

Some Educational Issues in Recent Family Law Matters: Australia in Microcosm

Frank Bates

University of Newcastle, New South Wales, Australia

In an earlier comment, ¹I noted ² that global prediction as to how Courts would resolve doctrinal disputes between parents and parents and the State would not be an easy matter. It should be said that the cases which were there discussed were very much products of their time and, as will be seen, it is as products of their time that the cases which will be discussed in this article must be considered. In the earlier article the cases which were discussed were, first, *In the Marriage of Bishop*, ³which involved the question of whether a child should be permitted, as she wished, to study ballet rather than to pursue more orthodox academic education through a private school. Second, *In the Marriage of Newberry*, ⁴a case which may still be influential today, where the issue involved was whether which public school a child attended was really a matter for the Courts. ⁵ Lastly, there was the bizarre decision of the English Court of Appeal in *Re DJMS (A Minor)*, ⁶where parents had developed an implacable opposition to the system of education which operated where they lived and were hoping that the local authority would pay for the child to be educated at private schools.

Those were very much the kind of issue which was current at the time they were decided or the subject of comment. As will be seen, the cases to be discussed were represent on Australia which has different priorities and perceives itself differently. Significant amendment to the *Family Law Act 1975* since *Bishop* was decided ⁷ has of itself contributed to those changes of itself. Put another way, the cases involving education in family law matters have arisen in a different context from that of thirty years ago necessarily leading to different emphases and different relationships with various socio-cultural phenomena.

These matters are immediately illustrated by the first case to be discussed, that of *Re G: children's Schooling*. ⁸ That case involved an appeal against orders which permitted the wife to enroll the parties' sons (aged ten and eight years respectively) as day students in a particular private school (referred to as 'School B'). In consequence of consent orders made in 1997, the parties were jointly responsible for the long term care, welfare and development of the children. The wife was solely responsible for their day-to-day care, welfare and development; the children reside with her and the husband had contact.

The children had been educated, since pre-school at another private school ('School A'). The wife, it appeared, had always wished the children attend School B, but School A had been agreed upon by the parents as a compromise. The competing applications as to which school the children should attend, were heard at first instance on the basis that matters involving the respective qualities of the schools should be presented by way of the parents' opinions.

In the event, the judge at first instance granted the wife's application and, in so doing, took some seven matters into account: first, that the children had lived constantly with their mother.

Second, that the wife had undertaken thorough researches into the two schools. Third, that the children wished to remain at School A, had made good progress there and were reluctant to travel to School B. Fourth, that the younger child had a physical disability. Fifth, that the travel time from the children's residence with their mother was much shorter in respect of School B than School A. Sixth, that the wife had undertaken to undertake retraining or new employment and travel to School A might hinder that process. Finally, a Family Report had been prepared for the proceedings which was consistent with the wife's view that the children would cope with a move to School B.

As regards the schools themselves, the Full Court⁹ noted¹⁰ the relative qualities possessed by the two schools as found by the trial judge: first, both schools were church based, Christian, private and co-educational schools; the fees at the school which the children presently attended [School A] were approximately \$10,000 less per year than [School B]; School B was spread over three sites, but, in 2000, it was proposed that School A would grow from three to four sites with an anticipated growth in the number of children attending. Shortly, the differences between the schools were minimal and there certainly seemed to be no opportunity for doctrinal dispute between the parties, though as the trial judge had pointed out, as noted¹¹ by the Full Court the dispute was ongoing to the sense that the husband felt that he had compromised by permitting the children to attend School A. On the other hand, the wife seemed to take the view that the husband was attempting to have power and control over her life by delineating the amount of travel undertaken by the children and where their school base would be.

It is clear from the Full Court's judgment that the decision of the trial judge was carefully argued and took into account many aspects of the dispute and the parties relationship. Nonetheless, there were four grounds of appeal: first, that the trial judge was wrong in law in holding that the parent with whom the children lived had the right to decide the school which the children should attend. Second, that the trial judge had applied a wrong legal principle – that being the decision in *Newbery*¹² and omitted consideration of the impact of the changes to the *Family Law Act* which had been effected in 1995. Third, that the trial judge had erred in law and/or fact by changing arrangements without any cogent evidence that the proposed change would benefit the children. Fourth, that the trial judge was wrong in law by not treating the best interests of the children as the paramount consideration. In that regard, the Full Court pointed out¹³ that that last did not appear to have been independently pursued either in written submissions or in oral argument. Thus, it seemed to have been implicit in the first three grounds of appeal.

After having set out the role¹⁴ of an appellate Court in the area, the Court then went on to comment that the trial judge's reasoning had closely followed that of Demack SJ in *Newbery*. However, the Full Court in *Re G*. took the view that that reasoning ought not to have been followed for two related reasons.

The first was that, in *Newbery*, the parent with whom the child lived had an order, as the law then stood, for sole custody which, according to Demack J,¹⁵ gave the mother the right to make the decision as to which school the child should attend. However, that view had been strongly queried by Treyvand J. in the later case of *In the Marriage of Bishop*¹⁶ who had said that, '... the Court's statutory concern with the welfare of the children empowers it to exercise a far-seeing and over-seeing jurisdiction over children, even when orders of custody are so made'. The Court in *Re G* then noted¹⁷ that a significant distinction between *Newbery and Bishop* and the instant case was that in *Re G*, the consent orders in the last case had made provision for 'joint responsibility in relation to long-term decisions regarding the care, welfare and development of the children'.

The Court were at pains to emphasise that, whatever view one might take regarding the desirability of joint orders in relation to long term responsibility, it was clear that they did make a difference to the relationship between the parents. In that context, Fogarty and Kay JJ in *H v W*¹⁸ had been critical of the uncertainty which of which such orders might be productive, a confusion which had not been resolved by the 1995 amendments to the *Family Law Act*.¹⁹

One further matter which arises out of any discussion of *Newbery and Bishop* is that in the former, there was a dispute between the parents as to which State school was attended by the children of the marriage. On the facts available to the Court there was no issue as to relative cost or religious instruction. Hence, as in *Re G*, there was no doctrinal or ideological dispute. However, in *Bishop*, the situation was entirely different and, indeed, as such puts *Newbery* and, to a degree, *Re G*, in a different light. The facts there were that the father of the two daughters sought an order that the mother be restrained from enrolling the elder daughter, who was aged thirteen, at a College of the Arts where she wished, having previously attended a private school, to study ballet.

There is also more to these cases than the Full Court in *Re G*. seemed to suggest. First, in *Newbery*, Demack SJ. was concerned²⁰ about submissions which had been made by the husband that the Court must always scrutinise the welfare of the child, and that where the parties cannot agree upon any issue which affects the welfare of the child, then the matter for the Court to decide. Demack SJ seemed alarmed at that prospect, were it correct.²¹ In his own words; ‘... There are innumerable issues that arise within a family where parents find it hard to agree, eg. Which football code is to be played, which musical instrument is to be learned and so on. To say that they may have recourse to the Courts to have these questions decided is to encourage division within families, and will mean that the Court will assume a burden which it can never hope to bear’.

However, for the purposes of this discussion, that basic point, which, of course, carries considerable force, Demack CJ. then continued by referring the issue to the educational question. Thus, he unequivocally stated²² that, ‘... in my opinion this Court should not be directly involved in answering the question which school a child is to attend. The Court may be involved indirectly as a consideration in determining the amount of maintenance, or as a circumstance affecting the welfare of the child on an application for custody. Perhaps there may be circumstances when the choice of school is so deleterious to the welfare of the child that it will raise the whole issue of who is to have custody, but it is difficult to envisage this being the only circumstance which called for a change in custody’.

Elsewhere, I have suggested²³ that, quite apart from other issues which will be canvassed²⁴ in connection with the *Re G* decision, Demack SJ’s comment is far too broad, even though it may have application in the vast majority of situations which are readily imaginable. Parental eccentricity in matters of education is too well known almost to need proper documentation and may exist where parents remain married or, at least, not in obvious disagreement. It must surely be an appropriate role for Courts to perform to seek to protect children from such eccentricity.

In *Bishop*, Treyvaud J. seemed to accept such a view when he said²⁵ that the Court’s statutory concern, a matter which at no stage in the development of the *Family Law Act*, could reasonably be overlooked, for the welfare of children empowers it to exercise a far-seeing and over-seeing jurisdiction over children.

It followed, therefore, that; in admittedly very rare, cases the question of where a child was to be educated was a proper matter for the Courts to consider. The facts of *Bishop* made it one of

those cases. Hence, especially given the detailed factual analysis of the case in *Bishop*, it could not be said that the decision was anything other than curial in its nature.

However, the Full Court in *Re G*²⁶ considered that the decision in *Newbery* was based on the concept of parental rights and it certainly appears from some of the rhetoric employed by Demack SJ that criticism is more than a little justified, particularly in view of the 1995 amendments to the *Family Law Act*. Section 60B (1) of the Act, as there amended, makes it, the Court thought, clear that the concept of parental rights was no longer relevant to the determination of the best interests of the child.²⁷ This subsection, although by now well known needs, in view of the present context, to be set out as follows: ‘... The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children’. The Court emphatically were of the view²⁸ that the provision clearly derived from the statement of Lord Scarman in *Gillick v West Norfolk and Wisbech Area Health Authority*²⁹ that, ‘... parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and properly of the child’. The Court stated in *Re G* that that was a statement of fundamental importance because it made it clear that the parent’s ownership of the child. ‘Parenthood’ said the Court, ‘was therefore a source of duties and responsibilities rather than of proprietary rights’. The Court’s view of s 60B (1) is supported by s 60 B (2) which provides that the principles which underlie s 60 B (1), except where it would be contrary to a child’s best interests are:

- (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
- (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and
- (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
- (d) parents should agree about the future parenting of their children.

The Court went on to say³⁰ that the importance of s 60 B had been stated by the Full Court on a number of other occasions in various contexts. In particular, the Court referred to the landmark decision in *B and B: Family Law Reform Act 1995*³¹ where it had been said that, ‘...Where there are no countervailing factors the s 60B factors may be decisive, not only because they are contained in s 60B but because they accord with what is in the best interests of particular children’.

That is by no means the only such comment which has been made in relation to s 60B: thus, in *Cooke v Stebbens*,³² Lindenmayer and Mushin JJ emphasised that the principles set out in s 60B (2) were, ‘... very relevant. They are expressed in positive terms and must be approached accordingly’. That *dictum*, of itself, suggests the importance of the 1995 amendments to the subject matter of this paper. Again, in *H v E*,³³ the Full Court, in agreeing with the trial judge, had said that the appropriate way of dealing with the various provisions contained in the 1995 amendments was to, ‘... make an order which would from his perspective advance the welfare of the child, taking into account the relevant considerations under s 68F (2) and s 60B’.³⁴ Of course, *Newbery* (and *Bishop*) were decided before those amendments, but a subsequent case predicated

on *Newberry* is, at the very least, suspect and the Full Court in *Re G* were not directly concerned with the *Newberry* case but by the decision at first instance which purported to apply it.³⁵

The Full Court in *Re G*, then turned its attention to the issue of change in existing arrangements as it affected the children. Any such discussion must include some consideration of the wishes of the relevant children. The Full Court found³⁶ that the Family Report could be taken to indicate that the children had said that they did not wish to change and that they liked their present school. In so doing, the Full Court rejected³⁷ a submission that the trial judge had treated the expressed wishes of the children in a ‘cursory manner’. The Court said that it was clear from the judgment that, ‘... proper regard must be had to the expressed wishes of the children and that reasons for decision must reflect their significance. However, there is no presumption that decisions must accord with expressed wishes ...’

After having made those general observations, the Full Court then turned its attention³⁸ towards the re-exercise of the discretion in the case. The first point which they made was that the matter of the application was approached without any legal presumption which favoured acceding to the proposal of the parent with whom the children were living. However, the very fact that s 65 E of the Act, because it provided that the best interests of the child were the paramount consideration, did require a consideration and determination of the relative proposals. However, although no *presumption*³⁹ arose in favour of the residence parent (and, correspondingly, no ‘hurdle or onus’ faced by the other), the reality of the children residing with one parent is not without relevance.

Of course, in this, by now, somewhat miasmal situation, some route clearly has to be found out of it and the Full Court in *Re G*, sought assistance in the judgment of Kirby J. in the High Court of Australia’s decision in *AMS v AIF; AIF v AMS*.⁴⁰ There, it was said that, although the law gives the highest priority to the child’s best interests, ‘... that consideration does not expel every other relevant interest from receiving its due weight. In part, this is because (as the English Courts recognised long ago) the enjoyment of parents of their freedom necessarily impinges on the happiness of the child’.

At that point, the Court began to consider the terms of s 68F (2) of the Act, which, together with the provisions of s 60B,⁴¹ provided a check-list towards meeting the essential enquiry required by s 65E. Despite what had earlier been said about the central portion of s 60B,⁴² the Court expressed the view⁴³ that their importance varied from case to case and they were of, ‘... little decision-making assistance in the present dispute’.

Section 68F (2) sets out twelve matters which Courts are to consider in ensuring that orders are in accord with s 65E. Clearly, not all twelve will be relevant in all cases and, in consequence the Court in *Re G* regarded it as appropriate to identify those which held particular significance in the present application. Of the twelve, the Court identified five as being relevant in evaluating the competing proposals. Inevitably, the first such was paragraph 68F (2) (a), which referred to the wishes of the children. As will be remembered, the Court had earlier examined the legal attitude towards this issue,⁴⁴ as well as the case law which had given rise to that conclusion.⁴⁵ At this point, the Court, as with other s 68F (2) factors, considered the factor as it related to the evidence which supported the particular proposal. As regards s 68F (2) (a), the Court said⁴⁶ that that the stated wishes of the children favoured rejection of the wife’s proposal to change schools. The husband had also acknowledged the children’s reluctance, but he had accepted, under cross-examination, that their wishes ought not to determine the issue.

Section 68F (2) (b) requires the Court to take into account the ‘... nature of the relationship of the child with each of the child’s parents and with other persons’. The first point made by the Court in that context was the relevance of anxiety which the children might experience as a result of changing peer groups through changing schools. In particular, the husband was of the view that the younger child’s physical disability might present some difficulties for him as the Family Report had observed that he might not be able to play with his elder brother at the new school. The Court regarded that as a relevant, but not determinative, factor.

A second matter which had arisen in the discussion of s 68F (2) (b) which might be of interest to educational theorists was an assertion by the husband, and which formed a part of his case, that, at the school the children attended, a broader cross-section of children attended than at the other. The Court dismissively commented⁴⁷ that, ‘Without doubting that this may be the husband’s view or otherwise of a school’s population features, the husband’s view is an assertion which a Court cannot take into account and which we put aside for the purposes of the present dispute’.

It was also admitted by the husband that there was no one more familiar with the two boys and their development than was the wife. On that issue, the Court said that that was readily comprehensible in view of,⁴⁸ ‘... the arrangements in place between the parties for the care of their children, arrangements which take account of the husband’s other commitments. The wife’s acknowledged day to day intimacy with the children does carry a particular weight in this case in making an assessment of how the children’s statements of wishes are to be construed’.

The next paragraph of s 68F (2) which the Court regarded as being relevant was paragraph (c) which refers to, ‘... the likely effect of any changes in the child’s circumstances, including the likely effect on the child of any separation from:

- (i) either of his or her parents; or
- (ii) any other child, or other person, with whom he or she has been living.

In addition to the children’s apprehensions about changing schools, the Court considered that the parent’s views about the *effect*⁴⁹ of change had to be taken into account. The husband’s concerns for the elder were largely concerned with his shyness and lack of self-confidence and, as regards the younger, in seeking to have to explain his disability to a new group of children.

The wife agreed, in cross-examination, with the essence of the husband’s concerns, but, in relation to the younger, she said that she would be making every effort, in respect of the younger, to make the transition as smooth as possible in collaboration with the staff from the children’s previous school.

Her core concern in respect of the children was that the younger required more challenges in his academic life which could better be met in the second school. Similarly, the elder required that his self-esteem and confidence could be enhanced through sporting activities at the second school.

Finally, on this issue the Court noted that each school was divided into various sites and, hence, there was no guarantee that the children would remain at the same campus for the remainder of their schooling. The husband had also conceded that it was inevitable that the children would meet new children, even if they were to continue at the same school, though he expressed the view that this would be less stressful, especially for the younger.

The Court then considered the operation of s 68F (2) (h) which requires the Court to consider, ‘... the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child’s parents’. The Court considered that two issues arose out of the application of that

paragraph: the first related to the consequences of one parent's carrying out the major burden in carrying out the practicalities which result from the children's schooling. However, the Court seemed at pains to comment⁵⁰ that, 'There is no doubt that the parties are seeking to advance the interests of the children in the way each considers will nurture the children's strengths and cater to their needs. We think this is so notwithstanding the suggestion in the Family Report that additional agendas between two parties may be at work'.

Where some dispute between the parents did, though, seem to arise related to the amount of traveling which was required of the wife in relation to the practical daily demands associated with the children's schooling. This, out of school activities, which in the case of the two boys did not necessarily finish at the same time. These activities involved travel at weekends.

The wife also gave evidence, which was disputed, that living close to school would facilitate out of hours play for the children. One matter, though, which was certain was the wife's urge to return to the workforce. Although that desire itself was not disputed by the husband, he did claim that, given the *quantum* of the parties' financial settlement and child support meant that the wife's attitude represented a choice which ought to accommodate the children's schooling and associated activities as well as associated travel.

As regards the matter of travel,⁵¹ the husband accepted that, although it was a matter for consideration, he refused to concede that the wife undertake an onerous or significant amount of travel. However, the Court regarded that ? to concede as being 'at odds' with the view which he had expressed in the proceedings at first instance.

The second point which arose under s 68 F (2) (h) was the fact, which was not disputed, that the wife had thoroughly researched schools in the area and her view of the second school was based on those researchers. On the other hand, the husband admitted that he had not made any such inquiries. Thus, his knowledge of that school had been based either through having lived in the relevant area for forty years, observing the people who had gone to the school or asking other people as to their opinions.

Finally, the Court considered the relevance of s 68F (2) (l) which related to, '... any other relevant fact or circumstance'. In that context, the Court referred⁵² to the prior agreement between the parties relating to the children's schooling. The Court emphasised that the agreement had been made under different circumstances, notably that the residence parent and the children had moved to a new location. This meant that the provision contained in s 60B (2) (d)⁵³ (ie that parents should agree about the future parenting of their children) was reduced in importance.

Thereafter, the Court concluded⁵⁴ that, having regard to their evaluation of the educational proposals as represented by the earlier discussion, the wife should be permitted to enrol the children at the second school. Nonetheless, they emphasised that, as had the trial judge, their view, '... was not an assessment of the relative merits of the schools preferred by the parties'. This view, of course, is clearly redolent of that expressed by Demack SJ in *Newbery*.⁵⁵ As regards that earlier case, the Court in *Re G*, while saying that the trial judge had fallen into error in taking guidance from that case, they did consider it proper in considering any decision regarding schooling or related matters, it was proper to consider evidence as to effect on a residence parent as distinct from that on a non-residence parent. This, they thought, was, '... because it is the residence parent who will in most cases have greater day to day responsibilities in respect of the child'. It followed that it was in the child's best interests that, '... the residence parent should not be subject to more irksome and unnecessary additional restraints than such commitments necessarily entail'.⁵⁶ In coming to that conclusion, the Court were fortified by the comments of the Full Court in *B and*

*B and Family Law Reform Act 1995*⁵⁷ where it was said that, ‘... A very important aspect of a child’s best interests is to live in a happy family environment. That may be significantly impacted upon where the residence parent is required to live in circumstances which diminish his or her future life either in an economic or a social sense, perhaps in a long-term way. If that had an adverse impact upon the children’s best interests, that may be an important matter to consider’. The final comment made by the Court⁵⁸ concerned the relationship between the last issue considered by the Court and the wishes expressed by the children. The Court commented that, in cases such as the present, the children’s wishes were less significant than in cases where the issue was with which parent children should live. Decisions regarding education, the Court continued, ‘... Such decisions may well run contrary to the wishes to the child or children concerned and yet may be made for entirely proper reasons. Unless a child is actively unhappy in a particular school environment, it is not at all unusual for them to wish to remain at their existing school. This is entirely understandable and while a relevant factor, should not in our view dictate the outcome when a Court is called upon to determine which of the competing proposals is in the best interests of the child or children concerned’. *Re G* is an interesting decision on more than one level: first, it emphasises that decisions on education do not exist as a distinct group. Thus, the criteria set out in s 68F (2) of the *Family Law Act* do not refer to education as such at all. Hence, the Court were required necessarily to extropolate from provisions expressed in more generalised terms. Similarly, the cases decided since the 1995 amendments to the Act were not concerned, except in the most indirect way with education. Clearly, in the relocation cases such as *B and B*, education may well be an issue albeit a peripheral one. Therefore, the parties and their representatives in any dispute regarding education must be prepared to examine case law derived from factual situations which may not have any direct and obvious connection with educational matters.

The second point which arises out of *Re G* is more directly societal in nature. The analysis of the evidence and the approach of the parties to that evidence will have been apparent, even though the Court was unwilling to examine the actual relative merits of the schools. However, detailed comment was made on the parental attitudes towards the question and that, in the end, was the central feature of *Re G*. This means that personal views and attitudes of what might be described as middle-Australian may be subject to judicial scrutiny.

The second major case which is to be the object of comment in this article could be scarcely less concerned with the activities, attitudes and behaviour of middle Australia as it has traditionally been perceived. The decision of Ryan FM in *H v H*⁵⁹ initially involved parenting orders in respect of a child aged 3½ years, whose mother was a Muslim Lebanese Australian. The father was a Catholic Maronite Lebanese Australian. The parties had married first in 1998 in accordance with Islam and, later, in 1999, in accordance with the *Marriage Act* 1961. The birth of the child towards the end of 1999 caused disagreement as to the intended faith of that child. At that time, the father threatened to leave the mother unless the child was baptised in the Catholic Maronite faith but the mother eventually relented and the child was baptised in his father’s faith at eight weeks old.

The parties separated in February 2002 and in April of that year, the mother initiated proceedings for parenting orders. In January 2003, during the hearing of the matter, the parties reached significant agreement on a number of issues which related to the child’s residence with the mother as well as extensive and regular contact with the father. However, there were unresolved issues concerned largely with the parties’ differing religious beliefs and their opinions on how and where the child should be educated. Each party, hitherto, had been educating the child in their own faith when the child was in their care. Presently, though, they were unable to

agree on which school the child should attend in the future and how to divide contact time during significant religious festivals such as Eid and Palm Sunday. The acknowledged that the child should have some knowledge of the mother's faith, sought an order that, *inter alia*, the child be educated in a Catholic Maronite school. The mother argued that the child ought to be brought up with knowledge of both parents' religions but claimed that the child should attend a non-denominational state school. The reason being that she wished the child to be able to determine his own religious identity when sufficiently mature.

In granting the mother's application, Ryan F.M. first noted⁶⁰ that, 'Australia is a multicultural society represented by a diverse range of cultural and religious groups. It is the home of a diverse range of families who share a wide range of beliefs and traditions. This diversity stems from the policy of multiculturalism. The rationale behind this policy is that the contributions made by different religious groups in society will "enrich" Australian society. It is grounded upon respect and co-operation'. That statement, it is suggested represents one of the very few curial attempts to recognise the policy of multiculturalism *per se*⁶¹ and for that reason, if for no other, *H and H* is an important decision with implications for a substantial number of activities, including educational.

In addition, given the emphasis placed by the Full Court in *Re G* on s 68F (2) of the *Family Law Act* 1975, as amended in 1995,⁶² it is necessary to take note of Ryan FM's comments on the provision relevant to the instant case. Section 68F (2) (h). It is there provided that, when determining what order is in the best interests of the child, the Court must take into account, '... the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal people or Torres Strait Islanders) and any other characteristics of the children that the Court thinks are relevant'. Ryan F.M. pointed out that s 68F (2) (h) was influenced by the United Nations Convention on the Rights of the Child, which stressed the importance of taking into account the traditions and cultural values of children to assist in their development.⁶³

As regards the matters which he had so far discussed, Ryan FM noted⁶⁴ that culture and religion were often intrinsically related and that cases which involved religion often involved one of the parents arguing that being brought up in a particular faith was fundamental to the child's best interests. However, she continued, the cases showed that the Courts had attempted to avoid that kind of argument and that religion was only considered to be relevant when it was detrimental to the child.

It followed, Ryan FM commented,⁶⁵ that religious beliefs of a parent and proposed religious observance by their children were not ordinarily the subject of detailed evidence. That, in view of what she had earlier said, was because Courts generally refrained from making orders which defined the religious upbringing of children and only intervened when the best interests of the child demanded. In the present case, evidence had been included⁶⁶ because the mother had sought an injunction concerning the child's attendance at church when with the father. It, further, continued to be relevant because of the father's application that the child be enrolled in a religiously orientated school – an application which the mother was resisting.

Ryan FM, again inevitably in view of what she had earlier stated,⁶⁷ emphasised that the discussion of religion was important because of its relevance as a determinant of cultural values and norms within the Lebanese Australian community and the potential impact on the child if a decision was made which was inconsistent with the community's belief systems. She emphasised, in addition, that neither party had suggested that their religion should be preferred because it alone was the one true religion. 'Both' Ryan FM said,⁶⁸ '... are able to respect religious diversity,

but take a different approach to the degree of exposure to religious beliefs that the child should have and the point at which his active religious life, if any, should commence’.

At the same time though, the mother was resistant to the child’s enrolment at a particular school suggested by the father because the child would inevitably be exposed to, and included in, Catholic religious education. In spite of evidence which had sought to attempt to minimise the extent of that activity, the Federal Magistrate was satisfied, that the child would effectively be inculcated into active participation in the Catholic Masonite faith were he to attend that school. Her reasons for so saying were that the school held itself out as a Catholic school and its students had been enrolled in it for the purpose of the school’s religious and cultural facilities.

Ryan FM went on ⁶⁹ to note that the mother’s family’s view of patriarchy was less influential than was the cultural norm and it appeared likely that they were aware that the mother led a considerably more liberal than the observance of strict religious and cultural moves would permit. ‘Within this extended family’, she said, ‘the child has the opportunity to be enriched by his Lebanese heritage, exposure to his Islamic and Catholic heritage all lived within the context of a culturally diverse community’.

However, she went on, pivotal to the child’s capacity to benefit from that culturally rich environment was the importance of education. Hence, it followed that, in Ryan FM’s own words, ‘Putting this child into a school where he is likely to be victimised because of his religious observance or lack of it will mar his childhood and is highly likely to undermine his opportunity for academic achievement’. For that reason the child ought not to be exposed to a school community which will mark or reject him because he does not practice his father’s religion. Nor, Ryan FM considered, ⁷⁰ should the child be exposed to a religious education which is inconsistently with the values he will be exposed to day to day. For those, and related reasons, Ryan FM supported what she described as ‘the mother’s inclusive proposals’. ‘By carefully selecting’, she said, ‘... an appropriate non-government school the child need not be exposed to the narrow application of patriarchy from a peer group. His extended family’s inclusive approach to their second generation adult children satisfies me that within the family the child is unlikely to be stigmatised for not actively and strictly adhering to his father’s religion. Eventually the child may choose to practice a religious faith, but that is a decision that he will be able to make in his own time when he is competent to do so’.

The issue of evidence, to which allusion has already been made, ⁷¹ was of more particular importance because evidence had been led by an expert witness regarding the likely social and cultural impact of the child within the wider Lebanese/Australian community of the parents’ proposals regarding the child’s religion and education. The expert witness had formed the opinion ⁷² that the child would be less likely to be so victimised were he educated in an open and diverse environment, and that the best approach would be to raise the child to understand and respect both his parents’ religions.

In making the orders, Ryan FM first noted ⁷³ that, ordinarily, a Court would not make orders which decide where a child will attend until the child was about to start school. That course was because many relevant circumstances – for instance where the child lives, the child’s educational capacity or need for special educational facilities – might change. In this particular case however, Ryan FM considered that such change was unlikely. She continued by saying ⁷⁴ that both parents would benefit from certainty about the style of education the child is to have and, ‘together can plan which *particular state school he will attend*’. ⁷⁵ That, she went on, must take account of the fact that the mother, who was more likely to be involved with the child’s homework and similar matters, works and of the assistance she needs with before or after school care. ‘Ideally’

Ryan FM stated, 'he will attend a school close by to her home or place of employment. Because balance in religious education and peer influence is important, the state school should be one that is religiously diverse'. At the same time, Ryan FM made reference to the father's genuine motivation that the child do well at school, which must be acknowledged and given a proper basis so that he, the mother and child recognise his involvement as an equal decision maker from the start.

One other, more general matter, not directly connected with the educational issues raised in *H*, is the issue of the father's contact with the child. This is of interest because of its connection with *Re G*⁷⁶ and s 60B (z) (b) of the *Family Law Act*. In *H*, Ryan FM dismissed⁷⁷ an application by the father for mid-week contact. She did so on the grounds that contact which had been proposed would be too destabilising for the child and would not necessarily add quality to the relationship which existed between them. Thus, the right to contact vested in a child by that provision did not seem to carry any significant weight.

What, then, do *Re G* and *H and H* tell us about education as it relates to s 65E of the Act and the best interests of children who are the subject of disputes? Probably the most immediately obvious conclusion is that it is caught up with and cannot be disentangled from the various criteria set out in s 68F (2) of the *Family Law Act* as amended in 1995. The question, whatever its importance to children and their parents, is not treated directly in the provision with the immediate result being that extrapolation is necessary to justify the provisions application. Likewise, as will have been observed the post 1975 case law is scant and the post 1995 case law similarly. That, in turn, has meant that the Courts in *Re G* and *H v H* have had to rely on authorities cited to them which are not directly in point. So that, for instance, *R and R; Family Law Reform Act 1995*,⁷⁸ to which copious reference was made in *Re G* was a case on parental relocation, as was the High Court's decision in *AMS v AIF; AIF v AMS*.⁷⁹ These cases may have some educational implications, but they are by no means central to the decisions.

The cases, too, cast doubt on the basic principle enunciated by Demack SJ in *Newbery*:⁸⁰ from both *Re G* and *H*, it is clear that Courts are prepared to involve themselves in a detailed consideration of, at any rate, the implications of children's schooling. Given the situations which were present in both of the cases under consideration, that is probably inevitable.

It is, hence, safe to conclude that, as a result of these cases the Australian Courts may be forced to deal with issues involving education both directly and at a fundamental level. This may be the case whether a serious and obvious doctrinal dispute is involved. Education and family law proceedings may be well entering a new era, hand in hand with other reforms.

Address for correspondence: Prof Frank Bates, School of Law, Faculty of Business and Law, The University of Newcastle, Callaghan NSW 2308, Australia. Email: Frank.Bates@newcastle.edu.au

Endnotes

1. F.Bates, 'Some Educational Considerations in Recent Family Law Cases' (1982) 7 *Uni Tas. L.R.* 222.
2. *Ibid* at 226.
3. (1981) FLC 91-016.
4. (1977) FLC 90-205.
5. There were no associated issues such as cost or religious education. The parents simply

could not agree on which school the children would attend.

6. [1977] 3 All ER 582. For more detailed comment, see F.Bates, 'Parent and Child – Legal Intervention – Another Development' (1978) 56 *Can B.R.* 517.
7. Since 1981, the *Family Law Act* 1975 has been amended no fewer than 61 times, notably in 1995 when an entirely new Part VII dealing with children was introduced.
8. (2000) FLC 93-025.
9. Nicholson CJ, Kay and Brown JJ.
10. (2000) FLC 93-025 at 87,405.
11. *Ibid* at 87, 403.
12. Above text at n 4.
13. (2000) FLC 93-025 at 87, 405.
14. *Ibid* at 87, 406. See *AMS v AIF; AIF v AMS* (1999) FLC 92-852. *per* Kirby J.
15. (1977) FLC 90-205 at 76,070.
16. (1981) FLC 91-016 at 76,191.
17. (2000) FLC 93-025 at 87,406.
18. (1995) FLC 92-598 at 81,591.
19. See *Vlug v Poulos* (1997) FLC 92-778 at 84, 594.*ff.*, *per* Finn, Kay and Moore JJ for further discussion of the relevance of those amendments, see below text at n 35 *ff.*
20. (1977) FLC 90-205 at 75,068.
21. *Ibid* at 75,068.
22. *Ibid* at 75,070.
23. Above nn 1, 7
24. Below text at n 26
25. (1981) FLC 91-016 at 76, 191.
26. (2000) FLC 93-025 at 87, 406.
27. *Family Law Act* 1975 s 65E.
28. (2000) FLC 93-025 at 87, 406
29. [1986] AC 112 at 184.
30. (2000) FLC 93-025 at 87, 407.
31. (1997) FLC 92-755 at 84, 220 *per* Nicholson CJ, Fogarty and Lindenmayer JJ.
32. (1999) FLC 92-839 at 85, 821.
33. (1999) FLC 92-845 at 85, 892 *per* Ellis, Kay and Steele JJ.
34. Section 68F (2) sets out the matters which Courts must take into account in deciding what order is in the best interests of the child. For comment on its relevance to the present issue, see below text at n 43.
35. (2000) FLC 93-025 at 87, 407
36. *Ibid* at 87,415
37. *Ibid*
38. *Ibid* at 87,416.

39. Author's emphasis.
40. (1999) FLC 92-852 at 86,050
41. Above text at n 27
42. Above text at n 31 *ff*
43. (2000) FLC 93-025 at 87,416
44. Above text at n 37
45. See *H v W* (1995) FLC 92-598; *R and R: Children's wishes* (2000) FLC 93-000
46. (2000) FLC 93-025 at 87,417.
47. Ibid
48. Ibid at 87,418
49. Author's emphasis.
50. (2000) FLC 93-025 at 87,418
51. Ibid at 87,419
52. Ibid
53. See above text at n 29
54. (2000) FLC 93-025 at 87,419.
55. Below text at n 22.
56. The Court had already stated, (2000) FLC 93-025 at 87,419, that that there was considerable force in the arguments which the mother had advanced, above text at n 50, in relation to travel commitments.
57. (1997) FLC 92-755 at 84,118. That view the Court suggested, was consonant with the view of Kirby J. in *AMS*, above text at n 40.
58. (2000) FLC 93-025 at 87,420.
59. (2003) 30 Fam LR 264
60. Ibid at 268
61. Although Ryan FM, Ibid at 269, did note that there had been genuine attempts by courts to address problems arising from it. See, for example, *in the Marriage of Harman* (1976) FLC 90-024; *In the Marriage of N and H* (1982) FLC 91-267; *In the Marriage of Sanders* (1976) FLC 90-078; *Torrens v Fleming* (1980) FLC 90-840; *In the Marriage of Goudge* (1984) FLC 91-534. For comment on the latter cases, see F. Bates, 'Maintaining a Child's Like with Native Parents as a Factor in Custody Decisions: (1986) 35 *ICLQ* 461'.
62. Above text at n 41.
63. See particularly Arts 20 and 30 of the Convention which provide: *Article 20* 1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
 2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
 3. Such care could include, *inter alia*, foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering

solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background. *Article 30* In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

64. (2003) 30 Fam LR 264 at 270.
65. Ibid at 275.
66. Below text at n 71.
67. Above text at n 64.
68. (2003) 30 Fam LR 264 at 275.
69. Ibid at 276
70. Ibid at 277
71. Above text at n 66
72. (2003) 30 Fam LR 264 at 272-4.
73. Ibid at 278
74. Ibid
75. It will have been noted that Ryan FM had earlier referred to, above text at n 70, to a 'non-government school'. In view of the totality of the orders, it can only be assumed to be a typographical error. Author's consequent emphasis.
76. Above text at n 30.
77. (2003) 30 Fam LR 264 at 277.
78. (1997) FLC 92-845.
79. (1999) FLC 92-852.
80. Above text at n 22.