Between: N Johnson (Appellant/Husband) and M L Johnson (Cross-Appellant/Wife) [1997] FamCA 32 (7 July 1997)

FAMILY COURT OF AUSTRALIA

BETWEEN:
N JOHNSON (APPELLANT/HUSBAND)
AND
M L JOHNSON
(CROSS-APPELLANT/WIFE)
Appeal No. SA1 of 1997
No. AD6182 of
1993
Number of pages -31
Practice and procedure

COURT

IN THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA

ELLIS, BAKER AND LINDENMAYER JJ

CATCHWORDS

Practice and procedure - Hearing - interposition of witnesses - recall of witnesses - procedural fairness - litigant in person - obligations of trial Judge in Part VII litigation

HEARING

ADELAIDE, 22-23 April 1997 (hearing), 7 July 1997 (decision)

7:7:1997

Ms Nelson of Queen's Counsel with Mr Figwer of Counsel, instructed by Stuart Hamilton Lindsay, Solicitors, appeared on behalf of the Appellant Husband

Mr Strickland of Counsel, instructed by Playfords, Solicitors, appeared on behalf of the Cross Appellant Wife

Ms Dibden of Counsel, instructed by Legal Services Commission, appeared on behalf of the Child Representative

ORDER

IT IS ORDERED

1. That the appeal be allowed.

2. That the cross appeal be allowed.

3. That orders 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 of 19 December 1996 be set aside.

4. That the husband have leave to amend his application filed on 10 December, 1993, to include an application that the child of the marriage, L, reside with him.

5. That the application in relation to settlement of property, spousal maintenance, residence and contact be remitted to a single Judge of the Adelaide Registry of the Court for re-hearing.

6. That the appellant husband file and serve any written submissions which he seeks to make in relation to the appeal from the order in relation to the costs of the trial, and in relation to the costs of the appeal and the cross appeal within twenty (21) days.

7. That the Child's Representative file and serve any submissions she may wish to make in relation to the costs of the appeal within 21 days.

8. That the cross appellant wife file and serve any submissions on which she seeks to rely in relation to costs of the trial and in relation to the costs of the appeal and the cross appeal within a further period of twenty one (21) days thereafter.

9. That the appellant husband have leave to file and serve submissions in reply to those of the respondent within 14 days of the receipt of the wife's submissions.

10. That each party endorse on the cover sheet of any submissions filed pursuant to Orders 6, 7, 8 and 9, the date upon which those submissions were served upon the other parties.

DECISION

ELLIS, BAKER AND LINDENMAYER JJ

1. The husband has appealed, and the wife has cross-appealed, from orders made by Murray J on 19 December 1996 in relation to parental responsibility, residence, contact, settlement of property and spousal maintenance. The husband has also appealed against an order which the trial Judge made in relation to the costs of the proceedings on 16 April 1997.

THE APPEAL

BACKGROUND FACTS

2. When the parties met in 1982, the wife had been divorced from her first husband and was supporting her two sons of her previous marriage, S, born 24 January 1972 and M, born on 26

August 1975. The husband was employed in his medical practice at that time. The parties married on 20 June 1982. The evidence before the trial Judge, which her Honour accepted, was that initially the marriage was happy, with the wife's two boys relating well to the husband. However, the relationship between the parties began to deteriorate, due, in part, to the quite different views which each party had towards parenting the children. Many of the problems surrounding the parties' relationships with one another at that time were due to the husband's behaviour and attitude towards the wife and her two sons. Evidence was given, which the trial Judge accepted, that the wife requested the husband to attend counselling, but after one or two sessions, he refused to attend any further.

3. Before their final separation, the parties separated on two earlier occasions, for a period of three months in 1987-88 and a further period of between four and half and six months from July 1991. During each of these periods of separation, the wife's parents assisted the wife and the children with both shelter and support.

4. There was one child born to the union, L, on 2 October 1985.

5. Early in 1993, the wife's children of her first marriage, S and M, now aged respectively 21 and 17 and a half years, left the matrimonial home. The final separation of the parties occurred on 9 July 1993, when the wife left the matrimonial home with L, and the parties have thereafter lived separately and apart.

6. On three occasions during the 1991 separation, the husband exercised unsupervised contact with L, being at Aldinga beach, where the wife was living in a house provided for her by her parents. On another occasion, the wife dropped off L by himself to the former matrimonial home for father and son to have contact.

7. Following the separation, the husband requested contact with L and the evidence was, as indeed the trial Judge found, that the child had insisted on such occasions that the wife stay with him, much to the annoyance of the husband. The husband was unable to accept this constraint, although he did concede that L had informed him that contact could only occur in the presence of his mother.

8. Problems over contact set the scene for a bitter and protracted dispute between the parties in relation to contact, settlement of property and spousal maintenance. The matter was fixed for hearing before her Honour on 19 March 1996. However, the trial did not actually commence before the trial Judge until 20 March 1996. It is necessary to trace the history of the litigation in order for this Full Court to be aware of the applications which were before the trial Judge.

9. On 10 December 1993, the husband filed an application in which he sought the following orders:-

(1) That the wife do give and the husband do take access to the infant child of the marriage L born on 2 October 1985 as follows: (i) Each alternate weekend from 12 noon on the Saturday until 6.00 pm on the Sunday; (ii) Each other Tuesday from 4.30 pm until 7.00 pm; (iii) On such

further dates and times as may be agreed between the parties and in default of agreement as ordered by this Honourable Court;

(2) For such further or other orders as to this Honourable Court seems fit and proper.
Interim/Interlocutory Orders

(3) That the wife do give and the husband do take access to the said child as follows:- (i) Each alternate weekend from 12 noon on the Saturday until 6.00 pm on the Sunday; (ii) Each other Tuesday from 4.30 pm until 7.00 pm; and that such access commence on the weekend following the hearing of this application.

(4) Such further or other orders as to this Honourable Court seems fit and proper.

10. In her answer and cross application, filed on 8 April 1994, the wife opposed all the orders set out in the husband's application, and by way of response, sought the following orders:-

Final orders

1. That the wife have the sole guardianship of L born on the 2nd day of October, 1985 (hereinafter referred to as "the child").

2. That the wife have the sole custody of the child.

3. That the husband's application filed herein on the 10th day of December, 1993 be dismissed.
4. For costs.

Interim Orders

5. That the wife have the interim custody of the child.

6. That the child be separately represented.

7. That the husband be examined by a psychiatrist as ordered by this Honourable Court and that such psychiatrist do provide to this Honourable Court a report as to the husband's mental health, diagnosis and prognosis and in this respect that the husband do authorise that all of his previous medical history be made to the psychiatrist.

11. On 9 May 1994, an order was made adjourning the above-mentioned applications and a separate representative was appointed for the child, L.

12. On 21 November 1994, a report was provided by a Dr Stephen Ward, a child psychiatrist, who under the instructions of the separate representative, had interviewed L on three occasions, the wife on four occasions and the husband twice. Each interview was conducted separately.

13. On 8 December 1994, Bulbeck J ordered that contact take place between the husband and his son once a fortnight in the presence of the wife. The evidence was, as indeed the trial Judge

found, that this order irritated the husband intensely. He resented the necessity for supervised contact and stated that, in his opinion, it was pointless.

14. On 21 December 1994, the wife filed an application for settlement of property, spousal maintenance and costs.

15. On 15 February 1995, the husband filed an answer and cross application in relation to issues of settlement of property, spousal maintenance and costs.

16. On 15 February 1995, orders were made by the Court, including the adjournment to 31 March 1995, of the wife's application for the husband to be psychiatrically assessed upon condition that the husband attended upon Dr Stephen Ward on four occasions.

17. On 13 March 1995, the wife filed a reply in answer to the cross application filed by the husband on 15 February 1995.

18. On 27 March 1995, the wife filed an application in which she sought either to discharge or to suspend the orders for access which had been made previously by Bulbeck J on 8 December 1994, together with orders by way of injunction and in relation to the mortgage upon the former matrimonial home.

19. On 29 March 1995, a further report was prepared by Dr Stephen Ward upon instructions from the separate representative, in relation to the husband's continuing contact with L.

20. On 30 March 1995, Gun J suspended the order for contact made by Bulbeck J on 8 December 1994 and issued an injunction in favour of the wife, preventing the husband from contacting the child L, or from attending at L's school or sporting activities.

21. On 16 May 1995, a further report was prepared by Dr Stephen Ward, upon instructions by the separate representative.

22. On 13 June 1995, further interim orders were made by Forbes JR, suspending the husband's access and enjoining the husband from contacting L or from attending at his school.

23. On 27 June 1995, the wife and L moved to Queensland with no notice of intention in this respect having been given to the husband and very short notice to the child's school. The trial Judge found that this move was precipitated by the wife's fear of the husband and L's apparent fear of his father, and the child's disturbance at the thought of being contacted by him.

24. On 11 August 1995, the husband filed an application in which he sought orders that the wife provide him with particulars of the child's address and schooling.

25. On 31 August 1995, the wife filed an application in which she sought an order by way of injunction that the husband be restrained from employing an investigator in order to monitor the activities and pursuits of the wife and the child, L.

26. On 4 September 1995, a further report was prepared by Dr Stephen Ward on instructions from the separate representative.

27. On 8 September 1995, the husband filed a further application seeking, inter alia, orders that order 1 of 13 June 1995 be discharged and that the husband have liberty to communicate with the child by forwarding correspondence to him, care of the separate representative, and that he have liberty to communicate with the child's school concerning L's education, sport and related activities.

28. On 8 September 1995, an order was made that the husband have liberty to write to the child, care of the separate representative, and for the separate representative to forward school reports to the husband in relation to L, but with the name and address of the school to be deleted.

29. Ultimately, as has been said earlier, the trial was fixed to commence before her Honour on 19 March 1996, but it did not actually commence until the following day.

THE TRIAL

30. As the manner in which the trial was conducted is germane to the grounds of appeal, it is convenient if we record the order in which witnesses appeared, as the interposition of, and certain requests by him to recall, a witness form the factual basis of much of the husband's first two grounds of appeal.

31. Day 1: On 20 March 1996, the husband, who had been represented by both solicitor and counsel throughout the interlocutory stages of the litigation, dispensed with the services of both, with the result that the hearing commenced with the husband unrepresented. The appearances before her Honour throughout the trial were therefore as follows:-

The husband appeared in person;

Mr Strickland of Counsel (instructed by Playfords) appeared on behalf of the wife;

Ms Dibden of Counsel (instructed by the Legal Services Commission) appeared as the child representative.

32. The husband gave evidence-in-chief, and his cross-examination commenced on 20 March 1996.

33. Day 2: On 21 March 1996, at the request of the child representative, Dr Stephen Ward was interposed, gave evidence-in-chief and was cross examined by the husband and Mr Strickland.

34. Day 3: On 22 March 1996, the husband's cross-examination continued.

35. Day 4: On 26 March 1996, at the request of the husband, the following witnesses were interposed. They gave evidence-in-chief and were cross examined by Mr Strickland and Ms Dibden:-

Donald Douglas Prince;

Lynette June Aird;

Peter Allan Ardle;

Peter Charles Johnson; and

Peter Ross Graham.

36. Day 5: On 27 March 1996, at the request of the husband, Archibald Verstin was interposed, gave evidence-in-chief and was cross examined by Mr Strickland and Ms Dibden. The husband's cross-examination then continued.

37. Day 6: On 28 March 1996, at the request of the husband, Roger John Taylor was interposed, gave evidence-in-chief and was cross examined by Ms Dibden and Mr Strickland.

At the request of Mr Strickland, the following witnesses were then interposed, gave evidence-in-chief and were cross examined by the husband and Ms Dibden:

S Maurice Shorten; and

M Ian Shorten.

38. Day 7: On 29 March 1996, the husband's cross-examination continued.

39. Day 8: On 9 April 1996, no evidence was given.

40. Day 9: On 15 May 1996, the trial Judge heard and determined an application by the wife for urgent spousal maintenance, pursuant to the provisions of s77 of the Family Law Act. Submissions were made by the husband and Mr Strickland. The trial Judge ultimately ordered the husband to pay to the wife the sum of $1,000 by way of urgent spousal maintenance, plus $150.00 per week.

41. Day 10: On 9 September 1996, the husband's cross-examination continued.

42. Day 11: On 10 September 1996, the husband's cross-examination continued.

43. Day 12: On 11 September 1996, the husband's cross-examination continued and concluded. Roydon Donald Schultz, the husband's final witness, then gave his evidence. The wife's evidence also commenced.

44. Day 13: On 12 September 1996, Mr Strickland interposed Mr Clarke Hill, who gave evidence-in-chief and was cross examined by the husband and Ms Dibden. The wife's evidence continued.

Mr Strickland interposed Helen Anne Geoffreys, who gave evidence-in-chief and was cross examined by the husband and Ms Dibden. The wife's evidence then continued.

45. Day 14: On 13 September 1996, the husband subpoenaed Dr Graham Douglas Craig as a witness, who gave evidence-in-chief and was cross examined by both Mr Strickland and Ms Dibden. Mr Strickland interposed Susan Kathleen Morisset, who gave evidence-in-chief and was cross examined by both the husband and Ms Dibden. The wife's evidence then continued.

46. Day 15: On 23 September 1996, the wife's evidence continued and concluded.

47. Day 16: On 24 September 1996, Rose Katherine Drummond and Ian Angus Annear gave evidence for the wife.

The husband was recalled for further cross-examination, which then concluded.

48. Day 17: The trial continued on 27 September 1996, on which day her Honour reserved her decision.

49. Day 18: On 19 December 1996, her Honour published her reasons for judgment and made the orders from which the husband now appeals and the wife cross-appeals.

50. Those orders were as follows:-

"1. That the wife do have the sole responsibility for the long term care, welfare and development of the infant child of the marriage **L L JOHNSON** born on 2 October 1985, including but not limited to the sole responsibility for making decisions relating to the said child's health and education.

2. That the said child reside with the wife and the wife have the sole responsibility for the day to day care, welfare and development of the child.

3. That the husband do not have any parental responsibility for the said child and do not have any contact with the child save and except that the husband be at liberty to write letters to the said child, such letters to be sent to the child's grandfather Mr. Annear for transmission by him to the said child.

4. That Mr. Annear do obtain school reports relating to the said child and then forward the same to the husband after deleting therefrom the name and address of the school.

5. That the husband be restrained and an injunction is hereby granted restraining the husband from: (a) entering upon or attending at or being in the vicinity of the residence from time to time of the said child; (b) entering upon or attending at or being in the vicinity of the school attended by the said child from time to time; (c) approaching or contacting the said child.

6. That the order for contact made herein on 8 December 1994 be and the same is hereby discharged.

7. That by way of settlement of property the husband do pay to the wife the sum of $280,375 in the manner following:- (a) $180,000 within 3 months (b) the balance within 6 months.

8. That in default of payment a Registrar of this Court be appointed to execute all such deeds and instruments in the name of the husband to do all such acts and things to give validity and operation to such deeds and instruments to sell the house property situate at and known as 88 Seaview Road, West Beach either by private treaty or by auction as may be agreed by the parties and in default of agreement as determined by this Honourable Court and to pay from the proceeds thereof to the wife all moneys due to her under this order and to pay the balance (if any) to the husband, such right of sale to be without prejudice to any other remedy the wife may have for enforcement of this order.

9. That upon payment of the said moneys by the husband pursuant to paragraph 7 hereof and the transfer by the husband pursuant to paragraph 10 hereof, the wife do transfer to the husband all her estate and interest in the said house property.

10. That the husband do all such things as may be necessary to transfer to the wife as Trustee for the said child AMP Policy No.55033846 and any other Policy or Fund in the name of the husband relating to the provisions of payment towards secondary and tertiary education of the said child.

11. That the wife do indemnify the husband in respect of any moneys due by him to Mr. Annear.

12. That the property in the 1987 Holden Camira and furniture in the possession or control of the wife do vest absolutely in her.

13. That the property in the remaining personalty in the possession or control of the husband do vest in him.

14. That pending the final payment of all moneys due hereunder the husband do pay to the wife towards her maintenance the sum of $250 per week and thereafter until the 31st December 1999 the sum of $150 per week, the first such payment of $250 to commence one week from the date hereof.

15. That the question of costs be reserved and adjourned to a date to be fixed.

Liberty to apply as to consequential orders."

51. The wife made an application that the husband pay her costs of and incidental to the proceedings before the trial Judge, which was heard by her Honour on 16 April 1997. On that date, her Honour made the following orders:-

1. That the husband do pay one third of the wife's costs of the trial relating to contact, such costs to be agreed and in default of agreement, to be taxed.

2. That the husband do pay three quarters of the wife's costs of the trial insofar as relates to settlement of property, such costs to be agreed and in default of agreement, to be taxed.

52. On 22 April 1997, the Full Court granted both parties leave to amend their respective appeal and cross-appeal to enable them to appeal her Honour's decision in relation to costs and the amended notices of appeal and cross-appeal were ordered to be filed and served within twenty one days of that date.

GROUNDS OF APPEAL

53. The grounds of appeal filed by the husband, insofar as they relate to the orders which the trial Judge made concerning residence, parental responsibility and contact as set forth in the amended notice of appeal, are as follows:-

1. RESIDENCE AND PARENTAL RESPONSIBILITY ORDERS:

(i) The learned trial Judge erred in law in not permitting the husband at trial to oppose the wife's application for residence and parental responsibility orders.

2. CONTACT ORDERS

(i) The learned trial Judge erred in law in not allowing the husband's application to recall Dr Stephen Ward when: (1) Ward was interposed by the separate representative during the husband's case on the second day of evidence of the trial and would ordinarily have given his evidence after the case of the husband and the case of the wife had been presented; (2) Ward was the only professional witness who had been provided with the opportunity of assessing the child; (3) The injustice occasioned by the inability of the husband to put to the witness Ward matters relating to the parental alienation syndrome were not capable of being remedied by the husband being able to put such matters to the witness Dr Graham Craig who was the psychiatrist who had treated the wife and who was in any event attending upon the subpoena as a witness for the husband who was unable to cross examine him; (4) The husband was entitled as a matter of natural justice to put the matters relating to parental alienation syndrome to the principal witness of the separate representative; (5) The husband was a self-represented person and ought not to have been penalised through the child representative's request to interpose a witness at a very early stage of the trial.

54. These grounds can be dealt with together, as each relates to the submissions made by the husband's counsel in the course of the hearing of the appeal, the effect of which was that the husband was denied procedural fairness.

55. In the course of her submissions, Ms Nelson, counsel for the husband, identified four instances which occurred in the course of the trial by which the husband was denied natural justice by the trial Judge in that the manner in which the trial Judge conducted the trial was procedurally unfair to her client. The instances cited by Ms Nelson are as follows:-

(A) <u>The trial Judge refused the husband's application to recall Dr Stephen Ward</u>;

(B) The trial Judge refused the husband's application to amend his application during the trial, to enable him to seek an order for residence in relation to the child;

(C) Her Honour failed to advise the husband in relation to his procedural rights; in particular her Honour did not inform him of the consequence of the interposition of Dr Ward at such an early stage in the proceedings; and

(D) Her Honour refused the husband leave to call Dr Keith Lepage as part of his case;

56. It is convenient if the above issues be considered seriatim and the appropriate findings and comments made.

(A) The Trial Judge's Refusal of The Husband's Application to Recall Dr Stephen Ward

57. On 21 November 1994, Dr Stephen Ward, a child, adolescent and general psychiatrist, prepared a report which had been ordered previously pursuant to the provisions of Order 30A. A subsequent report was prepared by Dr Ward on 4 September 1995. It is clear from the evidence, both documentary and oral, that at the time that Dr Ward prepared these two reports, the only issue between the parties related to contact. Therefore, Dr Ward's reports were directed solely to that issue. Dr Ward also prepared two ancillary reports on 29 March and 16 May 1995, respectively, which have no particular relevance to this appeal.

58. For the purpose of the preparation of his first report, Dr Ward saw L on 14 October 1994, 28 October 1994, and 16 November 1994. He met with the wife on 14 October 1994, 28 October 1994, 8 November 1994 and 16 November 1994. He had a consultation with the husband on 2 November 1994 and subsequently on 9 November 1994.

59. In his first report, Dr Ward stated that he had read the following documents:-

1. Report by Dr Timothy Hill, psychologist, dated 31 January 1994;

2. Affidavit by the husband dated 4 May 1994;

3. Affidavit by the wife dated 21 January 1994, which contained an annexure relating to Family Law proceedings involving the husband in the years 1973 and 1980.

60. In a somewhat lengthy report, Dr Ward made observations of the personalities of the parties, as he observed them and, under the heading, "Opinion", on pp. 192 and 193 of AB 1, Dr Ward stated:-

"Ms Marie Johnson, mother of L, offers a tense, intense concern for the well being of her son, herself and for Dr Johnson.

By her and Dr Johnson's description, and to my observation, she has a strong sense of kinship with her own family of origin. Dr Johnson is of the view, however, that her alliance with her own family at times has transgressed her loyalty to her marriage. Ms Johnson was exposed to

emotional stress and distress in her first marriage and, by description, her first husband has opted out from an active parenting of his sons by his relationship with Ms Johnson.

Ms Johnson reports, with distress, a series of events in her relationship with Dr Johnson which she felt were either lacking in respect for her own value system or were more overtly abusive of herself, and of L.

I can not offer a formal psychiatric diagnosis to ms Johnson's presentation however the intensity with which she is carrying her concern does cause me some concern for her own welfare, and as I will discuss, for the welfare of L.

L Johnson clearly, to my view, had an agenda in meeting with me to discuss his view that he had a "bad" father. He sought to describe a number of incidents in which he felt had been abusive of him and his needs. I believe however that L's dogmatism in presenting his views does mask an uncertainty and ambivalence of emotion in relation to his father, symbolized in his wish to have a "better dad". L Johnson presents as a tense 9 year old. At [no] time in my three meetings with him did he appear to be relating freely and easily with me. I note that he is meeting with a psychologist because of difficulties in interpersonal relationships and the question of psycho-somatic basis to abdominal pain has been questioned with L.

The tense intensity of L's presentation reflects that of his mother. I am not of the view that Ms Johnson has consciously inculcated a system of beliefs or personality style in L but I believe that L has been, and remains, vulnerable to modelling his mother's nervous intensity.

Dr Johnson's presentation does cause me clinical concern. By Ms Johnson's report he was subject to displaying intense angry behaviour which was explosive and impulsive. By Ms Johnson's report, and in part confirmed by Dr Johnson, there has been a dysfunctional aspect to Dr Johnson's family of origin.

Ms Johnson reports that various members of Dr Johnson's family have required psychiatric care. Dr Johnson reports that his father was a "religious fanatic" and that there were issues of mistrust in his relationship with his father. Schisms have developed between Dr Johnson and several of his siblings for reasons that still remain unclear to me. Ms Johnson describes Dr Johnson as having a need for tight emotional control in his interpersonal relationships and is prone to anger when that control is challenged or threatened. She describes him as being socially isolative of himself.

I was not able to establish a rapport with Dr Johnson in my two meetings with him. An intensification of his tension was evident when he began to describe his own family circumstance. He expressed an intense and strong motivation to be doing the best by his son L through the practical arrangements for L's education.

I am of the opinion that a number of emotional issues are being reflected in Dr Johnson's parenting of his son L. I believe that he carries major issues from his own family background and indeed I question whether he was subject to covert or overt abuse within his own family of origin. He continues to grieve the loss of his relationship with his son by his first marriage and,

understandably, continues to carry an intense anger about this and the circumstances under which it occurred. I believe that Dr Johnson feels somewhat powerless in his parenting abilities and this is reflected, if I accept Ms Johnson's view, in the anger that he can display towards L and, by report, as happened with Ms Johnson's sons by her first marriage, an anger that is counterposed by a strong altruism towards the boys.

I believe, by the descriptions offered to me, by my mental status observations of Dr Johnson and by interpretation, that he does have an Intermittent Explosive Disorder (also known as Episodic Dyscontrol Syndrome) but I am not able to conjecture on the presence of a differential diagnosis to this disorder (ie other psychiatric diagnosis that may offer explanation for the behaviour). I can not recommend a change to L's current access arrangements currently. With respect I would like the opportunity to discuss with Dr Johnson the opinion that I have offered to you and I would like to canvas with Dr Johnson the possibility of he and I meeting over some four to six sessions to further explore the anguish that I believe that Dr Johnson carries from his own family background. Hopefully having established a clinical rapport with Dr Johnson through this process, I believe I would be in a further position to offer recommendation to Dr Johnson, Ms Johnson, L and yourself about strategies and structural change within L's circumstance that may obviate the tension that L is so obviously carrying."

61. Dr Ward's report of 4 September 1995, related to a specific issue as to whether the husband should have L's residential address in Queensland, in order to have contact with L, and whether he should have the name and address of L's school, in order to make contact with the same. In his report of 4 September, Dr Ward suggested that the husband have only limited written communication with L by means of an independent third party.

62. As has been stated earlier in these reasons for judgment, the hearing commenced before her Honour on the morning of 20 March 1996. In the course of opening comments by counsel, Ms Dibden, counsel for the separate representative made the following application:-

"MS DIBDEN: Yes, I think so. The other thing, your Honour, is that Dr Ward was booked to come tomorrow morning at 10 am and that is when we anticipated that we might be starting on Monday. He is still booked for that time. I have made enquiries and there is really no other time that he is free. My friend, Mr Strickland, is happy to interpose him and I have mentioned it to Dr Johnson and I am not quite sure what his position on it is.

HER HONOUR: I will hear what he has to say in a moment or two but it certainly would be a very good thing if we could get - I mean, he is an expert. It is not a question of a creditor or anything like that.

MS DIBDEN: That is right. I do not think anybody is disadvantaged by him being interposed.

HER HONOUR: No, no.

MS DIBDEN: I am in your Honour's hands obviously.

HER HONOUR: Yes, thank you. Yes, Dr Johnson, if you would kindly open thank you.

DR JOHNSON: Yes, your Honour, thank you, and I am very inexperienced in these matters as you no doubt know and I think that the reason that I have gone on like this is that I believe that this whole procedure has been a waste of time and effort and it has brought a lot of heartache and a lot of distress to a lot of people. I really did not try to have anything like this. I have been trying to do my utmost to avoid it in fact. However, to give you a brief idea of what has happened, which you have no doubt read about from your point of view, but from my point of view I - there is a chronology here. I am not sure if I should go into this."

63. There was no further discussion that day concerning the interposition of Dr Ward and the husband continued with his opening address.

64. Shortly thereafter, the husband entered the witness box and gave evidence-in-chief, following which his cross-examination commenced.

65. On day 2, without any further discussion taking place between the parties and their legal representatives, Dr Ward entered the witness box. The balance of day 2 was taken up with Dr Ward's evidence, with no other witnesses being called or interposed.

66. On day 10 of the trial, which was 9 September 1996, and almost six months after Dr Ward had given his evidence, the husband informed the trial Judge that during the intervening period he had received some information which may have some bearing on the case, a copy of which he had already given to Ms Dibden and Mr Strickland. The husband then indicated to her Honour that he wished to cross examine the two psychiatrists Dr Ward and Dr Craig, in relation to that information. Dr Craig was a treating psychiatrist of the wife. At that point however, the husband did not inform the trial Judge precisely what the information was. Ms Dibden then informed the trial Judge that she had received from the husband some articles on Parental Alienation Syndrome and that it was that information which the husband wished to present to the Court, because it presented an explanation as to why the child was resisting contact with him. Ms Dibden agreed that the Parental Alienation Syndrome had not been put to Dr Ward by any of the legal practitioners appearing before her Honour and that until the husband had sent her the articles referred to, she had not had any instructions in relation to it, nor turned her mind to it.

67. Ms Dibden then informed the trial Judge that she had indicated to the husband that she had no objection one way or the other as to the recall of Dr Ward, the advantage being that Dr Ward had seen the child and the mother. Further, that having re-read his report, it may well be that Dr Ward could answer some questions in relation to the matters which the husband was seeking to put to him. Ms Dibden further informed the trial Judge that the husband had informed her that he had not heard earlier of this particular Syndrome, but that he had now read extensively in relation to it and wanted to put some questions to Dr Ward concerning the Syndrome. Ms Dibden stated further that the only issue was when it might be convenient to recall Dr Ward and suggested that in her view, it was preferable for that to be done after both parties had completed their evidence.

68. Her Honour then asked Mr Strickland what his view of the matter was, and it is clear from p. 5 of the transcript of day 10, that Mr Strickland was opposed to Dr Ward being recalled. The basis of Mr Strickland's opposition to the recalling of Dr Ward, shortly stated, was that Dr Ward's reports had all been available for some time and the issue of the influence on the child by

the wife (if any) which in his view is what Parent Alienation Syndrome is all about, had already been dealt with in extenso in the course of Dr Ward's reports and in the course of his evidence, including his rather extensive cross-examination. Mr Strickland submitted, in short, that the Parent Alienation Syndrome was only another label for matters which had already been put to Dr Ward.

69. Having heard submissions from Mr Strickland, her Honour refused the husband leave to further cross examine Dr Ward, as appears in the following passage on p. 6 of the transcript of day 10:-

"HER HONOUR: I am not going to allow Dr Stephen Ward to be recalled, and that is my ruling on the matter. We have had extensive evidence from Dr Ward, I am not going to allow him to be called, but certainly you may put questions as you will, you may question Dr Craig as you will about any syndrome that you wish to put to him. Thank you. Now, Dr Johnson, if you would get back into the witness box"

70. The Parental Alienation Syndrome was originally described as such by Dr Richard Gardner in "Recent Developments in Child Custody Litigation" appearing in *The Academy Forum*, (1985) Vol 29 No 2 published by the American Academy of Psychoanalysis. Dr Gardner's article was tendered in evidence before the trial Judge as Exhibit "H6". The basis of Parental Alienation Syndrome is that children who suffer from it have been subjected to an intense and persistent form of brain washing, either consciously or subconsciously by one parent against the other. The overt goal was said to be to reduce dramatically contact by the child with the other parent, with the ultimate aim virtually to eliminate the other parent from the child's life.

71. In an article by Dr Kenneth Byrne, who is a clinical and forensic psychologist in full time private practice in Clifton Hill, Victoria, and an honorary lecturer in the Department of Psychological Medicine at Monash University, which appeared in the March, 1989 volume 4 number 3 edition of *The Australian Family Lawyer* (1989) Vol 4 No 3 at p. 1, it is indicated that the symptoms of the presence of the Syndrome are:-

"1. The child shows a complete lack of ambivalence - one parent is described almost entirely negatively, the other almost entirely positively;

2. The reasons given for the dislike of one parent may appear to be justified, but investigation shows them to be flimsy and exaggerated; with younger children, the reasoning is even more transparent;

3. The child proffers the opinion of wanting less contact with one parent in a way which requires little or no prompting. The complaints have a quality of being rehearsed or practiced;

4. The child seems to show little or no concern for the feelings of the parent being complained about;

5. The alienating parent, while seemingly acting in the best interests of the children, is actually working to destroy the relationship between them and the other parent. It is not uncommon for this to be further fuelled by new spouses or defactos;

6. Most importantly, while the children will verbally denigrate one parent, they retain an unspoken closeness and affection for that parent. However, if the syndrome is allowed to develop unchecked, this can be all but erased by the alienating parent."

72. In relation to the above-mentioned symptoms, Dr Byrne made the following comments:-

"These symptoms are seen exclusively in children where parents are engaged in a legal battle for custody or access. The more protracted and bitter the dispute, the more this is likely to occur.

The Parental Alienation Syndrome represents the intertwining of a complex series of factors. It certainly goes well beyond simple brainwashing. It is begun and propelled by a host of factors in the alienating parent, including both unconscious and subconscious elements. The child, independent of the brainwashing parent, can have a vested interest in maintaining an overt position against one parent for both conscious and unconscious reasons."

73. Under the heading, "Conclusion", Dr Byrne, on p. 5 of the article stated:-

"The Parental Alienation Syndrome represents an extreme form of brainwashing of children by one parent. It is always seen in the context of disputed custody or access situations. The goal of the brainwashing parent is to get revenge. There is no greater revenge than blocking the other parent from playing a meaningful role in the child's life. The syndrome has clear signs and symptoms and, with appropriate procedures, can be diagnosed and treated. This syndrome is also seen in more complex forms, when it is embedded in situations of alleged child sexual abuse or child kidnapping. It can easily be misdiagnosed by professionals who have not educated themselves about these situations, and misguided efforts at helping can worsen an already bad situation."

74. Mr Strickland, in effect, conceded that the existence of Parental Alienation Syndrome was an important consideration which the husband was entitled to put to Dr Ward, but his argument opposing the further recalling of Dr Ward was that the matters referred to had already been put to Dr Ward under another label.

75. It is necessary at this point for us to consider what evidence was given by Dr Ward with regard to the relationships between the parties and L, and we now do so:-

The Evidence of Dr Ward

76. Dr Stephen Patrick Ward gave evidence on 21 March 1996. He was the Court appointed expert and was a practicing psychiatrist with additional specialisation in child psychiatry. Approximately 70 to 80 per cent of his practice constituted work with children.

77. Dr Ward met with the child L on three occasions, the wife on four occasions and the husband on two occasions. Each of the consultations was conducted with the parties and child on their own. The witness stated that L demonstrated an ambivalence towards contact with his father. Although L's stated position was that he did not want contact with his father he was still open to the possibility of access to his father.

78. Dr Ward stated that in his opinion the husband was convinced that the wife had "brainwashed" L into thinking the husband to be a dreadful person. Furthermore that the husband was angry, anguished and distressed due to the breakdown of the marriage and his loss of contact with L. The husband did not believe that he had done anything harmful to the child and in the opinion of the witness, the husband believed that the court process he was required to undertake was demeaning to him.

79. Dr Ward stated that he believed that L was seeking to use his consultations with him as a forum to discuss his confusion in relation to his father, in that he was anxious to tell his father how bad his father was and at the same time he was unclear as to whether he wanted anything further to do with his father. The witness also gave evidence that L's tense presentation reflected that of his mother.

80. It was clear that throughout his cross-examination of Dr Ward, the husband attempted to put statements to the witness in relation to his interpretation of events during the marriage that had not at that time been tested in cross-examination of him. This, in combination with the fact that he was self-represented, gave the husband some difficulty in conducting his cross-examination of the witness.

81. Dr Ward noted that L cited a number of examples where he perceived his father had behaved badly towards him. These included the manner in which his father insisted upon reading to him every night and the husband entering the changerooms at L's swimming lessons. Dr Ward noted that L when reciting the reasons why he did not want to see his father, repeatedly recited the same reasons. In his opinion, the relationship between the husband and L would be improved if the husband developed an understanding as to the issues and uncertainty that L identified in relation to his father.

82. Dr Ward also gave evidence as to what he perceived as the husband's Intermittent Explosive Disorder that left the husband subject to sudden, unpredictable and ungovernable rage episodes.

83. It was further submitted on appeal by Mr Strickland that, in any event, the husband had put the various elements of the Syndrome to Dr Craig and that therefore any further cross-examination of Dr Ward would not be of any assistance to the Court.

84. It is necessary that we record what Dr Craig's evidence was in relation to Parental Alienation Syndrome and we now do so:-

The Evidence of Dr Craig

85. Dr Craig gave evidence on 13 September 1996. He was the husband's witness. The witness saw the wife as a treating psychiatrist from 6 July 1993 until 12 March 1996. He also saw S Shorten. He never saw L. The witness admitted that he knew nothing about the husband except through hearsay evidence.

86. In the course of the witness' examination at p. 19 of the transcript of 13 September 1996 her Honour asked Dr Craig:-

"With the greatest of respect as far as I am concerned as regard relationships between L and his father it does not help me a great deal because you were treating or you were assisting Mrs Johnson? --- Yes."

87. The husband asked Dr Craig about the diagnostic symptoms of parental alienation syndrome. The witness listed such symptoms as follows:

1. The child makes negative non-ambivalent statements about the non-custodial parent;

2. The child makes entirely positive statements about the custodial parent and entirely negative statements about the non-custodial parent;

3. The reasons given for the dislike of one parent may appear to be justified but investigation shows them to be flimsy and exaggerated;

4. The child proffers the opinion of wanting less contact with one parent in a way which requires little or no prompting and these complaints have a quality of being rehearsed or practiced.

5. The child shows little or no concern for the feelings of the parent being complained about;

6. The alienating parent, while seemingly acting in the best interests of the child is actually working to destroy the relationship between the child and the other parent.

7. While the child will verbally denigrate one parent they retain an unspoken closeness and affection for that parent.

88. Dr Craig also stated that the syndrome goes "[b]eyond the level of simple brainwashing. There is a complex series of personality interactions, hidden desires, hidden agendas." Dr Craig quoted from Richard Gardner, the psychiatrist who coined the syndrome and stated:-

"The term is applicable only when the parent has not exhibited anything close to the degree of alienating behaviour that warrant the campaign of denigration exhibited by the child."

89. The husband did not put the individual facts of the case to the witness in order to establish if the syndrome existed in the case of L.

90. In cross-examination, Dr Craig admitted to never having experienced parental alienation syndrome in his practice and that his evidence was based upon his reading. Furthermore he stated that only five to ten per cent of his practice involved children.

91. The witness then stated that after reading the reports of Dr Ward, he did not think that the requisite expressions of severe hatred and denigration were evident to establish the syndrome in the case of L. Dr Craig gave evidence that the child's ambivalent feelings towards the father, as found by Dr Ward, meant that the syndrome did not apply to L. It was also the evidence of Dr Craig that in order to determine if the child had an unspoken closeness and affection for the alienated parent it would be necessary to observe the body language and interaction between the child and that parent.

92. The separate representative, after confirming the fact that Dr Craig did not see L as a patient in his practice, asked the following question of the witness:

"So in view of that is it fair to say that you are not in a position to say whether parental alienation syndrome is operating in this particular situation? --- Exactly."

93. The witness then qualified this statement by saying that if the reports of Dr Ward were accurate then in his opinion a number of the factors that indicate parental alienation syndrome were not present in L.

94. Although Dr Craig came to Court under subpoena by the husband, he was a psychiatrist who, over a number of years, had been treating the wife. He had neither seen nor treated the child, and therefore was unable to express any opinion as to the relationship existing between father and son. Although elements of the Syndrome were put by the husband to Dr Craig in the course of his evidence, both his evidence and his opinion suffered from the obvious defect that he had not seen the child, nor was he able to comment, from the viewpoint of his own observations, upon the relationship between father and son or whether, as between the parents, the Syndrome applied.

95. For reasons which we shall give later in relation to another issue, Dr Ward should not have been called so early in the proceedings. The fact that he was called was apparently by arrangement between Ms Dibden for the child representative and Mr Strickland for the wife, and without the husband's consent being properly sought or obtained.

96. In a case where there have been obvious contact difficulties between the parties, the possibility that the child has either been brainwashed, or indoctrinated by one of the parents, must be a relevant consideration. Dr Byrne's article leaves us in no doubt that Parental Alienation Syndrome is a very real psychological phenomenon which the husband, in our opinion, was entitled to investigate and put to the relevant experts called in the course of the trial.

97. Given that s65E and s68F clearly mandate the Court to apply the best interests principle when determining contact and residence cases, and given that Ms Dibden for the child representative was of the opinion that the husband should be allowed to recall Dr Ward, in our opinion the trial Judge erred in refusing the husband the right to recall the expert. The error has

been compounded, in our view, for reasons which we shall give in more detail later, by the fact that Dr Ward was called out of turn before the husband's and the wife's evidence had been completed.

(B) <u>The trial Judge's refusal of the husband's application to amend his application during the trial, to enable him to seek an order for residence in relation to the child</u>

98. The pleadings which were before the trial Judge in relation to the child, L, commenced with the husband's Form 7 application filed on 10 December 1993, in which he sought an order for access, as on p. 81 of AB 1. In her Form 7A answer and cross-application, the wife opposed the order for access and sought orders for sole guardianship and sole custody, as they appear on p. 89 of AB 1. There was no reply filed by the husband in response to the latter-mentioned application.

99. The husband appears to have been legally represented from the time of the commencement of the proceedings up to immediately before the first day of the hearing before her Honour on 20 March 1996. The affidavit which the husband prepared pursuant to Order 30, rule 2 of the Family Law Rules was filed on 7 February 1996, and it is apparent from that affidavit that, at that time, the only order which the husband was seeking from the Court in relation to the child, L, was an order for access.

100. The husband first raised the question of his seeking an order for residence in relation to the child, L, on day 7 of the trial (29 March, 1996). On p. 11 of the transcript of that day, the following exchange took place between the husband and her Honour:-

"DR JOHNSON: Yes. Well, I mean, your Honour, I think that I have found a number of discrepancies in what the other two children were saying yesterday as to what actually happened and what they had written in their affidavit, and I believe that they are dominated by this woman who is now attempting - or, not attempting, she has dominated my son, L, and I believe that her mental status is in question here. She is looking after, has complete control of, these children or of L now and I do not believe that she is a fit person to have that complete control.

HER HONOUR: Are you seeking custody or access?

DR JOHNSON: Well, I seek anything, your Honour.

HER HONOUR: I must know. It is no good saying you seek anything. Tell me.

DR JOHNSON: I seek as much as I can get really. I am in your Honour's hands as far as that is concerned. My original attempt was to get minimal access with my child alone without his mother being present and that is what this trial has been all about. I was not attempting to get custody from her, I was only trying to get minimal access to this child. All access to him had been denied by this woman, this obsessive woman, and I cannot understand it and I do not understand why the Court denied it and put in a separate representative to just interfere and complicate the whole thing. I mean, up until the time that I made it quite clear that I was not going to have her back because I could not stand her irresponsible behaviour she suddenly

stopped me from seeing my son at all alone and I believe it was vindictive and obsessive of her to do this."

101. In the course of his cross-examination on day 11, on p. 48 of 10 September 1996, Ms Dibden asked the husband, "So what orders do you now ask this Court to make regarding contact between you and L?" to which the husband replied, "I believe that this is an extremely severe case of parental alienation and that he should be taken away from his mother". The following exchange then took place between her Honour, the husband and Ms Dibden:-

"MS DIBDEN: So are you saying that the orders you now seek from this court are that the child's residence be reversed so that he lives with you?---That's correct.

That is what you are now seeking?---Yes.

If this court were to make an order, either for the child to reside with you or for the child to have contact with you and the child was reluctant, the child was reluctant, what do you believe should happen in that situation? If for instance, the child says, "I am not going"?---I believe that he should be made to.

HER HONOUR: But it is too late, Dr Johnson, to make application for residence.

MS DIBDEN: Well, I must say, I was not anticipating that, your Honour.

HER HONOUR: Well, it is too late. I mean, his application is for contact, dated 10 December 1993?---That's why I've been trying to bring in this syndrome, your Honour. Are you familiar with it, your Honour?

I have heard evidence about it in other cases, but I can tell you, Dr Johnson, it is too late for you to make application for residence now. All I have got before me is the application for contact?---Your Honour, this case has been going on for three years and it's been positively - the terrible decisions of this court, that its in this situation.

Yes, well all right, I am just saying that we'll confine the matters to questions of contact. That is the only matter that is before me as regards L. Questions of property, of course, they are still before me.

MS DIBDEN: Could you indicate, Dr Johnson, what contact orders you would seek from this court, particularly in view of the fact that the child now resides in Queensland?---That is again, a matter of dispute that it should've been allowed to go. It's only because of this court that he's been allowed to go to Queensland under the and the method that he was. This - - -

Yes, if you could just indicate what contact orders you would be seeking from this court?---What contact orders? I have already said that I think the child should be given to me."

102. The matter was pursued again by the husband later on the same day (see p. 75, transcript of 10 September 1996) but again, the trial Judge made it clear to the husband that the only matters

which were properly before her related to contact, property settlement and spousal maintenance. It was argued on behalf of the husband that the trial Judge erred in failing to permit the husband to conduct his case on the basis that he wished to change his application to one of residence of the child, L and that such error constituted a denial of natural justice to him.

103. Although the basis upon which the husband now sought an order for residence in relation to the child was not put to her Honour at the time of the above-mentioned exchanges, it is clear that he was referring to the Parental Alienation Syndrome to which we have earlier referred. It was argued by Mr Strickland for the wife that Dr Ward had provided a number of expert reports to the Court over a significant period of time, to which the husband had had access at all times. The husband was well aware of Dr Ward's expert assessment and opinion, which opinion he confirmed in his oral evidence. This opinion, as indeed the trial Judge found, on p. 35 of AB 1, was that, "Any form of contact would not be beneficial to L, but rather it would do him harm".

104. At the time that the husband made his oral application for an order for residence in relation to the child L, although Dr Ward had already given his evidence, no questions had been put to him in relation to the concept of Parental Alienation Syndrome. In addition, Dr Craig, who was subpoenaed by the husband, had not given his evidence, nor had the husband had the opportunity at that time to examine Dr Craig in relation to Parental Alienation Syndrome.

105. The traditional rule in relation to allowing an amendment is that the amendment should be permitted if necessary to allow the true issues in controversy to be resolved, and if such amendment would not result in injustice to the other party which is not capable of being compensated by an award of costs. Thus, in *Clarapede & Co v Commercial Union Association* (1883) 32 WR 262 at p. 263, Brett MR held:-

"The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but, if the amendment will put them into such a position that they must be injured, it ought not to be made."

106. See also the judgment of Bowen LJ in *Cropper v Smith* (1884) 26 Ch D 700 at p. 710.

107. However, the law in relation to allowing a litigant to amend pleadings has been the subject of much recent judicial comment. One of the seminal modern cases that deals with this issue was the decision of the House of Lords in *Ketteman v Hansel Properties and Others* [1987] AC 189, and in particular the statement by Lord Griffiths at p. 220 as follows:-

'Whether an amendment should be granted is a matter for the discretion of the trial Judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes and the legitimate

expectation that the trial will determine the issues one way or the other. Furthermore, to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.'

108. It is clear therefore that, when a trial Judge exercises his or her discretion in relation to an application seeking to amend pleadings, the law requires a wide range of considerations to be taken into account. These include not only the question of costs, but also the strain of the litigation on the parties, the impact of a continuation of the proceedings on court lists and case management guidelines (see *Sali v SPC Limited [1993] HCA 47;* (1993) 116 ALR 625 at p. 629. [Whilst this case specifically addresses the question of an adjournment, its principles would also extend to an amendment that requires a considerable lengthening of proceedings]), as well as the legitimate expectation that the trial will determine the question at issue with some sense of finality.

109. The High Court decision of *State of Queensland and Anor v JL Holdings Pty Ltd* (Unreported decision of 14 January 1997) is the most recent case dealing with the considerations that a trial Judge must undertake when exercising the discretion to allow an amendment to a litigant's pleadings. That case involved an appeal from a decision of a trial Judge refusing an application to amend a party's defence in relation to civil proceedings in Queensland. The trial Judge, with whom the Full Court of the Federal Court agreed, refused to allow the amendment as to do so would jeopardise trial management guidelines and procedures. This decision was reversed in the High Court where Dawson, Gaudron and McHugh JJ held:-

"In our view the matters referred to by the primary judge were insufficient to justify her Honour's refusal of the application by the applicants to amend their defence and nothing has been made to appear before us which would otherwise support that refusal. Justice is the paramount consideration in determining an application such as the one in question. Save in so far as costs may be awarded against the party seeking the amendment, such an application is not the occasion for the punishment of a party for its mistake or for its delay in making the application. Case management, involving as it does the efficiency of the procedures of the court, was in this case, a relevant consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties. In taking an opposite view, the primary judge was, in our view, in error in the exercise of her discretion."

110. In the present case, her Honour does not appear to have fully addressed the issues required of her in exercising her discretion to refuse the husband's application to amend his application. There was no evidence nor any submissions before her Honour indicating that allowing the amendment would require a significant adjournment, or that the factual issues dealt with by both parties when presenting their cases in relation to the husband's contact application required substantial amplification or alteration in order to address an amended application by the husband for residence. In the circumstances of the case, it was insufficient for her Honour to have stated, as she did at pp. 48 and 49 and again at p. 75 of the transcript of 10 September 1996, that it was too late for the husband to amend his application to one seeking residence and that the only

matters before her were for contact, property settlement and spousal maintenance, as per the husband's application of December 1993 and the wife's application of December 1994.

111. In our opinion, the best interests of the child and the interests of justice required that all available evidence be heard and all outstanding issues be resolved by the trial Judge. Although the husband had changed his primary position mid-stream, as it were, in the course of the trial, following a six month adjournment and the recognition by the husband of a psychiatric syndrome of possible relevance to the proceedings during that adjournment, in our opinion, in the circumstances of this case he should have been permitted to do. It has not been shown, nor was it seriously suggested, that to allow him to amend his application at that time would have caused the wife or the child any injustice which could not have been compensated by orders as to costs or otherwise.

(C) Her Honour's failure to advise the husband in relation to his procedural rights; in particular her Honour's failure to inform him of the consequence of the interposition of Dr Ward at such an early stage in the proceedings

112. Ms Nelson submitted that the husband was unrepresented at all times during the course of the trial and therefore her Honour had a clear obligation to ensure that he in fact received a fair trial. It was asserted that this obligation required the trial Judge to inform the husband, being an unrepresented party, of his procedural rights and to explain to him the manner in which the trial would be conducted. This included, so it was submitted by Ms Nelson, that the trial Judge was bound to inform the husband of the possible prejudicial consequences of any course taken during the proceedings, to enable the husband thereby to make an effective and informed choice. For example, the husband may not have consented to Dr Ward being interposed had he been told that that act alone might prevent him from putting the whole of his case in the manner that he saw fit.

113. The essential elements of this ground can be summarised as follows:-

(a) The trial Judge failed to inform the husband of the significance of calling Dr Ward early in the course of the proceedings before all the evidence from the parties themselves had been given;

(b) The trial Judge failed to explain fully to the husband the manner in which the trial was to proceed, the order of the calling of witnesses, including examination-in-chief, cross-examination, and re-examination; and

(c) The trial Judge failed to inform the husband that he had a right to object to the interposition of Dr Ward at an early stage of the proceedings and out of the usual course of such proceedings.

114. Many of the cases involving procedural unfairness referred to by counsel for the husband are in relation to criminal trials and as such, given the special nature of criminal proceedings, involving as they do the possible loss of liberty of citizens, are readily distinguishable from civil proceedings. The High Court in *Stead v State Government Insurance Commission [1986] HCA 54;* (1986) 161 CLR 141 at pp. 145-6 held:-

"The general principle applicable in the present circumstances was well expressed by the English Court of Appeal (Denning, Romer and Parker LJJ) in *Jones v. National Coal Board* [1957] 2 QB 55 at p. 67 in these terms:-

'There is one thing to which everyone in this country is entitled, and that is a fair trial at which he can put his case properly before the judge. ... No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it.'

That general principle is, however, subject to an important qualification which Bollen J plainly had in mind in identifying the practical question as being: Would further information possibly have made any difference? That qualification is that an appellate court will not order a new trial if it would inevitably result in the making of the same order as that made by the primary judge at the first trial. An order for a new trial in such a case would be a futility. For this reason not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial. By way of illustration, if all that happened at a trial was that a party was denied the opportunity of making submissions on a question of law, when, in the opinion of the appellate court, the question of law must clearly be answered unfavourably to the aggrieved party, it would be futile to order a new trial.

Where, however, the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference. True it is that an appeal to the Full Court from a judgment or order of a judge is by way of rehearing and that on hearing such an appeal the Full Court has all the powers and duties of the primary judge, including the power to draw inferences of fact (Supreme Court Rules O.58 rr.6 and 14). However, when the Full Court is invited by a respondent to exercise these powers in order to arrive at a conclusion that a new trial, sought to remedy a denial of natural justice relevant to a finding of fact, could make no difference to the result already reached, it should proceed with caution. It is no easy task for a court of appeal to satisfy itself that what appears on its face to have been a denial of natural justice could have had no bearing on the outcome of the trial of an issue of fact. And this difficulty is magnified when the issue concerns the acceptance or rejection of the testimony of a witness at the trial."

115. In the unreported decision of *C and O* delivered on 18 March 1997, the Full Court of this Court, at p. 22 held:-

"This ground does however raise the wider issue as to under what circumstances the Court is able to give assistance to an unrepresented litigant in the course of proceedings before it. Clearly a trial judge would be obliged to inform a litigant in person of the manner in which the trial is to proceed, the order of the calling of witnesses and the right which he or she has to cross examine witnesses. Similarly, I am of the opinion that a trial judge should explain to a litigant in person any matters of procedure relative to the litigation and generally assist him or her by taking basic information from witnesses called, such as, name address and occupation and then indicating to him or her as the trial proceeds when he or she may ask questions, whether in chief or in cross-examination and when final submissions are to be made.

Trial judges in my view should not give litigants in person legal advice, essentially for the following reasons: (a) It would be unfair to the other litigants in the proceedings, and; (b) Such advice may be given without full knowledge of the facts and therefore be of dubious assistance or perhaps even plainly wrong."

116. The question of the extent to which a Court should give advice or assistance to a self-represented litigant was considered by the New South Wales Court of Appeal in the case of *Rajski v Scitec Corporation Pty Ltd* (unreported, 16 June, 1986 - see: Butterworths Unreported Judgments BC8600928).

117. In that case Samuels JA, after observing that the self-represented litigant in that case was "entitled to that degree of protection and advice which the Court ordinarily affords to litigants in person" and, that the "extent depends upon the assistance to which the litigant appears to stand in need", proceeded to clarify the position thus:-

"In my view, the advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish, so far as this is possible, the disadvantage which he or she will ordinarily suffer when faced by a lawyer, and to prevent destruction from the traps which our adversary procedure offers to the unwary and untutored. But the court should be astute to see that it does not extend its auxiliary role so as to confer upon a litigant in person a positive advantage over the represented opponent."

118. On the same topic, in the same case, Mahoney JA said this:-

"When a party appears in person, he will ordinarily be at a disadvantage. That does not mean that the court will give to the other party less than he is entitled to. Nor will it confer upon the party in person advantages which, if he were represented, he would not have. But the court will, I think, be careful to examine what is put to it by a party in person to ensure that he has not, because of the lack of legal skill, failed to claim rights or to put forward arguments which otherwise he might have done."

119. The above statements by the two learned Justices of Appeal were adopted with approval by McLelland J (as he then was) in the Equity Division of the Supreme Court of New South Wales in *Tardy v The Secretary of the Department of Community Services and Health* (unreported - 9 October, 1990 - see: Butterworths Unreported Judgments BC9001906) and again by McLelland CJ (as his Honour had, by then, become) in the same court in *Studer v Konig* (unreported, 4 June, 1993 - see: Butterworths Unreported Judgments BC9301722). In the latter case his Honour, before referring to the dicta of Samuels and Mahoney JJA in *Rajski v Scitec Corporation* (supra) said this:-

"There can be little doubt that a litigant in person who has little or no legal training or experience is subject to a serious disadvantage in the effective conduct of legal proceedings, and in recognition of this fact, the Court takes such steps as are reasonably available to it to assist such a litigant to overcome or diminish that disadvantage.

But there are limits to how far the Court can properly go in providing such assistance, and the limits are reached when to go any further would either (a) compromise either the impartiality, or the appearance of impartiality, of the Court, or (b) result in procedural or substantive injustice to the other party."

120. To the same effect is the statement of Legoe J of the Supreme Court of South Australia in *Dawson v Deputy Commissioner of Taxation* (1984) 56 ALR 367 at p. 378:-

"Clearly it is the duty of the court to ensure that unrepresented defendants are given every opportunity to explore the rights which they may appear to have."

121. The principles which the above-mentioned authorities espouse, although arising out of the general law, must be looked at in the light of the special circumstances which surround litigation under Part VII of the Family Law Act. In cases involving children, where contact and residence are the issues, the Court is at all times constrained to act in the best interests of the child. Generally speaking, that obligation imposes upon the Court the necessity to conduct as full and complete an enquiry into the relevant issues as is possible, and not to be inhibited by restrictive procedures. We think it necessary for the guidance of judges and of the legal profession generally, to explain what was said in *C and O* (supra) and set out in some detail the obligations which we consider trial judges have when hearing cases involving unrepresented litigants and we now do so, as follows:-

1. To inform the litigant in person of the manner in which the trial is to proceed, the order of the calling of witnesses and the right which he or she has to cross examine the witnesses;

2. To explain to the litigant in person any procedures relevant to the litigation;

3. To generally assist him or her by taking basic information from witnesses called, such as name, address and occupation;

4. If a change in the normal procedure is requested by the other parties, such as the calling of witnesses out of turn, to explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course;

5. If evidence is sought to be tendered which is or may be inadmissible, to advise him or her of the right to object to inadmissible material, and to enquire whether he or she so objects;

6. If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights;

7. To ensure as far as possible that a level playing field is maintained at all times;

8. To attempt to clarify the substance of the submissions of unrepresented parties, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated. (*Neil v Nott [1994] HCA 23;* (1994) 121 ALR 148 at 150)).

122. It is undesirable for legal advice to be given to the litigant in person, essentially for the following reasons:-

(a) It may be unfair or have an appearance of unfairness to the other parties; and

(b) The advice given may not be with full knowledge of the facts;

123. In our opinion, the trial Judge failed to afford the husband procedural fairness in relation to the interposition of Dr Ward before the wife's evidence had been given. In particular:-

1. By failing to explain to him the consequences of and the possible undesirability, of Dr Ward's being called before the conclusion of the evidence from both the husband and the wife; and

2. By failing to advise him that he had a right to object to the early interposition of Dr Ward's evidence, and of the possible consequences of his failure so to object.

(D) Her Honour's refusal to allow the husband to call Dr Lepage

124. At the conclusion of her arguments Ms Nelson informed us, upon instructions from her client, that she sought to rely upon a further element of procedural unfairness in that her Honour refused the husband leave to call Dr Keith Lepage. The husband had indicated to the trial Judge that he wished to call further evidence. However, at that stage, no affidavit had been filed by the husband in relation to it. It does appear however, that the husband was seeking to obtain evidence from Dr Lepage in relation to Parental Alienation Syndrome. The husband had previously called Dr Craig and put questions to him in relation to such Syndrome and wished to call a further expert in relation to it. It must be said however, that Dr Lepage at no stage interviewed the child with either parent and therefore his evidence, in all probability, would have been of little assistance.

125. The husband, as we have said, did not make it clear precisely what evidence Dr Lepage would give. As the trial had already been in progress for many hearing days, her Honour, in our opinion, was correct in refusing to allow the husband to call this further evidence.

SUMMARY AND CONCLUSIONS

126. In summary, we are of the opinion that procedural fairness was denied to the husband in the proceedings before the trial Judge, in three important respects, viz:-

1. Her Honour failed to explain to the husband the possible undesirability of Dr Ward's being called to give evidence before the conclusion of the evidence of both the husband and the wife, and failed to advise him of his right to object to the early interposition of that witness and of the possible consequences of his failure so to object.

2. In the circumstances, her Honour erred in refusing the husband's request, on 9 September, 1996, to have Dr Ward recalled for further cross-examination on the Parental Alienation Syndrome.

3. Her Honour wrongly refused the husband an opportunity, on 10 September, 1996, to amend his application to seek a residence order in respect of the child L.

127. Whilst it is, of course, quite possible that even if her Honour had granted full procedural fairness to the husband in the three respects to which we have referred, the result of the case would have been no different. However, as the procedural unfairness related to issues of fact which were central to the proceedings before her Honour, we are unable to conclude that if the husband had been afforded procedural fairness throughout the trial, the result would have been the same. It follows that, in our opinion, the result of the case could have been different if the husband had not been denied the procedural fairness to which we have referred. Accordingly, in conformity with the principles discussed in *Stead v The State Government Insurance Commission (supra)*, the appeal must be allowed, her Honour's orders as to residence and contact set aside, and the proceedings remitted for rehearing before another Judge of the Adelaide Registry of the Court.

128. In relation to the appeal and cross-appeal in relation to settlement of property and spousal maintenance, it was generally conceded by counsel for both parties that in the event that the appeal in relation to contact and residence succeeded, there was no alternative other than for these appeals also to be allowed and the issues of settlement of property and spousal maintenance also to be remitted for rehearing before another Judge of the Adelaide Registry of the Family Court. This was necessary for the reason that her Honour made an adjustment in respect of the s.75(2) factors because of the continuing obligation which the wife would have pursuant to her Honour's orders in relation to the child L.

129. The order which the Court makes in relation to these issues will depend to a significant extent on which parent ultimately succeeds in his or her residence application.

COSTS OF THE TRIAL

130. We did not invite counsel to make oral submissions in relation to the costs of the trial, the appeal or the cross appeal, but will make orders requiring the parties to file written submissions in relation thereto in the orders which now follow.

IT IS ORDERED

1. That the appeal be allowed.

2. That the cross appeal be allowed.

3. That orders 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 of 19 December 1996 be set aside.

4. That the husband have leave to amend his application filed on 10 December, 1993, to include an application that the child of the marriage, L, reside with him.

5. That the application in relation to settlement of property, spousal maintenance, residence and contact be remitted to a single Judge of the Adelaide Registry of the Court for re-hearing.

6. That the appellant husband file and serve any written submissions which he seeks to make in relation to the appeal from the order in relation to the costs of the trial, and in relation to the costs of the appeal and the cross appeal within twenty (21) days.

7. That the Child's Representative file and serve any submissions she may wish to make in relation to the costs of the appeal within 21 days.

8. That the cross appellant wife file and serve any submissions on which she seeks to rely in relation to costs of the trial and in relation to the costs of the appeal and the cross appeal within a further period of twenty one (21) days thereafter.

9. That the appellant husband have leave to file and serve submissions in reply to those of the respondent within 14 days of the receipt of the wife's submissions.

10. That each party endorse on the cover sheet of any submissions filed pursuant to Orders 6, 7, 8 and 9, the date upon which those submissions were served upon the other parties.