"taking advantage" and particularly whether the latter concept is reduced in meaning to "exercise" or "use".[51]

A further amendment in 1977 relevant to section 46 was section 4E which defines "market" in terms of substitutability thus precluding a one brand market.[52] Due to the concession of counsel for C.S.B.P. there was no need for Fisher J. to discuss the elements of market, although the case does disclose some inconsistency in market definition. The allegation was that C.S.B.P. was in substantial control of the market for the supply of artificial nitrogenous fertilizers in Western Australia. His Honour held that there was control at least over the urea market south of the Tropic of Capricorn in Western Australia. Usually, control will more readily be found where the market is narrowly defined. However, it appears that C.S.B.P. had control in fact in both these markets. Also although urea may be a submarket[53] in the larger product market of artificial nitrogenous fertilizers it appears from related litigation[54] that the only other fertilizers substitutable for this product were a few compound artificial fertilizers which would not affect the dominance of C.S.B.P. even had the section 4E test been applicable.

Finally, it is suggested that the decision on the section 46 aspect is not satisfactory in terms of the policies discussed above. The actual determent of R.T.C. from the urea market because of C.S.B.P.'s timely price reduction indicates that the objectives of the Act have failed. This raises the question of whether there is room for an element of intent in this fact situation[55] particularly where conduct of a witness may tip the balance. Perhaps the place of the monopolist in the workable competition process should be re-examined.

Mary Burke

PREFERENCE FOR MOTHERS IN CUSTODY CASES: GRONOW v. GRONOW

In custody cases, it is now settled that the task of the court is to make whatever order will best promote the child's welfare.[1] But the concept of "welfare" is inherently indeterminate. Actual decisions often require difficult determinations of fact and predication about the future; they

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[51] B. Donald and J. Heydon, note 23 *supra*, 230.

[52] To overcome the narrow, non-economic dictionary definition of Joske J. in the *Top Performance* case note 22 *supra*, 467.

[53] *Re Queensland Co-operative Milling Association Ltd* note 6 *supra*, 516-518.

[54] *In Re Rural Traders Co-operative (W.A.) Ltd* [1979] A.T.P.R. 18,111, 18,120.

[55] R. Officer, *The Swanson Committee Report—Monopolisation, Price Discrimination, Merger and the Termination of Franchises—A Critique* (1976); *cf.* The Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (August 1976) 39, para. 6.4 (The Swanson Committee); The Trade Practices Consultative Committee, note 8 *supra*, para. 9.19.

[1] See *e.g. Barnett* v. *Barnett* (1973) 2 A.L.R. 19; *In the Marriage of Sanders* [1976] F.L.C. 75,363; *A.* v. *C.* [1970] A.C. 668.

also involve value judgments about what is good for children.[2] Consequently, as Aickin J. put it, "in many cases different minds may reach different conclusions".[3] The recent High Court decision *Gronow* v. *Gronow*[4] considers two issues that arise out of the highly discretionary nature of custody litigation: the role of an appeal court, and the extent to which judges should act on a principle or presumption that young children, especially girls, should normally be placed in the custody of their mothers.

The case involved a competition for the custody of a girl of four and a half. The parents were both professionals, the father a medical practitioner and the mother a nursing sister. Both were "loving" and anxious to care for the child, and, as Stephen J. said, "able to offer her high standards of material comfort and to surround her, as well as a single parent can, with the warm and caring atmosphere of home".[5] It appeared that the child would be well looked after by either parent, and was "a happy, well adjusted child".[6] Unfortunately, there was protracted litigation: there were three hearings in the Family Court between the time the parties separated (February 1977) and the decision of Evatt C.J. which gave custody to the father (June 1978) with whom the child had been living since the separation. However, the Full Court of the Family Court allowed the mother's appeal (Watson S.J. and Joske J.; Fogarty J. dissenting) and the child was transferred to her (January 1979). The father then appealed successfully to the High Court.

Two points arose on the role of an appeal court. First, it was argued for the father that the principles governing appeals had been changed by the decision in *Warren* v. *Coombes*,[7] where the High Court had held that an appeal court is as well placed as the trial judge to draw inferences from established facts. This argument was quickly dismissed. *Warren* v. *Coombes* was not concerned with *discretionary* judgments, especially where they turn on an assessment of the personalities of the parties, as did this custody case. Consequently, that decision had not altered the "settled principles of law" which governed appeals from discretionary judgments. The High Court did not find it necessary to state or discuss those principles at length, but stressed the need for an appeal court to exercise caution where the trial judge has made no clear errors and the matter is reasonably evenly balanced.[8] On the facts of *Gronow*, the High Court considered that it was very evenly balanced, and that the decision at first instance was "carefully reasoned"[9] and "made after a careful

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[2] For a valuable analysis, see R. Mnookin, "Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy (1975) 39 *Law & Contemp. Prob.* 226, 265-268.

[3] *Gronow* v. *Gronow* [1979] F.L.C. 78,344, 78,859.

[4] [1979] F.L.C. 78,844.

[5] *Id.*, 78,847.

[6] *Ibid.*

[7] (1979) 23 A.L.R. 405.

[8] Note 4 *supra*, 78,847, 78,859.

[9] *Id.*, 78,854 *per* Mason and Wilson JJ.

[10] *Id.*, 78,847 *per* Stephen J.

review . . . of all relevant circumstances".[10] In such a case, as Stephen J. pointed out, a decision either way would be sustained on appeal.

The High Court was therefore critical of the majority of the Full Court which allowed the appeal from the decision of Evatt C.J.[11] Joske J. in the Full Court had said that it was not an evenly balanced case at all, because the maternal grandmother was to be preferred to the paternal grandmother, and that a friendship which the father had with another family "was entirely unsatisfactory and lacked stability", though there were no apparent grounds for this view, according to Aickin J. in the High Court. Watson S.J. had said that Evatt C.J. had "offered considerable criticism" of the paternal grandmother; but in fact she had not. On another point, Evatt C.J. had given considerable weight to the fact that the wife displayed hostility to the husband in the child's presence. Watson S.J. had said of this that "human feelings being what they are, relationships between former spouses can change". Aickin J. considered that on such a matter the trial judge was much better placed than the appeal court; as a general proposition, Watson S.J.'s comment was "no doubt unimpeachable but it is also unhelpful in a particular case".[12] In general, the Full Court "did no more than exercise their own discretion and substitute their conclusions for that of the trial judge".[13]

The second matter concerning the role of an appeal court was the problem that, on the appeal, there is normally no evidence relating to the period since the trial judgment: yet this may be crucial in determining what is best for the child. In *Gronow* itself, over a year had elapsed, representing a quarter of the child's life. The High Court referred to English decisions[14] where appeal courts have allowed in evidence fresh evidence, and did not disapprove of this practice: it clearly intended to leave this matter to the Family Court to work out. But while it was agreed that such a procedure was inappropriate for the High Court, there was little consensus about how the problem should be resolved. Murphy J. would have remitted the case to Evatt C.J. to receive fresh evidence on the child's present circumstances.[15] Stephen J. would have stayed the operation of the High Court's order to enable the mother to apply for a variation.[16] However, the majority simply made the order allowing the appeal, and restoring Evatt C.J.'s order, so that the child was returned to the father. It appears that the mother did make a further application, which was successful.[17] It is most unfortunate for children to be shunted back and forth in protracted litigation, and the child would have been spared two additional changes of home had the suggested orders of Stephen J. or Murphy J. been made.

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[11] *Id.*, 78,848 (Stephen J.); 78,852 (Mason and Wilson JJ.); 78,856 (Murphy J.); 78,860 (Aickin J.).
[12] *Id.*, 78,860.
[13] *Id.*, 78,859.
[14] *In re B. (T.A.) (An Infant)* [1971] Ch. 270; *Corbett* v. *Corbett* [1953] P. 205.
[15] Note 4 *supra*, 78,857.
[16] *Id.*, 78,852.
[17] (1980) 29 A.L.R. 129.

However, the central issue arose from an argument that Evatt C.J. had erred in failing to give effect to "the principle or presumption that a young child, especially a young female child, is best left in the custody of her mother".[18] Nobody had put this argument in the proceedings before Evatt C.J. or in the Full Court. This is not surprising, since several Family Court decisions had firmly rejected any such principle:[19] Demack J. had said in an early case that "to look for disqualifying factors against the mother is to put the cart before the horse. The inquiry is essentially a positive one designed to promote the interests of the child . . .",[20] and this had been much quoted in later decisions. In *In the Marriage of Raby*[21] after a consideration of the matter, the Full Court said "the suggested preferred role of the mother is not a principle, a presumption, a preference or even a norm. It is a factor to be taken into consideration . . .".[22]

Nevertheless, there was some support for the "mother principle" in the cases. Some of the older judgments contain statements which, taken out of the context of the social conditions of the time and facts of the particular case, do seem to support such a principle.[23] And there was a remarkable statement by Glass J.A. (with which Street C.J. agreed) as late as 1976 that "[t]he bond between a child and a good mother . . . expresses itself in an unrelenting and self-sacrificing fondness which is greatly to the child's advantage. Fathers and step-mothers may seek to emulate it and on occasions do so with tolerable success. But the mother's attachment is biologically determined by deep genetic forces which can never apply to them".[24]

In their joint judgment, Mason and Wilson JJ. found "obvious difficulties" in the statement of Glass J.A.: "For one thing, it fails to take account of an adoptive or foster mother. For another thing, though his Honour's view of the relationship which subsists between mother and child is expressed to be based on biological and genetic links, the connection cannot be demonstrated."[25] Their Honours held that the principle "was not, and never had been, a rule of law. It is, or was, a cannon of common sense founded on human experience. The weight or value to be given to it has varied with the times and from case to case".[26]

At the same time, their Honours considered that the position taken by the Family Court appeared to draw on "sociological or psychological perceptions the truth of which are incapable of precise demonstration", which (the opinion of the experts being "notable for its fluctuation") provide "an insecure foundation from which to arrive at a generalised

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[18] Note 4 *supra*, 78,852 (Mason and Wilson JJ.).
[19] *E.g., In the Marriage of Mathieson* [1977] F.L.C. 76,215.
[20] *In the Marriage of Jurss* (1976) 9 A.L.R. 455.
[21] (1976) 12 A.L.R. 669.
[22] *Id.*, 682.
[23] *E.g., Kades* v. *Kades* (1962) 35 A.L.J.R. 251; *Storie* v. *Storie* (1945) 80 C.L.R. 597.
[24] *Epperson* v. *Dampney* (1976) 10 A.L.R. 227, 241.
[25] Note 4 *supra*, 78,854.
[26] *Id.*, 78,853.

conclusion".[27] Their Honours found an acceptable middle ground in the Family Court's statement in *In the Marriage of Hobbs* that the principle was "an important factor".[28] Changes in parental responsibilities have reduced its strength, but have not eliminated it "or reduced its significance to a consideration which is less than important".[29]

In particular cases, the judgment continues, its weight will depend on the facts: "Where the mother stays at home and looks after the children while the father works, and has little to do with them, the factor has more weight than it has in the case where the mother works on a full-time basis and makes other arrangements for the care of the child."[30]

Murphy J. referred in more detail to the historical changes, especially the entry of married women into the work force, and quoted the passage from *Raby* with apparent approval. In His Honour's view, the mother principle "has been greatly weakened in recent times . . . It may well be that the consistency and warmth of the relationship rather than the sex of the custodial parent, is the governing factor in the welfare of a child".[31] His Honour regretted that the matter had to be decided on little evidence; and hoped that the Institute of Family Studies would supply material on which an informed decision could be made.

The *Gronow* decision is welcome in that the High Court firmly rejected an invitation to resurrect, or create, a strong presumption that young children are better off with their mothers. Acceptance of the invitation would have been a serious setback in the development of this area of law, in which the golden thread is the careful evaluation of the whole evidence bearing on the child's welfare, rather than the application of presumptions or rules of thumb which tend to produce arbitrary decisions.[32] Both on the role of the appeal court and the "mother principle", the Court has affirmed this golden thread: appeal courts should be slow to intervene because of the superior position of the trial judge in evaluating the whole situation; and any presumption in favour of mothers generally will yield to evidence about the *actual* qualities of the parents and other relevant people in the particular case.

In view of this last point, there is a curious unreality about the discussion of the "mother principle". As Stephen J. stresses, there is no room for any such presumption where there is evidence upon which the court can evaluate the merits of the mother in question. There would be little excuse for proceeding in such a case: the Family Court can call

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[27] *Id.*, 78,854. Typical judicial reactions to expert evidence may be found in *Epperson* v. *Dampney* (1976) 10 A.L.R. 227. There is some empirical evidence on fathers: G. Russell, "Fathers as Caregivers" (1980) 1 *Aust. J. Sex Marr. & Fam.* 101. It appears that in the Family Court, fathers are increasingly winning custody in approximately 40% of contested cases: Report of the Joint Select Committee on the Family Law Act, *Family Law in Australia* (1980) vol. 1, 44.

[28] (1976) 12 A.L.R. 443, 447.

[29] Note 4 *supra*, 78,854.

[30] *Ibid.*

[31] *Id.*, 78,855-78,856.

[32] See *e.g.*, *In the Marriage of Mathieson* note 19 *supra*; R. Chisholm and C. Petre, "Of Children Custody and Cliches" [1976] *A.C.L.D.* 233.

for family reports[33] or appoint a representative for the child[34] to ensure that it is properly informed. It is hard to see why a judge would ever have to assess, *in general terms*, whether children are better off with their mothers.

Perhaps the High Court could have fruitfully considered whether it is helpful to speak of a "mother factor" or "mother principle" at all. Many "factors" are important in custody cases. For example, judges generally think that it is best for brothers and sisters to be kept together, if possible. This is sensible, and a judge who split up the children without stating good reasons for it might well be reversed on appeal. Yet nobody has found it necessary to invent a "sibling principle" or worry about its strength. It is not obvious why the relationship between mothers and children should be treated any differently. In this context, it is interesting to note that the Select Committee on Family Law recommended that the legislation should direct the court to take a series of matters into account: while there are references to the conduct of parents and their wishes, there is no reference to "the mother principle" in any form.[35]

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[33] Family Law Act 1975 (Cth) s. 62(4).
[34] *Id.*, s. 65.
[35] Report of Select Committee on the Family Law Act, note 27 *supra*, 59.

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