RE J.R.L.; EX PARTE C.J.L.

H. C. OF A. 1986.

June 10; *July* 30.

Gibbs C.J., Mason, Wilson, Brennan and Dawson JJ.

Courts and Judges — Bias — Family Court of Australia — Judge approached in private chambers by court counsellor — Absence of parties — Counsellor prospective expert witness — Views expressed favouring one party — Reasonable apprehension that judge might not bring impartial mind to matter.

Family Law — Family Court of Australia — Jurisdiction — Status of court counsellor as officer of court — Improper private approach by counsellor to judge — Family Law Act 1975 *(Cth)*, *ss.* 37, 62A — *Family Law Rules O.* 25, *r.* 5.

Where a court counsellor approached a judge of the Family Court in the judge's private chambers to complain about the intended adjournment of the hearing of a custody application and volunteered information about her qualifications as a prospective expert witness and canvassed aspects of the proceedings before the judge asked counsel for the parties to attend too,

Held by Gibbs C.J., Mason and Brennan JJ., Wilson and Dawson JJ. contra, that the actions of the counsellor and judge gave rise to a reasonable apprehension that the judge would not bring an impartial mind to the resolution of the issue.

In re Dyce Sombre (1849), 1 Mac. & G. 116, at p. 122 [41 E.R. 1207, at p. 1209] and *Kanda v. Government of Malaya*, [1962] A.C. 322, at p. 337, applied.

Reg. v. Magistrates' Court at Lilydale; Ex parte Ciccone, [1973] V.R. 122, at p. 127, approved.

Per curiam. It is undesirable and inappropriate that a court counsellor, exercising functions conferred by or under the *Family Law Act* 1975 (Cth), should make representations about pending proceedings to a judge of the court privately and in the absence of the parties or their counsel.

PROHIBITION.

A decree nisi for the dissolution of the marriage of C.J.L. (husband) and J.R.L. (wife) was pronounced by the Family Court of Australia in 1984. Further proceedings continued about the custody of a child of the marriage. A court counsellor was directed to furnish to the Court a family report, which became available at a hearing before Renaud J. It indicated that the child, then in the father's custody, was "on the way to a severe anxiety neurosis" and should be given to the mother. Counsel for the parties proposed an adjournment by consent to consider the report. The counsellor approached the wife, saying that an adjournment would be outrageous, that something would be done about it, and that she would not be silenced. After discussions with a superior officer she attended the

judge in private chambers during the luncheon adjournment. After conversation between them, the judge called counsel for the parties to her chambers. It then became known that the counsellor was a clinical psychologist, that she favoured the wife's position, and that she had discussed the conduct of the proceedings with the judge. When the hearing resumed, counsel for the husband applied to the judge to disqualify herself. She refused. The husband then obtained in the High Court an order nisi for prohibition to restrain the judge from proceeding in the matter.

F. S. McAlary Q.C. (with him *F. D. M. Curran*), for the applicant. The *Family Law Act* 1975 (Cth) does not confer any special status on Family Court counsellors: *Hall and Hall* (1). The function of counsellors is not to act as amicus curiae, to volunteer reports to the court, or to take over the running of cases.

[GIBBS C.J. They have no role to play so far as the court is concerned, they may well have so far as the parties are concerned.]

The action of a counsellor in deliberately approaching the primary judge in private chambers to influence the proceedings was a contempt of the court: *In re Dyce Sombre* (2). Here the counsellor took up a position of thinking that she knew better than the judge and would not be silenced. Her intervention was designed to alter the conduct and course of the proceedings. The action of the judge in receiving the counsellor privately, unknown to the parties and in the absence of counsel, and in obtaining evidence on a material matter, discussing the case with the counsellor as an involved witness, and in canvassing the future conduct of the proceedings, rendered the judge privy to the counsellor's contempt. It could be reasonably apprehended that the judge might not bring an impartial and unbiased mind to the matter: *Kanda v. Government of Malaya* (3); *Reg. v. Tait & Bartley* (4).

[DAWSON J. *Kanda's Case* (5) is about the audi alteram partem rule, not about bias.]

Bias occurs if a party cannot be fairly heard. It does not matter which party is affected, the test is whether a bystander would entertain a reasonable apprehension that the judge would not be

(1) [1979] F.L.C. 78,814, at p. 78,818.
(2) (1849) 1 Mac. & G. 116, at p. 122 [41 E.R. 1207, at p. 1209].
(3) [1962] A.C. 322, at pp. 335, 337.
(4) (1979) 24 A.L.R. 473, at p. 487.
(5) [1962] A.C. 322.

H. C. OF A. 1986.

RE J.R.L.; EX PARTE C.J.L.

impartial and unprejudiced: *Reg. v. Watson; Ex parte Armstrong* (6); *Livesey v. N.S.W. Bar Association* (7).

A. T. McInnes Q.C. (with him *J. P. H. Stevenson*), for the respondent wife. What the court counsellor did is immaterial in the absence of an allegation against the judge of bias. The question is whether anyone could reasonably have held an apprehension or suspicion of bias on the part of the judge. [He referred to *Dickason v. Edwards* (8); *Reg. v. Watson; Ex parte Armstrong* (6); and *Franklin v. Minister of Town and Country Planning* (9).]

[Gibbs C.J. *Franklin's Case* (10) is against you.]

It is an authority for the proposition that one looks to the whole of what happened to establish whether the judge was even-handed. The necessary steps to make out grounds for prohibition in a case like this have not been taken. A high "probability" of bias has not been established: *Reg. v. Australian Stevedoring Industry Board* (11). It is not demonstrated that a suspicion of bias is "reasonably" held by reasonable people: *Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (12). We concede that the procedure adopted was inappropriate, but, on whatever test, the judge neither did nor said anything indicating bias. It follows that no party has been prejudiced. On the contrary, the evidence shows that the judge, having heard the counsellor's proposals, indicated that she did not accept or agree to act upon them.

[Mason J. The question is not whether in fact the judge was influenced but whether there is the appearance of lack of impartiality.]

J. M. Rees, for the separate representative of the child of the marriage, applied for the representative to be excused from attendance and was not called upon further.

F. S. McAlary Q.C., in reply.

Cur. adv. vult.

July 30.

The following written judgments were delivered:—

GIBBS C.J. This is an application to make absolute an order nisi

(6) (1976) 136 C.L.R. 248, at p. 258.
(7) (1983) 151 C.L.R. 288.
(8) (1910) 10 C.L.R. 243.
(9) [1948] A.C. 87, at p. 103.
(10) [1948] A.C. 87.
(11) (1953) 88 C.L.R. 100, at p. 116.
(12) (1969) 122 C.L.R. 546, at p. 553.

for a writ of prohibition directed to a judge of the Family Court prohibiting her from further proceeding in a matter in which competing applications had been made by the prosecutor (the husband) and the wife for an order for the custody of a child of the marriage who was, at the time of the hearing, living with the husband.

The applications came on for hearing in the Family Court on 4 February 1986. A court counsellor, Ms. Bernet, had, pursuant to a direction of the Court, furnished a report dated 28 August 1985. In November 1985 she had been directed to prepare a further report and her further report, dated 31 January 1986, became available to counsel only during the hearing on 4 February 1986. The report strongly favoured the wife; it stated that the child was "on the way to a severe anxiety neurosis" and that if she remained living with her father her condition could be expected to deteriorate. At that stage of the proceedings it was not known whether the counsellor had any qualifications that fitted her to make this diagnosis. It had never previously been suggested that the child was affected in this way, and the husband, who was later shown the report, wished to have the child examined by a psychiatrist or psychologist. On the following day (5 February) counsel for both parties agreed that the hearing could not proceed to a conclusion until investigations had been made into matters raised in the report. The date on which the hearing might be resumed was discussed — 27 May was suggested. Both counsel said that in the circumstances they did not wish to have the counsellor called to give evidence that day and the judge indicated that the counsellor could go home. However, the hearing proceeded to enable a medical witness to be examined and to enable the course of further proceedings to be debated.

At some time on 5 February 1986 the counsellor approached the wife and said that the proposed adjournment was outrageous and that she proposed to do something about it. She in fact discussed the matter with the Director of Court Counselling at Parramatta and then went to the judge's chambers during the luncheon adjournment and had a conversation with the judge. Shortly afterwards, the judge called counsel for both parties into her chambers, introduced them to the counsellor and told them that the counsellor had some recommendations in regard to the child. There then occurred a conversation, substantially between the judge and the counsellor, in the course of which the judge said that the counselling service was extremely concerned about the length of the adjournment and the counsellor said that she thought that a separate representative should be appointed for the child, and that there should be supervision by the Canberra Counselling Service. The judge made

H. C. OF A. 1986.

RE J.R.L.; EX PARTE C.J.L.

Gibbs C.J.

certain remarks that appeared to indicate some of the matters which she had earlier discussed with the counsellor. She said, "The counsellor has said that she is a clinical psychologist". She said to the counsellor, "What do you think ought to be done? You think very strongly the child should be returned to her mother. The earlier she is returned emotionally it is better for the child". Later, again the judge said to the counsellor, "You are asking that the child be placed with the mother". She also asked the counsellor "Why did Norm see it as a possibility?" and the counsellor replied "The time is seen as too long for the child". The judge's question may have been directed to the possibility of separate representation for the child, but the reference to "Norm", who was the Director of Court Counselling at Parramatta, shows that his views must have been mentioned during the conversation between the judge and the counsellor. When the hearing resumed that afternoon, counsel for the wife sought the appointment of a separate representative for the child. Counsel for the husband asked the learned judge to disqualify herself from hearing the matter further but the judge refused to do so. The judge ordered that a separate representative be appointed to represent the child, gave certain directions as to procedure and adjourned the hearing.

It is a fundamental principle that a judge must not hear evidence or receive representations from one side behind the back of the other: see *Kanda v. Government of Malaya* (13). McInerney J. stated the practice as it is generally understood in the profession in *Reg. v. Magistrates' Court at Lilydale; Ex parte Ciccone* (14) as follows:

> "The sound instinct of the legal profession — judges and practitioners alike — has always been that, save in the most exceptional cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party. Once the case is under way, or about to get under way, the judicial officer keeps aloof from the parties (and from their legal advisers and witnesses) and neither he nor they should so act as to expose the judicial officer to a suspicion of having had communications with one party behind the back of or without the previous knowledge and consent of the other party. For if something is done which affords a reasonable basis for such suspicion, confidence in the impartiality of the judicial officer is undermined."

The principle, which forbids a judge to receive representations in private, is not confined to representations made by a party or the

(13) [1962] A.C. 322, at p. 337.

(14) [1973] V.R. 122, at p. 127.

legal adviser or witness of a party. It is equally true that a judge should not, in the absence of the parties or their legal representatives, allow any person to communicate to him or her any views or opinions concerning a case which he or she is hearing, with a view to influencing the conduct of the case. Indeed, any interference with a judge, by private communication or otherwise, for the purpose of influencing his or her decision in a case is a serious contempt of court: see *Halsbury's Laws of England*, 4th ed., vol. 9, par. 28 and cases there cited.

It is true that court counsellors are officers of the Family Court: see the *Family Law Act* 1975 (Cth), as amended ("the Act"), s. 4(1), definitions of "court counsellor" and "marriage counsellor" and s. 37. However, they are not exempt from observance of these fundamental principles. Broadly speaking, court counsellors have three main functions, all of which are important, but none of which is judicial. The first of these functions is to counsel persons who intend to marry, or who are married and are facing marital difficulties or separation, divorce or annulment, or whose marriage has been dissolved or annulled: see the definition of "marriage counselling" in s. 4(1) of the Act and ss. 14, 15, 16, 16A and 62 of the Act. The advice which a counsellor gives may assist the parties to improve their relations, or resolve their differences, so that litigation either becomes unnecessary, or may be settled on terms acceptable to all concerned. However once the Family Court is called on to perform its judicial functions, it must perform them judicially. It is quite antipathetic to and subversive of the exercise of the judicial power that a judge should receive private communications from any official, however well informed and well intentioned, even if the official is an officer of the court.

The second role of a court counsellor is to furnish a report when in proceedings under the Act the welfare of a child who has not attained the age of eighteen years is relevant and the Family Court has directed that a report be furnished: s. 62A(1). The Family Court may order that the report be furnished on such matters relevant to the proceedings as that Court thinks desirable and the court counsellor may include in the report, in addition to the matters required to be included, any other matters that relate to the welfare of the child: s. 62A(1) and (2). By s. 62A(6) a report furnished to the Family Court in accordance with a direction given under s. 62A may be received in evidence in any proceedings under the Act. That means of course, that it may be received in evidence in the ordinary way, in the presence of the parties or their legal representatives. Section 63(2) provides that where, in proceedings for a decree of dissolution of marriage, the Family Court is in doubt whether the

H. C. OF A. 1986.

RE J.R.L.; EX PARTE C.J.L.

Gibbs C.J.

arrangements made for the welfare of a child of the marriage are proper in all the circumstances, the Family Court may adjourn the proceedings until a report has been obtained from a court counsellor regarding those arrangements. In the performance of this function the court counsellor becomes a potential witness — a court appointed witness who is perhaps in some respects analogous to an expert witness — but is not part of the court, and has no right to communicate with a judge in relation to a pending matter except through the medium of the report if it becomes evidence and by giving evidence if the counsellor is called as a witness.

Thirdly, by s. 64(5), when the Family Court makes an order under Pt VII with respect to a child, the Family Court may further order that compliance with the first-mentioned order shall so far as practicable be supervised by a court counsellor or order that a court counsellor give to any party to the first-mentioned order such assistance as is reasonably requested by that party in relation to compliance with, and the carrying out of, the first-mentioned order. In the performance of this function the counsellor plays a part in ensuring that the orders of the Family Court are enforced.

By O. 25, r. 5 of the Family Law Rules it is provided as follows:

> "(1) The court or a Registrar of a Family Court may order, in proceedings, the preparation by a court counsellor or welfare officer of a report in accordance with section 62A or sub-section 63(2) of the Act.
>
> (2) Where a report has been obtained under sub-rule (1) the court may—
>
> (a) furnish copies of the report to the parties or their legal practitioners, or to a legal practitioner separately representing a child under section 65 of the Act;
>
> (b) receive the report in evidence;
>
> (c) permit oral examination of the person making the report; and
>
> (d) give such directions as to the future disposition of the report and any copies of the report as it thinks fit."

The rule gives the Family Court the power either to receive the report in evidence, or not to receive it, but quite clearly it does not (even if it validly could) give the Court power to act on the report without receiving it in evidence, or to admit it in evidence without making it available to the parties. The effect of O. 25, r. 5 is not directly in question in the present case and it is unnecessary to consider fully its effect and in particular unnecessary to consider whether or not Asche S.J. was right in *Mulcahy and Mulcahy* (15) in receiving a report and making it available to counsel but not to the parties.

(15) [1978] F.L.C. ¶90-425.

There is nothing in any of these provisions to entitle the court counsellor to interfere in the judicial process or to entitle a judge to receive a private communication from a court counsellor. I entirely agree with Tonge J. in *Ahmad and Ahmad* (16) where he said:

> "Nowhere at all in the Act or Rules is there any provision, other than perhaps s. 65, which would allow a counsellor of his or her own motion to approach a judge. No doubt the good motives which the counsellors almost universally possess makes the temptation to do so in certain cases great. However, it is a temptation that they must overcome as must the judges overcome the temptation to allow such approaches. By virtue of the Act and Regulations, counsellors and their reports stand in an almost unique position in the law. However, the Act and the Regulations provide for circumstances in which their unique position can be availed of in the interests of justice and there are no other ways."

(See also per Asche and Marshall S.JJ. (17).) Section 65, to which Tonge J. referred, allows the Family Court, in certain circumstances, to order that a child be separately represented. That section does not allow a counsellor to approach a judge other than in court in accordance with the procedures provided by the Act and Rules. Further, the fact that the court, in the proceedings regarding the custody of the child, was required to regard the welfare of the child as the paramount consideration (s. 64(1)(a) of the Act) does not mean that the court is entitled to depart from fundamental rules of judicial procedure.

In the present case it was wrong of the counsellor to attempt to influence the judge and ill-advised for the judge to speak to the counsellor in private. Counsel for the prosecutor referred us to authorities which establish that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the question involved in it: see *Livesey v. N.S.W. Bar Association* (18). I rather think that the present case is governed by an analogous principle, that justice must not only be done but must manifestly be seen to be done; when a judge has received in private representations concerning a case, the court will not inquire whether the representations in fact worked to the prejudice of the party against whose interest they were made - it is enough that they might do so: see *Kanda v. Government of*

(16) [1979] F.L.C. ¶90-633, at p. 78,304; 5 Fam. L.R. 15, at p. 34.

(17) [1979] F.L.C., at p. 78,297; 5 Fam. L.R. 15, at p. 260.

(18) (1983) 151 C.L.R. 288, at pp. 293-294.

H. C. OF A. 1986.

RE J.R.L.; EX PARTE C.J.L.

Gibbs C.J.

Malaya (19). Examples of a strict application of the principle are provided by *R. v. Justices of Bodmin; Ex parte McEwen* (20) and *Garrihy v. Wyatt* (21). In the present case, the counsellor had formed a view adverse to the husband. She had expressed that view, not only in her report, but also in the presence of counsel in the judge's chambers. She had gone to see the judge because she believed that it would be detrimental to the child to remain for long in the husband's custody. The husband was entitled, not unreasonably, to fear that the counsellor may have made remarks adverse to him when she was alone with the judge and that the judge might have been influenced by them. Justice would not be manifestly seen to be done if in those circumstances the judge decided the case. The judge should not continue to hear the case and the order nisi for prohibition should be made absolute.

MASON J. A central element in the system of justice administered by our courts is that it should be fair and this means that it must be open, impartial and even-handed. It is for this reason that one of the cardinal principles of the law is that a judge tries the case before him on the evidence and arguments presented to him in open court by the parties or their legal representatives and by reference to those matters alone, unless Parliament otherwise provides. It would be inconsistent with basic notions of fairness that a judge should take into account, or even receive, secret or private representations on behalf of a party or from a stranger with reference to a case which he has to decide. This principle immediately distinguishes the judicial branch from other branches of government, except in so far as they may be relevantly affected by the rules of natural justice. In conformity with the principle, every private communication to a judge made for the purpose of influencing his decision in a case is treated as a contempt of court because it may affect the course of justice: *In re Dyce Sombre* (22) per Lord Cottenham L.C. Indeed, it is regarded as a serious contempt.

A judge must therefore be alert not to receive any such communication: *Kanda v. Government of Malaya* (23). The responsibility of a judge in this respect was stated by McInerney J. in *Reg. v. Magistrates' Court at Lilydale; Ex parte Ciccone* (24), in these terms:

"The sound instinct of the legal profession — judges and

(19) [1962] A.C., at pp. 337-338.
(20) [1947] K.B. 321, at p. 325.
(21) (1975) 10 S.A.S.R. 476.
(22) (1849) 1 Mac. & G. 116, at p. 122 [41 E.R. 1207, at p. 1209].
(23) [1962] A.C. 322, at p. 337.
(24) [1973] V.R. 122, at p. 127.

> practitioners alike — has always been that, save in the most exceptional cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party. Once the case is under way, or about to get under way, the judicial officer keeps aloof from the parties (and from their legal advisers and witnesses) and neither he nor they should so act as to expose the judicial officer to a suspicion of having had communications with one party behind the back of or without the previous knowledge and consent of the other party. For if something is done which affords a reasonable basis for such suspicion, confidence in the impartiality of the judicial officer is undermined."

This proscription does not, of course, debar a judge hearing a case from consulting with other judges of his court who have no interest in the matter or with court personnel whose function is to aid him in carrying out his judicial responsibilities. The same standard is applied in the *Code of Judicial Conduct for United States Judges*, approved by the Judicial Conference of the United States: see Canon 3 and commentary.

As McInerney J. pointed out, the receipt by a judge of a private communication seeking to influence the outcome of litigation before him places the integrity of the judicial process at risk. A failure to disclose that communication will seriously compromise the integrity of that process. On the other hand, although the terms of a subsequent disclosure by the judge of the communication and a statement of its effect in some, perhaps many, situations will be sufficient to dispel any reasonable apprehension that he might be influenced improperly in some way or other, subsequent disclosure will not always have this result. The circumstances of each case are all important. They will include the nature of the communication, the situation in which it took place, its relationship to the issues for determination and the nature of the disclosure made by the judge.

The problem is governed by the principle that a judge should disqualify himself from hearing, or continuing to hear, the matter if the parties or the public entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the issues: *Reg. v. Watson; Ex parte Armstrong* (25); *Livesey v. N.S.W. Bar Association* (26). This principle, which has evolved from the fundamental rule of natural justice that a judicial officer should be free from bias, reflects a concern with the need to maintain public confidence in the administration of justice. This

(25) (1976) 136 C.L.R. 248, at pp. 258-263.

(26) (1983) 151 C.L.R. 288, at pp. 293-294.

H. C. OF A. 1986.

RE J.R.L.; EX PARTE C.J.L.

Mason J.

concern is expressed in the cognate principle that, not only must justice be done, it must be seen to be done.

It seems that the acceptance by this Court of the test of reasonable apprehension of bias in such cases as *Watson* (27) and *Livesey* (28) has led to an increase in the frequency of applications by litigants that judicial officers should disqualify themselves from sitting in particular cases on account of their participation in other proceedings involving one of the litigants or on account of conduct during the litigation. It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be "firmly established": *Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (29); *Watson* (30); *Re Lusink; Ex parte Shaw* (31). Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

The present case must be determined against this background of general principle and policy. However, it is necessary in the first instance to delimit with some precision the role of court counsellors under the *Family Law Act* 1975 (Cth) ("the Act") and Family Law Rules ("the Rules"). The Principal Director of Court Counselling, the Directors of Court Counselling and other court counsellors are officers of the Family Court: s. 37(1) and (8). They have three functions: (1) marriage counselling and counselling in relation to the

(27) (1976) 136 C.L.R. 248.
(28) (1983) 151 C.L.R. 288.
(29) (1969) 122 C.L.R. 546, at pp. 553-554.
(30) (1976) 136 C.L.R., at p. 262.
(31) (1980) 55 A.L.J.R. 12, at p. 14; 32 A.L.R. 47, at pp. 50-51.

welfare of a child (see the definitions of "court counsellor", "marriage counsellor" and "marriage counselling" in s. 4 together with ss. 14(2A), (4) and (5), 15, 16(2), 16A and 62); (2) furnishing a report to the court pursuant to a direction given by the court (see ss. 62A, 63(2) and O. 25, r. 5); and (3) supervising compliance with a court order under Pt VII with respect to a child and assisting a party to comply with and carry out the order: see s. 64(5).

It is only the second of these functions that has any relevance to the present case. Where, in proceedings under the Act, the welfare of a child is relevant, the court may direct a court counsellor to furnish to the court a report on such matters relevant to the proceedings as the court thinks desirable and may, if it thinks necessary, adjourn the proceedings until the report is furnished to the court: s. 62A(1). The court counsellor may include in the report any other matters that relate to the welfare of the child: s. 62A(2).

Section 63(2) provides that when, in proceedings for dissolution of marriage, the court is in doubt whether the arrangements made for the welfare of a child are proper in all the circumstances, the court may adjourn the proceedings until a report has been obtained from a court counsellor regarding those arrangements. Section 63(2) appears to proceed on the footing that the report will be obtained pursuant to a direction under s. 62A. However, O. 25, r. 5(1) of the Rules provides that the court or a registrar may order, in proceedings, the preparation by a court counsellor of a report in accordance with s. 62A or s. 63(2). Rule 5(2) goes on to provide:

> "Where a report has been obtained under sub-rule (1), the court may—
>
> (a) furnish copies of the report to the parties or their legal practitioners, or to a legal practitioner separately representing a child under section 65 of the Act;
>
> (b) receive the report in evidence;
>
> (c) permit oral examination of the person making the report; and
>
> (d) give such directions as to the future disposition of the report and any copies of the report as it thinks fit."

The powers of the court in relation to a report furnished pursuant to a direction given under s. 62A(1) are to be gathered, not only from O. 25, r. 5(2), but also from s. 62A(6) and s. 64(1A). Section 64(1A) enables the court to "have regard to anything contained" in such a report "for the purpose of complying with the requirements of [s. 64(1)(b)]". That provision requires the court, in proceedings with respect to the custody, guardianship or welfare of, or access to, a child, to

> "... consider any wishes expressed by the child in relation to the custody or guardianship of, or access to, the child, or in

H. C. OF A. 1986.

RE J.R.L.; EX PARTE C.J.L.

Mason J.

relation to any other matter relevant to the proceedings, and shall give those wishes such weight as the court considers appropriate in the circumstances of the case".

Section 62A(6) provides that the report may be received in evidence in any proceedings under the Act. There is at least an element of duplication in s. 62A(6) and O. 25, r.5(2)(b). Whether these provisions enable the court, as well as the parties, to introduce the report into evidence is not altogether clear. However, as it is to be expected that the court, in order to comply with s. 64(1)(b), would frequently wish to "have regard to" anything in a report relating to this topic, there is much to commend the view that the court may put the report, or part of it, in evidence. It is not to be supposed in these circumstances that Parliament intended that the court should "have regard to" the contents of a report unless it be put in evidence. And if the report is to be put in evidence, it must be put in evidence at a hearing at which the parties are present or represented.

The expression "have regard to" must mean "take into account" for the purpose of determining a substantive issue in the case. On the other hand the court may need to peruse or read a report before it is put in evidence, as a preliminary to exercising or refusing to exercise the powers set out in O. 25, r. 5(2)(a) to (d). It is clear enough that "may" in the opening words of the sub-rule is discretionary, not mandatory. This is so notwithstanding that the court would be justified in refusing to furnish copies of a report to a party or his legal representatives only in exceptional circumstances, if at all, and that the court will apply the ordinary rules of evidence in permitting oral examination of a court counsellor who prepares a report. In this respect a court counsellor is in a position analogous to that of an expert who makes a report. It may be that in some cases, as the Full Court of the Family Court suggested in *Hall and Hall* (32), the trial judge should, in the exercise of his discretion, allow the report to be placed before the court as a court document, treating the court counsellor as a witness called by the court so as to permit each party to cross-examine the counsellor.

Be this as it may, three important points emerge from this review of the provisions of the Act and the Rules. The first is that a report is only to be taken into account on the footing that it is evidence received at a hearing in the presence of the parties or their legal representatives. The second is that the court counsellor who prepares a report is a potential witness. And the third point is that, although the counsellor is an officer of the court, he is not

(32) [1979] F.L.C. ¶90-713, at p. 78,818.

authorized to make any communication to the court with reference to the resolution of the issues in a case before the court, otherwise than by means of oral testimony or a report pursuant to s. 62A, s. 63(2) or O. 25, r. 5. He is not an officer of the court who has any function, except in the manner indicated, to assist a judge in carrying out his judicial responsibilities. As Tonge J. observed in *Ahmad and Ahmad* (33):

> "Nowhere at all in the Act or Rules is there any provision, other than perhaps s. 65, which would allow a counsellor of his or her own motion to approach a judge. . . . By virtue of the Act and Regulations, counsellors and their reports stand in an almost unique position in the law. However, the Act and the Regulations provide for circumstances in which their unique position can be availed of in the interests of justice and there are no other ways."

It follows that the approach made by Ms. Bernet, the court counsellor, to the judge in this case and the conversation which then took place between Ms. Bernet and the judge in private chambers with respect to the proposed adjournment, in the absence of the parties and their legal representatives, was not authorized by the Act or the Rules. It was a very serious departure from the cardinal principle which governs the hearing and determination of cases in courts of justice, though it is plain enough that the motive for the departure was concern on the part of Ms. Bernet for the future welfare of the child. The seriousness of that departure was certainly alleviated by the judge's prompt and proper disclosure to counsel for the parties of the approach made by Ms. Bernet and of the substance of the discussion which occurred in private chambers.

But the critical question is whether in all the circumstances the parties or the public would reasonably apprehend that the judge would not bring an impartial and unprejudiced mind to a hearing and determination of the custody proceedings between the parents of the child. Or to put it another way, the question is whether the principle that justice must be seen to be done requires that the judge be disqualified. In considering this issue the first point to be made is that the view which Ms. Bernet expressed to the judge in private chambers during the luncheon adjournment strongly favoured the wife. It appears that she asked that the child be placed with the mother and said that the sooner that this took place the better it would be emotionally for the child. It is true that Ms. Bernet had expressed a similarly strong view in favour of the wife in her report

(33) [1979] F.L.C. [90-633, at p. 78,304; 5 Fam. L.R. 15, at p. 34.

H. C. OF A. 1986.

RE J.R.L.; EX PARTE C.J.L.

Mason J.

dated 31 January 1986 which became available to counsel during the hearing on 4 February. In that report Ms. Bernet described the child as being "on the way to a severe anxiety neurosis". However, this was the first indication that the child might be affected in such a way. It excited a question as to Ms. Bernet's qualifications (which were not known) to express such an opinion. It made it very likely that Ms. Bernet would be called as a witness, more particularly because the husband wished to have the child examined by a psychiatrist or psychologist. One other circumstance must be mentioned and it is important. Ms. Bernet, before seeing the judge, had spoken to the wife during the course of proceedings on 5 February, saying that the proposed adjournment was outrageous and that she proposed to do something about it. In fact she discussed the matter with the Director of Court Counselling at Parramatta before seeing the judge.

In this situation the discussion between the judge and Ms. Bernet was significant in several respects. It resulted from an approach by a potential witness who strongly supported the wife's case and seems to have expressed that support to the judge. She apparently informed the judge of her qualifications and thereby indicated that her opinion was that of a qualified expert, a matter which was in question in the proceedings. Moreover, the reference in the discussion to the Director of Court Counselling at Parramatta suggests the possibility, not negatived by the evidence, that Ms. Bernet claimed that her approach was indorsed by the Director. In disclosing the approach which had been made, the judge did not reflect adversely on it. On the contrary the judge seems to have proceeded on the footing that the initiative taken by Ms. Bernet required serious consideration by the court and counsel for the parties. In effect the judge invited counsel to respond to the recommendations of the court counsellor and to obtain instructions to enable them to do so. The judge did not treat the court counsellor's approach as irregular and did not assure counsel that she intended to disregard completely what the court counsellor had said to her.

It is evident from what I have said that there is a firm basis for a reasonable apprehension that the judge will not bring to bear an impartial and unprejudiced mind on the resolution of the custody issue. It is not to the point to say that the prosecutor has failed to establish the existence of any bias on the part of the judge. The courts have always refused, for obvious reasons, to embark upon an inquiry whether a judge will determine the issues impartially and with an unprejudiced mind. It would be idle for this Court to say that it is confident that the judge will act impartially. We have to

ask ourselves how the matter would appear, viewed reasonably, to the public and the parties. And when we ask this question the answer that immediately presents itself is that the judge, who in all probability would be called upon to evaluate the correctness of the opinion of the court counsellor and her credibility as a witness, had the unprecedented advantage of a private discussion with her on the very issue for decision in the case, the counsellor being a convinced, and perhaps convincing, advocate of the wife's cause in the case. The fact that the counsellor is an officer of the court is a matter which enhances, rather than diminishes, cause for concern. A fair-minded observer, as well as a concerned parent who is a party to the litigation would naturally and rationally conclude that the counsellor's standing as an officer of the court would ensure that her opinion would carry weight with the judge. The subsequent discussion between the judge and counsel in private chambers would have done nothing to dispel that cause for concern. The case is plainly one in which the principle that justice must manifestly be seen to be done requires that the matter be heard by another judge: see *Goold v. Evans & Co.* (34).

In reaching this conclusion I am conscious of the unique problem which the Family Court has in accommodating the functions of court counsellors to the traditional principles governing the hearing and determination of cases coming before the court. And I am in general agreement with what the Full Court of the Family Court has had to say on the subject of reports by court counsellors and the relationship between court counsellors and the Family Court itself in *Hall and Hall* (35). To these comments I would add the observation that it is particularly important that litigants do not gain the impression that court counsellors have a part to play in deciding cases outside the limited, albeit important, functions assigned to them by the Act and the Rules.

I would make the order nisi for prohibition absolute.

WILSON J. This is the return of an order nisi for a writ of prohibition addressed to a judge of the Family Court of Australia ("the judge"). The prosecutor seeks to prevent the judge from continuing to hear disputed custody proceedings in the Family Court at Canberra ("the Court") on the ground that the parties or the public would entertain a reasonable apprehension that the judge might not bring an unprejudiced and impartial mind to a determination of the issues involved in the matter.

(34) [1951] 2 T.L.R. 1189, at p. 1191.

(35) [1979] F.L.C. ¶90-713, at pp. 78,819-78,820.

H. C. OF A. 1986.

RE J.R.L.; EX PARTE C.J.L.

Wilson J.

The case is one between the parties to a marriage in respect of the custody of a child of the marriage ("the child"). The marriage has been dissolved. The child is nine years old. The hearing of the matter commenced on 4 February 1986. Three days had been set aside in the hope that the hearing would proceed to a conclusion. Prior to the hearing the parties had received from the Court a copy of a report dated 28 August 1985. The report had been prepared by a court counsellor ("the counsellor") attached to the Counselling Section of the Family Court at Parramatta in pursuance of a direction given by the Court under s. 62A(1) of the *Family Law Act* 1975 (Cth) as amended ("the Act"). In November 1985 the Court had directed that a further report be furnished to the Court by the counsellor. This report only became available to the legal representatives of the parties in the course of the hearing on 4 February. The contents of the second report were quite disturbing. The counsellor expressed the view that the child was developing a severe anxiety neurosis and recommended a change of custody from the husband to the wife. The development of such a condition had not been suggested previously. The implications of the new material were discussed during the hearing on the morning of 5 February. The judge raised the question of the qualifications of the counsellor to make a diagnosis of anxiety neurosis and asked counsel for each of the parties whether it would be of assistance to lead evidence from the counsellor of her professional qualifications. In the course of the discussion it became apparent that further investigation of the child's mental condition would be required and counsel for the husband foreshadowed an application designed to facilitate such an investigation. After a short adjournment counsel informed the judge that the parties had agreed that the hearing could not proceed until that further investigation had been carried out and that the hearing should therefore be adjourned. The judge was also informed that neither counsel wished to have the counsellor called at that stage. The counsellor was then given permission to return to Parramatta and the Court adjourned for lunch.

It appears from what transpired subsequently, that the counsellor was very concerned about the effect of an adjournment on the welfare of the child. She telephoned the Director of Court Counselling at Parramatta and was advised to make certain recommendations to the judge with respect to matters consequent upon the adjournment of the hearing. The counsellor then sought and obtained an interview with the judge in chambers. Shortly thereafter, both counsel were called in. When the hearing resumed after lunch, the judge placed on record that:

> "during the luncheon adjournment, I asked counsel for both parties to see me in the presence of the counsellor who prepared the family report. That counsellor made several recommendations on the assumption that the matter was likely not to be concluded today. Those recommendations were put to both counsel, and, at the conclusion of that meeting, . . . I gave the opportunity to both counsel to seek instructions . . ."

There were two recommendations upon which counsel were invited to seek instructions. The first was that the Court should make an order for the separate representation of the child as provided for by s. 65 of the Act. The second was that in connexion with any order the Court might make with respect to the child there should be an order for supervision by the Counselling Service attached to the Canberra registry. However, before those and other matters of a procedural nature were dealt with, counsel for the husband moved that the judge disqualify herself on the ground of reasonable suspicion of prejudgment by reason of the private meeting in chambers between the judge and the counsellor. It was said that the counsellor was likely to be an important witness in the proceedings. Following an adjournment overnight and after counsel for the wife had spoken in opposition to the motion, the judge delivered reasons in which she reviewed the circumstances and concluded that no suspicion of prejudgment could reasonably be engendered. The application was therefore dismissed. Thereupon orders were made allowing each party to arrange for further investigation of the child's condition and the judge acceded to a contested application by the wife for the appointment of separate representation for the child.

The principle of law governing this matter is not in doubt. It is that a judge should not sit to hear a case if, in all the circumstances, the parties or the public might entertain a reasonable apprehension that he or she might not bring an impartial and unprejudiced mind to the resolution of the question involved in it: *Reg. v. Watson; Ex parte Armstrong* (36); *Livesey v. N.S.W. Bar Association* (37). It has been recognized that in a case such as the present, where there is no allegation of actual bias, the test of reasonable suspicion may be a difficult one to apply involving questions of degree and particular circumstances which may strike different minds in different ways: *Re Shaw; Ex parte Shaw* (38); *Livesey* (39). A court of review must be careful not to exaggerate the significance of actions or statements made by a judge in the course of a proceeding. There must be

(36) (1976) 136 C.L.R. 248, at pp. 258-263.
(37) (1983) 151 C.L.R. 288, at pp. 293-294.
(38) (1980) 55 A.L.J.R. 12, at p. 16; 32 A.L.R. 47, at p. 54.
(39) (1983) 151 C.L.R., at p. 294.

H. C. OF A. 1986.

RE J.R.L.; EX PARTE C.J.L.

Wilson J.

"strong grounds" (*Reg. v. Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co. Pty. Ltd.* (40)) for inferring the existence of a reasonable suspicion. In *Shaw* (41), Gibbs A.C.J., in a judgment with which three other members of the Court agreed, said:

> "In that case [referring to *Watson*] it was pointed out (42) that it is not uncommon, and sometimes necessary, for a judge, during argument, to formulate propositions for the purpose of enabling their correctness to be tested, and that 'as a general rule anything that a judge says in the course of argument will be merely tentative and exploratory'. However, in some cases the words or conduct of the judge may be such as to lead the parties reasonably to think that the judge has prejudged an important question in the case, and then prohibition may issue. Of course, the court which is asked to grant prohibition will not lightly conclude that the judge may reasonably be suspected of bias in this sense; it must be 'firmly established' that such a suspicion may reasonably be engendered in the minds of the parties or the public, as was made clear by the Court in *Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (43), in the passage cited in *Reg. v. Watson; Ex parte Armstrong* (44)."

The prosecutor complains of the conduct of the judge in allowing the counsellor to speak to her in private concerning the case and then in permitting, in the presence of counsel representing each of the parties, a general discussion to proceed in her chambers concerning procedural arrangements attending the adjournment.

There is no transcript of any conversation that took place in the judge's chambers. However, although the judge does not detail in precise terms the matters that were referred to, it does appear that before counsel were called in the counsellor told the judge that having spoken to the Director of Court Counselling at Parramatta she wished to make the two recommendations to which reference has already been made. When counsel joined them, the judge said that the Counselling Service, having regard to the welfare of the child, was extremely concerned about the length of an adjournment and asked the counsellor to repeat the two recommendations that she wished to make. In the course of the discussion that followed the judge mentioned that the counsellor's professional qualifications were those of a clinical psychologist. Reference was made to the counsellor's recommendation, expressed in her second report, that it would be better for the child if she were placed in the custody of the mother whereupon the judge said, in effect, that for that to happen

(40) (1953) 88 C.L.R. 100, at p. 116.
(41) (1980) 55 A.L.J.R., at p. 14; 32 A.L.R., at pp. 50-51.
(42) (1976) 136 C.L.R., at p. 264.
(43) (1969) 122 C.L.R. 546, at pp. 553-554.
(44) (1976) 136 C.L.R., at p. 262.

there would have to be a hearing of an application for interim custody. With regard to the recommendation that separate representation be provided for the child, counsel for the wife expressed support for that view and foreshadowed an application to that effect. Although there is no suggestion that any other aspects of the case were referred to in the private discussion between the judge and the counsellor, it remains an important fact requiring consideration, as counsel for the prosecutor correctly submitted, that the conversation occurred at all. However the apprehension that might reasonably be generated by such a happening can only be determined in the light of all the circumstances including the subsequent conduct of the judge.

At the heart of the prosecutor's submission is the proposition that the Act does not confer any special status on a court counsellor. In a case where a counselling service has been required to prepare a report for the court and the report is received in evidence, then the counsellor who prepared the report may well be called as a witness, as was most likely to happen in the present case. But that is the extent of the counsellor's role, so the argument runs. If the parties to a marriage are engaged in litigation over the custody of their child and agree upon an adjournment of the hearing and that adjournment is acceded to by the judge then the counsellor has no business to intervene, whether in open court or otherwise, even if that intervention is prompted by a concern as to the effect of the adjournment on the welfare of the child.

There are serious misconceptions involved in this submission. In the first place, the court counsellor does have a special status under the Act. Section 37 makes it clear that a court counsellor is an officer of the court and has such duties, powers and functions as are provided, inter alia, by the Act. As enacted in its original form, the *Family Law Act* provided that where, in any proceedings under the Act, the welfare of a child is relevant, the Family Court may require a court counsellor to prepare a report on such matters relevant to the proceedings as the Court thinks desirable and may receive the report in evidence: s. 62(4). Such a provision was not novel, being copied in substance from the Act's predecessor, the *Matrimonial Causes Act* 1959 (Cth), s. 85(2). The court counsellor's role was expanded by the *Family Law Amendment Act* 1983 (Cth). That statute inserted a new section, s. 62A, which, inter alia, authorized a court counsellor to include in a report prepared pursuant to a direction of the court, in addition to the matters required to be included therein, any other matters that relate to the welfare of the child: s. 62A(2). It is true that this provision does not give to a court counsellor an unlimited right of access to the court but it would

H. C. OF A. 1986.

RE J.R.L.; EX PARTE C.J.L.

Wilson J.

seem to give to a counsellor who has been required to report to the court the duty, power or function of bringing to the attention of the court any other matter relating to the welfare of the child. That responsibility would normally be discharged by referring to such matters in the original report or if necessary in a supplementary report. It will be noted that the report is to be made to the court and that it is for the court to decide whether copies of the report are to be furnished to the parties or their legal representatives and to be received in evidence: Family Law Rules, O. 25, r. 5(2). In the event of an unexpected adjournment of the hearing which might affect adversely the welfare of a child, it would be consistent with the duty, power or function of a court counsellor under the Act who had been required to report to the court with respect to that child, to make a further report to the court.

The second misconception, closely related to the first, is reflected in the emphasis placed by counsel for the prosecutor on the rights of the parties and hence on the adversary nature of the proceedings. In *Watson* (45), Barwick C.J., Gibbs, Stephen and Mason JJ., in a joint judgment, had occasion to correct an observation made by the learned trial judge in interlocutory proceedings, to the effect that the proceedings were not strictly adversary proceedings but were more in the nature of an inquiry followed by an arbitration. Their Honours said:

> "It is impossible to allow that observation to pass uncorrected. It indicated a basic misconception as to the position of the Court in *proceedings of this kind* under the *Family Law Act* 1975. Proceedings in which a wife seeks an order for maintenance or the settlement of property may involve a dispute as to property of great value and will often be bitterly contested on both sides. The order made determining such proceedings may be of the utmost importance to the future of both parties. The judge called upon to decide *proceedings of that kind* is not entitled to do what has been described as 'palm tree justice'. No doubt he is given a wide discretion, but he must exercise it in accordance with legal principles. ... These remarks ... are designed to make it clear that a judge of the Family Court exercises judicial power and must discharge his duty judicially." (My emphasis.)

This is undoubtedly an important statement and nothing I have to say about it is intended to minimize that importance. To the greatest extent that is possible, consistent with the nature of the proceedings, it should be treated as a statement of general application. Nevertheless, the statement itself emphasizes that it is made in the context of

(45) (1976) 136 C.L.R., at pp. 257-258.

maintenance and property proceedings. Some modification of the statement is necessary in its application to custody proceedings. The course and conduct of those proceedings cannot remain wholly in the hands of the litigating parties. This is because the Act declares an objective in custody proceedings which may override the wishes of the parties with respect both to the ultimate conclusion of the case and to the manner in which it is conducted. Section 64(1)(a) provides that in proceedings with respect to the custody of a child of a marriage the court shall regard the welfare of the child as the paramount consideration. It is in the pursuit of this objective that the court is empowered, on its own initiative, to create or gather material by directing the preparation of a report by a court counsellor on those matters which, being relevant, the court thinks desirable, and may then decide whether that material is to be received in evidence. It is plain that a judge may receive information from a court counsellor which is then not received in evidence without his or her impartiality thereby being called into question. That is precisely what the Act and Rules contemplate.

The point is well made by Burbury C.J. in *Sing v. Muir* (46) when his Honour, referring to s. 85(2) of the *Matrimonial Causes Act*, said:

> "But for myself I have no doubt that the court has an independent discretion to obtain and admit a welfare officer's report. ... In strictly inter partes proceedings there might be much to be said for reading down a provision of this kind to accord with traditional adversary procedures. But although custody proceedings are in form inter partes the court has an overriding duty to regard the interests of the children as the paramount consideration and it is not merely deciding an issue between two parties: see *In re K.* (47), per Lord Upjohn. To my mind, the clear purpose of the legislature in enacting s. 85(2) was to give to the court a robust initiative exercisable of its own motion to make further relevant inquiries through a welfare officer in any case where it feels that the evidence which the parties have chosen to adduce is inadequate to enable a fully informed decision to be made in the best interests of the children. Section 85(2) is a recognition by the legislature that in exercising a jurisdiction in which the overriding principle is what is best for the children of a broken-down marriage it is often unrealistic and illusory for the court to attempt to come to the proper decision only upon such evidence as the warring parties choose to submit in accordance with traditional adversary procedures and rigid rules of legal admissibility."

But wherever possible the basic principles governing the conduct

(46) (1969) 16 F.L.R. 211, at pp. 213-214.

(47) [1963] 1 Ch. 381, at p. 402.

H. C. OF A. 1986.

RE J.R.L.; EX PARTE C.J.L.

Wilson J.

of judicial proceedings will govern the situation. If the decision is made to receive the report in evidence then it follows that copies will be furnished to the parties or their legal representatives and oral examination of the court counsellor permitted: O. 25, r. 5(2). If the decision is against receiving the report in evidence then the judge will be obliged to put its contents entirely out of his or her mind and come to a decision only upon the evidence that is before the court. Again, a judge will have constantly in mind that basic rule which has been said correctly to be essential to the preservation of confidence in the judicial system, namely, the rule that the proceedings of courts of justice should be conducted "publicly and in open view": *Scott v. Scott* (48), and see ss. 97(1) and (2) of the Act. In the present case, with all respect to the judge, it is this rule which she overlooked when acceding to the request for an interview from the counsellor. It is easy to be wise after the event, but the judge should have required the counsellor to state her concern in open court when the hearing resumed after lunch. Even though counsel were called into chambers shortly after the interview began, there was no reason why the discussion could not have taken place in open court. In my opinion, the report having been disclosed to the parties, it should have done so.

The thrust of the prosecutor's submission is that the parties or any onlooker could entertain a reasonable apprehension that the judge might not bring an impartial and unbiased mind to the matter. In order to warrant intervention by this Court such an apprehension must be firmly established. But in my opinion the prosecutor has failed to discharge such an onus. From the point of view of the parties nothing that was said in chambers in the presence of their counsel could have generated a reasonable apprehension that the judge had prejudged any issue in the case. It was clear that the counsellor believed that the child's welfare required that she be placed in the custody of the wife but that belief had already been made plain in her second report. The judge made it clear that before there could be a change of custody there must be a hearing of an application for interim custody during the adjournment. In the event, no such application was made and consequently the child has remained in the custody of the husband. Of the two recommendations made by the counsellor, one (the separate representation of the child) was the subject of an application in open court and the judge heard submissions from both counsel before announcing a decision; the other (supervision by the Counselling Service attached to the Canberra registry) was not raised by either

(48) [1913] A.C. 417, at p. 441.

counsel in open court and consequently was not pursued. The ascertainment by the judge of the fact that the counsellor was a clinical psychologist could not sensibly give rise to any apprehension of bias or prejudgment. The counsellor's report suggested that the child was developing a form of psychiatric disorder. Such a suggestion obviously raised a question concerning the qualification of the counsellor to make such a diagnosis. But it remained a matter upon which the counsellor, when called as a witness, would be examined in order to establish the weight to be given to the report. In all the circumstances it is impossible to identify any issue between the parties as to which there could be any reasonable apprehension that the judge might already have made up her mind in advance of hearing the evidence.

In support of his submission for the prosecutor, counsel relied upon the decision of the Privy Council in *Kanda v. Government of Malaya* (49). This reliance suggests that counsel may wish to invoke both of the twin pillars supporting the principle of natural justice. Their Lordships were at pains to distinguish between the rule against bias on the one hand and the right to be heard on the other, saying that they are separate concepts and are governed by separate considerations (50). *Kanda's Case* concerned the right to be heard. Inspector Kanda had been dismissed from the police force following a disciplinary hearing in which the tribunal had access to a report of a board of inquiry which severely criticized the inspector but the contents of which were not disclosed to him. Their Lordships made plain the fundamental importance of the rule when they said (51):

> "It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing."

In the light of counsel's reference to *Kanda*, it is necessary to evaluate the prosecutor's case on the basis that what is complained of is the denial to a party of the right to be heard. It could not be described as a case where one side has had access to the judge without the other side knowing. Although the counsellor's second report had favoured the wife, the counsellor was not identified with either the husband or wife. Having been directed by the Court to

(49) [1962] A.C. 322.
(50) [1962] A.C., at p. 337.
(51) [1962] A.C., at pp. 337-338.

H. C. OF A. 1986.

RE J.R.L.; EX PARTE C.J.L.

Wilson J.

report to it with respect to the child's welfare the nature and extent of her participation unless and until called as a witness was determined wholly by that direction. The complaint must be that, by reason of the judge speaking to the counsellor in her chambers before calling for the attendance of counsel, the judge was denying to both parties their right to be heard. But again, in my opinion, the submission cannot be accepted. Sufficient appears from the circumstances to show that as soon as the judge learned that the counsellor wished to make some recommendations with respect to the adjournment of the hearing, she called counsel in so that they might hear those recommendations for themselves and be able to seek instructions before the hearing resumed. There was no denial of the right to be heard and no risk of prejudice.

In summary, then, my opinion is that neither the parties nor any onlooker who saw the counsellor enter the chambers of the judge followed shortly thereafter by a conference attended by counsel for each of the parties could reasonably be concerned that there might have been a denial of natural justice either by reason of the judge failing to be impartial or by reason of the parties or either of them being denied a right to be heard.

I would discharge the order nisi for prohibition.

BRENNAN J. C.J.L. ("the husband") and J.R.L. ("the wife") were married in 1965. There were five children of the marriage. A decree nisi for the dissolution of their marriage was pronounced by the Family Court of Australia on 16 July 1984. Proceedings were commenced between the parties with respect to the custody of four of the children but, at the time with which these proceedings are concerned, the litigation related to the custody of one child only, C.L. ("the child"). Renaud J. allocated three days — 4, 5 and 6 February 1986 — for hearing the custody proceedings in Canberra.

An order had been made under s. 62A of the *Family Law Act* 1975 (Cth) ("the Act") directing a court counsellor to furnish to the Court a family report in respect, inter alios, of the child. In August 1985 a report was prepared. Prior to the commencement of the hearing on 4 February 1986, a further direction was given under s. 62A for the family report in respect of the child to be updated. An updated report was prepared by Ms. Gisela Bernet, a court counsellor, dated 31 January 1986. The report was not available when the hearing commenced on 4 February but became available to the parties during that day. Ms. Bernet reported, inter alia, that "the results of the assessment showed clearly that [the child] was in the early stages of a neurotic process". She reported:

> "A neurotic process is usually precipitated by excessive emotional pain which is prolonged beyond the child's tolerance. In this case, it is my view that the emotional pain experienced by [the child] is attributable to her unmet need for her mother's care and closeness."

The husband, who had custody of the child, wished to challenge the correctness of and foundation for the counsellor's opinion that the child was in the early stages of a neurotic process and the counsellor's qualifications to make that diagnosis. Counsel for the parties, who treated the report as having been received in evidence or as about to be received in evidence, agreed that the proceedings could not be concluded without the parties having an opportunity to deal with the contents of the report.

Before the luncheon adjournment on 5 February the parties agreed that the matter could not proceed further and that the counsellor, who had come to Canberra for the hearing, was at liberty to go home until resumed dates of the hearing were set. No date was available for resumption of the hearing until May 1986. Ms. Bernet approached the wife and is reported to have said that she was outraged by the adjournment and intended to do something about it.

It appears that the counsellor then contacted the Director of Court Counselling at the Parramatta registry, Mr. Norman Goodsell, and that he gave her some advice. The counsellor sought and was given an appointment with the judge during the luncheon adjournment. The counsellor suggested that a special representative of the child should be appointed under s. 65 of the Act and that the situation during the adjournment should be supervised by a court counsellor of the Parramatta or Canberra registry. From a subsequent discussion, it appears that the counsellor informed the judge of Mr. Goodsell's view that the period of the adjournment was "too long for the child". Her Honour immediately sent for counsel and had the counsellor repeat in their presence the recommendations which she had made.

According to the common recollections of counsel (as deposed to in their respective affidavits) the conversation in the judge's chambers between her Honour, Ms. Bernet and counsel commenced with the judge informing counsel that Ms. Bernet had approached her during the luncheon adjournment because the counselling service was extremely concerned about the length of the adjournment and the welfare of the child during that period. Ms. Bernet then repeated the recommendations which she had made to the judge as to the appointment of a separate representative and supervision by the counselling service. She reiterated Mr. Goodsell's

H. C. OF A. 1986.

RE J.R.L.; EX PARTE C.J.L.

Brennan J.

view that the period of the adjournment was too long. The judge informed counsel that the counsellor had told her that she was a clinical psychologist. The judge said to the counsellor: "What do you think ought to be done? You think very strongly the child should be returned to her mother. The earlier she is returned emotionally it is better for the child." The counsellor replied: "Even a bad parent can meet the child's needs. A parent can be a bad parent but still be meeting the child's needs." At another stage of the conversation, the judge said to the counsellor: "You are asking that the child be placed with the mother." Counsel for the husband stated that his client would like to have the child assessed by an expert whom he considered appropriate and counsel for the wife proposed that the matter could then be listed for mention and, depending upon the assessment, an application could be made for interim custody.

When the Court resumed sitting after the luncheon adjournment, her Honour put on record that recommendations had been made to her by Ms. Bernet and that her Honour had had those recommendations put to counsel and had asked counsel to seek instructions. Counsel for the wife applied for the appointment of a special representative of the child under s. 65 of the Act, as the counsellor had recommended. Counsel for the respondent made an application to her Honour that she should disqualify herself from further sitting. Her Honour declined to do so. The principle which counsel for the husband invoked and which her Honour held not to be applicable is the principle laid down in the majority judgment in *Reg. v. Watson; Ex parte Armstrong* (52). That principle, as restated by the Court in *Livesey v. N.S.W. Bar Association* (53), is "that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it". As this Court pointed out in *Livesey* (54), the question whether a judge at first instance should disqualify himself or herself can be a difficult one when the judge is confident of his or her own ability to determine the case fairly and impartially. Nevertheless, on the return of an order nisi for prohibition directed to her Honour, we must determine on the materials before us whether the principle stated is applicable in the circumstances of the instant case.

The counsellor, whose report was clearly of great importance and whose opinion strongly favoured the wife's case, approached the

(52) (1976) 136 C.L.R. 248, at pp. 258-263.

(53) (1983) 151 C.L.R. 288, at pp. 293-294.

(54) (1983) 151 C.L.R., at p. 294.

judge and spoke to her privately about the case. In *In re Dyce Sombre* (55) Lord Cottenham L.C. said:

> "Every private communication to a Judge, for the purpose of influencing his decision upon a matter publicly before him, always is, and ought to be, reprobated; it is a course calculated, if tolerated, to divert the course of justice, and is considered, and ought more frequently than it is, to be treated as, what it really is, a high contempt of Court."

No doubt both Ms. Bernet and Mr. Goodsell were motivated by professional concern for the welfare of the child, but that was the issue being litigated between husband and wife. It was the issue which the judge had to determine and, in the absence of any statutory provision authorizing the counsellor to approach the judge, it was improper for her to raise privately with the judge any aspect of that issue. The function of counsellors under the Act is both important and limited. The reports prepared by counsellors pursuant to directions under s. 62A are no doubt of great assistance. They give the court an impartial assessment of situations which are frequently fraught with passion. But the functions of counsellors under the Act and the Family Law Rules do not include the intervention on behalf of, or the representation of, a child whose custody or access is the subject of a proceeding before the court. The function of a counsellor in preparing a report is akin to that of an independent witness. The report is not automatically received in evidence and, when it is, the court may permit oral examination of the counsellor: see O. 25, r. 5(2). The only initiative to approach the court which the Act assigns to a counsellor is to report the failure of a party to attend a conference in respect of which an order has been made under s. 62(1): see s. 62(3). The Act gives a counsellor no authority to seek to influence a judge in deciding upon custody and access except by the preparation of a report and the giving of evidence. Counsellors exceed their functions if they approach judges on their own initiative to discuss cases pending in the court. I respectfully agree with the view of Tonge J. in *Ahmad and Ahmad* (56), that this "should never be permitted" so long as the Act remains in its present form.

If a counsellor were given access to a judge to discuss privately a case pending in the court, the parties could have no confidence that justice would be done according to the impartial view of the judge on the evidence adduced in the proceedings. The parties to litigation are entitled to be present during the hearing of their case not merely

(55) (1849) 1 Mac. & G. 116, at p. 122 [41 E.R. 1207, at p. 1209].

(56) [1979] F.L.C. ¶90-633, at p. 78,304; 5 Fam. L.R. 15, at p. 34.

H. C. OF A. 1986.

RE J.R.L.; EX PARTE C.J.L.

Brennan J.

because they have an interest in the proceedings but because confidence in the court could not be maintained if the parties are left unaware or only partially aware of the matters which affect the court's judgment. The Act has curtailed public scrutiny of the administration of justice in the Family Court, but it does not countenance the administration of justice in the absence of parties who may wish to be and are able to be present. It would require at least statutory authority to permit a judge to discuss with a counsellor out of court any question of substance relating to an issue in proceedings for custody pending before that judge. Nor does the Act authorize a judge before whom proceedings are pending for the custody of a child of a marriage to discuss an issue in the proceedings with a counsellor and the legal representatives of the parties meeting in private. The jurisdiction to determine such a matter is vested in the Family Court, and it cannot be exercised in the privacy of a judge's chambers. That is incompatible with the intention of the Parliament. To leave the parties — typically anxious parties — to learn by report what has happened in their absence is to foster any apprehension either party may have that the proceedings may not be judicially conducted.

Here, it is known that a counsellor whose views are antipathetic to the husband's case, saw the judge privately and had a conversation with her which reinforced the counsellor's concern (as stated in the report) that the child ought not be allowed to remain in the husband's custody. The judge ascertained Ms. Bernet's qualifications to make a diagnosis that the child was in the early stages of a neurotic process. Ms. Bernet made a submission to the judge with reference to the order which the judge should make during the adjournment, and that submission reinforced the view she had expressed in the report that the wife should have the custody of the child. The judge thus had a private conversation with an expert witness whose opinion was to be challenged, and it might reasonably be thought that that conversation enhanced the witness' credibility in the judge's eyes. Then a discussion took place in the presence of counsel in which the judge sought confirmation of the counsellor's views that the child should be placed in the wife's custody as soon as possible. An impression that the judge was influenced by the discussions she had had privately was strengthened by the judge's request to counsel to seek instructions on the recommendations which Ms. Bernet had made.

It is reasonable for the husband to apprehend in those circumstances that the judge will not be able, however conscientiously she tries, to remove from her mind the impermissible effect of the discussions she had in chambers and thus to bring an impartial and

unprejudiced mind to the determination of the matter pending in the court. Acknowledging the good faith of all involved, it is none the less necessary to make absolute the order nisi. I would so order.

DAWSON J. I do not think that there can be any doubt that it was wrong of the trial judge in this case to have seen the court counsellor privately in her chambers during the luncheon adjournment. The counsellor had made a report, favourable to one side, and the parties had been given copies of it. They would almost certainly have been given permission to cross-examine the counsellor upon the report. She was, therefore, in the position of a witness.

It is fundamental in judicial proceedings of the ordinary kind that during the conduct of a case a judge should not communicate privately with a party or a witness. If it can ever be justified, it certainly cannot without the prior knowledge and consent of all parties. The basic principles of natural justice establish the right of each party to put his case and to be heard by an impartial judge. To hear one party or a witness in his cause behind the back of the other party is to deny to the latter the right to be heard because he cannot know what has been said and so cannot be certain of the case which he has to meet. It may also undermine confidence in the impartiality of the judge and afford a reasonable basis for the apprehension of bias: see *Kanda v. Government of Malaya* (57). It is the latter possibility which is important in this case because it is not suggested that the parties did not, in the events which transpired, have an opportunity to be heard. What is suggested by the husband is that he is reasonably entitled to entertain an apprehension of lack of impartiality on the part of the judge. If that is so, then it is enough to vitiate the proceedings because it is established that a judge ought not to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he or she might not bring an impartial mind to the resolution of the questions involved in it: *Livesey v. N.S.W. Bar Association* (58).

It is an understandable tendency to assume the existence of a reasonable basis for supposing bias where there is, as in this case, an apparent departure from the proper standards of judicial behaviour. But the whole of the circumstances must be considered and such a conclusion must be firmly established and should not be reached lightly: *Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (59); *Reg. v. Watson; Ex parte*

(57) [1962] A.C. 322, at p. 337.
(58) (1983) 151 C.L.R. 288, at pp. 293-294.
(59) (1969) 122 C.L.R. 546, at pp. 553-554.

H. C. OF A. 1986.

RE J.R.L.; EX PARTE C.J.L.

Dawson J.

Armstrong (60); *Reg. v. Lusink; Ex parte Shaw* (61). Moreover, the whole of the circumstances are not confined to the conduct said to afford reasonable grounds for suspecting a lack of impartiality. They include what was done by the judge subsequently, which may be sufficient to eradicate any reasonable apprehension of bias notwithstanding an earlier lapse in the observance of proper procedures. It is clear that an initial failure to hear a party or to allow him to put his case may be cured by giving him an appropriate opportunity to be heard at a later stage: see *Ridge v. Baldwin* (62). It seems to me to follow that it must also be possible to remove an apprehension of bias on the part of a judge which might otherwise arise out of the failure to hear a party. After all, that kind of bias is not bias through interest or preconceptions existing independently of the case. Suspicion of bias of the latter kind, where there are grounds for it, may well be ineradicable: see *Reg. v. Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co. Pty. Ltd.* (63). Here the suggested bias is an inability to act impartially which is said to have been demonstrated by the fact that representations were made to, or evidence was heard before, the judge in the absence of the parties. Remembering that both parties were absent at the time, it does not seem to me to have been a situation which was necessarily incapable of correction either as regards fairness or as regards the appearance as well as the fact of impartiality.

The learned judge took steps to correct the situation which had arisen and I shall refer to these in a moment, but I should first observe that the conduct which is called in question took place in a somewhat special situation. The court counsellor, although in the position of a witness, was not in the position of an ordinary witness to be called by one side or the other. She was an officer of the court (*Family Law Act* 1975 (Cth), s. 37, sub-ss. (1) and (8)) performing a function akin to that of an expert witness who might be called by the court. That did not, in my view, justify the private approach which she made to the judge, but it does at least differentiate the situation from one in which she may have been in the camp of one side or the other.

The counsellor had delivered a report to the court, presumably having been directed to do so under s. 62A(1) of the Act. Her report was not necessarily restricted to matters upon which she was directed to report but might have included any other matters that related to the welfare of the child in question: s. 62A(2). Under

(60) (1976) 136 C.L.R. 248, at p. 262.
(61) (1980) 55 A.L.J.R. 12, at p. 14; 32 A.L.R. 47, at pp. 50-51.
(62) [1964] A.C. 40, at pp. 99, 101, 125, 129.
(63) (1953) 88 C.L.R. 100, at p. 116.

O. 25, r. 5 of the Family Law Rules the parties were furnished with copies of the report. Subsequently the court might have received it in evidence and might have permitted oral examination of the counsellor. It is to be observed that the trial judge was not required to receive the report in evidence, although clearly she would need to have read it in order to determine what course she should take. The Act and Rules contemplate that a judge should be able to consider a report by a court counsellor and, if it is not received in evidence, to put it out of his or her mind for the purposes of the case in hand. It has not been suggested that a judge would be unable to do so or that in these circumstances there would be any foundation for an accusation of lack of impartiality on the part of a judge. I must confess that, having regard to the expectation that a judge might read a report favourable to one side or the other and be able to put it out of his or her mind if it is not received in evidence, it is a somewhat unreal proposition to me that a judge would be unable to do the same with any representation made to him or her orally by a court counsellor. But even if I am wrong in that, it seems to me that the action taken by the judge, upon realizing the situation which had arisen, would have dispelled any reasonable apprehension that the judge would as a consequence of that situation favour one side unfairly in the subsequent hearing. Before turning to that, I should add that there is one additional consideration, difficult to evaluate, which should be mentioned as part of the surrounding circumstances of this case.

I spoke earlier of judicial proceedings of the ordinary kind. Proceedings in the Family Court in relation to the custody, guardianship or welfare of, or access to, a child are, in an important respect, not of the ordinary kind. Under s. 64(1) of the *Family Law Act* the court is required in such proceedings to regard the welfare of the child as the paramount consideration and under s. 43(c) the court is required generally in exercising its jurisdiction under the Act to have regard to the need to protect the rights of children and to promote their welfare. Thus the jurisdiction being exercised in this case, whilst essentially judicial, was not entirely inter partes because the paramount consideration was the welfare of the child. In this respect it was a jurisdiction analogous to the jurisdiction of the Court of Chancery in wardship cases which was of a special kind, permitting procedures which would not be permitted in judicial proceedings of the ordinary kind: see *In re K. (Infants)* (64). The very procedure laid down by the *Family Law Act* with respect to the compilation of reports by court counsellors at the direction of the

(64) [1965] A.C. 201.

H. C. OF A. 1986.

RE J.R.L.; EX PARTE C.J.L.

Dawson J.

court where the welfare of a child is relevant (see s. 62A(1)) and the reception of those reports in evidence demonstrates the special nature of the jurisdiction arising from the purpose of the inquiry undertaken by the court. In the exercise of such a jurisdiction, some modification at least is required of the ordinary rules of evidence and procedure in order to achieve that purpose: see *Sing v. Muir* (65).

It follows that the proceedings in this case were different from other proceedings under the *Family Law Act*, such as proceedings between a husband and wife with respect to property or maintenance, which are truly inter partes and in which the duty to act judicially is of the ordinary kind: cf. *Reg. v. Watson; Ex parte Armstrong* (66). Nevertheless these proceedings remained judicial proceedings. Neither their special nature nor the requirement in s. 97(3) that the court should proceed without undue formality relieved the court of the obligation to observe, where applicable, the procedures which are followed by courts acting judicially in order to ensure impartiality and fairness. It is for this reason I think that, notwithstanding that the proceedings concerned the welfare of a child, the learned trial judge acted wrongly in seeing the court counsellor privately, but I do not think that the special nature of the jurisdiction which she was exercising can be disregarded in considering whether the whole of the circumstances justified an apprehension that the judge might unduly favour one side.

I turn now to the steps taken by the trial judge when she realized, as she clearly did, that the court counsellor was making representations to her which ought not to have been made in the absence of the parties or their legal representatives. She called counsel for both parties to her chambers and requested the court counsellor to repeat, in their presence, the recommendations which had been made to her. This, of course, revealed the previous communication between the court counsellor and the judge; it is not suggested that this step taken by the judge was not intended by her to reveal to counsel everything of significance that had taken place between her and the court counsellor. Counsel were given an opportunity to obtain instructions and when the hearing of the matter was resumed after the luncheon adjournment the judge announced that recommendations by the court counsellor had been put to both counsel in her chambers and that they had been given the opportunity to seek instructions.

In those circumstances I think that it was beyond question that the parties were given a fair opportunity to be heard upon the

(65) (1969) 16 F.L.R. 211.

(66) (1976) 136 C.L.R., at pp. 257-258.

matters raised in chambers by the court counsellor. That, of course, is not the point taken, but it is very much related to the point in issue which is whether, having regard to the whole of the circumstances, the parties or one of them could reasonably apprehend that the trial judge could no longer bring an impartial mind to the hearing of the matter. With the greatest of respect to those who have reached a different conclusion, I cannot think that it would be reasonable to entertain such an apprehension. The judge took a step which it may be conceded was taken wrongly. The judge herself realized this and immediately moved to correct the situation. What was a few moments before a private communication by a person in the position of a witness, ceased to be a private communication and was made available to the parties to contest as they saw fit; it was no longer, if it ever was, something done behind the back of either party. If it could be suggested that the judge did not act with the intention of revealing all that had taken place between her and the counsellor in her chambers, then there would be some foundation for an apprehension of bias. No such suggestion was made nor, upon the material before us, do I think it could be made. The course taken by the judge adequately demonstrated, in my view, that she intended to continue the hearing of the matter in an impartial manner. There is no question of her capacity to do so.

I would discharge the order nisi.

Make absolute the order nisi for a writ of prohibition directed to the Honourable Margaret Ann Renaud prohibiting her from proceeding further in matter No. C. 746 *of* 1984 *in the Family Court of Australia.*

Order that there be no order as to costs.

Solicitors for the prosecutor, *Heaney Richardson & Heaney.*

Solicitors for the wife, *Messenger & Messenger.*

Solicitor for the respondent, *Australian Government Solicitor.*

Solicitors for the child, *Snedden Hall & Gallop.*

J.M.B.