INSTITUTE OF LAW RESEARCH AND REFORM

EDMONTON, ALBERTA

PROTECTION OF CHILDREN'S INTERESTS IN CUSTODY DISPUTES

REPORT NO. 43

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INSTITUTE OF LAW RESEARCH AND REFORM

The Institute of Law Research and Reform was established January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

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The Institute's legal staff consists of W.H. Hurlburt, Q.C, Director; C.R.B. Dunlop, George C. Field, Q.C., R. Grant Hammond, Thomas W. Mapp, and Margaret A. Shone, Counsel.

ACKNOWLEDGMENTS

Extensive and valuable research into the protection of children's interests in court was done by Dr. Olive M. Stone during the time which she spent with the Institute and is contained in her valuable book The Child's Voice in the Court of Law. The work was continued after her departure by John L. Dewar, then of Institute counsel.

Gary Frohlich, Jean McBean, Shirlee McCord, David Rode, David Tilley, David Vallance and Patricia Wright of the Edmonton bar

gave the Institute the benefit of their advice and experience and the first two named reviewed and commented upon a draft of this report. So did John C. Soby of the Calgary bar. Professor Leonard Pollock advised counsel and the Institute's Board on numerous occasions.

We also obtained the benefit of the advice and experience of professionals who have special involvemet in or knowledge of the processes described in this report. Drafts of the report were reviewed and commented upon by Dr. Paul Copus, Dr. C.F. Edwards, Professor Gayle James, M. Ruth Patrick, and Percy Royal, MBASW, RSW.

Alexander Hogan, Q.C. and Ethel Unsworth, whose experience together covers the whole period of government participation in the amicus curiae procedure, gave us much useful information and comment, and Jack E. Klinck, then Director of Civil Litigation for the Department of the Attorney General did likewise.

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Where appropriate, a Judge of the Alberta Court of Queen's Bench appoints a lawyer to ensure that the Judge receives all information necessary to enable him to decide who should have custody of a child or children involved in a custody dispute. Under Alberta terminology the lawyer is called an "amicus curiae." The amicus curiae customarily arranges for one or more expert professionals to investigate the circumstances of the child and the child's family and to form opinions as to where the child's best interests lie. If the dispute goes to trial the amicus curiae customarily calls the expert professionals as witnesses, makes recommendations to the Judge about custody or guardianship and about access, and, where necessary, cross-examines the witnesses produced by the parties claiming custody. A large majority of cases in which an amicus curiae is appointed, however, do not go to trial because the parents or guardians come to an agreement about custody on the basis of his report.

The Court may appoint a government lawyer to be amicus curiae. The Alberta Attorney General then provides the lawyer. The Attorney General also provides the lawyer with funds for paying expert professionals, though these may come from the government service so that additional funds are not needed. Much of the evolution of the amicus curiae procedure has been made possible by the consistency and continuity of the Attorney General's service which has enabled the judges to develop the procedure creatively from case to case.

Alternatively, when the parties are willing to bear the cost, the Court may appoint a lawyer in private practice to act as amicus curiae. This alternative procedure has given the people involved a much greater freedom of choice, and private lawyers acting as amicus curiae have also made a substantial contribution to the evolution of the procedure.

Since it is our view that the amicus curiae procedure is valuable, we recommend:

(a) that the amicus curiae procedure which has been developed for the assistance of the Court of Queen's Bench of Alberta and the Surrogate Court of Alberta in custody and guardianship disputes be recognised as valuable and that it be continued at the discretion of the Court;

(b) that the procedure be left to be evolved by the Court from case to case;

(c) that government lawyers and lawyers in private practice continue to be available for appointment;

(d) that the Attorney General's Department continue to provide professional and financial support for the procedure at least to current levels;

(e) that the Attorney-General's Department do what it can, administratively and financially, to minimize the delays which the procedure imposes upon custody and guardianship litigation and the cost which it imposes upon parents.

II. REPORT

1. Introduction

A. Purpose of Report

1.1 The purpose of this report is to describe and make recommendations about a procedure which has been initiated and evolved over the past eighteen years by the Judges of the Court of Queen's Bench of Alberta and its predecessors for getting at the facts in disputed child custody cases. The procedure is based upon the appointment of an "amicus curiae" to represent the interests of the child or children.

1.2 The same procedure has upon occasion been adopted in disputed cases involving the guardianship of children. What we have to say applies equally in such cases, but they are not numerically significant, and for convenience of exposition we will, with occasional exceptions, refer only to custody cases in the Queen's Bench.

B. Background to Report

1.3 The Institute has been interested in the amicus curiae procedure for many years. Our 1972 Working Paper on the Unified Family Court discussed it at some length and our 1979 Report 26, Family Law Administration: Court Services, recommended its continuance on an interim basis pending a general study of the protection of children's rights. We had in the meantime made a similar recommendation to the Deputy Attorney General when a budget for the provision of amicus curiae services by his department was under consideration. As part of the work leading up to Report 26 a Social Services Committee established by the Institute, which consisted of senior government officials, senior social work professionals, both academic and private, and Institute counsel, recommended the establishment of a Child

Advocate Service to represent children. From 1977 to 1979 Dr. Olive Stone, a well-known English family lawyer, who came to Alberta for two years as a consultant to the Institute, conducted extensive research into the subject of representation of children; her work, with some up-dating by her, was published in 1981 by Butterworths as a book entitled "The Child's Voice in the Court of Law". In 1981 and 1982 the work was continued by Institute counsel, who conducted interviews with lawyers who act as amicus curiae and with others. In 1984 Institute counsel also interviewed a number of lawyers and professionals who have had experience with the amicus curiae procedure.

C. Scope of Report

1.4 In this report we accept the general law relating to parents and children. In it we accept also the general framework of court practices and procedures. We do not deal with the broad subject of the representation of children before tribunals generally. Except for some guardianship disputes in the Surrogate Court, we deal only with the protection of children's interests in custody disputes before the Court of Queen's Bench of Alberta and our focus is the amicus curiae procedure in that court. We do however, discuss the relative advantages and disadvantages of this procedure over other forms of protection which might be given to the interests of children in Queen's Bench and Surrogate Court proceedings.

D. Law and Practice

1.5 The law is based upon the assumption that a child is not mature enough to manage his or her own life or even to choose the adult with whom he or she should live. Theoretically this assumption applies to any minor. Because of it, a minor does not, in the eyes of the law, have the capacity to make many of the decisions about his personal life which an adult may make.

1.6 Because a child does not have the legal capacity to make decisions for himself, the law recognizes that one or more adults must make decisions for him. Those adults are "guardians". The law recognizes that a child's natural protectors are the child's parents. It therefore recognizes parents as guardians, though it retains the power to substitute other guardians if necessary.

1.7 Guardianship in Alberta is a broad concept. Apart from powers with respect to property, with which this report is not concerned, guardianship includes all the powers which an adult may exercise in relation to the upbringing of a child. It includes the power to say where and with whom the child shall live. It includes control over education and religion, control over the child's name, and control over the child's right to marry. Custody, in Alberta, is part of guardianship and includes the right to have the child live with the custodial adult and it includes also the power to make the day to day decisions which flow from the relation between a parent and his or her child. It is quite common for one parent to have sole custody while the other continues to be a guardian. It is less common for both to have custody. The custody of the child is the usual focus of a dispute between parents or others interested in the child, but sometimes it is guardianship which is in issue.

1.8 The Court of Queen's Bench of Alberta deals with most of the custody and guardianship disputes which are litigated in Alberta. That is because it has exclusive jurisdiction in divorce, and because most custody disputes are brought to court in divorce proceedings. The court also has independent jurisdiction in custody and guardianship, and its Judges are Judges of the Surrogate Court, which also exercises powers in guardianship. Because custody disputes are more numerous by far than guardianship disputes, and because the inclusion of

constant references to guardianship and the Surrogate Court would impede the discussion, we propose to refer in general only to custody disputes in the Queen's Bench.

1.9 We pause to note that the Family Division of the Provincial Court of Alberta also exercises jurisdiction in custody proceedings. The practices of that court are however significantly different from the practices of the Queen's Bench. As we have said, we have restricted this report to proceedings in the Queen's Bench and the associated Surrogate Court. Although the same basic law is applied in all Alberta courts our discussion is not, in general, applicable to the Family Division.

1.10 The legal system usually accepts the decisions of parents or other guardians. However, if a child's guardians disagree, some external authority must settle the dispute, and the courts are that external authority. Even if the guardians agree, the courts retain a power to override their decision if the decision is not in the child's interest. The courts usually exercise their power by awarding custody of the child to one parent or guardian, with or without a provision that the other is to have access to the child.

1.11 In child custody litigation, two parties, usually parents or guardians, are in contention about the interest of a third, the child. Usually the natural feeling of the two parties will cause them either to make an agreement about custody or, if they cannot agree, it will cause them to put before the court all the evidence and argument necessary to enable the Judge to determine what will best serve the child's interest.

1.12 However, the parties do not always agree or litigate in the child's interest. They are sometimes blinded by bitterness towards each other. They may use the child's

interest as a bargaining counter in negotiations for a divorce or for a property or support settlement. In such cases, the parties will not put before the Judge all the evidence and argument which he needs. There are also cases in which the parties themselves agree that an investigation by an external and objective functionary is necessary to obtain and put the necessary evidence before the parties and the Judge.

1.13 Assuming as we do that the court is to continue to have the ultimate power to make decisions about custody, we think that there are two broad alternative aproaches which might be adopted. One of them might be implemented in a number of different ways. The two broad alternatives are:

1. To treat the child virtually as a party to the proceedings with the right to retain and instruct counsel and to appear and present a case to the court.

2. To ensure that others put before the court everything which it needs to make a properly informed decision for the child. This broad approach might result in the adoption of any of the following specific courses of action:

   (a) reliance upon the parents or other litigants involved in the custody action.

   (b) supplementing the evidence adduced by litigants by one of the following:

      (i) the investigations and evidence of court-appointed expert professionals;

      (ii) a case put forward by a lawyer who is either

         (a) appointed by the court for a particular

case, or

(b) appointed by the state to act on his own motion

and who may be regarded as

(a) a guardian for the child for the purposes of the litigation, or

(b) an advocate for the child's interest, or

(c) an adviser to the court. (this is the amicus curiae procedure);

(iii) a case put forward by someone other than a lawyer.

1.14 As we have said, the focus of this report is the amicus curiae procedure in the Court of Queen's Bench. In Chapter 2 we will discuss it. In Chapter 3 we will refer to the other possible forms of protection of children's interests. The remaining chapters will set out our conclusions and recommendations.

2. The Alberta Amicus Curiae Procedure

A. Origin and Development

(1) Origin

2.1 The amicus curiae procedure under discussion was originated by Mr. Justice M. E. Manning of the Trial Division of

the Supreme Court of Alberta in the case of Woods v. Woods.1 Two married couples had exchanged partners. One resulting couple applied for the custody of two children who were nine and six years of age respectively. The exchange of partners had caused a good deal of bitterness between the two couples. The Judge suggested to counsel that he would like to have a third counsel appear "whose only interest would be that of the two children." He gave his reasons in the following words:

> "Counsel for the disputing parents must obviously take instructions from their clients and some matters concerning the best interests of the children may be overlooked in the conflict between the parents."

Counsel for the parents "acceded to" the suggestion.

2.2 Mr. Bruce Rawson, then a lawyer with the Attorney General's Department, accepted the appointment. He arranged with two experts, a child psychiatrist and the superintendent of the City of Edmonton's Welfare Department, to formulate a professional opinion about the disposition in custody of the two children. The experts interviewed the two sets of parents and the children in various combinations, apparently with Mr. Rawson in attendance. Mr. Rawson appeared at the trial with the experts who gave evidence and were cross-examined. They recommended that one parent have custody and that the other be excluded from access, and the judge largely accepted their recommendations.

(2) Development

2.3 Mr. Justice Manning continued to appoint an amicus curiae from time to time, and other Judges began to do the same. These appointments were taken by Mr. Alexander Hogan, Q.C., then Assistant Public Trustee, and later by Mrs. Ethel Unsworth of the Attorney General's Department. In recent years Mr. Hogan

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1 1966, unreported.

has again become responsible for the amicus curiae service in the Attorney General's Department. The experimental procedure which was adumbrated in Woods v. Woods was shaped into a system. This system supplied a consistent administrative element which has helped the judges and counsel to shape and develop the role of the amicus curiae from case to case over the intervening 18 years.

2.4 For several years there was no budget for the amicus curiae service. Mr. Hogan was to a great extent able to use government personnel as expert advisers and the Attorney General's Department was able to find some money when he was obliged to use the services of private persons. Sometimes the cost was paid by the parties. However, in the late 1970's the Attorney General's Department became persuaded of the need for more substantial arrangements. It established a budget for the service and it established a unit of lawyers within the Department who are prepared to act as amicus curiae. The Department pays the cost of providing the amicus curiae, though upon occasion a Judge will direct that the cost be paid by the parents or from the child's property.

2.5 The number of appointments of government lawyers as amicus curiae has increased to the extent that, during the three years 1980, 1981 and 1982 there were in total more than 700 cases in which such appointments were made, or an average of 200 to 300 per year. The number has increased since.

2.6 The Court frequently, at the request of the parties, appoints as amicus curiae a lawyer in private practice. The practice arose when a government lawyer was not available. Nowadays the parties sometimes prefer a private lawyer, either to obtain a quicker result, or to have the work done by a lawyer and professionals of their own choice. Most of the private lawyers who are appointed as amicus curiae are experienced in

family law work. Their injection of different ideas and approaches has made a significant contribution to the evolution of the system, and the availability of a private practitioner as amicus curiae provides a desirable flexibility in the procedure and greatly enlarges the freedom of choice of the parties.

B. Description of Procedure

(1) Appointment of amicus curiae

2.7 A Judge who for some reason is doubtful that the usual adversarial procedure will bring out the evidence which he needs for a proper decision about custody may of his own motion appoint an amicus curiae, and Judges upon occasion have done so without the consent of the parties. We are told that a number of the appointments of government lawyers come about upon the initiative of the Judges.

2.8 In many cases however the parties apply for the appointment of an amicus curiae. Sometimes the reasons are adversarial. Sometimes they are not. A party may think that the report of the amicus curiae is likely to strengthen his or her case. A party may want delay. A party may want an independent opinion in the hope that it will avoid a bitterly contested court hearing and will result in the best arrangement for the child. Sometimes parties agree that an amicus curiae should be appointed, and sometimes the Judge accepts their agreement as sufficient foundation for making what is virtually a consent appointment.

(2) Form of order

2.9 The usual form of order recites that it is desirable and in the best interests of the child or children involved to request that an amicus curiae represent them and make an investigation and recommendation to the court on the issues of

custody and access. The order then goes on to make the appointment. It authorizes the amicus curiae to conduct investigations with whatever assistance and guidance, including the assistance and guidance of social workers and other professionals, that he thinks necessary. It then goes on to say that the amicus curiae shall make recommendations to the court on the issues of custody and access and to call evidence, subject to the right of the parties to cross-examine.

(3) Investigation

2.10 The amicus curiae customarily arranges for a home study to be made by a social worker, who interviews persons likely to provide useful information. These may include parents, neighbours, social workers, teachers and doctors. In some cases he retains a psychiatrist or psychologist to interview the parties and the child. For two reasons which appear to us to be valid and important he usually, but not invariably, leaves the actual investigation to the professionals. The first is that it is the professionals who are qualified to conduct the investigation. The second is that if the amicus curiae involves himself in the investigation he is in danger of becoming a witness as to facts. He may, however, meet counsel for the parties to obtain information, to go over reports made, and to facilitate settlement.

2.11 Sometimes the amicus curiae will involve himself more directly and will interview the parties and the children. He may as a result be more active at the trial. We see dangers in this. It may compromise the impartiality of the amicus curiae, which is valuable but difficult to maintain when his intervention will usually favour one side or the other. It may lead to the amicus curiae undertaking the function of a social worker, psychologist or psychiatrist for which he is not trained. The question is one of judgment, however, and the procedure allows scope for an experienced and competent lawyer

who is conscious of the risks involved and of the limitations of a lawyer's competence. The control of the Court over its proceedings and over the amicus curiae will usually be an ultimate safeguard against an undue extension of the lawyer's function.

2.12 We should refer here to the heartfelt wish of one experienced professional to be protected both from "the prospect of psychiatrists, psychologists, or social workers in the role of adjudicators", and from "practising barristers and solicitors who may also arrogate to themselves such a role before they have been elevated to the Bench".

(4) Report

2.13 The professionals prepare reports and recommendations. The amicus curiae reviews these and may ask for clarification or even for further investigation. He then prepares his own report and recommendation. He circulates his report and those of the professionals to counsel for the parties. At this stage the parties will often make an agreement about custody out of court.

(5) Trial

2.14 If the custody dispute goes to trial, the amicus curiae appears as counsel. He calls the professionals as expert witnesses and leads their evidence. He calls any other evidence which he thinks necessary. He makes a recommendation. The parties cross-examine the amicus curiae's witnesses. The amicus curiae may cross-examine the witnesses of the parties. In so doing, he is subject to the direction of the Judge, and some Judges take a more limited view of his function than do others.

2.15 The Judge then makes his decision upon the basis of the evidence and argument. The evidence and recommendations of the amicus curiae and his professionals are important parts of what he has to consider, but on considering all the evidence he may come to a conclusion which is different from theirs.

(6) Other functions

2.16 Upon occasion a Judge has appointed an amicus curiae in proceedings other than custody proceedings, for example, guardianship proceedings, proceedings for an appointment of a trustee of an alleged mentally incapacitated person, adoption proceedings, and permanent wardship proceedings. A Judge has also upon occasion asked the amicus curiae to perform specifically non-legal functions such as supervising access, monitoring custodial care, and taking temporary custody of a child in order to return the child to the proper custodian. In one case, where there was a history of abduction by both parents, the Court of Appeal asked the amicus curiae to look after the child during the few days before and during the hearing of an application for leave to appeal to the Supreme Court of Canada.[2]

C. Nature of the Amicus Curiae's function in Custody Disputes

(1) Adviser to the Court

2.17 There is no definitive statement of the amicus curiae's role and function. We think that this is as well; the development of the procedure from case to case has been the source of its value and should not be unduly confined. We think, however, that the essential characteristics of the role and function are clear, and we propose to state them.

2.18 The Court appoints the amicus curiae. The Court authorizes the amicus curiae to carry out an investigation. The

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2 Read v. Read, unreported, 1981, Calgary, No. 13846.

Court orders the amicus curiae to make a recommendation on the issue of custody. The court order is the foundation of the amicus curiae's position at trial. The Court gives the amicus curiae his directions, and no one else is entitled to do so. Although the Court requires the amicus curiae to "represent" the child, that is because it is the child's interest which the Court is trying to ascertain. We do not think that the amicus curiae can properly be said to "represent" either the child or the child's interest in any sense in which counsel usually "represents" a client or a client's interest.

2.19 We think that the conclusion is inescapable that the amicus curiae's primary functions are to assist the court:

(1) by arranging for an investigation of the facts, usually by a professional;

(2) by laying before the Judge relevant evidence about the facts;

(3) by laying before the Judge relevant expert opinions about the available custody and access options, and his own recommendation; and

(4) by elucidating for the Judge's benefit by cross-examination the evidence adduced by the parties.

The amicus curiae is therefore an independent adviser to the court in respect of the particular case.

2.20 The amicus curiae's function is that of a lawyer. He arranges for the gathering of evidence by experts through investigation. He assesses the opinions of the experts and, if he does not think that they are sufficient for the Judge's purposes, he arranges to have the deficiencies made good. He calls the experts as witnesses and examines them. Upon occasion

he cross-examines other witnesses in order to cast light on the facts. It is true that he makes a recommendation to the court, but the recommendation should be based upon a lawyerly assessment of the evidence, and it is usually based upon the evidence of the professionals whom he retains. He does not make a decision and he does not advocate the adoption of a particular decision in the way in which lawyers usually advocate the position which a client wants a court to adopt.

2.21 As an adviser to the Court, it appears that the amicus curiae should be, and should appear to be, as impartial as the circumstances permit. One circumstance that frequently militates against both the substance and the appearance of impartiality is that the amicus curiae's investigators give opinions which, if accepted, would lead to the result desired by one party, and that the amicus curiae himself makes a recommendation. This is part of the functions of the amicus curiae and his professionals and is unavoidable, but it should be performed as objectively and fairly as possible. Another similar circumstance is the cross-examination of witnesses by the amicus curiae. On this point there seem to be two schools of thought. One holds that the amicus curiae should vigorously cross-examine as to facts and credibility in much the same way as counsel for a party would. The other holds that unless there are unusual circumstances the amicus curiae should cross-examine only to elicit facts which the Court should have and which would not otherwise come out. Madam Justice Veit's decision in Burnett v. Burnett[3] would, in the interests of maintaining impartiality, restrict the amicus curiae's function, including cross-examination, to doing things which counsel for the parties do not adequately do themselves, and would generally leave questions of credibility to be determined by the judge without assistance from the amicus curiae. Without commenting on the

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3 (1983) 46 A.R. 216.

particular case, and without suggesting that limitations be placed on experienced counsel, it seems to us that this approach is generally desirable.

2.22 The amicus curiae is not a party to custody proceedings in the sense of having an interest in the proceedings, or a right, independent of the judge's wishes, to appear and be heard. His whole status, like his power to make a recommendation, is dependent upon the order appointing him, and he is subject to discharge if the court does not want to hear him.

2.23 The amicus curiae does have some of the standing of a party. Notices of applications affecting the child must be given to him. If the interests of the child so require he can bring on an application himself. We have already referred to cases in wich he was given temporary "custody" of the child.[4] He is sometimes awarded costs. He has been allowed to appear upon an appeal. Indeed, in at least one case the court stated that the amicus curiae has become "a party to the divorce action."[5] However, in the same case the Judge recognised "that the amicus is essentially a creature of our own courts and that the amicus can do no more than the court allows".[6] The amicus curiae is not an independent litigant who has an interest in the outcome of the proceedings or with a right to appear and be heard other than that which is conferred by the order appointing him.

(2) Communicating the Child's Wishes

2.24 We repeat here that custody dispute is based on the assumption that a child is too immature to fend for himself or

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4 Paragraph 2.16.

5 Burnett v. Burnett (1983) 46 A.R. 216 (Q.B.).

6 Id., 219.

even to choose an adult to care for him. This is precisely why the child must be in the custody of an adult. That assumption is true for a babe in arms. Its truth becomes less obvious as the degree of maturity of the child increases, and whatever the degree of truth in it, the child is a person and his wishes should be considered if he cares to make them known. A Judge may not think that the wishes of a seven or eight year old are firmly based, but there is no reason why he should not be told what they are. He may well pay great attention to the wishes of a child of 13 or 14 years of age who is likely to run away from a custodian whom the child does not want.

2.25 As we have said earlier, the child, though vitally interested in the outcome, is not a party to the custody dispute. The child does not usually appear as a witness, and there is general agreement that it would often be injurious for him to do so. A Judge will sometimes interview the child but most Judges have reservations about doing so. The child does not have a lawyer whom he can instruct to lead evidence in support of his views and to advocate that those views be accepted. We will discuss later the question whether or not the child should be a party or entitled to instruct counsel. Here it is enough to say that, in the absence of a lawyer for the child, the amicus curiae procedure provides a way for the child's wishes to be conveyed to the court if that is what the child wants. Within the framework of existing practices, this is a useful function.

(3) Relation to the Judicial Function

2.26 In most cases the court's award of custody is consistent with the amicus curiae's recommendations. We have been given impressionistic estimates of 80% to 90%. That does not of necessity mean more than that in most cases the recommendations are in accordance with the whole of evidence given at the trial. Certainly Judges make decisions inconsistent with the recommendations when they think they

should--the Board of Inquiry into the Child Welfare Act said that "frequently the courts do not pay attention to" the recommendations. It seems that when the amicus curiae and his witnesses have done a thorough and workmanlike job their evidence and recommendations are highly persuasive, but that even then the Judge is in a position to, and does, assess what they say in relation to the whole of the evidence from all sources. The amicus curiae may be an adviser, but what he puts forward is evidence and argument which the Judge uses as he thinks best.

(4) Effecting Settlements

2.27 In most cases the parties, after receiving the amicus curiae's report, make an agreement which settles the custody issue out of court. Mr. Hogan says that this happens in 90% of the cases handled by his office, and impressionistic estimates relating to cases in which private practitioners are appointed are comparable. Speaking quantitatively it seems that the amicus curiae's primary function is not that of an adviser to the court, but rather that of a promoter of custody agreements out of court.

2.28 When the amicus curiae sends his report to the parties to the custody dispute, usually through their lawyers, it becomes a new element in the legal situation before the parties and it may have two effects. First, counsel for the party adversely affected by the report is likely to advise his client that the report, while not definitive, is likely to be persuasive. He is also likely to advise his client that the alternative to accepting it is a bitter and costly trial the result of which is at best uncertain and which is likely to have adverse ramifications for the future of the client's relationship with the child. Second, the party adversely affected will see an independent and objective assessment of the relative appropriateness of the contending parties as

custodians, and, if he is willing to consider the issue rationally, may be persuaded that the child's interests will not be badly served by the recommended disposition. Indeed, we are told by one experienced practitioner that it is not uncommon for a parent to be quite relieved to be persuaded that his or her duty to the child does not require him to continue a contest over custody.

2.29 The usefulness of the role of the amicus curiae in bringing about agreements can be questioned. A settlement brought about by third party pressure is not necessarily a good settlement. It may be said that by influencing the parties to agree as to the custody of a child, the amicus curiae, in effect, makes the decision which should be made by the Judge. It may be that a party will be, or will feel, coerced by the amicus curiae's recommendation. We are not aware of any empirical evidence which establishes whether or not such agreements stand up over time and whether or not they are beneficial to the child; equally we are not aware of evidence to the contrary. Nor do we know how many "settlements" would have been made anyway.

2.30 However, we think that the amicus curiae's function of promoting agreements out of court is a good one. Each party is safeguarded by having legal advice. The decision is made by those who should make decisions about the child's upbringing. A party may feel pressure to concur, but at least he or she does concur and does not merely submit to a decision imposed by a court; many persons will perform agreements, however reluctantly made, more readily than they will accept arrangements which are imposed. A party who feels strongly that the recommendation is wrong, or who is advised that it is wrong, can still go to court. A decision which is made by the parents on legal and independent professional advice is as likely to be correctly made and to be in the child's interest as one made by a Judge after a bitter contest. Finally, a procedure which keeps

hundreds of contested custody issues out of the courts each year relieves court congestion and also relieves parties of the financial and emotional costs of bitterly contested trials. Empirical evidence about the long-term effect of custody agreements made under these conditions would be highly desirable, and we hope that it will be sought, but until it comes to hand we think that impressionistic evidence and arguments based on reasonable probabilities should be accepted.

2.31 It should be noted that the amicus curiae does not usually act as a conciliator in the usual sense. He does not usually meet the parties and help them to settle issues by agreement. He usually deals with situations in which the parties have lawyers, and he provides legally significant material which the lawyers use, usually successfully, as part of the negotiating process. The amicus curiae procedure is therefore neither a conciliation service nor a substitute for one, nor would a conciliation service be a substitute for the amicus curiae procedure; either or both may be of value in a given case, but neither could perform the functions of the other. If conciliation continues to become more common and is successful it will reduce the number of cases in which the amicus curiae procedure will be needed. Indeed, we understand that the Alberta Attorney General's Department is at this time exploring the greater use of mediation in order to reduce the number of cases in which a government lawyer is appointed as an amicus curiae. So long as the Judge remains free to make an appointment where he himself sees the need for one, this appears to us to be an appropriate development.

3. Protection of the Child's Interest by Other Means

A. The Court and the Parties as the Protectors of the Child

3.1 As we have said earlier, the parents or other

guardians of the child will usually either make an agreement in the child's interest or put before the Judge all the evidence and argument which are necessary to enable him to make the decision which will best promote the child's interest. There are, however, cases in which they do not or cannot do so. If they do not, the Judge cannot properly exercise his function as the ultimate protector of the child's interest. Something more is necessary in such cases. The question is what it should be.

B. The Child as Party

3.2 A child who is involved in a custody dispute could be treated as a party. This would be anomalous for two reasons. The first is that the law would simultaneously treat the child as being incapable of making a custody decision and as being capable of deciding what custody decision to advocate and of advocating it or instructing a lawyer to advocate it. The second is that the purpose of a custody application, unlike the purpose of ordinary litigation, is not the determination and enforcement of the child's rights and duties but rather the determination of the child's interest, a subject in which the child does not have an adversarial interest.

3.3 These considerations are not decisive. Law and legal concepts can be changed. There may well be an argument for lowering the age at which a child is accorded legal capacity to decide upon his or her own capacity, or to introduce a maturity test, but we think that until that argument is made and accepted in the basic law, the practice of a court dealing with arrangements inside the family should reflect current basic legal assumptions. Further, it is obvious that by any standard many children involved in custody disputes, including all children in arms and most teen-agers, are either incapable of intervening in custody disputes or ought not to be subjected to the responsibility for doing so. We think that the underlying facts and the legal and practical assumptions upon which the

legal system operates militate against conferring upon a child the status of party to a custody dispute and the power to appear personally or to instruct counsel to appear in the dispute.

3.4 There are those who contest the fundamental assumption that a child is not mature enough to make his own choices, or at least the assumption that a child is not mature enough to be heard as a party when a choice is being made for him. A child is as much a person as anyone else, they say, and is entitled to the same basic legal rights as anyone else, including the right to be heard in court. This line of thought would lead to the conclusion that a child should have a lawyer who is his own adviser and advocate in the same way as a lawyer whom an adult retains is that adult's adviser and advocate. Many lawyers would feel more comfortable in this role as it is one to which they are accustomed.

3.5 A child may of course be mature enough to decide upon the parent or guardian with whom he wishes to live, and to give instructions to a lawyer to prepare and present a case to persuade the court to make an order accordingly. It would be perfectly appropriate to provide such a child with a lawyer of his own whom he can instruct as he wishes. We think, however, that few children about whom custody applications are made have reached that degree of maturity; if they have reached it their wishes are likely to be respected without court proceedings. The legal system should provide protection for the great majority who are truly unable to decide properly for themselves.

3.6 If a lawyer is to be an advocate in the traditional sense he must be instructed. Unless someone is empowered to certify to him that a child is mature enough to give instructions, the lawyer would have to judge the degree of the child's maturity for himself, something which he is not trained to do and about which there is little guidance. If the decision is that the child is not mature enough to instruct him, the

lawyer would have two choices. The first is to throw up his hands. That course of action would not help the child. The second is to decide himself what position to advocate. That course of action would suffer from two drawbacks. The first is that it would not give effect to the only theory that justifies the appointment of a lawyer as advocate, namely that the child has a right to be heard. The second is that a lawyer is not trained to make decisions about a child's best interest and is therefore not trained to make decisions about what position to advocate. On top of all that, while there may be an advantage in having an independent lawyer whose function is to provide the judge with information and views, it is less clear that there is a similar advantage in having an independent lawyer whose function is to put forward a particular case and no other. Finally, while the addition of another lawyer in an adversarial capacity might encourage settlements, it is not at once apparent that it would do so on a large scale.

C. Investigations

3.7 The Court can, either under its inherent powers or under R. 218 of the Alberta Rules of Court, appoint a professional investigator for the purpose of investigating the circumstances relevant to a custody decision and to give expert evidence if it is needed, and such appointments are not uncommon. If such an appointment is made by consent, the professional investigator has access to both sides, and has the advantage of objectivity through not being associated with either. There may be some procedural awkwardness in getting his evidence before the court if no party calls him as a witness, but the procedure under R. 218, if applicable, will deal with that, and in any event it is likely that the two parties will agree on the admission of the professional investigator's report or that one party will call him as an expert witness. Professionals are available for appointment through services attached to the Family Courts at Edmonton and Calgary. It

appears, however, that some parties apply for the appointment of a government amicus curiae primarily because he will have an investigation made without cost to them.

3.8 The function of the court-appointed professional investigator is sometimes confused with the function of the amicus curiae. The two functions are however quite different. One is the function of the expert investigator and witness. The other is the function of counsel. The only analogy which is relevant and valid is between the court-appointed professional and the professional retained by the amicus curiae; the professional has substantially the same function however he is appointed.

3.9 It would even be possible, and it is sometimes suggested, that an investigation should be required in all contested custody cases, or even (since the lack of a contest does not prove that the proposed disposition of the child is right) in all cases in which the custody of a child is involved. If a full scale investigation were to be made in every case a substantial injection of resources would be needed - it seems that a thorough home study is likely to take more than a week of a social worker's time - and in the absence of a clear demonstration of need it seems pointless in a time of retrenchment to recommend a substantial expansion of investigation services. It is not clear to us, anyway, that a full-scale investigation in every case, would be a proper use of resources which will always be scarce, and the making of a home study as a matter of course without the consent of the parents and without any demonstration of need is itself an intrusion by the state into the lives of families which should be imposed only where it can be clearly justified. On the other hand, a system which purports to apply to all cases but does not call for a full-scale investigation of each, is likely to become a superficial procedure which will give a misleading appearance of protecting children but which will not be thorough enough to

identify the cases where protection is needed.

3.10 However, there are cases in which the appointment of a professional investigator is desirable and will provide the court with all that is needed. That is not an argument against the amicus curiae procedure in those other cases in which a lawyer is needed to organize and supervise the investigation and take part in the trial. It merely goes to reduce the number of cases in which an amicus curiae should be appointed.

D. A Non-lawyer as Amicus Curiae

3.11 The Court of Queen's Bench has upon occasion appointed a professional from another discipline as amicus curiae. We think that such appointments reflect some confusion about the respective roles of an expert witness and of a lawyer.

3.12 What the amicus curiae does under the Alberta procedure, as we have said in paragraph 3.8, is different from and inconsistent with the function of an expert witness; it is the function of counsel, and the mixing of the functions of witness and counsel has always been rejected by the Courts and should be rejected here. Mr. Justice Miller made this point in Drapaka v. Drapaka[7] when he said that the clinical psychologist who was the amicus curiae in that case had been put in the position virtually of a litigant. Mr. Justice Miller went on to say that an amicus curiae should always be a lawyer. A non-lawyer amicus curiae has had upon occasion--the Drapaka case being one--to retain counsel, and a procedure under which a functionary appointed to assist the court feels impelled to retain counsel to represent him has little to recommend it. It follows from what we have said earlier that the court can get

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[7] Unreported, Edmonton Action 27483, Appeal 13404.

its advice where it wishes. We think, however, that if the court wants advice from a non-lawyer it is better to appoint him as an expert than as an amicus curiae.

E. Child's Advocate

3.13 We have described the functions of the amicus curiae as we think they have in fact been performed and are being performed in Alberta. The question arises whether these are the functions which a lawyer should perform, or whether a different kind of appointment would better protect the child's interest. It is sometimes argued that what is needed is a "child's advocate." This is a term to which different meanings may be given.

3.14 The first way to provide a child's advocate is for the court to appoint a lawyer to take instructions from the child and to advocate the position chosen by the child. An argument can be made that the function of the amicus curiae as we have described it is not enough and that a child, even though not a party, should have a lawyer to advance the case which the child wants advanced. Indeed, the Board of Review into the Child Welfare Act, which reported in 1983, recommended that a 12-year old or a mature sub-12 should be given his own lawyer if the State proposes to remove him from his family; and the Manitoba Court of Appeal, in a decision[8] which is under appeal, held that in such a case a 13-year old boy had a right to counsel under the Canadian Charter of Rights and Freedoms. Whether or not the Manitoba decision would apply to an intra-family custody dispute, and whether or not the decision is reversed on appeal, however, it is only rarely, if at all, that a child will want to appear with counsel at the trial of a custody dispute between the child's parents or guardians.

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[8] Re R.A.M.; Children's Aid Society of Winnipeg v. A.M. and L.C. [1984] 2 W.W.R. 742.

3.15 The second way to provide a child's advocate is to appoint a lawyer who will decide what position should be taken on behalf of the child, and then proceed to advocate it. This is much the same function as that of the guardian ad litem, which we will discuss in paragraphs 3.17 to 3.20. It would require the lawyer to make in the first instance a decision which must ultimately be made by the Judge. We think that it is better to provide the Judge with assistance through an amicus curiae than to provide an additional decision-maker.

3.16 The Family Advocate appointed to the British Columbia Unified Family Court project is a different kind of functionary. He is a legally qualified official who can intervene on behalf of a child on his own motion. Again, we doubt that the resources are available in Alberta for such a service, and we are not sure that such an official would do a better job of identifying the cases where a lawyer is needed to protect a child's interest than will an alert bench and bar. Indeed, it appears that the British Columbia Family Advocates found themselves unable to screen every case and came to rely upon references from others.

F. *Child's Guardian*

3.17 A separate "representative" of a child is sometimes thought of as a "guardian", or "law guardian" or "guardian ad litem". The term "guardian" suggests a person who has a power to make a decision on behalf of a child for the child's benefit. A guardian ad litem would not be a child's advocate and need not even take the child's wishes into consideration. He would not be an adviser to the court, but would be a separate person with his own standing as a party before the court and with a direct duty to the child. He would be appointed because it is thought that "decision-making is improved as a result of an independent

search on behalf of the child for a position felt to further the child's best interests."[9] His first function would be to decide what is in the child's best interests and his second would be to advocate the acceptance of that decision by the Judge.

3.18 If the guardian ad litem's function is to identify the best position to be taken for the child he would not have to be a lawyer. Indeed, it might be better that he be trained in some discipline which is more likely than law qualify him to make an appropriate decision. But if the position which the guardian ad litem selects is then to be advocated, he would either have to advocate it himself or retain a lawyer to do so. The former course of action would burden him with some rather conflicting functions, and the latter would add again to the complexity and cost of the proceedings.

3.19 In summary, it would be quite practicable to name a guardian ad litem for a child with the function of identifying and advocating the best course of action for the child. The participation in the custody proceedings of another adversary would, however, add to complexity, delay and cost, and does not seem likely to encourage settlements. Further, as we have said about the Child's Advocate in paragraph 3.15, his initial decision about the child's best interests is precisely the decision which the Judge must ultimately make, and we think that it is better to provide the Judge with assistance through an amicus curiae than to provide an additional decision-maker.

3.20 A government functionary could perform the function of guardian ad litem, and in some jurisdictions there is a functionary called a Law Guardian or Official Guardian. In some cases, the functionary reports on all child custody cases. This

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[9] Thomson, George M., Role Confusion in the Child's Lawyer [1983] 4 Can. Journal of Family Law, 125, 131.

is not necessarily a guardianship function. We doubt the practicability in times of restraint of a proposal for investigations in all cases and our remarks about the desirability of universal investigations which appear in paragraph 3.9 militate against making it.

G. Existing and Proposed Legislation

(1) The Alberta Child Welfare Act

3.21 The Alberta Child Welfare Act[10] deals with child welfare cases. The Board of Inquiry into the Child Welfare Act recommended that in child welfare proceedings 12-year olds and mature sub-12's have a right to counsel, and that the court have power to appoint a lawyer to represent a younger child in unusual cases. S. 77 of the 1984 Act deals with the same subject but is framed somewhat differently. It gives the court powers upon application to direct that a child be represented by a lawyer if the child's interests or views would not otherwise be adequately represented. The application may be made by the child, a guardian of the child or a departmental director.

3.22 A child welfare matter is different from a custody dispute, if only because a child welfare matter involves a contest between state and family and because it may result in the removal of the child from the family and not merely from one family member to another. Another difference is that in a child welfare matter one government functionary is already necessarily present in what the government conceives to be the child's interest. S. 77 of the Child Welfare Act, however, recognizes that even where a government official is present there may be a case in which a lawyer is needed, and it would cover a case in

[10] S.A. 1984 c. C-8.1.

which the child is not mature enough to instruct counsel as well as a case in which the child is mature enough.

(2) The Divorce Bill

Bill C-10, of the last session of Parliament would have amended the Divorce Act. S 12.1(3) would have directed the Court to take account of the best interests of the child as a paramount consideration, and, to give effect consistent therewith, to appoint a "barrister, a solicitor, a lawyer or an advocate" to represent the interests of children independently where the proper protection of those interests so requires. (Since the French version talks only of "un avocat" it seems likely that "advocate" in the English version is intended to include only a legally qualified advocate.) If this provision were to be revived and enacted, it might fairly be said to give statutory support to the Alberta amicus curiae procedure. However, the bill would not have provided for the government support which the Attorney General's Department provides for the Alberta amicus curiae system. The bill died on the order paper when Parliament was dissolved.

4. Need for the Amicus Curiae

A. Advantages

4.1 The advantages of the amicus curiae procedure are as follows:

(1) In the custody disputes which go to trial, the procedure makes available to the Judge:

(a) expert evidence, independent of the parties and directed towards the child's interest, which is based upon an investigation arranged by a lawyer,

which is reviewed by a lawyer to assess its validity, and which is presented by the expert under examination by counsel;

(b) a lawyer's assessment of the circumstances, in the form of a recommendation;

(c) elucidation and amplification of the parties' evidence, where necessary, by cross examination;

(d) a vehicle for conveying the child's wishes to the Judge, if the child wants them conveyed.

(2) Most custody cases in which an amicus curiae is appointed are settled by agreement out of court--possibly 90%. While it is not possible to say how many would be settled if no amicus curiae were appointed, and while empirical evidence about the success or failure of the settlements is lacking, and while other processes might also achieve settlements, it does seem that the procedure provides a valuable machinery for settlement and reduces court congestion. It does seem also that it avoids embittered trials and more damage to family relations.

(3) In the absence of some procedure for an independent investigation (whether through an amicus curiae or through the appointment of an independent investigator) the Court is likely to be faced with the evidence of expert witnesses who have had satisfactory access only to the parties who retain them and to the children in the custody of those parties. This is unsatisfactory.

B. Disadvantages

4.2 The disadvantages are as follows:

(1) Cost

4.3 The amicus curiae procedure is costly. It involves a lawyer and expert professionals, all of whom are usually highly paid. If a private amicus curiae is appointed, the cost of the procedure can be determined by adding up the professional accounts which the parties pay; it is likely to amount to $2000 or $3000, and in a difficult case it may be much more. The cost of the government amicus curiae is not so easy to quantify and is not usually borne by the parties, but it is also substantial.

4.4 Generally speaking, the parties bear the cost if the amicus curiae is a private practitioner, and the Attorney General's Department bears the cost if he is a government lawyer. In some cases a government amicus curiae asks for and is awarded costs from a party or even from the child's property, but he does not usually do so, and he does not do so when he thinks payment of costs would bear harshly on a party who would have to pay them. Of course, even if he asks for costs it is in the Court's discretion to award them or to refuse them.

4.5 On the one hand, it may be thought that parents are responsible for providing for the needs of their children and should therefore pay for the cost of professional services necessary to enable the judge to make a proper decision about the child's future. This argument is strengthened by the consideration that it is the failure of the parties to agree--and in particular the failure of the one who is not awarded custody--which gives rise to the need for the appointment of the amicus curiae.

4.6 On the other hand, there is a public interest in the welfare of children, and the decision to follow the amicus curiae procedure should not be determined by the parties' willingness or ability to pay the cost. Further, a custody dispute is likely to come at a time when the financial position of the parties is seriously and adversely affected by the cost of a divorce and by other additional costs which they are incurring because they have begun to live separately rather than together or because they have entered into new relationships.

4.7 We think that the Attorney General's Department was wise in agreeing to provide a budget for the amicus curiae service. We do not think that in the usual case, parties should be required to pay the cost of the procedure. We think also, however, that the option of retaining the private amicus curiae at the parties' expense should remain open.

(2) Delay

4.8 It takes time for the amicus curiae to retain his professionals, and for his professionals to investigate and to prepare written reports. It takes time for the amicus curiae to assess the reports and, if necessary, to ask his professionals to do additional work. We understand that the demand upon the Attorney General's resources is so great that four months is the target for the service, and that the procedure upon occasion takes two or three times that long.

4.9 Delay is the most serious fault of the procedure. Uncertainty about his future for a period of months is a serious matter to a child, whose time frame is short. Uprooting a child after a long period with one parent is likely to be highly unsettling to the child and may well be injurious. This latter consideration is likely to inhibit a Judge from changing custody, so that the delay caused by the procedure may affect the outcome, and a party may seek the appointment of an amicus

curiae in order to achieve a delay which will improve his or her chances of ultimate success. A speedy disposition of the issue on deficient information may be better for the child than a delayed disposition on adequate information.

4.10 A private amicus curiae is often able to move more quickly because he can retain a private professional who can fit the investigation in more quickly. This option is available only if the parties agree and will pay the cost.

4.11 Every effort should be made to eliminate from the Attorney General's service all delay which is not built into the system. One way to do that would be to add whatever resources, in money or personnel, are needed to provide almost immediate service. While we would like to see this done, we think it unrealistic to suggest it be done in the time of restraint and retrenchment which exists now and is likely to continue for at least some time into the future. We do most urgently recommend that existing levels of support be continued, and, if possible increased.

4.12 The alternative would be to reduce the demands upon the Attorney General's service. One way, government funding of private amicus curiae, is subject to the financial difficulties which we have mentioned. Another would be to try to diminish the flow of appointments through greater use of conciliation or mediation, if that is possible, and, as we have said in paragraph 2.31, the Attorney General's Department is exploring this possibility. The final way is for counsel and the Judges to be rather more selective in the cases in which appointments are made. The difficulty with that suggestion is that there is no reason to think that the cases in which appointments are being made will not benefit from them, so that any substantial decrease in number may mean that some children will be deprived of the protection who ought to receive it.

4.13 We should note that we have received comments from responsible professionals to the effect that there are cases in which delay is of value because the passing of time reduces the bitterness felt by the parents toward each other and allows them to negotiate an agreement in a more objective frame of mind. While we accept that this happens, we think that there is quite enough inevitable delay in the system to accommodate this function, and that avoidable delay due to the amicus curiae procedure is, as a general rule, bad.

(3) Other

4.14 There is probably some additional trial time involved when the amicus curiae takes part (though the numerous settlements on the whole probably save much trial time).

4.15 The Board of Inquiry into the Child Welfare Act mentioned the amicus curiae procedure in passing. It suggested that the procedure has further disadvantages.

4.16 The Board said that in some instances it has been suggested that the Court is abdicating its role as decision maker in favour of the amicus curiae, though it did not indicate the source of the suggestions or set out the supporting evidence. We do not ourselves have any knowledge of such evidence. If there were any, it would still not seem to us that a court should deny itself information, or be denied it, merely because it is sometimes suggested that a judge does not use it properly. Chief Justice Milvain said in Copithorne v. Copithorne (1977) 2 AR 431 that "it is true, of course that no judge dare shirk "the . . . responsibility of decision in favor of experts," and we would expect that to be the normal judicial reaction. We doubt that mistrust of the Judges is a sufficient reason to discontinue a useful procedure.

4.17 The Board also said that the procedure is of dubious utility and that frequently the courts do not pay attention to the recommendations. Certainly judicial criticism of the evidence adduced by an amicus curiae is not unknown.[11] However, Judges, sometimes on their own initiative and sometimes at the instance of parties speaking through counsel, are making hundreds of appointments each year, and would hardly do so if they thought that the procedure lacks utility. And Judges have specifically recognized the utility of the procedure. For example, Chief Justice Milvain said in Copithorne v. Copithorne[12] that the idea of employing an amicus curiae in that case had been an excellent and helpful method of assisting him, and, in general that the amicus curiae procedure makes it possible to obtain objective evidence not associated with a party, and Mr. Justice Miller said in Drapaka v. Drapaka[13] that the system had worked well. The Board spoke only of cases tried and did not mention the great mass of settlements which take place and the consequent reduction of pressure on the Court and on individual litigants.

C. Conclusions

4.18 In its present form the amicus curiae system depends on three elements. The first is Judges who are watchful for cases in which the procedure will be useful and who are willing to ask for the kind of assistance which an amicus curiae can give. The second element is a continuing and consistent service by the Attorney General's Department. The third element is the existence of a substantial group of family law practitioners who are conscientious enough to be uneasy about the determination of a child's future through an unmitigated adversial procedure and

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11 See for example Monastersky v. Monastersky 12 A.R. 492.

12 (1977) 2 A.R. 431 (S.C.T.D.); Burnett v. Burnett (1983) R.F.L. 216 (Q.B.).

13 Edmonton Action 27483, Appeal 13404.

who are perceptive enough to recognize the cases in which the interests of children call for additional protection. This group perform two functions. As counsel for parents they perceive instances in which the amicus curiae procedure is useful and maintain pressure for its proper development. As amici curiae themselves, they contribute the distinctive ideas of the private bar to the operation and development of the procedure, give parents an effective alternative choice, and provide healthy competition to keep the Department on its mettle.

4.19 The amicus curiae system appears to operate in a hit-and-miss fashion, and it may even be said to be no system. It does not guarantee that all cases in which a child's interest needs protection will be recognized; recognition depends upon the alertness of Judges and counsel.

4.20 The amicus curiae system is obviously imperfect. It has, however, been developed on a case-by-case basis by the Court of Queen's Bench in conjunction with the government and the bar. It is flexible and capable of development as required by changing perceptions of need. It gives significant protection to children in custody and personal guardianship cases, and appears to be as well suited to current Alberta needs as any system which is within the range of practicability.

5. Legal Justification for the Alberta Amicus Curiae

5.1 The Court of Queen's Bench of Alberta, as a Canadian superior court, is the inheritor of the parens patriae power which devolved upon the English and Canadian superior courts from the royal prerogative. In relation to a child the parens patriae power is the power, in the exercise of the court's equitable jurisdiction, to intervene to protect the child's interests. The historical origins and the scope of the power

are not clear, but there is no reason to doubt that it includes a power to appoint a functionary to protect the interests of a child before the Court.

5.2 The Alberta practice is to call that functionary an amicus curiae. English law has recognized an amicus curiae at least since the 14th century. In early times the amicus curiae was a bystander who came forward to point out some error of fact or law of which the judge was unaware or about which the judge was in error or seeking guidance. Sometimes also the court would ask one of its officers to assist in its deliberations and that officer was called an amicus curiae. In Canada, a provincial Attorney-General may sometimes appear as amicus curiae in the Supreme Court of Canada in a constitutional case. The courts have never precisely defined what an amicus curiae may do or when he may intervene, but as Mr. Justice Manning pointed out in Woods v. Woods, a Lord Chancellor said more than 200 years ago[14] that anyone, as amicus curiae, may make an application for and on behalf of an infant.

5.3 There may be controversy as to whether or not an amicus curiae had, before Woods v. Woods, performed the functions which the Alberta amicus curiae performs. While it seems to us that the ancient institution was quite capable of being developed to enable him to do so, it is probable that there was no precise precedent for such a development. We think, however, that any such controversy is arid. When the Court of Queen's Bench and its predecessors have made some thousands of appointments under that title, and when the Court of Appeal has recognized the appointments and the title[15], it seems to us that the law of Alberta is that the Court of Queen's Bench can appoint such a functionary and can apply that title to him.

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14 In Beard v. Travers (1749) 27 E.R. 1052.

5.4 Whether or not the title "amicus curiae" is correct, we do not think that there is any legal grounds upon which anyone could successfully challenge the authority of the Court to appoint an official to perform the functions which the Alberta amicus curiae performs in custody cases, whether he is called an amicus curiae or something else. So far as we know, no one has mounted a legal challenge to it. Indeed, in the recent case of Re Beson and Director of Child Welfare for Newfoundland,[16] an application for habeas corpus which became an adoption case, the Supreme Court of Canada appointed, and heard at length, counsel for the child, who with great perspicuity and care performed a function which was much the same as the function performed by an Alberta amicus curiae, and, indeed, was rather more extensive. The Supreme Court did not feel the need to defend its jurisdiction to make the appointment, and counsel who was appointed concluded that the appointment was made in exercise of the court's parens patriae power, which is presumably the same power (or, at least, no more extensive a power) than the parens patriae power of the Court of Queen's Bench. There seems to be as good a foundation for a superior court's jurisdiction to appoint such a functionary in a custody case as there is in an adoption case.

5.5 The Newfoundland case began as an application for habeas corpus brought by a couple with whom the Director of Child Welfare had first placed the child for adoption but from whom the Director had removed the child. In the result the Supreme Court of Canada made an adoption order in favour of the

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15 See e.g., Singh v. Singh (1981) 34 A.R. 271, Read v. Read, unreported, Calgary No. 13846, 1981, and Drapaka v. Drapaka (unreported, Edmonton Action 17483, Appeal 13404).

16 (1983) 142 D.L.R. (3d) 20; 30 R.F.L. (2d) 438; see also a note by counsel at (1983) 33 R.F.L. 16.

applicants. Before the appeal was heard, Madam Justice Wilson, of her own motion, made an order appointing a Newfoundland lawyer "counsel to represent" the child in the appeal. Counsel obtained expert advice to the effect that the child was incapable of instructing counsel. He then himself investigated the circumstances, retained professionals to investigate, applied as counsel for the child to introduce evidence, led the evidence, cross-examined, and made a recommendation. Counsel thought that his function as "counsel for the child" permitted him more latitude to serve the child client's best interests than would the function of an amicus curiae. It will be noted, however, that counsel was appointed by the court, that he received no instructions from the child, that with the help of professionals he identified a position which he thought was in the child's best interests, and that he also described his function as "guardian and advocate of the boy's best interests," so that his function was not that of counsel in the usual sense. As we have said, we think that he performed a function much like that of the Alberta amicus curiae. This is of course only one case, and a case of a kind which reaches the Supreme Court of Canada only infrequently; but it shows the Supreme Court of Canada reacting in very much the same way as Mr. Justice Manning reacted in Woods v. Woods. It seems to put beyond doubt the jurisdiction of the Court to appoint a functionary such as the amicus curiae under one name or another.

5.6 In summary we think:

(1) that the Court of Queen's Bench of Alberta has an undoubted power to appoint a functionary to perform the functions which the Alberta amicus curiae performs.

(2) that under the law of Alberta, it is proper to call that official an "amicus curiae", but that if it is not proper, the official can be given another title and perform the same functions.

6. Recommendations

6.1 We recommend:

(a) that the amicus curiae procedure which has been developed by the Court of Queen's Bench of Alberta for its own assistance in custody disputes be recognised as valuable and continued;

(b) that the procedure be left to be evolved by the Court from case to case;

(c) that the Attorney General's Department continue to provide professional and financial support for the amicus curiae procedure at least to current levels;

(d) that the Attorney General's Department do what it can, administratively and financially, to minimize the delays which the procedure imposes upon custody and guardianship litigation and the cost which it imposes upon parents.

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October 1984