliefs. In such an environment, it is likely the children [S] and [O] would grow up believing that their sister had been sexually abused by their father and paternal grandparents*

*15.6 For so long as the wife continues to maintain her beliefs in relation to sexual abuse of the child [T], not only is it unlikely she will do anything to persuade the child from believing she had been sexually abused, I think it more likely than not, that she will provide positive reinforcement for the child's beliefs. I accept the evidence of Dr Lord and Dr W to the effect that the perpetration of false allegations of sexual abuse had great potential to damage the children and their interpersonal relationships."*

• His Honour said further on this issue, at AB 120:-

*"17.4 On behalf of the wife it was submitted, that her position was that if the Court found the husband had not digitally penetrated the child [T] and if he was to show appropriate respect and treat the children in a dignified and neutral manner, she would accept that decision, albeit with difficulty. In relation to this aspect of the matter I think it relevant to note that the wife, having heard all the evidence presented at the trial, remained of the same view, namely that the husband had sexually abused the child [T] and the child [S]. Given the rigidity with which the wife holds these views, I think it unlikely in the short to medium term, that she will change them and this being the case, I think it unlikely, in the short to medium term at least, that she will accept my findings that the children [T] and [S] have not been sexually abused by the husband and [the paternal grandparents]."* (our underlining)

• On the issue of contact he said at AB 122:-

*"303 It is appropriate that the wife have contact with the children on a regular basis. However having regard to the wife's attitude to the husband and in particular having regard to the fact that she continues to believe, without hesitation, the child [T]'s allegations that the husband sexually abused her, I am of the view that in the short term at least, the wife's contact with the children should be supervised. I reach this conclusion, because having regard to the wife's beliefs about and attitude towards the husband, unsupervised contact would expose the children to the risk of inaccurate, inappropriate and critical comments by the wife about the husband. Unless and until the wife modifies her beliefs and attitudes, the degree of supervision should be such as to monitor her conversations with the children. The monitor of the conversations should ensure that the wife not make statements, which would have the effect of reinforcing the child [T]'s beliefs that the husband sexually abused her."*

### **The Further Hearing on 3 April 2000**

89. The evidence concluded on 18 February 2000 and the matter was adjourned to 3 April 2000 to enable the parties to lodge written submissions.

90. At the hearing an exchange took place between his Honour and counsel for the wife, the full details of which appear at paragraph 254 of the reasons for judgment of Kay J. The substance of it was that his Honour pressed Counsel to indicate whether the wife still maintained the position that he had at trial, namely that the husband had sexually abused the child [T]. Counsel for the wife said that she did so. This appears to have provided the basis for his Honour's comments at paragraph 17.4 of the trial judgment which we have underlined.

## **THE APPEAL**

91. The two major issues raised on the appeal were first that his Honour erred in concluding in the circumstances that the wife was unlikely to be able to move from her belief in the truth of the allegations made by [T].
92. The second was that his Honour gave undue weight to the evidence of Dr W in arriving at his conclusions.

### **The Application by the W.A. Department of Family Services**

93. Before dealing with the first issue it is necessary to deal with an application made on the hearing of the appeal by Dr Dickey QC, who appeared for the Department of Family and Children's Services, seeking leave to introduce an affidavit sworn by Mr Katsibardis, as to discussions between himself and the parties in 1998.
94. The submissions of the Child Representative highlight the fact that endeavours had been made since March 1999 to bring before the Court, information from Relationships Australia and Mr Katsibardis concerning alleged admissions by the husband of inappropriate behaviour which had led to the abuse notifications and charges against him.
95. Subsequently, Relationships Australia raised the claim of privilege under s19 of the [Family Law Act 1975](#) to oppose the production of files relating to the matter and on 13 May 1999, at the initial hearing of the application, a Magistrate of the Family Court of Western Australia indicated the subpoena would not be granted. On May June 1999, the subpoena was withdrawn with costs against the Child Representative.
96. In an affidavit sworn by Mr Ian Allen, a senior legal officer with the Department, it was asserted that Mr Katsibardis's affidavit disclosed matters highly relevant to the decision as to which parent should be the care of the children. This related to the interviews between Mr Katsibardis and the parties to which we have previously referred. We did not inspect the affidavit of Mr Katsibardis as Mr Dowding for the husband submitted that we should determine the preliminary point of its admissibility before inspecting it.
97. In the event we refused Dr Dickey's application, indicating that we would deliver our reasons as part of our reasons for decision on the appeal. Dr Dickey then sought leave to withdraw from the proceedings but indicated that he proposed to seek instructions as to whether to ask the Court to state a case to the High Court of Australia when our reasons became available.
98. As to the reasons for refusing the applications, we agree with and adopt the reasons of Kay J set out at paragraphs 219-226 of his reasons for decision. We would however add the following remarks.
99. In our view, it is most unfortunate that the legislation contains no exception to the legislative prohibition to the giving of such evidence in circumstances where its non-receipt may impinge on the best interests of children. This means that a court that is required to make decisions treating the best interests of children as the paramount consideration in determining issues such as residence and contact must do so without having any knowledge of important and relevant facts that could affect such a decision.
100. In the present case we have no knowledge as to the nature of Mr Katsibardis's evidence save for what appears in Mr Allen's affidavit and Dr Lord's report. We do however know that the Department considered it to be

of sufficient importance to attempt to introduce it on the hearing of the appeal.

101. Dr Lord, in his report says at AB148 :-

*"At interview, [the husband] denied that he had ever sexually assaulted a child. However, a document on the record of the Department of Family and Children's services alleges that [the husband], himself, disclosed sexual behaviours that may be considered unusual if not aberrant."*

102. In the present case the trial Judge made positive findings that the husband had not sexually abused the children and that he had not been involved in aberrant sexual behaviour. It is obvious that he did so without the benefit of Mr Katsibardis's evidence.

**Whether the trial Judge's discretion miscarried in finding that the wife was unlikely to move from her belief in the truth of the allegations made by [T].**

103. As noted above this was the first major issue raised in the appeal.

104. The trial Judge's reliance upon the existence of evidence to the contrary of the wife's beliefs, and the fact that she knew of its content is, we think, of critical significance in analysing whether the wife, up to the date of delivery of the judgment at least and probably later, can be criticised for continuing to believe that there was substance in [T]'s allegations.

105. Perhaps more importantly, it casts considerable doubt upon his Honour's finding that her continued acceptance of the truth and accuracy of [T]'s allegations and that she is unlikely in the short and medium term to accept his Honour's findings provides a sound reason for altering the residence of all of the children.

106. Another troublesome aspect in this regard is his Honour's handling of the issue of the support given to the wife's position by the Department and other professional advisors. It was put on her behalf that she could hardly be criticised for maintaining a position that sexual abuse had probably occurred when that was the position of the Department and other professionals.

107. His Honour discounted this upon the basis that the wife had failed to disclose information about her New Age spiritual beliefs and that had she done so, the Departmental and professional position may have been different.

108. It seems to us that there are two answers to this proposition.

109. The first is that [T] was extensively cross-examined about these matters in the District Court proceedings and the Department would have been well aware of the issue.

110. Secondly, and perhaps of more significance, the only person who saw any connection between the wife's beliefs and the allegations of sexual abuse was Dr W, whose evidence in this regard was eventually accepted by his Honour. No other professional witness did so and there was no reason for the wife to have disclosed the same. As hereafter appears, we think that Dr W' evidence was fundamentally flawed.

111. Even if this was not the case, the wife can hardly have been expected to make a disclosure of a matter that she, and all other relevant professionals, thought to be

entirely irrelevant. His Honour in effect conceded this but because he accepted the opinion of Dr W that it was relevant, he therefore thought that the approach of the other professionals was misguided. If this second alternative explanation was the case we consider that it led the trial Judge into error.

112. The next matter that we think gives rise to concern about his Honour's findings as to the wife's acceptance or otherwise of his decision relates in part to the events of 3 April 2000 and also to earlier events during the trial.
113. His Honour by the 3 April 2000 appears to have thought that it was so obvious that there was no substance in the allegations of sexual abuse by the husband of [T] that the wife should have accepted that view. However, this ignores the fact that the wife's whole case had been predicated upon the contrary proposition.
114. His Honour had not given his decision at that time, and the wife had no way of knowing that he would disbelieve her and [T] and believe the husband. Similarly, she did not know that his Honour would accept the evidence of Dr W as to the relevance of her beliefs as having brought about false allegations of sexual abuse by [T] or that he would discount the evidence of Dr Dixon, which was strongly contrary to the evidence of Dr W.
115. In our view, his Honour placed the wife's Counsel and the wife in an impossible position on 3 April 2000. In effect, the wife was being called upon to abandon her case before it had been decided. It was a case that not only been pursued by herself, but had been supported by the Department, as is evidenced by the Department's attempted involvement in this appeal, which was in effect an attempt to further the wife's case.
116. We cannot see how a trial Judge would usually be assisted by pressing Counsel for a party at the close of evidence but before the giving of judgment, whether that party still maintains his or her position at trial. Indeed, we consider such an approach may cause unfairness and inappropriate inferences being drawn by the trial Judge. Further, it seems to us that if his Honour wished to receive evidence on the subject – and we do not say that it could have assisted him - the appropriate course would have been for the wife to give sworn evidence with the benefit of her Counsel at liberty to raise objections with the trial Judge.
117. Accordingly and, particularly in the circumstances of this case, we therefore think that it was quite unfair to the wife for his Honour to have formed a view that she would not accept his findings in the circumstances that prevailed on 3 April 2000 or indeed during the trial.
118. His Honour specifically found that she had not acted maliciously in the matter, and it follows that she must be regarded as having acted *bona fide* in presenting her case. The most adverse finding that his Honour made against her was of exaggerating her evidence, and this appears to have been in relation to the issue of her beliefs and the involvement of [T] in them.
119. We have already indicated that we do not think that his Honour should have drawn an adverse inference against the wife from the evidence that [T] gave in the District Court.
120. In all the circumstances, we consider that his Honour's discretion miscarried and that this aspect of the wife's appeal should succeed.
121. During the course of argument an issue was raised, arising from the submissions of the Child Representative, as to whether his Honour should have adopted the course taken by Kay J at first instance in what was on appeal known as *R v B* ([1996](#)) [FLC 92-658](#). Kay J there had made a provisional order in favour of the wife in order to determine

whether she would accept the findings.

122. That was a much stronger case than this one in that Kay J found that the wife had acted maliciously in making allegations as the child sexual abuse.
123. While we think that such an order might have been preferable to the one made by his Honour in the present case, we agree with Kay J in his reasons for judgment in this case, that this was a discretionary matter for his Honour. Further, this case is complicated as we have said, by the Departmental and professional support for the wife's position. It may be that in these circumstances, particularly having regard to the attitude of [T] to the husband, that such an order would have been inappropriate.
124. However this may be, in our view, his Honour's discretion did miscarry and it follows that this ground of the appeal is made out.

### **Whether the trial Judge Gave Undue Weight to the Evidence of Dr W**

125. In dealing with this second principal argument of the appellant, we think it is desirable to first summarise the expert evidence.

#### **a) Dr Lord**

126. Dr Lord, a Court appointed psychiatric expert, delivered a report dated 6 December 1999 and also gave evidence. His report was a thorough and comprehensive one albeit that his capacity to make a proper assessment of [T] was obviously made more difficult by the hostile attitude of the child to the process.
127. Dr Lord's conclusions, which were accepted by the trial Judge, are set out in his judgment at paragraph 256.

128. On the issue of sexual abuse, Dr Lord recorded that there was much contradictory material. Significantly he recorded that:-

*“At interview, [the husband] denied that he had ever sexually assaulted a child. However, a document on the record of the Department of Family and Children's Service alleges that [the husband], himself, disclosed sexual behaviours that may be considered unusual if not aberrant.”*

129. Dr Lord went on to refer to the fact that at interview no child made any disclosure of sexual molestation to him, but that [T] had previously made such disclosures on a number of occasions and to different parties. He also commented that there would appear to be inconsistency between the disclosures of sexual abuse made by [T] and her evidence given in the District Court.

130. Dr Lord described his interviews with [T] as follows:-

*“[T] came, when invited, and without prompting to the interview room her facial expression was impassive and the general impression she gave was of resignation. However, during the interview, [T] sat quite comfortably in an office chair. She did not appear to be restless or discomforted. Generally speech was to the point. However, in the final stages of the interview [T] responded to very few statements or questions. Whilst [T] demonstrated a range of affective responses, generally the impression was reserved, possibly defensiveness. [T] rarely*

*smiled or laughed. Generally, eye contact could be initiated. It was not always readily maintained and was often withdrawn. There was no obvious evidence of impairment to concentration, perception or thought.”*

131. Dr Lord then describes engaging [T] in general conversation and commented that during this that she was most spontaneous. He said:-

*“Initially, in discussing father, [T]’s attitude was of interest and animation. It seemed almost as though she missed him. She certainly did not appear to be distressed or angry. However when [T] was subsequently asked whether anyone had ever done bad or mean things to her, her attitude and behaviour together with verbal responses, changed completely. [T] sat in her chair and looked through half closed eyes. It was almost as though she was attempting to stare someone out. No matter how questions or statements were put to her, a response could not be elicited. [T] did not appear to be upset or sad. It was impossible to understand what was happening. It seemed as though [T] was either challenging the interview process, itself, or possibly withdrawing into herself. Her reactions were most puzzling.*

*Eventually, after various suggestions were put to her, [T] responded that she was not sad or unhappy she was feeling a little bit cross. This “crossness” was to do with her frustration at being unable to find the exact response to the statements or questions being put to her.*

*Accordingly, matters put to [T] were expressed much more simply. However she continued to avoid verbal response. She also withdrew eye contact and it became as though she had gone completely into herself.*

*[T] could not be encouraged to discuss notions of good and bad touching. She could not be encouraged to talk about private parts. [T] made no disclosure of inappropriate touching or sexual assault. [T] did not appear to be distressed. Her attitude was of distance and detachment.”*

132. When she was interviewed again, the doctor records the following:-

*“When interviewed, alone, for a second time on 18 October 1999, eye contact could not be made with the child. [T]’s facial expression was a serious one - possibly sullen. [T] could not be encouraged to engage in conversation. After playing with a ring on her finger for a period of time, [T] began to play with her fingers themselves. It was almost as though she had detached, gone into a daydream, or into herself. Occasionally, a flicker of facial expression suggested that she may have comprehended a statement or question.”*

133. He records that when it became clear that [T] could not be engaged in interaction, her mother was invited to come in, at which point the child responded similarly to her mother’s questions except at one point saying “Can I kick you?”. Dr Lord commented :-

*“It seemed almost as though the child was angry with both adults and behaving in defiant and challenging ways. These behaviours were puzzling in the context of a child who is supported by a mother, having made very serious allegations about father and now presented*

*with an opportunity to express wishes to the Court. It was impossible to make any sense of the child's behaviour especially in the absence of any indication of apprehension, sadness or distress."*

134. Dr Lord described an observation of [T] in the company of her two younger sisters and mother following this interview and the fact that she appeared to be withdrawn.

Subsequently, on the 25 October 1999, the doctor observed [T] in interaction with her two younger sisters and father. He said of the three children, [T] was the most reserved, but was not reluctant to enter the interview room where [the husband] was waiting and chose to sit on the chair next to him. He described the interactions between the children and their father as animated and comfortable, [T]'s reactions being similar to that of her younger sisters.

135. It is perhaps not without significance that these observations were made prior to [T] being interviewed by Dr Lord as distinct from the previous occasion of the 18 October 1999 when the interactions observed took place after the interview.

136. Dr Lord recorded the following as to his interview with [T] on 25 October:-

*"At a subsequent interview, alone, on 25<sup>th</sup> October 1999 eye contact with [T] was made initially and she appeared to be listening. However, when [T] was asked questions about the activities with father she appeared to go into a trance. Her eyelids lowered, her facial expression became a more distant one and she did not respond to questions or statements. This continued for some minutes. [T] then appeared to become alert and oriented again and asked what other questions she would have to answer. [T] explained that mother had told her that she would be asked some questions and she wanted to know what they were. It was explained to [T] that she had already been asked some questions and that she had not responded to them. [T] was also reminded that she had an opportunity to express her views about a range of matters previously and that she had chosen not. [T] then appeared to go back into a trance like state and could not be encouraged to respond. [T] remained in a trance like state until mother (who was invited into the interview room) spoke to her in Hebrew."*

137. The doctor records that [T] failed to attend further interviews scheduled on 27 October 1999, one of which was to include observation of [T] and her younger sisters with the paternal grandparents. He said that Mrs [W] explained that she had been unable to persuade [T] to come with the others and that she had been extremely upset and very distressed after the interviews on 25 October 1999.

138. In his conclusions, Dr Lord said:-

*"Whilst [T] had every opportunity to confirm her previous disclosures as to sexual abuse as perpetrated by father and other relatives, she chose not to do this. It is possible that the withdrawal of [T] into herself, at times, and her challenging and somewhat defiance stand at other times reflected an unwillingness to reconsider traumatic experiences. It is also possible, though, that the child's responses were consistent with those of an individual unwilling to acknowledge the discovery of fabrication. The possibility of fabrication may also assist understanding of the apparent anger directed by [T] towards mother and the enjoyment clearly demonstrated by the child in interactions with father."*

139. We have some concerns about reading too much into the reaction of [T] to these interviews by Dr Lord. This child had already been subjected to departmental and police interviews and a searching and unpleasant experience in the witness box. With all respect to Dr Lord, we feel that his interviews at this stage bordered upon institutional abuse of the child insofar as they sought to investigate her allegations. He can hardly be



criticised for this however as he had been appointed by the Court to do so.

140. We consider that by this time, the desirability of such an investigation was well past and the interviews would have been better directed to an assessment of the relationship between the children and the parents and other significant family members. The continued investigation of the sexual abuse allegations by Dr Lord coloured in our view, the value of his other observations.

#### **b) Dr Dixon**

141. Dr Dixon was called on behalf of the wife. He was the psychiatrist who treated the wife in therapy. He had not seen the child [T] or [the husband] but he had seen the wife on some fifteen occasions in the course of treatment.

142. He was subjected to extensive cross-examination about the notes he had taken on the matters that the wife had disclosed to him, the cross-examination being largely directed to the issue of her spiritual beliefs. Again we think that this issue was given far too much emphasis in this case. Its relevance was connected only by the evidence of Dr W, which we consider to have been fundamentally flawed.

143. As Kay J records, when asked to comment about Dr W' linkage of the child's assertions and the wife's new age beliefs, Dr Dixon said:

*"I just can't see that there is anything remotely connecting them, and certainly, nothing sinister, as has been suggested by Dr W (sic) and therefore, the suggestion that the children should be removed from their mother, never to see her again, I feel, is a totally preposterous suggestion, and I feel that, if anyone attempted that, then the likely thing would be Family and Children's Services would move in, and make them wards of the State and they would take control, but that's my own personal view. I haven't discussed that with anyone."*

144. In the event, his Honour completely rejected Dr Dixon's evidence in the following terms:-

*"A careful consideration of Dr Dixon's evidence led me to conclude, that even allowing for the fact that the wife had been and was in fact his patient, he lacked the objectivity normally found in a specialist medical witness. My assessment of Dr Dixon was that his objectivity was significantly clouded by his completely uncritical acceptance of the history of the matter, as related to him by the wife. The fact that Dr Dixon amended his report dated 24 January 2000 in consultation with the wife, is also a matter of concern in relation to his objectivity."*

#### **c) Dr W**

145. It is important to note some features to Dr W' involvement in the case which we think should have led to his evidence being regarded by his Honour with considerable reservation.

146. Firstly, that Dr W had been brought from New South Wales in order to support [the husband's] case. It is perhaps not unreasonable to wonder why such expertise was not tapped at a much earlier stage and why no such expertise is available in Perth particularly in the context of the appointment of a court expert.

147. Secondly, Dr W did not have the opportunity of having the husband, the wife and the children attend on him. We think that there are grave dangers in reliance upon expert

evidence given in such circumstances. When we examined the transcript of his evidence we considered that there was even greater cause for reservation, as hereafter appears.

148. These comments should not be interpreted as necessarily involving a personal attack upon Dr W but rather as a criticism of the system of calling expert witnesses as it presently operates in this jurisdiction.
149. In a chapter titled “Problems Relating to the Expert Witness in Personal Injury Cases”, appearing in Harold H. Glass (Ed.) (1970) *Seminars on Evidence*, The Law Book Company Ltd, Mr. Gordon J. Samuels (as he then was) said:  
*“The criticism made of the expert witness may be justified. But, in justice, it should be directed not at the witness himself but at the role which the lawyers have forced him to adopt. It was they who originally altered his function from that of an assessor to that of a witness; and it is not his own corruption which had brought him into low repute, but the circumstances in which this function has to be discharged. The allegation of undue adherence to his client’s cause is made by those have created and who perpetuate the forensic techniques to which he has been forced to adapt himself. It is not the expert’s own choice to be a partisan but a consequence of the adversary system in which he has to play a part.”*
150. In the present case, before the advent of Dr W, there were in the offing a number of expert witnesses including a court appointed expert, Dr. Lord.
151. It appears likely that the husband and his advisers saw that there were a number of substantial weaknesses in his case. These included the fact that he had made damaging albeit inadmissible admissions to Mr. Katsibardis. They also included the fact that no expert witness was able to form any conclusion as to why the child should have made unwarranted allegations of sexual abuse.
152. In these circumstances, the husband faced a substantial risk that the Court, even if it found that the allegations of sexual abuse had not been made out, would still find that there was an unacceptable risk to the child in her either residing with the husband or in his having contact with her and the other children except in a supervised fashion, because of the possibility that abuse might have occurred.
153. The stakes were high and the obvious forensic solution lay in the selection of an appropriate forensic expert who might redress the balance in the husband’s favour.
154. In the context of normal adversarial litigation, this is a well recognised and perhaps acceptable approach. In a jurisdiction where the best interests of the child are the paramount consideration, such an approach is less satisfactory.
155. Adding to these problems in the present case, is the fact that by the stage at which the expert evidence was first foreshadowed, the trial had been running for four days.
156. As we have said, Dr W saw neither of the parties and none of the children and yet arrived at damaging conclusions about one of the parties, who happened to be on the opposite side to the party who commissioned him.
157. This brings to mind the statement in *Lord Arbinger v Ashton* [\(1873\) 17 LR Eq 358](#) at 374 that:  
*“Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual that we constantly see persons, instead of considering themselves as witnesses, rather consider themselves as the paid agents of the person who employs them.”*
158. That impression persists today amongst the Australian judiciary.

159. In July 1999, The Australian Institute of Judicial Administration published a survey of Australian judges by Ian Freckelton, Prasuna Reddy, and Hugh Selby titled *Australian Judicial Perspectives on Expert Evidence: An Empirical Study*. We share the authors' view (at para 1.1 of their Executive Summary) that:

*“the perspective of the judiciary is important because judges, more than any other participants in the civil, family law and criminal justice systems, consistently see expert witnesses and reports and have an opportunity to evaluate them from a dispassionate standpoint.”*

160. Relevantly, the Australian Law Reform Commission Report No 89 *Managing Justice – A review of the federal civil justice system* released last year, noted (at para 8.159) that a comparative analysis made clear that:

*“... the Family Court is much more directly involved than most other courts in the way in which expert evidence is collected and presented to it.”*

161. Freckelton *et al*'s sample of 244 judges amounted to just over half of all those approached and were thought to represent approximately 60% of trial Judges. The results were conveniently summarised in the following way at para 6.95 of the *Managing Justice Report*:

*“most judges responding to the survey questionnaire had occasionally encountered ‘bias’ on the part of experts. Nearly nine out of ten judges said that had encountered ‘partisanship’ in expert witnesses, and nearly half considered that such partisanship was a significant problem for the quality of fact-finding in their court”* (footnotes omitted).

162. Freckelton *et al* commented (at para 1.2 of their Executive Summary):

*“... the forensic reality is that experts, especially in civil and family litigation, are retained by one party which is intent upon winning the case, or, if that is not feasible, upon minimising the extent of their loss. Each party pays for the experts of its choice, selecting them on the basis of the extent to which, by opinions and the way that they express them, the experts will advance the party's contentions (sic) case. Selection of the expert witnesses is not generated by a dispassionate quest for truth by either courts/tribunals or the parties.”*

163. In an article by Sperling J presented at the Supreme Court of New South Wales Annual Conference in 1999 and published as “Expert Evidence: The Problem of Bias and Other Things” (2000) 4 *The Judicial Review* 429, his Honour observed at 432:

*“The actual role of the expert witness, particularly in major litigation, is that the expert is part of the team. He – it usually is a “he” – contributes to the way the case is framed and indirectly to decisions as to what evidence is to be got in to provide a basis for his opinion. His report is honed in consultation with counsel. Then, when it comes to the trial he is a front line soldier, carrying his side's argument on the technical issues under the fire of cross-examination.*

*Natural selection ensures that expert witnesses will serve the interests of their clients on this way. If the expert measures up he will be kept on and he will be used again by the same client, the same solicitors and others. If he does not measure up, he will be dropped from the case or never used again by anyone. He then disappears from the forensic scene.*

*An appearance of objectivity is a marketable attribute. Cross-examination or contrary evidence may unmask dissemblance or may not. A judge is ill-equipped to diagnose bias in an expert witness. It is likely, therefore, that the incidence of bias as assessed by surveyed judges in the Freckelton report is an under-estimate.*

*Judges are interested in valid fact-finding. So long as the adversarial system continues unremittingly, however, the interests of litigants in presenting expert evidence that may win the case will prevail over the interests of judges in obtaining objective assistance on technical issues as a basis for valid fact finding.”*

164. *Taylor on Evidence* has this to say on the subject:

*“These witnesses are usually required to speak, not to facts, but to opinion; and when this is the case it often quite surprising to see with what facility, and to what extent, their views can be made to correspond with the wishes or the interests of the parties who call them.”*

165. In a similar vein, Walsh J observed in *Miller Steamship Co. Pty. Limited v Overseas Tankship (U.K.) Ltd.* [\(1963\) N.S.W.R. 737](#) at 753:

*“As to the evidence of the academically qualified scientists, a brief review of it will suffice because I cannot regard this as of much assistance ... Professor X, Y & Z, called for the defendant and Professor P. for the plaintiff, are all learned and intelligent men, I have no doubt that they gave their evidence honestly, although affected in greater or less degree by the kind of unconscious bias which is a well-known characteristic of expert evidence.”*

166. Our examination of the transcript of Dr W’ evidence gives us the clear impression that what the trial Judge considered to be objectivity was in fact something else. We have, of course, had the advantage of subsequent argument and time for reflection on that argument that was not available to his Honour.

167. Our conclusion, however, is that this case is a classic example of the misuse of expert evidence. In light of the matters to which we have just referred, and the case-specific matters which we will next identify, we think that the trial Judge should have harboured significant reservations about the evidence and opinions of Dr W because Dr W was more than prepared to express views favourable to [the husband] and contrary to the position of [the wife] about her suitability as a residential parent without the opportunity to properly assess the issues.

168. On the issue of removing the child from the care of [the wife], his Honour had this to say about the evidence of Dr W (paragraph 284):-

*“According to Dr W, if the child [T] still believed that the husband had sexually assaulted her, then, the longer the child received reinforcement for this belief, the longer it would take for the belief to abate. Given the relationship between the wife and the child, there was a serious risk that even contact might be enough to reinforce it. In Dr W’ report dated 11<sup>th</sup> February 2000 he stated that;*

*‘Based upon a fairly scanty literature with children and a more extensive literature dealing with deprogramming adult former cult members and brainwashed prisoners of war and kidnap victims, there are several clear principles to treatment.*

- (1) *The person must be removed totally from the persuader who has caused him or her to distort reality or to believe in imaginary things;*
- (2) *The person needs counselling to understand that the persuader is merely human and not supernatural or otherwise embodied with special powers, and that paranormal phenomenon were imagined, in order to establish their ability to make the distinction between real, realistic and fantasy in day to day life.*
- (3) *The person needs counselling to deal with an underlying vulnerability to the influence of the persuasive force, if it is evident that a vulnerability exists, as it does in [T]' case."*

169. In cross-examination Dr W stated that:-

*"The answer is probably total removal, - - or highly supervised contact, unless you are convinced that the mother isn't going to fill the child's head up with some other idea, or an extension of the one she already has, because this child is very, very vulnerable to that. We know that already."*

170. According to Dr W, the solution of removing the child from the wife was predicated upon the notion that the wife still held her beliefs absolutely and that she was not going to be able to stop herself talking to the child about her beliefs, even if the child resided with the husband.

171. Dr W was also of the view that removing the child [T] from the care of [the wife] was a discrete harm, but allowing the child to grow up believing she had been a victim would also be harmful to her.

172. Dr W also attached considerable significance to the wife's new age beliefs and beliefs in spiritualism as providing an explanation for the child having made false allegations of sexual abuse. This was a view accepted by his Honour and a matter, which considerably influenced his judgment.

173. The extent to which Dr W was prepared to express opinions about people with whom he had never been associated can be measured by the fact that he said *"It is clear that [T] was a troubled, very insecure girl from toddlerhood, although of superior intelligence."* and his conclusion that *"It is probably that Mrs [W] is a highly susceptible but persuasive person, but [T] is a very insecure girl who is desperate for attention and has felt that way since early childhood."*

174. He went further and said :-

*"The materials which I have seen strongly suggest that once the mother became convinced of her paranormal beliefs and philosophies she inappropriately shared them with her daughter who, being extremely needy of attention, produced for her mother based on suggestive questioning, a range of paranormal experiences which confirmed in the mother's mind that her daughter had special powers."*

175. In cross-examination, Dr W said:-

*"We're talking about a highly dysfunctional set of fantasies which have - - transported this child off the planet a couple of years ago and -- and at least within the sexual domain, in my view, have transported her off the planet now, and that -- its -- it's part of the same process. I mean what you're trying to do is separate the two where it is absolutely wrong to do that."*

176. We are very troubled about an expert expressing such views about people that he had never dealt with. This is even more marked when it is remembered that Dr W was the only expert to see a link between the wife's spiritual beliefs and [T]'s allegations of sexual abuse.

177. Somewhat startlingly in our view, Dr W did not concede that if [the wife] was able to

stop herself from talking to the child about the sexual abuse allegations, there would be no reason that [T] and her sisters should not remain living with [the wife].

178. At AB 1642 there was the following cross-examination of Dr W-:

*“MS BRADDOCK : I see. Moving on, your postulated, as it were, solution of removing [T] from the household in which she lives is, presumably, pre-conditioned on the same conditions existing at the present time? - - - Exactly. It’s predicated on the notion that the mother still absolutely believes this, and that the - - and that she’s not going to be able to stop herself from talking to [T] about it, even if [T] lives with the father.*

*The solution, presumably, would be different if that were not the case? - - - Yes.*

*If that were not the case, then there would be no reason that [T] and her sisters should not remain living with their mother, all things being equal? - - - Well, I’m - - I’m - - I’m not so sure that that’s the case. I mean, I - - I think that the - - that the fact that this has happened, and the - - and - - and - - and the degree to which [T] got embroiled in the new age stuff, and - - I mean, the fact is that , you know, whatever complexion you put on it, the mother’s had several periods of psychiatric treatment, including one that was totally independent of these proceedings, in a period of what was probably quite a prolonged period of depression when the children were - - were, you know, in the - - from the last 80’s.*

*I mean, I would have thought that all of things which need - - need to be thrown into the melting pot, in terms of the mother’s capacity to - - to parent, her own mental stability, the extent - - the extent to which she can focus on the children’s welfare, and put - - put her own welfare - - or - - or subordinate her own welfare to the children’s welfare; all of the usual sorts of things that one should - -*

*The usual considerations - - ? - - - -so - - so I mean, I - - I would have - - I would have thought that, even if there’s a change of mind, that there is - - there’s a basis for - - perhaps a strong basis for believing that the children would still be better placed with the father. I mean, I - - as you say, I haven’t seen the parties, so I can’t really say. Dr Lord is probably in a better position to answer that hypothetical question, if you like.”*

179. It is clear from this passage that Dr W was prepared to go well beyond the position of an expert commenting on facts that were common ground or the opinion of other experts and was stepping into the ring himself. Perhaps the realisation came at a late stage in the above passage when he made a partial retreat from his position.

180. We believe that a careful reading of Dr W evidence reveals him to have been extremely partisan to the point where we find it difficult to accept his professional objectivity. We refer to the following examples:

a) We find his comparison of [T] to the victims of professional brainwashing to be far fetched in the extreme (AB 1624-5);

b) The significance that he sought to attach to [the wife's] attendance at a course on sexuality and use of an artefact to relieve menstrual tension decision bordered in our opinion upon the ludicrous as having any bearing upon whether [the wife's] encouraged the child to make allegations of sexual abuse (AB 1661-15);

c) His refusal to accept that [the husband's] behaviour could have affected [T]'s behaviour was in our view partisan (AB 1616-18). When it was put to him that [the husband's] behaviour in getting into bed with the child, may have caused her some concerns, he attempted to equate that with an insecure child attempting to get into bed with a parent (AB 1617). This was a most inappropriate analogy and suggests the reaction of a witness who is attempting to act as an advocate for a cause.

d) He stated that he had only once previously recommended the removal of a child in a case such as this and that was in relation to an allegation of a satanic conspiracy. Again, his attempt to equate this case to that one was drawing a long bow indeed. (AB 1622-3);

e) His attempt to justify [the husband's] alleged justification for touching [T]'s breast as "she's my daughter". (AB 1626) Again this passage of evidence smacks strongly of the evidence of a partisan witness.

f) His speculation as to [the wife's] behaviour prior to 28 October and the effect of the Relationship Australia interviews was again very troublesome,(AB 1642).

He said :-

*"She got father to go off to Relationships Australia and----and between she and the Relationships Australia person, managed to talk him into--into trying to enrol himself into a sexual offenders programme or something like that".*

We find this to have been an extraordinary assertion, particularly in view of the fact that Dr W had already conceded that he did not know what had occurred at that interview (see AB 648). The counsellor from Relationships Australia was not called and could not have been called and we have great difficulty in attaching credibility to an expert witness who would make such a statement in these circumstances.

g) His dismissal of the validity of a police interview that he had not previously seen suggests that he was determined to maintain [the husband's] position at any price. (AB 1639);

h) His reference in a pejorative sense to [the wife's] psychiatric treatment as a possible basis of removal of the children is curious in the context of a witness who had no direct knowledge of her condition. (AB 1642). In our view this was an irresponsible and partisan statement from a witness who had never had, nor sought, the opportunity to assess [the wife].

i) His refusal to accept that even if [the wife] had genuinely changed her mind about the allegations the children could or should remain with her.

181. Although his Honour expressed a note of caution, it is clear that he accepted the evidence of Dr W almost in toto and that this underpinned the orders that he in fact made.

182. It is of importance to note that Dr Lord, who was present in Court and heard Dr W'

evidence, did not support the view expressed by Dr W as to the connection between the wife's New Age beliefs and [T]'s allegations against the husband, nor did he appear to see them as having any relevance at all. In this regard, his position was closer to that of Dr Dixon than Dr W.

183. This connection was critical to his Honour's finding that the allegations of child abuse against the husband was at least in part due to the wife's spiritual beliefs.

184. It is apparent from the above discussion that we also regard the second argument in relation to Dr W has been made out.

## **SUMMARY AND CONCLUSIONS**

185. In this case [the wife] was the primary carer of all three children. Findings were made that:

- [the wife] was genuinely concerned about the welfare of the children.
- the two older children wish to live with [the wife].
- [the wife] was able to adequately provide for the physical and educational needs of all children.
- [the wife] had a warm and close relationship with all children.
- it was agreed that the three children should not be separated.

186. However, an order was made that all three children reside with [the husband] because of:

- a finding in relation to [the wife's] ability to provide for the emotional needs of the eldest child.
- a finding that there was a very real danger that the children and in particular the eldest child would suffer psychological harm if they resided with [the wife].

187. These findings in turn depended upon the findings in relation to [the wife's] attitude to the acceptance or otherwise of the validity of the findings that no sexual abuse occurred and the evidence of Dr W.

188. As to the first matter, a finding was made that [the wife] was genuinely concerned about the welfare of the children and further, a finding was made that [the wife] had not acted maliciously. Therefore to support the findings about the mother's ability and danger to the children it was necessary to link [the wife's] attitude to the husband with her New Age beliefs and it was only Dr W who did this.

189. The injustice to [the wife] is compounded by the failure to consider the possibility of counselling in the context of the children residing with [the wife]. It was ordered only in the context of the effect on the children of a change in residence.

190. As to the evidence of Dr W, we are of the opinion that Dr W demonstrated bias and thus little, if any weight, should have been attached to his opinion. In our view, he stepped out of the role of an expert witness and assumed the role of advocate.

191. It follows in our view that the trial Judge's decision must be set aside.

192. We are of the opinion that the case highlights the need for reform in the area of expert evidence. In this regard, we note that the previously cited article by Sperling J offers a number of recommendations which we see as applicable to the family law jurisdiction, such as:



- Promulgating a code of conduct for expert witnesses;
- Consideration of amending statutes to make breach of a duty of objectivity professional misconduct;
- Greater use of the power to refer out technical issues for determination by an expert referee; and
- Amendments to the Rules of Court in respect of matters such as an express power to limit expert evidence to that of a single expert selected by the parties or the Court in appropriate cases.

193. We think that there is considerable merit in these proposals. We note that some have been adopted by changes to the Rules of the Supreme Court of New South Wales (see Bill Madden “Changes to the role of the expert witness” [\(2000\) 38 \(5\) Law Society Journal 50](#)) and that the last one is also favoured by the Family Court of Australia’s *Future Directions Committee Report* which was published in July 2000 (see [http://www.familycourt.gov.au/court/html/future\\_summary.html](http://www.familycourt.gov.au/court/html/future_summary.html)).

## **ORDERS**

194. The next question is as to what should now occur. We would be most reluctant to simply order a new trial, given the length of this trial and the trauma to the parties that a second trial would involve.

195. Another option would be to simply reverse his Honour’s orders as sought by the wife, which would still leave an issue of contact.

196. We are also conscious of the passage of time and events that may have occurred since the trial and that the High Court’s decision in *Allesch v Maunz* [\(2000\) FLC 93-033](#) requires this Court to provide the parties with an opportunity to adduce evidence relevant to the present situation if the discretion which was reposed in the trial Judge is now to be exercised by this Court.

197. We therefore propose the following orders:

1. That the appeal is allowed and his Honour’s orders are set aside.
2. That the matter be listed for directions before the Full Court that heard this appeal.

## **KAY J:**

### **INTRODUCTION**

198. This is the wife's appeal against orders made by Barlow J on 21 June 2000. His Honour ordered that the three [daughters] of the marriage [I will refer to as, [T] born [in] 1988, [S] born [in] 1990 and [O] born [in] 1995] should reside with their father. His Honour further ordered that the father have sole responsibility for decisions concerning the day-to-day and long term care, welfare and development of the children, and that the wife have contact from 9.00am to 4.00pm each Sunday supervised by a professional supervisory service. There were orders made concerning on-going counselling for the children. There were also orders for alteration of property interests, which had the effect of dividing the property of the parties equally.

199. By her appeal the wife seeks orders that the children reside with her and that the husband have contact with the children as recommended by Dr Hagan, psychiatrist. She

further seeks orders in the property appeal which have the effect of dividing the property as to 60% in her favour and 40% in the husband's favour.

200. The orders made were as follows:

"1 All previous interim orders made in these proceedings be discharged.

2 The children [T] born [in] 1988, [S] born [in] 1990 and [O] born [in] 1995 'the children' reside with the husband and the husband have the sole responsibility for decisions concerning the day to day and long term care, welfare and development of the children.

3 The wife have reasonable contact with the children

4 Until further order of the Court, the contact provided for in Order 3 hereof be

(a) from 9 am to 4 pm each Sunday;

(b) supervised by a professional supervisory service.

5 Until further order of the Court, the wife be restrained by injunction from arranging, or in any way facilitating, counselling for the children.

6 Until further order of the Court the husband be restrained by injunction from arranging, or in any way facilitating, counselling for the children, save for counselling by Elaine Atkinson, Clinical Psychologist.

7 Subject to Orders 5 and 6 hereof, unless and until the Court Expert and/or the Separate Representative directs otherwise, or until further order of the Court, the parties forthwith take all steps to engage themselves and the children in such counselling and/or family therapy as may be recommended by Dr. Michael Hagan, Child Psychiatrist, or by such other child psychiatrist as may be agreed by the parties or determined by the Court.

8 The husband and wife each be restrained by injunction from:

(a) denigrating each other in the presence of the children;

(b) exposing the children to derogatory remarks about the husband or the wife as the case may be.

9 The wife be restrained by injunction from making any statements to the child [T], which would in any way suggest that the said child had been sexually abused by the husband, or by the child's paternal grandparents.

10 The husband provide the wife with copies of all school reports, medical certificates, certificates of merit and other documents recording the children's educational, religious, sporting, recreational and artistic activities, within seven days of receipt of such reports.

11 The husband inform and authorise all relevant organisations, agencies and individuals and in particular the Principal of the school at which the children attend from time to time, to provide the wife directly with reports and/or information regarding the children's activities and development, provided that the provision of such information shall not entitle the wife to give directions or instructions to such organisations, agencies and individuals, in relation to matters for which the husband has sole responsibility.

12 Until further order of the Court the husband and wife each be restrained by injunction from removing the children from the State of Western Australia or the Commonwealth of Australia.

13 The wife forthwith deliver to the Principal Registrar of the Family Court of Western Australia the current passport for each of the children, such passports to be held by the Principal Registrar until further order of the Court.

14 The husband pay to the wife the sum of \$147,715.00 within 30 days.

15 In the event the total balance of the bank accounts in the names of the husband and the wife held with [certain banks] exceeds the sum of \$173,000.00, then in addition to the monies payable by the husband to the wife pursuant to Order 14 hereof, the husband pay to her an amount equivalent to one half of the amount by which the total balance of the accounts exceeds the sum of \$173,000.00.

16 If the husband fails to pay to the wife the amounts payable by him pursuant to Orders 14 and 15 hereof within 30 days, then the husband pay interest on such amounts, or so much thereof as remains unpaid at the rate of 10 per cent per annum, calculated from the expiration of the said period of 30 days and payable calendar monthly on the first day of each month.

17 Upon payment by the husband to the wife of the amounts referred to in Orders 14 and 15 hereof together with any interest payable by him to her pursuant to Order 16 hereof, the wife's interest in [a certain property] vest in the husband absolutely.

18 Upon payment by the husband to wife of the amounts payable by him pursuant to Orders 14 and 15 hereof and any interest payable by him to her pursuant to Order 16 hereof, the wife at her expense, forthwith cause the removal of, the caveat registered over the [certain property] by the Legal Aid Commission of Western Australia.

19 Within 30 days of the date of the payment by the husband to the wife of the amounts referred to in Orders 14 and 15 hereof together with any interest payable by him to her pursuant to Order 16 hereof, the wife vacate the [certain property] and thereafter be restrained by injunction from entering upon it, unless with the consent of the husband.

20 Until the date upon which the wife vacates the [certain property] she be responsible for the payment of any accounts rendered in relation to electricity, water and the telephone used in connection with the said property.

21 Subject to Order 20 hereof the husband be responsible for other outgoings payable in respect of the [certain property], including the mortgage payments payable in respect of the mortgage secured against the said property.

22 The husband indemnify and keep indemnified the wife in relation to any liability arising from the mortgage secured against the [certain property].

23 Save for withdrawing funds for the purpose of paying to the wife the amounts payable pursuant to Orders 14 and 15 hereof together with any interest payable by him to her pursuant to Order 16 hereof, until payment of such amounts and any such interest, the husband be

restrained by injunction from in any way dealing with the monies deposited in the names of the husband and wife or either of them with [the certain banks].

24 Upon payment by the husband to the wife of the amounts referred to in Orders 14 and 15 hereof together with any interest payable by him to her pursuant to Order 16 hereof, the following vest in the husband absolutely:

(a) the balance of funds in the names of the husband or the wife or either of them with [certain banks];

(b) the Mitsubishi Pajero motor vehicle;

(c) the husband's superannuation entitlement;

(d) the furniture and effects in the possession of the husband;

(e) one half of the family photographs and family video recordings in the possession of the wife.

25 Any interest the husband may have in the following vest in the wife absolutely:

(a) [Certain] Commonwealth Bank accounts;

(b) the Holden Apollo motor vehicle;

(c) the furniture and effects in the possession of the wife;

(d) one half of the family photographs and family video recordings in the possession of the wife.

26 Except as otherwise provided for in these orders, all of the husband's right, title and interest in any other property or financial resources in the name of or in the possession of the wife, vest in the wife.

27 Except as otherwise provided for in these orders, all of the wife's right, title and interest in any other property or financial resources in the name of or in the possession of the husband, vest in the husband.

28 The husband and wife each do such acts and things and sign all documents necessary to give effect to these orders.

29 Each party have liberty to apply in relation to the implementation of these orders.

30 The husband and the Separate Representative have liberty to apply for an order for costs, such liberty to be exercised within 21 days of the date hereof.

31 On the undertaking of the husband not to enforce the orders made herein and on the undertaking of the wife not to discuss with the children the reasons for judgment delivered on 21 June 2000, the matter be adjourned to 9.30am on 23 June 2000.

30 Otherwise the applications of the husband and wife be dismissed."

201. The Third Amended Notice of Appeal appears to describe the orders appealed against generally by reference to the paragraph numbers set out in the Reasons for Judgment. In order to avoid confusion they are best identified by reference to the formal orders set out above. The paragraph numbers of the orders appealed against have been emphasised in **bold text**.

202. The orders sought in the Third Amended Notice of Appeal were as follows:

"1. The children [T] born [in] 1988, [S] born [in] 1990 and [O] born [in] 1995 reside with the wife.

2. The wife have the sole responsibility for decisions concerning the day to day and long term care, welfare and development of the children.

3. The husband have reasonable contact with the children such contact to be subject to the direction of Dr Michael Hagan, child psychiatrist both as to frequency and the requirement (if any) of supervision.

4. The balance of money, inclusive of interest, held in the joint names of the parties in accounts with [certain banks] be divided equally between the husband and wife.

5. The wife pay to the husband within 60 days the sum of \$19,619 or such other sum as will result in the husband having received 35% of the net assets of the parties.

6. Upon payment by the wife to the husband of the sum set out in paragraph 5 the husband transfer to the wife his interest in the [certain property].

7. The wife be responsible for all outgoings payable in respect of the [certain property] including the payment in respect of the mortgage secured against the said property."

203. Although the Third Amended Notice of Appeal contained some 30 grounds, the presentation by Mr Ackman QC on behalf of the appellant appeared to be limited to arguments that the trial Judge could not and should not have made findings as to the mother's future behaviour which would have justified requiring that the children move to live with their father.

## **BACKGROUND**

204. The husband is 34 years of age and the wife 32. The husband was born in Perth and the wife in [another country]. Some part of the husband's formative years were spent living in [that country] and that is where the parties met and were married on 29 September 1986. They remained living together until October 1998.

205. The history of the parties' life together in [the other country] is relevant insofar as the property proceedings are concerned, but as the property appeal only becomes relevant if the residence appeal is allowed, and as I do not intend to allow the residence appeal, it is unnecessary for me to deal with the property appeal. In any event, it has been agreed between counsel that the property appeal only becomes relevant should the residence appeal succeed and even then, it should proceed by way of written submissions after the judgment in the residence appeal has been delivered. For those reasons it is now unnecessary to outline matters relating to the property appeal.

206. The parties lived in Perth from 1990 to 1998 save for most of 1996 when they attempted unsuccessfully to settle in [the other country].

207. As early as 1992 it was apparent that the child [T] had behavioural problems. She was seen by a psychologist and a language therapist. She changed schools between her first and second years. When in [the other country] she was again seen by a psychologist, who reported "[T] is a girl having very high capacities, with considerable difficulties in the emotional and social areas...".

208. After the parties returned to Perth in late 1996 they bought a home at [in Perth]. [T] and [S] attended first at [one school] and then at [another primary school].

209. Early in 1997 the wife became interested in what she described as "New Age beliefs". She began to involve [T] in her belief system.

210. In September 1998 the parties attended Relationships Australia for counselling. Late in that month the wife told [T]'s school teacher of her concerns about apparent disclosures the child had made to her.

211. At AB 1719-1720, the school teacher was cross examined as follows:

"MR DOWDING: Has Mrs. [W] told you about some of the things that have happened in her home?---Regarding [T]?"

Well, regarding anything?---Regarding - -

Talking about domestic matters to you?---Only as far as regarding [T]; yes.

Right. And when is the first time - - has she ever talked about her husband to you?--- I think she has mentioned him; yes.

...

And did she [Wife] say to you something about her husband's behaviour?---Yes.

What did she say to you?---I can't say it, verbatim, because I can't remember the exact words.

Words to the effect?---Words to the effect? It was in regards to the children. She felt that they were being abused, emotionally and physically, by him.

Right. And did she give you an instance of any sort of sexual misconduct?---In regard to [T]?"

Well, in regard to any of them?---Okay. In regard to [T], I will answer that one, because I was told that Mr [W] went into the shower when [T] was in the shower, and that's - - I don't - - that's all I can say on that one.

And it was put in a context that that was inappropriate?---Yes it was.

And she was alarmed by it?---Yes, she was.

And she was upset by it?---Yes.

And she wanted to talk to you about it?---Yes.

And she wanted to talk to you about it, because she thought you might be able to help her?---  
When I'm told things like that, I have to report them. Yes.

...

So [the wife] told you something - -?---Yes.

- - that her husband had been in the shower with [T] - -?---No. That wasn't then. Well - -

Oh, I see. Well - -?--- - - that - - she told me that the - - the husband was abusing them,  
sexually and - - and emotionally, and that's when I told [the School Principal].

So was the 'in the shower' before or after that occasion?---After.

So she told you, on this occasion, about the 25th of September, that he was sexually - -?---  
And emotionally - -

- - and emotionally abusing the children?---Yes.

And it was all the children?---I can't answer that, because I can't remember.

And did she tell you what sexual abuse there was?---No, she didn't. But I did suggest that she  
asked [T] to show her.

Right. So the context was that he'd actually done something to the children, and you thought  
it appropriate that [T] demonstrate it to her?---Yes. So - - to make sure that that was right.  
Yes.

And did she come back to you, and report that she'd done that?---Yes.

And what was it that [T] said to her had happened?---[T] showed her where she had been  
touched.

And where was that, to your recollection?---As far as I remember her saying, it was  
everywhere, so I didn't go any further.

And by 'everywhere', did you contemplate - -?---I assumed - -

MR DOWDING: - - that was something to do with [T]'s private parts?---Yes, I did.

And that, in your mind, would be breasts and vagina?---Yes.

And was that before you spoke to [the School Principal], or at the same time?---At the same  
time."

212. The teacher drew the matter to the attention of the School Principal, who in turn reported it to the Department of Family and Children Services. The weekend after the report was made the mother left the children with the father for four days whilst she attended some courses related to her New Age beliefs.

213. On 3 October 1998 the husband left the [parties'] property and began to live apart from the family.

214. The wife asserted that on 28 October 1998 the child [T] disclosed to her that she had been sexually assaulted by the husband. On the next day the child was interviewed by officers of the Department of Family and Children's Services. Four days later the husband advised the wife that he was intending to travel to [the country where he had previously lived]. The husband asserted he had been in a very emotional state and needed support from his extended family.

215. The next day the child and the wife were interviewed by officers of the Police Child Abuse unit and the husband was apprehended at Perth International Airport as he was about to leave Australia. He was charged with two counts of sexual penetration of a lineal relative and four counts of indecent dealing. The charges all related to the child [T].

216. Immediately thereafter the husband commenced proceedings seeking residency orders and orders for alteration of property interests. The wife's response was to oppose the making of those orders and seek orders in her favour.

217. Between 30 December 1998 and 2 February 1999 the wife was hospitalised suffering from depression.

218. In July 1999 the child [T] gave evidence in the District Court in relation to the charges brought against the husband. Some four weeks later, on 23 August 1999, the Crown filed a nolle prosequi in relation to those charges. According to the wife, when she informed the children of this fact, the child [S] greeted the news with great joy, whereas [T] was bewildered.

## **FURTHER EVIDENCE ON APPEAL**

219. At the commencement of the appeal, Dr Dickey QC appearing on behalf of the Director-General Family and Children's Services, Western Australia sought to have introduced into evidence pursuant to [s 92A\(2\)](#) of the [Family Law Act](#) an affidavit sworn by one Alex Katsibardis. Mr Katsibardis was a counsellor employed by Relationships Australia. In September 1998, whilst acting as a counsellor, he discussed with the husband and the wife matters concerning the care, welfare and development of the three children of the marriage. On 25 September 1998 he interviewed the husband in these proceedings on matters concerning the welfare of the three children of the marriage. He then contacted the Department on 13 October 1998, and on 11 January 1999 prepared a report.

220. It appears to be common ground that Mr Katsibardis' assertions were well known to both of the wife and the child representative, but neither sought to call evidence from Mr Katsibardis at the hearing before Barlow J. It was their conscious decision that any evidence that Mr Katsibardis might give was rendered inadmissible by the provisions of s 19N of the [Family Law Act](#). The introduction of such evidence before us was opposed on the basis that it



was rendered inadmissible by the provisions of s 19N of the [Family Law Act](#). Dr Dickey submitted that [s 67ZB\(4\)](#) rendered the evidence admissible.

221. Those sections provide as follows

**"19N Admissions made to counsellors, mediators etc.**

(1) This section applies to:

(a) a family and child counsellor; or

(b) a court mediator; or

(c) subject to the regulations, a community mediator or a private mediator; or

(d) a person nominated, or acting on behalf of an organisation nominated, for the purposes of paragraph 14C(3)(b) or subparagraph 44(1B)(a)(ii); or

(e) a person to whom a party to a marriage has been referred, for medical or other professional consultation, by a person referred to in paragraph (a), (b), (c) or (d).

(2) Evidence of anything said, or any admission made, at a meeting or conference conducted by a person to whom this section applies while the person is acting as such a person is not admissible:

(a) in any court (whether exercising federal jurisdiction or not); or

(b) in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence."

**"67ZA Where member of the Court personnel, counsellor or mediator suspects child abuse etc.**

(1) This section applies to a person in the course of carrying out duties, performing functions or exercising powers as:

(a) a member of the Court personnel; or

(b) a family and child counsellor; or

(c) a family and child mediator.

(2) If the person has reasonable grounds for suspecting that a child has been abused, or is at risk of being abused, the person must, as soon as practicable, notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion.

...

(5) If notice under this section is given orally, written notice confirming the oral notice is to be given to the prescribed child welfare authority as soon as practicable after the oral notice.

(6) If the person notifies a prescribed child welfare authority under this section...the person may make such disclosure of other information as the person reasonably believes are necessary to enable the authority to properly manage the matter the subject of the notification."

**"67ZB No liability for notification under [section ...67ZA](#)**

(1) A person:

(a) must give notice under [subsection 67Z\(3\)](#) or [67ZA\(2\)](#); or

(b) may give notice under [subsection 67ZA\(3\)](#) or (4); or

(c) may disclose other information under [subsection 67ZA\(6\)](#);

in spite of any obligation of confidentiality imposed on the person by this Act, another Act, another law or anything else (including a contract or professional ethics).

(2) A person is not liable in civil or criminal proceedings, and is not to be considered to have breached any professional ethics, in respect of a notification under [subsection 67Z\(3\)](#) or [67ZA\(2\)](#).

(3) A person is not liable in civil or criminal proceedings, and is not to be considered to have breached any professional ethics, in respect of a notification under [subsection 67ZA\(3\)](#) or (4), or a disclosure under [subsection 67ZA\(6\)](#), if the notification or disclosure is made in good faith.

(4) Evidence of a notification under [subsection 67Z\(3\)](#) or [subsection 67ZA\(2\)](#), (3) or (4), or a disclosure under [subsection 67ZA\(6\)](#), is not admissible in any court except where that evidence is given by the person who made the notification or disclosure.

(5) In this section:

**court** means a court (whether or not exercising jurisdiction under this Act) and includes a tribunal or other body concerned with professional ethics."

**The interrelationship between ss 19N and [67ZB\(4\)](#).**

222. [Section 67ZB\(4\)](#) was enacted in its present form in 1995. It replaced

s 70BC(4) which had been introduced in 1991. The only substantive difference was that [s 67ZA](#) increased the class of persons to whom the mandatory reporting provisions applied.

223. In support of the application to have the affidavit admitted before the Full Court, Dr Dickey submitted that the provisions of [s 67ZB\(4\)](#) of the *Family Law Act* or alternatively the provisions of s 161(4) of the *Family Court Act* (WA) rendered the evidence of Mr Katsibardis admissible. Dr Dickey further submitted that Mr Katsibardis' evidence was "very relevant to the issue of the residence of, and contact with, the three children of the marriage".

224. The second reading speech of the then Attorney-General indicates that the genesis of the section was the Family Law Council's Report on Child Sexual Abuse which had been published in 1988. Mr Duffy said:

"The most important of the amendments to be made by the Bill are aimed at improving the handling of custody and access disputes in which allegations of child abuse are made by one party against another. In preparing these amendments the Government has been guided by the findings and recommendations made by the Family Law Council in its 1988 report on child sexual abuse.

The amendments to be made by this Bill are designed to complement the administrative steps already taken by the Family Court in the area of child abuse. The amendments will provide for mandatory reporting of child abuse by Family Court staff to State and Territory child welfare authorities; provide legal protection for Family Court staff who report child abuse to child welfare authorities; provide for State and Territory child welfare authorities and other interested persons to intervene in cases involving alleged child abuse; limit the number of unnecessary medical and psychological examinations of children obtained by parents involved in custody and access disputes; insert an express statement in the [Family Law Act](#) requiring the Family Court to have regard to the need to protect children from abuse; and provide protection for medical and other witnesses in child abuse cases from abusive or hectoring questioning."

225. The Family Law Council had recommended that court counsellors and other persons in a position of confidentiality be freed from the yoke of secrecy for the purposes of being able to draw to the attention of the relevant State authorities any information which had been brought to their attention which might lead to a child being at risk of abuse. The Report said as follows:

" Recommendation 18

Council recommends in particular that:

- the notification shall not be held to be a breach of any duty of confidence imposed by the [Family Law Act](#) or of professional etiquette or ethics or of a rule of professional conduct.
- the notification shall not be a breach of any requirement of confidentiality imposed by the [Family Law Act](#) resulting from any oath of office taken under the [Family Law Act](#), regulations and rules.
- no civil or criminal liability will be incurred by reason of the person making the

notification.

- a notification shall not be admissible as evidence in any court except where the notification is tendered or referred to by the person who made the notification.

#### 6.2.1 Comment

The legal position of Family Court counsellors with regard to suspected past or future child abuse is not entirely clear. Some doubt exists about whether court counsellors come within the definition of "marriage counsellor" in the Act when they are carrying out their responsibilities in connection with the welfare and custody of children. If so, are they under the obligations imposed by the oath required by the Act, to be sworn by marriage counsellors, to keep any conferences with a client confidential? If not, is there any legal bar to prevent court counsellors from reporting to State child protection authorities their reasonable suspicion that a child has been sexually abused?

The evidentiary bar imposed by Section 18 of the Act operates to preclude a counsellor from giving evidence in any court about what was said during a counselling session pursuant to such a conference, including alerting the State child protection authority to the possibility of child sexual abuse. It seems generally to have been accepted within the court, however, that, in the interests of the child, a counsellor should notify State authorities in circumstances where the counsellor reasonably suspects child sexual abuse, particularly if a parent is unwilling to report their suspicion to the State authority.

Council acknowledges that issues of confidentiality and trust are extremely important in a counsellor-client relationship. It considers, however, that they should yield, if necessary, to the need to provide protection for children in circumstances where a parent or counsellor cannot provide that protection, and intervention by the appropriate agency is required. Council would also wish to see protection for those who may report an allegation in good faith but who are not mandated to do so. "

226. The Report led to the enactment of Division 12A of [Part VII](#), which, in its initial form, applied to "a member of court personnel". In 1994 the relevant sections were removed to Division 8 Subdivision D of [Part VII](#) of the *Family Law Act*, and were enlarged to include not only members of the court personnel, but also "a family and child counsellor or a family and child mediator".

227. The issue as to whether or not s 70BC rendered admissible that which was otherwise inadmissible by reasons of the provisions of the *Family Law Act* and in particular s 18 as it then was (now s 19N), and s 62(5) as it then was (now s 62F(8)) was discussed in *Wakely and Hanns; Director of Court Counselling (Intervener)* ([1993 FLC 92-435](#); [17 Fam LR 215](#)).

228. Sections 62F(2) and (8) provided as follows:

"(2) The court may, at any stage of the proceedings, make an order directing the parties to the proceedings to attend a conference with a family and child counsellor or welfare officer:

(a) to discuss the care, welfare and development of the child; and

(b) if there are differences between the parties in relation to matters affecting the care, welfare and development of the child—to try to resolve those differences.

...

(8) Evidence of anything said, or of any admission made, at a conference that takes place pursuant to an order under subsection (2) is not admissible:

(a) in any court (whether exercising federal jurisdiction or not); or

(b) in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by consent of the parties, to hear evidence."

229. In *Wakely and Hanns*, McGovern J dealt with the question that raises itself in this case. In that case the mother had deposed to certain admissions made by the husband during the course of a counselling session which was covered by the provisions of s 62(5) (as it then was) prohibiting the admission of evidence of anything said at a such a conference. McGovern J followed the decision of Gun J in *Taylor* (unreported 22 August 1991) and held that

s 70BC(4) "did nothing more than provide that the counsellor may inform the court of the fact that a notification has been made".

"...the legislature, in addressing matters of utmost importance affecting the welfare of children, namely, the protection of them from abuse, is to be seen at the same time by s 70BC(4) as careful to preserve the prohibition against admission of evidence in any court of anything beyond the bare fact of notification of suspicion of abuse by the member of the Court personnel concerned; there it draws the line in so far as reception of evidence of notification is concerned; it, moreover, by implication leaves the prohibition contained in s 62(5) intact. In my opinion, the Parliament could not have made clearer its intention to maintain the ambit of s. 62(5) in the explicit terms in which it is expressed." (at 80,465)

230. In *Centacare Central Queensland and Downing v G and K* [1998] FamCA 109; (1998) FLC 92-821 at 85,339 Baker, Finn and Chisholm JJ said:

"It was also submitted, correctly we think, that there is nothing in the extrinsic material relevant to the Reform Act which suggests that the legislature had any intention to alter the prohibition which had existed in s 18(2). In this regard we were referred to the Explanatory Memorandum for the *Family Law Reform Bill 1994*, which states that what is now [Part III](#) will amend the Act to '...extend the secrecy and admission provisions that presently exist for court based personnel to approved community mediators and counsellors'.

We were also referred to other provisions of the Act, which were said to show that the legislature had recognised the need in certain circumstances to make exceptions to rules of confidentiality, suggesting, we took it, that the absolute nature of s 19N (and s 18 before it) was unlikely to be an oversight. We were specifically referred to ss 66ZA and 67ZB, although we note that these do not make exceptions to admissibility of evidence."

231. The decision in *Centacare Central Queensland and Downing v G and K* was touched upon by Gleeson CJ and Gummow J in *Northern Territory of Australia v GPAO and Ors* [1999] HCA 8:

"69 Finally, s 19N renders inadmissible in any court certain admissions made at mediation meetings and counselling conferences. In *Centacare Central Queensland v G and K*, the Full Court of the Family Court held, in our view correctly, that s 65E [the paramountcy provision] does not operate upon s 19N so as to allow the admission of evidence contrary to its terms."

Their Honours did not otherwise see fit to remark critically about any matters touched upon in *G and K*.

232. In *T v F; The Commissioner of the Australian Federal Police and the Children's Representative* [1999] FamCA 738; (1999) FLC 92-855; 25 Fam LR 36 Nicholson CJ, Lindenmayer and Kay JJ, when examining whether the Federal Witness Protection Plan gave the Commissioner of Police the right to withhold information which might otherwise assist the Court when making parenting orders, said:

"57. The concept of the Family Court having to make decisions relating to the welfare of children without being in full possession of all relevant material is not an alien one. It was reinforced recently by the High Court in *Northern Territory of Australia v GPAO* (1999) FLC 92-838; 24 Fam LR 253 where the majority of the Court held that Northern Territory legislation which protected the divulgence of information in welfare department files was not to be overridden by the paramountcy principles contained in s 65E of the *FLA*: see also *Relationships Australia v Pasternak* (1996) FLC 92-699; 20 Fam LR 604; *Centacare Central Queensland and Downing v G and K* (1998) FLC 92-821; [1998] FamCA 109; 23 Fam LR 476."

233. In support of his submission, Dr Dickey drew our attention to the provisions of Regulation 58 of the Family Law Regulations which provide for the form of oath or affirmation of a family and child counsellor, which oath prohibits the disclosure to any person of any communication or admission made unless the counsellor reasonably believed that it was necessary to make such a disclosure inter alia to protect a child.

234. In my view, the provisions of the Oath or Affirmation of Office of the Family and Child Counsellor permit the counsellor to comply with the mandatory reporting requirements now contained in s 70ZB. The further investigation of the matters raised by a counsellor in such a notification then falls upon the shoulders of the relevant authorities to whom the notification is made.

235. The legislation does not, in my view, render admissible that which is otherwise the subject of a prohibition as to its admissibility. Section 67ZB(4) has the effect of ensuring that if the evidence is otherwise admissible it can only be given by the maker of the notification and not via second-hand or hearsay evidence. The section does not go as far as it is submitted by Dr Dickey, namely to render admissible that which is otherwise inadmissible.

236. Given the effect of this ruling, it is unnecessary to enter into the other interesting issue raised by Dr Dickey as to whether or not the provisions of subdivision D of Division 8 of Part VII of the *Family Law Act* applies to the proceedings in the Family Court of Western Australia or whether the matter is governed by the provisions of subdivision 4 of [Part V](#) of the *Family Court Act 1975* (WA).

## **THE HEARING**

237. Between the date of separation and the trial before Barlow J there were several interlocutory skirmishes. There had been no contact with [T] other than for the purposes of preparation of a report to the Court by a Dr Lord, who had been appointed as a court expert. Dr Lord's qualifications are not immediately apparent although he does hold the degrees of MBBS, a DPM, and is a member of the FRANZCP. One of Dr Lord's conclusions in his report was "it is also possible, though, that the child's responses were consistent with those of an individual unwilling to acknowledge the discovery of fabrication".

238. The allegations as to inappropriate sexual behaviour had all come from the child, although they had been bolstered by the wife raising several issues of the husband's general propensity for nudity, his interest in [T]'s development of pubic hair, and his keenness to climb into bed with [T]. The husband denied any inappropriate behaviour towards the child. The child also involved the husband's parents and his brother in her assertions that she had been sexually molested by them over a long period of time.

### **No risk of abuse - finding and ramifications**

239. The trial Judge rejected any inappropriate sexual behaviour by the husband, his parents or his brother towards the children or any of them, and found that none of the children were at risk of any such behaviour. That finding has not been the subject of challenge by the wife or by counsel for the child representative in these proceedings and it is unnecessary from my purposes in the circumstances to further detail the allegations that had been made in the first place. What remained as significant was that [T] continued to resist any contact between herself and the father and when last involved in the proceedings had continued to maintain her assertions of inappropriate behaviour.

240. Dr Lord's conclusions in his report, which were accepted by the trial Judge and which ultimately appeared to be highly significant to the outcome of the case, were set out by the trial Judge at para 256:

"256. Dr. Lord's conclusions, in relation to the children's contact with the non residence parent and other significant adults in the lives of the children, were as follows:

'...1 No adverse impact upon [T], [S] and [O] is anticipated in the short to medium term from regular, supervised contact with the significant adults (non-residential) in their family.

However, supervised contact into the longer term is likely to impose significant constraints on the contact itself with possible negative implications should sexual assaults not have taken place.

2 In the event that the Family Court determines that sexual assaults have not been perpetrated upon any of the children and they are not considered to be at risk of same then the likely impact of unsupervised contact with non-residential adults within the family can only be seen in positive terms.

However, if assaults have been perpetrated the children will require appropriate protection from further assault.

3 [S] and [O] (and probably [T], as well) appear to have fundamentally sound relationships with all the significant adults in their family.

Accordingly, it is more probable than not that the denial of contact between any child and a significant adult will have negative impact upon the continuing development and mental health of that child.

4 If the Family Court determines that sexual abuse has not taken place then, in my opinion, there is unlikely to be any negative impact upon [T], [S] and [O] should they be required to spend periods of contact with either their father and/or paternal grandparents.

Should, however, the Family Court determine that sexual abuse has been perpetrated by a member (or members) of the paternal family then compulsory contact between any victim and the perpetrator(s) is likely to be detrimental should it be against the expressed wishes of the victim.'....

In relation to contact Dr. Lord went on to conclude :

'...It is unlikely to be in the best interests of the children for them to have no contact with their mother in the short, medium and long term.

It is unlikely to be in the best interests of the children for them to have no contact with their father in the short, medium and long term unless it is determined that he has perpetrated sexual assaults on the child [T].

Even then, it may not be in the best interests of the two younger children for them to have no contact with their father since there does not appear to be any evidence to suggest that they have been sexually abused.

Even in the circumstances of the child [T] (assuming that she has been subject to sexual assaults perpetrated by father) the situation remains far from clear cut. The child has, apparently, expressed a wish not to have contact with her father. Yet, when interviewed, spoke of him in positive terms and when observed with him clearly enjoyed the contact. It is the case that many children who have become the victims of sexual assault are nevertheless able to (and wish to) continue a relationship with the perpetrator but in such circumstances where safety from further assault is guaranteed.'...

There was, according to Dr. Lord, no clinical reason why there should not be contact between the children and the non-residence parent. However in the first instance, it may be such contact should be supervised."

241. Then again at para 282, his Honour set out a passage which appears to have ultimately led to the orders that were made:

"In Dr. Lord's second report he stated that :

'...In the event that the allegations of sexual abuse are determined by the Family Court to have been false then the children may be at risk if they remain in the primary care of Mrs [W] should she continue to perpetrate allegations of such abuse. Such allegations, if determined to be false, have great potential to damage the relationships between the children and significant adult family members. The continued expression of such allegations may also have a potential to compromise the continuing development and mental health of the children.'



According to Dr. Lord, if the child [T] had not been sexually abused and if the wife maintained her present views, then it might not be in the interests of the children, particularly the child [T], to continue to reside with her. However if the child [T] had been sexually abused and if she was not supported, then there was a greater likelihood in the future of the child experiencing psychological problems and problems with interpersonal relationships. Either way there was the potential for real damage."

242. In cross-examination the following exchange took place between Dr Lord and counsel for the husband (AB 1666):

"If his Honour concluded that, indeed, Mrs [W] either in a delusionary way, or in a deliberate way, or in an unconscious way, had created the environment where [T] had made these statements - - if his Honour concluded that, and if his Honour concluded there was nothing adverse about the father, and his relationship with the children, is it in the interests of the three children that they should go together to live with the father, or is there any benefit in separating the three of them?---Your Honour, I can see no benefit in separating the children, and in fact, there is a strong argument that the children should not be separated, in the sense that, a difficult time such as this of parental separation and family breakdown, if nothing else, children can provide enormous support to each other. The - - the children can obviously either live with one parent or the other. They can't live in two households.

They are, as I understand it, in many ways, well cared for in their current residential arrangements. The issue that would seem to be of concern is to do with the views of the mother. If - - in my opinion, if the mother were to maintain her present views, then it may not be in the best interests of the children - certainly not the child [T] - to continue to reside with the mother.

On the other hand, if mother has moved, or is able to move, to a position of recognition, in regard to the possibility that sexual assaults did not take place, then it may be possible for the children to continue to reside in their current household. Now, I am putting possibilities, rather than definite statements, because...I don't know at this stage what the findings of fact of the court will be, or what determinations will be made, in regard to issues of credibility of the parties, but...they're really the two broadbrush scenarios that I would envisage."

243. Dr Lord then commented that Mrs [W]'s refusal to provide contact for at least the younger two children did not on the face of it sound as though she had moved very far on the "belief scale", and her still persisting on the 8<sup>th</sup> day of the trial that the husband had been guilty of all the things she has complained about in her affidavit could lead to the reasonable suggestion that she had not changed her belief structure at all.

244. His Honour next went on to discuss the evidence of Dr W. Dr W deposes to being a consultant and forensic child psychologist in private practice in New South Wales. His affidavit was filed on the first day of the hearing. He saw neither of the parties nor any of the children. He had read much of the relevant material, including Dr Lord's report and an affidavit of Geoffrey Dixon, the wife's psychiatrist, sworn 25 January 2000.

245. Dr W asserted that [T]'s "allegations are strikingly lacking in detail and could simply be quite distorted reports of ordinary family practices". He was critical of the manner in which the first investigative interview was conducted. It was Dr W' expressed view that although he

had not seen the child, "it is clear that [T] was a troubled, very insecure girl from toddlerhood, although of superior intelligence". Dr W then concluded:

"...it is probable that Mrs [W] is a highly susceptible but persuasive person, but [T] is a very insecure girl who is desperate for attention and has felt that way since early childhood..."

He went on to say:

"The materials which I have seen strongly suggest that once the mother became convinced of her paranormal beliefs and [philosophies], she inappropriately shared them with her daughter who, being extremely needy of attention, produced for her mother based on suggestive questioning, a range of paranormal experiences which confirmed in the mother's mind that her daughter had special powers."

246. Proceeding on an assumption that there was no substance in the sexual abuse allegations, Dr W then provided a series of hypotheses as to how those beliefs had become entrenched in the child. It needed to be clearly kept in mind by the trial Judge that Dr W had not seen the child and could only speak in generalities. Again, proceeding on the basis that there was no substance in the allegations, Dr W answered the question "How does one treat [T]?" as follows:

"Based upon a fairly scanty literature with children and a more extensive literature dealing with de-programming adult former cult members and brainwashed prisoners of war and kidnap victims, there are several clear principles to treatment.

7.1 The person must be removed totally from the persuader who has caused him or her to distort reality or to believe in imaginary things.

7.2 The person needs counselling to understand that the persuader was merely human and not supernatural or otherwise embodied with special powers, and that paranormal phenomena were imagined, in order to re-establish their ability to make the distinction between real, realistic and fantasy in day to day life.

7.3 The person needs counselling to deal with an underlying vulnerability to the influence of the persuasive force, if it is evident that a vulnerability exists, as it does in [T]'s case."

247. Dr W' cross-examination occupied the whole of the morning of 16 February. His expertise in dealing with children who were the subject of allegations of sexual abuse was not challenged. He was critical of texts quoted by Dr Dixon, saying they were "seriously outdated". He expanded on why he thought that the child's evidence given in her interviews (some of which were videotaped) was unreliable. The cross-examination of Dr W focussed on why it was that he held views that the child had not been molested in the manner asserted. He was then asked as to why he was postulating total removal of the child from the mother, to which he replied (and noted by Barlow J at 285):

"The answer is probably total removal,.....or highly supervised contact, unless you're convinced that the mother isn't going to fill the child's head up with some other idea, or an extension of the ones she already has, because this child is very, very vulnerable to that. We know that already."

248. When further challenged as to why it was appropriate to take such drastic steps as removing [T] from her mother, Dr W said (AB 1623):

"...We're talking about a highly dysfunctional set of fantasies which have - - have transported this child off the planet a couple of years ago, and - - and at least within the sexual domain, in my view, have transported her off the planet now, and that - - it's - - it's part of the same process. I mean, what you're trying to do is to separate the two where it is absolutely wrong to do that."

249. Dr W' view is encapsulated by the trial Judge at para 286 of his judgment. Dr W was cross-examined by the counsel for the child representative about the notion of removing the child from the mother's household being based on the mother's absolute belief that the child had been sexually abused and that the mother was not going to be able to stop herself from talking to the child about it. Dr W would not, however, concede that if that were not the case there would be no reason that [T] and her sisters should not remain living with the mother. He said (AB 1642):

"Well I'm not so sure that's the case. I think that the fact that this has happened and the degree to which [T] got embroiled in the New Age stuff and I mean, the fact is that, you know what ever complexion you put on it, the mother's had several periods of psychiatric treatment, including one that was totally independent of these proceedings, in a period of what was probably quite a prolonged period of depression when the children were, you know, from the late 80s.

I mean, I would have thought that all of the things which need to be thrown into the melting pot in terms of the mother's capacity to parent, her own mental stability, the extent to which she can focus on the children's welfare and put her own welfare or subordinate her own welfare to the children's welfare; all of the usual sorts of things that one should---I would have thought that even if there's a change of mind, there's a basis for, perhaps a strong basis for believing that the children would still be better placed with the father. I mean as you say I haven't seen the parties so I can't really say. Dr Lord is probably in a better position to answer that hypothetical question if you like."

250. Dr Dixon gave evidence. He was a psychiatrist seeing the wife in therapy. He had not seen the child [T]. He was extensively cross-examined about the notes he had taken on the matters the wife had disclosed to him in the course of the therapy. Many of the matters put to the doctor would appear to indicate that the wife held extremely strong views about the correctness of her beliefs that the child had been interfered with and of the harsh treatment that she felt she had received at the hands of the husband and members of his extended family. My reading of that material would indicate that there was no room to suggest that the wife might have been putting forward her case on the basis that whilst she was at a loss to understand why the child was making the allegations that she was making, given that the child was making them she had little choice but to accept their validity. Her attitude was much rather coming through as being one who was eager and anxious to believe the worst of the husband.

251. Dr Dixon had been seeing the wife for her anxiety disorder since November 1998. He had seen her on 15 occasions. When asked to comment about Dr W' linkage of the child's assertions and the wife's New Age beliefs, Dr Dixon said (AB 1734):

"I just can't see that there is anything remotely connecting them, and certainly, nothing sinister, as has been suggested by Dr W (sic), and therefore, the suggestion that the children should be removed from their mother, never to see her again, I feel, is a totally preposterous suggestion, and I feel that, if anybody attempted that, then the likely thing would be Family and Children's Services would move in, and make them wards of the State, and they would take control, but that's my own personal view. I haven't discussed that with anyone."

### **Submissions on 3 April**

252. The evidence concluded on the afternoon of 18 February and the matter was then adjourned until 3 April to enable written submissions to be prepared.

253. In the written submissions both the husband and the child representative urged his Honour to make findings that the husband and his relatives had not abused [T] nor was she at any risk of any of them abusing her. The wife's submissions were (inter alia):

"The Court cannot discount that the disclosures made by [T] against the husband are true."

"There is evidence upon which a Court can find the husband poses an unacceptable risk to the children."

"The husband's sexualised behaviour has caused immense difficulty and psychological damage. The children need to be protected from his behaviours in the future."

254. At the hearing on 3 April the following exchange took place between the trial Judge and counsel for the wife (AB 1914):

"HIS HONOUR: Yes. Well, Ms Crisford, are your comments in reply contained in this written submission?"

MS CRISFORD: Yes.

HIS HONOUR: I suppose I think I really only have one question to ask of you, Ms Crisford, and it's this: is it the case that your client still maintains that her husband sexually assaulted the child, [T], and in particular, sexually assaulted her in the manner in which she has alleged?

MS CRISFORD: Sir, her position has always been that she believes her child; that what the child has said to her, she's believed. She's heard the evidence, and she accepts that there may well be other interpretations.

HIS HONOUR: Yes. But what does she say? She has heard the evidence. I think it's really, I guess, a 'Yes' or 'No' answer. Does she still allege and maintain that the child was sexually assaulted in the manner in which the child alleged by the husband?

MS CRISFORD: Sir, when you put it to me in that way, can I please just get some instructions, in that regard?

HIS HONOUR: Well - -

MS CRISFORD: You have the submissions which set out her position - -

HIS HONOUR: - - I must say, I'm surprised, at the end of the day, that you'd need to get instructions. I mean, presumably, the wife instructed you as to what her position was. Have you received any instructions to the contrary since the conclusion of the trial?

MS CRISFORD: Since the conclusion of the trial? No; not since her evidence was given.

HIS HONOUR: And the submissions have been put in?

MS CRISFORD: Yes.

HIS HONOUR: Let me put it another way: on the evidence that has been given, and the submissions made, it would be my present intention to proceed that the wife still maintained that the husband had sexually assaulted the child in the manner alleged by the child. I want to make it perfectly clear. I'm not talking - - you know, certain allegations are made about the husband's conduct. Some of his conduct may have been inappropriate, and I'm not talking about inappropriate conduct, at this stage, like getting into bed with the child. I'm talking about the serious sexual assaults which the child alleged, and for which he was charged.

MS CRISFORD: The wife believes what the child told her, and what was subsequently told to various agencies.

HIS HONOUR: So the answer to my question is 'Yes'?

MS CRISFORD: Whilst believing that, she will accept that the court finds it may not be the case, and is prepared - -

HIS HONOUR: Well - -

MS CRISFORD: - - to deal with it on that basis.

HIS HONOUR: - - it may be, but look, I think the answer is 'Yes', is it not? It's not what the court may find. I'm interested in what the wife maintains.

MS CRISFORD: That's - -

HIS HONOUR: If she believes it to be the case, I take it the answer is 'Yes'.

MS CRISFORD: That has been her evidence, and that's her position - -

HIS HONOUR: All right.

MS CRISFORD: - - but it's not a position that, in my submission, is likely to hinder the wife in fostering a relationship. There's been difficulties, but her position has always been - - it's been fully aired. The court will make a decision, and she will abide by that.

HIS HONOUR: I think the relevance of my question is because the wife has now heard all the evidence. She's no doubt had the opportunity of reading the submissions, and I think it is relevant, that notwithstanding the evidence, she still maintains this position.

MS CRISFORD: Sir, that was the reason I sought to get some quick instructions - -

HIS HONOUR: Well - -

MS CRISFORD: - - because she has had that this morning. I haven't received any different instructions, but I haven't specifically sought them either, and it was for that reason that I - -

HIS HONOUR: Well - -

MS CRISFORD: - - and it would simply mean me turning around to my instructor and getting that.

HIS HONOUR: Well, I suppose, Ms Crisford, I'll allow you that opportunity, but I have to say this: it would be very simple, now that your client has heard what I've got to say, to suddenly say 'No', she doesn't maintain it. I mean, it would be extraordinary, if she had changed her view, that she had not passed those instructions on to your instructing solicitor. You know, let's not beat around the bush. This is a critical issue.

MS CRISFORD: It's a very critical issue, your Honour.

HIS HONOUR: Well, I'll give you that opportunity. I don't think I should do it by you turning around. I think I should adjourn for a few moments. Yes. I'll adjourn for 5 minutes.

#### SHORT ADJOURNMENT

#### UPON RESUMPTION:

HIS HONOUR: Yes, Ms Crisford?

MS CRISFORD: Sir, thank you for that opportunity. My client's instructions remain the same. Her position is as it was at trial. Can I say to you that she says that, when a decision is given, in relation to this matter, it may well progress things, in terms of how she deals with matters, and how the children are able to progress in therapy about these matters, but her position is the same.

HIS HONOUR: Yes. All right. Thank you. Yes, Mr Dowding?"

#### **THE JUDGE'S FINDINGS**

255. At para 297 his Honour set out what he described as his essential findings as to why an order for residency of the children should be made in favour of the husband. They were (in summary)

- The husband was a generally reliable witness.
- The wife was an unreliable witness whose evidence was exaggerated, and less than frank. She "attempted to minimalise aspects of her behaviour".
- The child [T] was a most unreliable witness.

- The paternal grandparents were reliable witnesses.
- The maternal grandmother had a tendency to exaggerate, especially in relation to complaints about and criticisms of the husband.
- Dr. Lord was an objective and cautious witness.
- Dr. W was an objective witness whose evidence needed to be tempered by the fact, that he did not have the opportunity of having the husband, the wife and the children attend on him.
- Dr. Dixon's evidence lacked the objectivity normally found in a specialist medical witness.
- Gonzalo Bascunan's, (an Iridologist and Natural Therapist) evidence was unreliable.
- The other witnesses gave their evidence as accurately as their memories permitted and in general were reliable witnesses.
- The husband did not sexually abuse the child [T] as alleged or at all.
- The husband did not sexually abuse the child [S] as alleged or at all.
- The paternal grandparents did not sexually abuse either the child [T], or the child [S] as alleged or at all.
- The husband's brother did not sexually abuse the child [T].
- The children are not at risk of sexual abuse from the husband and/or Mr. and Mrs. [W].

### **New Age beliefs and their relevance**

256. His Honour then expressed his findings in relation to the wife's and the child [T]'s involvement in what he referred to as New Age Beliefs and/or Spiritual matters. In summary those findings were:

- The history of the manner in which the wife embraced them and the extent to which she had held and still held these beliefs, were very relevant to the matters for determination.
- The wife's New Age and/or Spiritual beliefs and practices were relevant to the effect, if any, those beliefs and practices have had, or were likely to have on the children and on the wife's ability to properly and appropriately provide for their physical and other needs, particularly their emotional needs.
- The wife's acknowledgment that in 1997 and 1998 she became absolutely immersed in what she described as New Age beliefs, and her acceptance that some of the beliefs held by her in 1997 and 1998 could be described as bizarre.
- The bizarreness of the wife's beliefs could be demonstrated in part by the fact that not only did the wife accept the child [T] could speak a language from a star, named Coercia, but she encouraged the child to believe that she could do so.

- The wife sought to minimalise some of the more bizarre aspects of her beliefs and behaviour.
- The wife's beliefs in relation to contact with spirits was not limited to inner feelings. She believed that she could actually communicate with spirits by sight and sound.
- The wife has probably maintained more of her beliefs, including some which might reasonably be described as bizarre, than she would have his Honour believe.
- That within a very short time of the wife becoming involved in New Age beliefs and/or spiritual matters, she actively encouraged the child [T] to also become involved.
- The wife sought to minimalise some of the more bizarre beliefs held by the child [T].
- The wife not only involved the child [T] in such matters, she came to believe the child was invested with significant powers, which exceeded even her own powers. To some extent the wife gave contradictory evidence, in relation to her beliefs about the child [T]'s ongoing powers as a spiritual healer and medium. She remains of the view that the child is a great spiritual healer and medium and that the child has psychic powers greater than her powers.
- The wife's beliefs in relation to the child [T]'s powers and the fact that they were in some respects greater than her own, have been passed on by the wife to the child.
- The wife's beliefs about the child [T]'s powers, have given rise to an inappropriate balance of power in the relationship between the wife and the child [T]. That imbalance of power has adversely affected the wife's ability to care for and control the child. Unless and until the wife has a change of view and attitude, that imbalance is likely to continue to affect her ability to care for and control the child.
- The involvement of the child [T] in spiritualism occurred primarily during the period April 1997 to approximately mid-1998. Thereafter the child [T]'s interest in such matters diminished.
- The involvement of the child [T] in the wife's spiritual beliefs and practices was not "essentially harmless" and was out of the range of normal activities. The wife did not simply share her beliefs with the child [T], but invested the child with powers related to an extreme set of beliefs.
- During 1997 and 1998 the husband demonstrated an interest in the wife's "New Age" beliefs and in part, explored same.
- The husband could have taken action, or at least made a greater effort to prevent the wife from involving the child [T] in New Age beliefs and spiritual matters. However the husband's explanation of how and why he became involved and why he did not take any action, or at least any effective action, to prevent the wife from involving the child [T] in such matters was accepted.
- The husband acknowledged he had made a mistake by not taking action, or at least more effective action, to oppose the wife involving the child [T] in such matters.



• [T]'s allegations of sexual abuse should be viewed not in isolation, but in the context of what had happened in the child's life during 1997 and 1998. It was more likely than not, there was a connection between the child [T]'s involvement in New Age beliefs and spiritual matters and her allegations of sexual abuse. "In relation to this aspect of the matter I accept the evidence of Dr. W".

### **The wife's present attitude**

257. His Honour said:

"298....

6.3 It is apparent that whatever the child [T]'s claims, in relation to sexual abuse and however exaggerated and unlikely they might seem, the wife accepted and continued to accept the accuracy and truthfulness of such claims. In this context I note that the wife accepted, without demur, the child's claim to have remembered many occasions of sexual abuse numbering in the hundreds. The complete lack of objectivity of the wife, in relation to the child [T]'s claims relating to sexual abuse, may in part be illustrated by the wife's assessment of the manner in which the child gave her evidence in the District Court proceedings. ....

6.4 If one had any doubts about the reliability of the allegations of sexual abuse made by the child [T], one need go no further than to consider her allegations made against [the paternal grandparents]. It is relevant to note again, that the allegations went beyond mere touching. Thus the child thought that [the paternal grandmother] had digitally penetrated her.

...

6.6 The wife's attitude, to the child's allegations of sexual abuse made against [the paternal grandparents], provides an insight into the wife's present beliefs and attitudes. On the one hand it was submitted she found it difficult to believe that [the paternal grandparents] had sexually abused the child. On the other hand the wife was unable or unwilling to accept the child had fabricated these allegations. It is also relevant to note, the wife's statement in Dr. Dixon's report dated 24 January 2000 to the effect that [the paternal grandparents] condoned sexual abuse. The contents of that report, which were settled by the wife, indicates the strength of the wife's views about [the paternal grandparents] being involved in the sexual abuse of the child [T]. In the circumstances there must be some doubt about the concession made by the wife, via her Counsel, to the effect that the allegation against [the paternal grandparents] was only of inappropriate touching."

258. His Honour then speculated as to why [T] made false allegations:

"7.2 I think it more likely than not, that the genesis for the child's [T]'s allegations of sexual abuse are to be found in one or more of the following:

(a) the belief systems adopted by the wife in 1997 and 1998 and passed on to the child

(b) a sexual aspect of those belief systems, namely the wife's growing preoccupation with aspects of those systems which might fairly be described as appearing to have a sexual component

(c) a change of view by the wife, which she probably passed onto the child [T], in relation to conduct and in particular conduct by the husband, which she and the child had previously

regarded as acceptable

(d) a lack of sensitivity by the husband to changing attitudes by the wife and the child [T], in relation to conduct, which was previously regarded as normal.

...

7.7 ...it was the wife's interpretation of the husband's behaviour, probably passed on to the child [T], which caused any such difficulty and damage.

7.8 I am not satisfied that the wife maliciously planted into the child [T]'s mind the belief that the husband had sexually abused her. I think it more likely the implant of this belief, related to the wife's adoption of an interest in New Age beliefs and Spiritualism. In other words, what the wife did, she did deliberately, but not maliciously. I accept that in her own mind, the wife has probably always acted in what she believed to be in the best interests of the children.

7.9 I accept it is possible, that the child [T] made the complaint of sexual abuse either believing it, or to serve some perceived purpose of her own, and/or believing it would in some way assist the wife.

...

8. ...the wife did not provide anyone [the Department of Family and Children's Services, the West Australian Police Service and professional counsellors ] with the complete picture. In particular the wife did not acquaint anyone with the fact, that both she and the child had entertained belief systems which, on her own admission, were in some respects bizarre. The wife's failure to provide the various parties with all relevant facts was due no doubt to her being unable, or unwilling to accept even the possibility of there being a relationship between such beliefs and the child's allegations."

### **Further relevant findings**

- The husband and wife are each genuinely concerned about the welfare of the children.
- They have in the past, in their own way, attempted to discharge their obligations as parents to the best of their ability.
- The wife's ability to properly and appropriately discharge her obligations to the children, has been adversely affected by her involvement in New Age beliefs and her involvement of the child [T] in those beliefs.
- The wishes of the children [T] and [S] are that they continue to reside with the wife. It is appropriate that some weight be given to those wishes balanced against other matters relevant to the welfare of the children.
- Probably the wife does not suffer from a delusional or psychotic illness. However the wife has in the past on more than one occasion suffered from depression and that she continues to suffer from depression and an anxiety condition for which she was receiving treatment.
- The husband has in the past suffered from depressive symptoms and has been appropriately treated for this condition.

- The wife presented her relationship with the husband as one of unmitigated unhappiness caused by the husband's insensitivity, meanness and sexual obsessiveness. She presented [the paternal grandparents'] attitude towards her as one of dislike and antipathy. The nature and extent of the complaints and criticisms, illustrate the wife's tendency to exaggerate. For the most part the complaints and criticisms were not justified.
- The wife had a very negative attitude towards the husband which was not surprising, having regard to the fact she believed and continues to believe, that the husband sexually abused the children [T] and [S].
- The wife's negative attitude towards the husband has undoubtedly affected his relationship with the child [T]. To date it does not appear to have significantly affected the relationship between the husband and the other children.
- If the children continue to reside with the wife it is more likely than not, that in the medium to long term, the wife's attitude towards the husband will not only continue to adversely impact on his relationship with the child [T], but could also adversely impact on his relationship with the children [S] and [O].
- The husband's attitude towards the wife is probably somewhat more negative and distrustful than he would have the Court believe. The degree of negativity which he holds towards the wife is significantly less than that which she holds towards him.
- With the assistance of counselling, there is a reasonable chance that negative feelings the husband feels towards the wife will ameliorate, at least to a degree.
- The husband, more likely than the wife, will be able to promote a positive relationship between the children and the non-residence parent.
- The evidence, relating to the child [T]'s relationship with the husband, is somewhat contradictory. She made very serious and, in my view, false allegations of sexual misconduct against the husband. She steadily maintained the view, that she did not wish to have any contact with him whatsoever. On the occasion the child was brought into contact with the husband, Dr Lord had no doubt she enjoyed being with him.
- A renewal of the relationship of the husband and the child [T] may not be as traumatic for the child and as difficult as the evidence might otherwise suggest.
- [T] had a close relationship with the wife, but that relationship was not without its difficulties. These difficulties, in part at least, arose from the wife's inability to control and guide the child [T]'s behaviour. [S] and [O] had a close relationship with the husband and enjoyed having contact with the husband.
- [S] and [O] have a good relationship with the wife. The paternal grandparents' relationship with [T] could not be evaluated, although their feelings towards the child remained positive ones.
- Notwithstanding the lack of contact between Mr and Mrs [W] and the children [S] and [O], their mutual relationship remained a reasonably good one.

- Whilst nobody submitted that the children should be split the husband acknowledged it was possible, that the only way to deal with the situation would be for the children [S] and [O] to reside with him and for the child [T] to reside with the wife. If the child [T] were to remain implacably opposed to residing with the husband, it is possible the husband may have no choice, but to relinquish residency of the child to the wife.
- Both the husband and the wife had the ability to provide for the physical and intellectual needs of the children.
- The task of coping with the emotional needs of the children, and in particular the emotional needs of the child [T], will not be an easy one. The husband has the ability to deal with the emotional needs of the children, and in particular the emotional needs of the child [T]. He will require professional assistance in doing so. He will deal with the difficulties, which will inevitably arise, with patience and tact. [T] is a troubled child in need of assistance, at least by way of ongoing counselling.
- The children will not be subject to any physical or psychological harm, or to any abuse, ill treatment or violence, from the husband.
- The children will not be subject to any physical abuse or ill treatment from the wife.

### **Trial Judge's conclusion**

259. The **crux of the judgment** is to be found in the following passages:

"298...

15.4 The wife continues to accept, without reservation, the truth and accuracy of the child [T]'s allegations, that she was sexually abused by the husband. For so long as the wife retains her views, in relation to the child [T]'s allegations of sexual abuse, I think it unlikely she will be able to appropriately and properly provide for the children's, and in particular the child [T]'s emotional needs. For as long as the wife retains these views, it is likely those views will effect not only the child [T], but all of the children.

15.5 In particular, for so long as the wife holds these views, it is unlikely she will make any attempt to dissuade the child [T] from her belief that she has been subjected to sexual abuse by the husband and [the paternal grandparents]. In relation to this aspect of the matter I again note the wife's evidence in relation to the child [T]'s claims relating to sexual abuse, namely that what mattered was what the child believed and that she would never encourage the child to think otherwise. Given the fact that I accept the wife's concern is well intentioned, it is relevant to note Dr. W' comment, that she was likely to be persistent and persuasive in her beliefs. In such an environment, it is likely the children [S] and [O] would grow up believing that their sister had been sexually abused by their father and paternal grandparents.

15.6 For so long as the wife continues to maintain her beliefs in relation to sexual abuse of the child [T], not only is it unlikely she will do anything to persuade the child from believing she has been sexually abused, I think it more likely than not, that she will provide positive reinforcement for the child's beliefs. I accept the evidence of Dr. Lord and Dr. W to the effect that the perpetration of false allegations of sexual abuse had great potential to damage the children and their interpersonal relationships.

...

17.3 If the children were to continue to reside with the wife, I am of the view there is a very real danger that they, and in particular the child [T], will suffer psychological harm. In relation to this aspect of the matter I accept the evidence of Dr. W to the effect, that if the child [T] still believed the husband sexually assaulted her, the longer the child received reinforcement for this belief, the longer it would take for the belief to abate.

17.4 On behalf of the wife it was submitted, that her position was that if the Court found the husband had not digitally penetrated the child [T] and if he was to show appropriate respect and treat the children in a dignified and neutral manner, she would accept that decision, albeit with difficulty. In relation to this aspect of the matter I think it relevant to note that the wife, having heard all the evidence presented at the trial, remained of the same view, namely that the husband had sexually abused the child [T] and the child [S]. Given the rigidity with which the wife holds these views, I think it unlikely in the short to medium term, that she will change them and this being the case, I think it unlikely, in the short to medium term at least, that she will accept my findings that the children [T] and [S] have not been sexually abused by the husband and [the paternal grandparents].

18.1 There is no doubt that the order I propose to make will, in the short term at least, cause significant disruption in the lives of the children, and in particular in the life of the child [T]. That disruption must be weighed against the ongoing harm, which in my view would inevitably be caused to the children, and in particular to the child [T], if they remain in the care of the wife.

18.2 The evidence led me to conclude, that such ongoing harm outweighs any disruption, which may in the short term be caused to the children by a change of residence parent."

260. His Honour than turned to the best manner of implementing the judgment:

"298....

18.3 In order to help minimise the effect on the children of the change of residence from the wife to the husband, the husband, the wife and the children should have appropriate ongoing counselling. In the circumstances it would be appropriate there be counselling, even if I had decided to make an order for residence in favour of the wife.

19.1 If the wife were to have unsupervised contact with the children, such contact could afford the wife the opportunity of reinforcing the false beliefs presently held by the child [T].

19.2 The only practical difficulty and expense, in relation to the wife having contact with the children, arises from the fact that in the short term at least, I am of the view such contact should be supervised.

20. Given the complexity of this matter I accept, that more likely than not, there will be further proceedings between the parties in relation to the children. In the result I do not think this aspect of the matter is of significance in this case, in the sense that whether a residence order is made in favour of the husband or the wife, I do not think either order is more or less likely to lead to the institution of further proceedings in relation to the children.

299. In the result I conclude that the best interests of the children will be served by an order for residency of them being made in favour of the husband."

261. Finally his Honour dealt with what he described as "Responsibility for day to day and long term care, welfare and development of the children":

"300. Disagreement between the husband and wife in relation to matters relating to the children's day to day care and long term care, welfare and development, may adversely affect the children. Inconsistent approaches to matters affecting the day to day care of the children and their long term care, welfare and development are not likely to be in their best interests. Disagreements and inconsistent approaches are likely to cause conflict and confusion.

301. In the circumstances of the case I conclude, that in order to reduce the risk of conflict and confusion arising from disagreements between the parties in relation to matters affecting the day to day and long term care, welfare and development of the children, the husband should have sole responsibility for such matters."

## **THE APPEAL**

262. Effectively the essential matter pressed upon us by Mr Ackman QC for the wife and supported by Mr Hooper for the Child Representative was that the evidence did not support the trial Judge's finding that the wife was unlikely in the short or medium term to accept the findings that the children had not been sexually abused by the husband and that flowing on from that finding [T] would inevitably suffer ongoing harm if she was to remain living with the wife.

263. The challenge to that finding and its implementation had several facets to it. Firstly, it was suggested that the finding was based significantly on the events of 3 April which events, it was asserted by Mr Ackman, amounted to a denial to the wife of natural justice and which were oppressive and manifestly unfair in all the circumstances.

264. Secondly, it was submitted by Mr Ackman and Mr Hooper that the finding ignored many passages of evidence which supported the wife's counsel's written submissions at trial (AB 883) which said:

"The wife's position is that if the Court found no digital penetration had taken place and that the husband, if he was to show appropriate respect and treat the children in a dignified and neutral manner, [she] would accept that decision. Her treating psychiatrist Dr Dixon indicated she would be capable of accepting that decision. Dr Lord mentions this on p. 7 at (N) of his report. She accepted herself it would be difficult but that she would accept it."

265. We were then referred to the following passages from the evidence. Wife cross-examined (AB1342-3):

"Is his Honour to conclude that this has arisen because, all this time, [the husband] 's been abusing her, sexually? This is my belief. Yes.

That's your belief now, is it? Yes

MR DOWDING: And you won't ever be shaken from that belief, will you? Nothing can be done or said now to shake that belief from you---If I'm given, or spoken to, by experts in the field who would be able to rationalise otherwise, then I would be open to suggestion, but this is my belief, at the moment."

266. However, that cross-examination continued as follows:

"I mean, Dr Dixon - - I mean, no one's suggested anything to you which supports the view that [the husband] hasn't been an abuser right through this period. I'm going back prior to 94. You think he's been an abuser since the child was young, don't you?---Yes. But I don't know how young.

But, I mean, we're talking perhaps one, or perhaps two, or perhaps 3 years old, aren't we? In your mind, what's the youngest [T] might have been when [the husband] started to abuse her, in your mind?---She mentioned to me around about the age of five.

Okay. And she was born in 1988, so 1993 is a possible - -?---Yes.

- - time that since then, he's - -?---Yes.

- - and nothing that's said by [the husband], nor by his Honour, is going to shake that view of yours, is it?---Again, I go by what the child says.

Well, that's fine. So when these proceedings are concluded, if you are granted the care and control of [T], [T] will grow up in an environment where her carer believes that her father abused her since she was three?---I did not mention the age "three". I said "The age of five".

Oh, five. I do apologise; the age of five. Okay. Insert "five", and the statement's true, isn't it?--At - - at the end of the day, it doesn't matter what I believe. It matters what the child believes - -

Well, maybe, but - -?--- - - and this is what I go by.

Well, maybe it does, and maybe it doesn't, but your belief is - - you're in the stand, and I'm asking you - -?---Yes.

- - and I suggest to you - -?---Yes. I understand.

- - this child's future is she will never get encouragement from you to think other than [the husband], the abuser, since age five?---That's - -

You haven't tried to dissuade her from any of these beliefs, have you? You haven't even tried to dissuade her from the belief that the grand-mum put her finger in her vagina. You haven't said to her 'Listen, sweetheart, you must be wrong. I don't think you're naughty for saying it, but how could it be so?'. You've never said that to her, have you?---I have asked her, on numerous occasions - -

No, no. That's not what I'm asking you. You've never put your arms around her, taken her into your arms, held her tight, tell her you love her, and say 'Look, sweetie, you've said these things about Grandma, but it couldn't be true'; anything like - - you've never done that, have you?---No, I haven't.

And as far as you're concerned, if she says it's true, it's true, and until she says it isn't, you'll never believe otherwise, will you?---To be specific, I have asked her if she has ever lied about this allegation, and she said 'No'.

Mrs [W], that's not my question. So long as she holds out with the proposition that it's true, as far as you're concerned, it is, isn't it?---Yes."

267. Then at AB 1460, when discussing possible contact between the father and the child, the following takes place:

"Sure. Have a look at your minute of orders, paragraph 2, the three children get to see their father, and that's not your proposal at all, is it?---Well, these are the - -

It's not your proposal, is it?---In regard to [T], I would allow her to make her own decision. I think she's old enough to make a decision.

But what information is she going to make a decision on? You have, unequivocally, conveyed to her the belief that she's been sexually interfered with, haven't you?---No; the other way round.

No, no. But you've conveyed your belief that it's true?---I - -

She knows that you believe it's true?---I believe in her; yes.

Well, she's never going to have a relationship with her father again, is she, on your evidence?---Again, I leave it up - - up to her, when and if she wants to - -

But she's a child, isn't she?---She's - -

She's 12 this year?---Yes. I think 12 is - -

She's 11, at the moment?---Yes.

So it's not a matter for you to have any view about, or any influence. It's all up to her. Is that right?---I think, at her age, she's - - she's intelligent enough to make her own decisions. Yes.

And you thought that about her in 1997, didn't you - -?---Yes."

268. Then at AB 1476:

"You said, I think early on, that if an expert was able to provide an explanation, you might be able to re-think - - I don't know quite how you put it, but review the situation?---Yes.

Now, as you know, there will be experts available to the court?---Yes.

And as you know, it's his Honour's decision to determine what the facts - -?---Yes, I know.

- - are. If his Honour, having heard everything - -?---Yes.

- - and given the matter due consideration, if he were to decide that your husband was no risk to your children, what would be your reaction to that, from a sexual point of view? How would you feel?---I've - - from day one, I've always had mixed feelings, in regards to this issue, whether it is possible or not, so I would assume I would have the same mixed and



confused reaction, but I'm - - I'm open - -

Would you feel relieved?---I have asked a few people - namely, the Child Abuse Unit people - to please tell me that my child is lying. I was hoping - -

HIS HONOUR: Which - -

MS BRADDOCK: Sorry.

HIS HONOUR: Which unit people?

MS BRADDOCK: The Child Abuse - -

WITNESS: The Child Abuse. I have asked them to please tell me that my child is lying. I understand I cannot quote what their answer is, but I was always hopeful that there's some awful mistake happening.

MS BRADDOCK: So if we come back to it, if, after all this evidence is taken - -?---Yes.

- - and his Honour has had opportunity to consider it - -?---Yes.

- - and he comes to the conclusion - - were to come to the conclusion, in his wisdom, that there was nothing for you, or more importantly, the court, to worry about, would you feel relieved?---I guess I would; yes.

Would you accept that?---I would imagine it would take me some time to accept it, but yes.

Do you appreciate that that doesn't necessarily mean that your daughter, [T], is consciously lying?---I don't know what the explanation is.

Well, I know you don't know, but do you see what I mean? Obviously, you've had direct communication with [T] about these matters?---Yes.

And you have come, reluctantly, to accept that she tells the truth about these matters?---Yes, yes."

269. And, at AB 1520 in re-examination the witness is asked:

"...Can you just indicate when steps you would be willing to take if the court was to say that it is likely [T]'s behaviour isn't related to abuse, and there's not an unacceptable risk of her being with her father?---Apart from various times where I have witnessed what I would call 'inappropriate sexual behaviour', I indeed have not seen any abuse occur. Therefore, I would be willing to accept counselling of any kind from any - - any expert that the court deems suitable."

270. His Honour then asks the witness some questions about the matter at AB 1537 and says:

"I suppose what I'm asking, Mrs [W], is why should I feel that you would obey an order that I make? Why should I feel confident about that?---As far as I can tell, this is the first time where the whole case has been heard in its entirety, where it hasn't been up until now, so

when all the details are collated, a better - - a better decision can be made.

Well, supposing that decision, for example, is - and I want to stress to you that I haven't drawn any conclusions so far - -?---Yes.

Supposing I decide, for example, that your husband should have unsupervised overnight contact, are you going to obey that order?---I would have great difficulties with it. Yes.

Well, what does that mean; you'd have great difficulties? My question is will you obey it?---I will obey it. Yes."

271. Our attention was also drawn to a passage in Dr Lord's report where he said (AB 150):

"The mother is not supportive (in the presence of allegations of sexual abuse) of contact between the children, their father and their paternal grandparents. However, should it be demonstrated that the allegations have no basis in fact then presumably the mother will reconsider her position in this regard."

272. When being cross-examined by counsel for the wife, Dr Lord said (AB 1669):

"The court, in my opinion, would need to be satisfied, having made a determination in regard to the facts, that the parties accepted the determination of the court, and could then put issues behind them, and move on into the future.

...

If the mother's position is, and just take it, that she could accept it, with some assistance, do you see it appropriate that the children still remain with her, or it being a workable solution?--  
-It has the potential to be a workable situation, but with those qualifications that I have already mentioned."

273. What both Mr Ackman and Mr Hooper urged was that this Court should find that his Honour erred in concluding in the circumstances that the wife was unlikely to be able to move from her position of belief in her daughter's allegations, at least in the short or medium term. They both submitted that the only way to comfortably reach a finding in respect of that matter would have been to enable the wife to demonstrate her capacity to come to grips with the reality of the finding, once the finding had been made. It was submitted that in all fairness the trial Judge should have announced his finding and then adjourned the matter for several weeks or months to enable further evidence to be put before the Court as to the effect of the finding upon the relationship between the children and their father and upon the capacity of the mother to dissuade the child [T] from her unfounded beliefs. Such course had been taken by me in *R and B*, which is reported on appeal at [\(1996\) FLC 92-658](#). In that case, I found that the mother of two young girls aged 5 and 4 was:

- "thoroughly and absolutely convinced that their father had sexually interfered with them and that nothing anybody would say to her about the issue could change her mind."
- "so fixated with her hatred of the husband that she is causing the children significant emotional disturbance and is likely to cause significant emotional disturbance."

Notwithstanding those findings, I found that the children were bonded closely to their mother and appeared to be functioning in their contact with the outside world. A social worker had given evidence that there was a significant risk of long term harm if the little girls were removed from their mother's care. In the circumstances, I concluded that the welfare of the children would best be served if they could remain in their mother's care and develop a meaningful relationship with their father. To that extent I adjourned the case for 12 months, made orders for liberal contact in favour of the father and imposed a number of conditions, including the requirement that the wife attend upon a psychiatrist or therapist for the purpose of undergoing a course of therapy to enable her to best promote access as an enjoyable experience for the children and to adjust to the reality that the children are to have a permanent and ongoing relationship with their father.

274. The majority of the Full Court in *R and B* (Baker and Chisholm JJ) concluded that there had been no errors by the trial Judge and dismissed the appeal. Nicholson CJ concluded that I had erred in finding that the husband had no "instinctive insight" into raising the children. Further, that it was not open to me to find that the husband, who was living in a rural community, lacked necessary services to assist him in raising the children. The Chief Justice would have remitted the matter for rehearing.

275. In my view, the decision in *R and B* is an example of the manner in which a trial Judge **may** make orders for further adjournment of an otherwise completed trial if the trial Judge concludes that is what the welfare of the children dictates. It is not authority for the proposition that the Court **must or should** make such orders.

276. In this case, nobody asked the trial Judge to make such an order. The mother's case was firmly that the children were at risk of abuse in the father's care, and at best she would examine her position if the trial Judge found otherwise, if the husband "was to show appropriate respect and treat the children in a dignified and neutral manner" and, if she was advised to do so by various professionals.

277. In my view, it was clearly open in this case for the trial Judge to make his own evaluation as to the likelihood of the mother changing her position in light of his Honour's findings. In my view, there was nothing sinister or inappropriate about his Honour asking the question of counsel two months after the evidence had been completed as to whether the wife still held to her basis proposition that the child [T] had been abused. No issue of a denial of natural justice or oppression arises. The mother was given ample opportunity to answer the question and, if counsel had thought it appropriate, an application could have been made to reopen the evidence on the issue. No such application was forthcoming.

278. Given the test that had been clearly propounded by Dr Lord, namely both the need and the capacity to move from a fixed position, it was entirely appropriate for the trial Judge to make an inquiry in April, some two months after the evidence had concluded. Indeed, had he failed to make such an inquiry then he may well have been the subject matter of appropriate criticism for making a finding based on speculation that no change was likely to be forthcoming when the only evidence to support that was all interwoven with the very heat of the trial. By April, some two months later, there had been time for careful reflection by all concerned and it was, in my view, thoroughly appropriate for his Honour to ask at that stage as to whether there had been any change in position.

279. In this case, the evidence indicated that once the sexual abuse issue had been determined, the sooner [T] was placed into a position that would begin to rehabilitate her from her present position, the better it would be for the child. The trial Judge was fully aware of the difficulties involved in ordering a change of residence, having regard to the views that [T] was expressing that the father was an abuser and that she was unwilling to meet with him. His Honour had correctly recited the proposition from *M and M*, that the Court must pay attention not only to the risk of abuse, but to the risk of disturbance to a child who is "compulsorily brought into contact with a parent whom the child believes to have sexually abused her". In this case his Honour had a very difficult decision to make. He carefully and conscientiously went about the task of examining the evidence provided to him. There is no challenge to his conclusions relating to that evidence. He identified each of the competing and relevant issues, weighed them up and reached a conclusion that the welfare of each of these children would be best advanced if they were placed in their father's care.

### **Dr W**

280. Of the Grounds of Appeal not otherwise covered by the above arguments and analysis it appears to me that it is appropriate to deal separately with the assertion that the learned trial Judge incorrectly exercised his judicial discretion by giving excessive weight in all the circumstances to the evidence of Dr W. Dr W' evidence as to whether or not sexual abuse occurred is dealt with by the trial Judge at paras 98 to 103 of the Reasons for Judgment. The passages quoted by his Honour almost entirely relate to an analysis of why the child's assertions should not be accepted. That finding is not under challenge in these proceedings.

281. At para 104 his Honour cites Dr W as saying "If the wife's concern was well intentioned, it was likely to be persistent and persuasive". Dr W' evidence is once again referred to when his Honour dealt with the wife's New Age practices. It is recited at paras 211 - 213 as follows:

"211. According to Dr. W, it was :

'...probable that Mrs. [W] is a highly suggestible but persuasive person, that [T] is a very insecure girl who is desperate for attention and has felt that way since early childhood, and that Mr. [W] is a somewhat passive though obsessional person who is also somewhat suggestible.

The materials which I have seen strongly suggest that once the mother became convinced of her paranormal beliefs and phiposophies<sup>(sic)</sup>, she inappropriately shared them with her daughter who, being extremely needy of attention, produced for her mother based on suggestive questioning, a range of paranormal experiences which confirmed in the mother's mind that her daughter had special powers....'

212. Dr. W thought the child [T] was desperately in need of attention. The child liked being in a fantasy world, or having an active fantasy life. Dr. W thought it remarkable, the extent to which the child [T] had been drawn into the wife's beliefs concerning New Age philosophies. The wife did not simply share her beliefs with the child [T], but invested the child with powers. As Dr. W put it:

'It's one thing to be a member of a congregation; it's another thing to be anointed the bishop.'

213. Dr. W was reluctant to call the beliefs, which had been held by the wife, delusions. He thought they were simply an extreme set of beliefs. More importantly, the wife managed to infect the child with same beliefs, not just in the ordinary spiritual way, but by putting the child on another plane. It went beyond the ordinary human process into something which was quite dangerous."

282. His Honour again considered Dr W' evidence when dealing with

s 68F(2)(g), (i) and (j) considerations. He noted that according to Dr. W the solution of removing the child from the wife was predicated on the notion that the wife still held her beliefs absolutely and that she was not going to be able to stop herself talking to the child about her beliefs, even if the child resided with the husband. Removing the child [T] from the care of the mother was a discreet harm, but allowing the child to grow up believing she had been a victim would also be harmful to her. The passages attributed to Dr W say no more than that said by Dr Lord in the passage recited at para 282 of the judgment (see para 241 above).

283. His Honour subsequently said he accepted the evidence of Dr. Lord and Dr. W to the effect that the perpetration of false allegations of sexual abuse had great potential to damage the children and their interpersonal relationships. Mr Ackman opened his case by conceding that it would be very harmful to [T] if her mother persisted in maintaining her belief that the child had been abused. The acceptance of Dr W' evidence on this point is unexceptional.

284. The remaining next significant reference to Dr W' evidence is in his Honour's assessment of the manner in which the wife involved [T] in her belief system. The finding is as follows (para 298):

"4.7 I accept Dr. W' assessment of the situation, namely that the wife did not simply share her beliefs with the child [T], but invested the child with powers related to an extreme set of beliefs. In other words, it was not a situation of a parent passing on beliefs to a child as described by Dr. Dixon. Dr. Dixon's comment in relation to this aspect of the matter, was in my view an indication of his lack of knowledge of what in fact had happened and of his lack of objectivity."

285. The wife had opened up the topic by extensive references to it in her evidence in chief. It was the subject of much cross-examination. It was clearly open to his Honour to reach the conclusions he did about the wife's involvement of the child and to accept Dr W' description of the apparent depth of that involvement based on the written material shown to him.

286. His Honour continued to explain why the child may have acted as she did, returning to Dr W' evidence in the following passage (para 298):

"6.1 In my view, the child [T]'s allegations of sexual abuse should be viewed not in isolation, but in the context of what had happened in the child's life during 1997 and 1998.

6.2 Contrary to Dr. Dixon's opinion, I think it more likely than not, there was a connection between the child [T]'s involvement in New Age beliefs and spiritual matters and her allegations of sexual abuse. In relation to this aspect of the matter I accept the evidence of Dr. W."

287. Again his Honour found Dr W' hypotheses helpful when trying to fathom why the child was making what his Honour concluded were false allegations. Neither Dr W nor Dr Dixon had seen [T]. Each was speculating as to the cause based on the material available to them. The choice of one witness' views in preference to another was clearly within the trial Judge's province and there is nothing untoward in his Honour preferring the evidence of Dr W over Dr Dixon on this point.

288. Finally his Honour returned to explain why it would not be in the child's best interests to remain with the wife (para 298):

"17.3 If the children were to continue to reside with the wife, I am of the view there is a very real danger that they, and in particular the child [T], will suffer psychological harm. In relation to this aspect of the matter I accept the evidence of Dr. W to the effect, that if the child [T] still believed the husband sexually assaulted her, the longer the child received reinforcement for this belief, the longer it would take for the belief to abate."

289. As already stated this passage reflects what was almost common ground. The real issues for his Honour were whether the wife could be assessed as being capable of alleviating this risk and whether the cure was worse than the disease.

## CONCLUSION

290. His Honour had a difficult decision to make. He chose one of two less than satisfactory paths to take. The extent of the findings made (summarised above) demonstrate the exhaustive and painstakingly careful manner in which his Honour approached his task. This was a discretionary judgment. The circumstances in which the Full Court should interfere with a discretionary judgment are well known. In *Gronow v Gronow* [1979] HCA 63; (1979) 144 CLR 513 Stephen J said at 517:

"In this case the fine balance of competing circumstances not only made the decision facing the learned trial judge a difficult one. It should also have gone far to satisfy the Full Court that this was not an occasion upon which it was proper for an appellate court to disturb the outcome of a discretionary judgment, particularly when made after a most careful review at first instance of all relevant circumstances and made with that unique advantage which the primary judge alone possessed, that of seeing the parties and those associated with them and gaining at first hand some personal impression of their personalities. Where very evenly balanced competing claims are in question and where it is custody that is in issue this advantage must be of particular significance.

(at519) The constant emphasis of the cases is that before reversal an appellate court must be well satisfied that the primary judge was plainly wrong, his decision being no proper exercise of his judicial discretion. While authority teaches that error in the proper weight to be given to particular matters may justify reversal on appeal, it is also well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion. When no error of law or mistake of fact is present, to arrive at a different conclusion which does not of itself justify reversal can be due to little else but a difference of view as to weight: it follows that disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge. Because of this and because the assessment of weight is particularly liable to be affected by seeing and hearing the parties, which only the trial judge can do, an appellate court should be slow to overturn a primary judge's discretionary decision

on grounds which only involve conflicting assessments of matters of weight."

Per Aickin J at 538

"The fact that a decision on custody depends upon the exercise of a judicial discretion recognizes that in many cases different minds may arrive at different conclusions.

The advantage which a trial judge has of seeing and hearing the witnesses is of particular importance in matters of custody where so much depends on an evaluation of the characters and personalities of the parents, and their attitudes, not only to the child, but also to each other. The attribution of comparative weight or importance to various factors will generally be influenced by the impression formed on seeing and hearing each parent, and in appropriate cases the child or children involved..."

291. In my view, none of the matters raised in the Notice of Appeal nor the eloquent submissions of counsel for the mother and for the child representative, demonstrate that his Honour has made an error in any appellate sense. I would dismiss the appeal.

### **Postscript**

292. Since preparing this judgment I have had the advantage of reading a draft judgment prepared by the Chief Justice and O'Ryan J. Their Honours extensively discuss at paras. 157-165 principles to be borne in mind when dealing with expert evidence. I agree with the sentiments therein expressed although for the reasons already given, I see no appealable error in the way Barlow J dealt with this matter.

293. As the majority judgment is that the appeal be allowed, I agree that it is now necessary to receive further submissions on the appropriate orders that should now be made.

*I certify that the preceding 293*

*paragraphs*

*are a true copy of the reasons*

*for judgment delivered by this*

***Honourable Full Court.***

*Danny Sandor*

*Senior Legal Associate*

*to the*

*Chief Justice*

<http://www.austlii.edu.au/au/cases/cth/FamCA/2001/216.html>