dweller in Alice Springs and drinking too much, I am unable to find that she was guilty of persistent neglect. None of the other grounds in section 27 is made out and the application to dispense with consent therefore fails. It follows that the application for adoption by the McMillens also fails. This is hard for the McMillens who, as I have said, appear to me to be admirable people. Neither the result nor anything I have said should be taken as criticism of any sort of either of them.

I have been critical of some actions of the Department of Social Welfare. It seems to me that ordinary concepts of justice require that if an allegation is made that a child is under unfit guardianship then the mother or other guardian must be given adequate notice of the Children's Court hearing at which the link between mother and child is likely to be severed, if not permanently, then for an appreciable time. So far as Aboriginal women are concerned, time and trouble must be taken to ensure that the mother understands what is alleged against her and what the result of the proceedings may be. The assistance of the Aboriginal Legal Aid Service should be enlisted for this purpose. A further point which arose in these proceedings is that the Welfare Department had made no investigation into Anupa's present circumstances and were not in a position to confirm or deny the evidence given on this topic. I would have found it very helpful to have a report from a welfare officer in this case but, of course, I have the evidence of the community adviser whom I accepted as an honest objective witness. In future I think that the Department should ensure that it has up-to-date information for the Court in any contested custody application. The fact that an order was made in May 1975 is interesting but little more since I do not know the basis for the making of the order and in any event only one side of the position was put before the Magistrate.

I should also say that it is my view that even if Anupa were shown to have persistently neglected the child some eighteen months ago this would not necessarily justify the making of an order dispensing with her consent if I were satisfied as I am that given an opportunity to look after Freddie she would not neglect him again.

I am asked by counsel for Anupa to make an order pursuant to section 17 of the Ordinance that Freddie be returned to her care and control. I can see no reason in the present circumstances why such an order should not be made and I therefore order accordingly.

A COMMENT ON THE MATTER OF FREDDIE:

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Children's Welfare
Association of Victoria)

Reported cases of adoption are rare in Australia, possibly because generally the Courts merely have the function of rubber-stamping a **fait accompli,** arranged, sanctioned and usually put into effect long beforehand. It is therefore refreshing to come across this well considered and humane judgement of Forster J. And although each adoption case is unique, and it is dangerous to rely over-much on previous cases as precedents, this case is of considerable general interest.

There are two very important points discussed in the case, and several **obiter dicta** of significance to lawyers, adoption agencies and others dealing with adoptions, throughout Australia. The legislation under review in this case is similar in all States, and thus the decision is relevant throughout Australia

The first point is the question of jurisdiction, that is, whether the court has power to make an adoption order at all. Now, jurisdiction in adoption is based on:—

(1) either domicile or residence of the potential adoptive parents, and

(2) physical presence of the child in the particular State.

Some readers may have difficulty in understanding the distinction bet-

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ween domicile and residence. Basically, domicile means residence in a jurisdiction, together with the intention of remaining there, at least indefinitely, if not permanently. A person is born with a domicile of origin. In the case of a child born within marriage, this is the domicile of his father at the time of his birth, in the case of a child born outside marriage, this is the domicile of his mother. This domicile of origin remains with a person unless it is altered by a domicile of choice, that is by going to reside in another country with an intention to live there permanently. If the domicile of choice is lost at any time, then the domicile of origin revives. Thus a person maintains a domicile of some sort at all times during his life. It is impossible for a person to be without a domicile. A person living in Australia may be domiciled in **Australia** for the purpose of a Federal law, e.g. marriage/divorce, and in a **particular State or Territory** for other purposes e.g. adoption.

Adoptive parents

As the proposed adoptive parents in this case were American citizens, and intended to return to Maryland at the end of the husband's contract of employment, they had not set up a domicile of choice in the Northern Territory, and remained domiciled in their home State, Maryland, U.S.A. But it was argued that jurisdiction in this adoption case could be based on "residence". "Residence" is a more temporary concept than domicile. Forster J. found that the potential adopters, although domiciled in Maryland, were resident in the Northern Territory. It is impossible to criticize his reasoning. Residence is a question of fact, and a two year period was held to be sufficient to classify as residence in the Northern Territory.

There is no doubt that this decision is completely right. It would hardly have required comment were it not for the fact that it is on its face irreconcilable with two previous Australian cases which seem to have gained a great deal of ground, and are being relied on as persuasive authorities.

The first of these is **Re An Infant** (1973) Qd. R.116, a Queensland case in which an Australian couple who were stationed in Malaysia in the R.A.A.F and visited Djakarta for a mere ten days were held to be resident there. They purported to adopt a child in Indonesia, and it was held by Williams J. that the Indonesian court had jurisdiction on the basis of that residence, so that the Indonesian adoption must be recognized in Australia. It is on the strength of this case that certain Australian lawyers have been advising that adoptions effected by transient Australians in Asian countries must be recoginzed.

Monstrous

It would be monstrous if the word, "residence", in section 8 of the Adoption Act (the basis of jurisdiction from Australian Courts) were interpreted differently from "residence" in section 42 (recognition of foreign adoptions). The two sections are **in pari materia** i.e. normally the same word in each section should be interpreted in the same way. The true basis of comity in international law is that one country should recognize a jurisdiction which it would itself have claimed for its own citizens.

Accordingly, this careful decision of Forster J. in **In the Matter of Freddie** is an important authority on the question of recognition of adoptions. There is little doubt that the Queensland case, **Re An Infant,** is categorically wrong and cannot be reconciled with **In the Matter of Freddie.** Residence must import a much greater degree of permanence than was given by Williams J.

Must recognize

Accordingly, the suggestions that one has heard frequently that Australian courts must recognize foreign adoptions even though the Australian adoptive parents have blatantly been transient visitors to the country of adoption may be discountenanced.

Second point

The second point of significance, concerning the question of jurisdiction, arises from the suggestion in the case cited in **In the Matter of Freddie, Re G. (an infant)** (1968) 3 N.S.W.R. 483, that in some way the word, "residence", should be flexibly interpreted in the light of the mischief which the section purports to counter. It was suggested by Myers J. in **Re.G.** that, because of the increasing recognition of the special tie between the child and its natural mother, the purpose of the section was to prevent a child being adopted by parents who were likely to leave the jurisdiction, and thus make it difficult for the child to establish and identify with his natural mother if he chose so to do. As is well known, there is considerable pressure for a change in the law to enable adopted children to identify their natural parents and make contact with them. A change of this nature has recently been made in England.

Not relevant

It is suggested that the decision in **In the Matter of Freddie** simply means that this consideration is not relevant to the question of whether the Australian court has **jurisdiction** to make the adoption order.

Nevertheless, the fact that the proposed adoptive parents are likely to leave the country is a circumstance which might militate against **making the order** in the best interests of the child, as indeed it did in **In the Matter of Freddie.**

The most substantive issue in the case is the question of the circumstances in which consent of a natural parent should be dispensed with.

It will be noticed that in this case there is no mention of the consent of the father of the child. This is a

troubesome matter, as the law seeks to give greater recognition to fathers, and indeed in many States has sought to abolish the concept of illegitimacy. It is somewhat surprising that there is no reference to Freddie's father, not even a mention as to whether an attempt was made to find him.

The question of parental consent to adoption is one which has caused a great deal of concern to workers in the field, but on which has been a dearth of reported cases in Australia. The basic rule is that a parent has a right to give or withhold consent to the adoption of his child, unless this is forfeited. The legislation of all States sets out five grounds on which the consent of the parent may be dispensed with. The first four grounds all import an element of misconduct on the part of the parent. On its face, the fifth ground gives **carte blanche** to the judge. It reads as follows: "if there are any other special circumstances by reason of which the consent may be properly dispensed with".

Interpreting

Now there are two possible ways of interpreting this section. The first is by using a technique very common to lawyers, namely interpreting the last, very wide precept in accordance with, and in harmony with, the other four preceding injunctions. This method of construction, known as the **ejusdem generis** rule, narrows the interpretation of wide statutory precepts. It requires that they be interpreted in a similar fashion to the preceding terms. Using this method of construction, notwithstanding the wide language of the subsection, a court might interpret the section to mean that some element of fault, akin to the fault in the preceding requirements, is required before the consent of the parent can be dispensed with.

The alternative solution is to interpret the words literally so as to give the court a complete discretion.

It is surprising that **In the Matter of Freddie,** the highly significant House of Lords case, **In re W.** (1971) A.C. 682, was not cited. In the absence of any binding Australian case, this decision of the highest court in England must be regarded as highly persuasive authority. In **In re W.,** the House of Lords, interpreting a similar clause, held that no fault need be shown; the true criterion was whether a reasonable parent should preceive that the best interest of the child would be furthered by an adoption order rather than by reversion to the natural parent. If he should so perceive, then his refusal to consent would be unreasonable.

English clause

In fact, the English clause is less open-ended than the Australian section of the discussion, for it lays the ultimate decision on the "reasonable parent". Yet no mention was made of this significant decision. Nevertheless, it seems clear that Forster J. did approach the interpretation of this clause on the assumption that it gave him a complete discretion. For he did discuss the merits of adoption by the American applicants, and weighed them against the advantages that the child would have been brought up by a single Aboriginal mother.

Refreshing

While the decision is refreshing in its refusal to give predominance to the material advantages, there may be some concern amongst readers that no psychiatric evidence appears to have been tendered. Conspicuously absent was any discussion in the case of the effect of changing the status quo, of disrupting the existing loving parental relationship. In "tug-of-love" cases, this has often been a very significant theory of social work and use it as an almost binding rule. For instance, the Courts at one time flirted with Bowlby's theory of maternal deprivation course, the theory has been so refined that it can hardly be said to be a rule at all. The present fashion seems to be the "status quo" theory. I have lost count of the number of times in which courts have cited an article on this subject in the Law Quarterly Review by Naomi Michaels. In the light of its popularity in legal circles, it is rather surprising to see that very little attention is paid to it in **In the Matter of Freddie.** But, otherwise, Forster J. seems to have considered all the major relevant factions, and weighed them in a skilful and balanced way. A further valuable point emerging from the case is that the finding of neglect by The Children's Court in proceedings for termination of parental rights is not **res judicata** as against the mother. In other words, the decision of the Children's Court did not necessarily compel the judge in the adoption proceedings to an inevitable finding of neglect under section 27 (1) (e) of the Adoption Act. Of course, the Children's Court proceedings dealt only with the question of "neglect", not that of "persistent neglect" as is required in the Adoption Act s.27 (1) (d). It is possible for each court to have acted properly in accordance with the particular statute under which it was operating. However, it is obvious that a finding of neglect by the Children's Court will be **relevant** but **not binding** on the adoption court.

Assessment

This case is a very refreshing example of the court's approach to the assessment of the child's best interest. It must be remembered that each adoption case is a case in its own right; it is dangerous to use previous cases as precedents,

because of the difference in the personalities of each case.

Nevertheless, this case illustrates that Judges are prepared to look beyond obvious material benefits in considering what is in a child's best interest. This judge showed a keen awareness of the signficance to an aboriginal of remaining in his own culture.

It is also a valuable corrective to the feeling that people in the adoption field may have had since the N.S.W. Case, **Re. K** (1973) N.S.W. L.R. 311, that the law had an undue preference for the middle-class, stable married couple.

News from the field

Queensland

CHILD CARE WEEK 1977

Child Care Week 1977 will be held on the week commencing 23rd October, 1977. A meeting of the Committee will be held at "Warilda" on Monday, 7th February, 1977, at which it is hoped that planning for Child Care Week 1977, can begin in earnest.

Office bearers and members of the Child Care Week Committee are:—

Superintendents' and Matrons' Association

Chairman **Reverend C. Schloss;** Vice Chairman **Mr M. Alexander,** Secretary/Treasurer **Miss C. Cooper;** From the City of Brisbane Lions Club **Mr Van De Baan;** From the Department of Children's Services, **Mr A. Sandaver;** From the Superintendents' and Matrons' Association, **Major Davids**

COMMITTEE ON RESIDENTIAL CARE EDUCATION PROJECTS

This Committee met again on 23rd February; some points to note are:—

* all residential care facilities for children in care will be recommended to the Minister for Education for nomination as eligible to receive **grants;**
* guidelines and application forms will be distributed soon;
* $75,000 is available for distribution by 30th June, 1977, and at least a further similar amount by 31st December, 1977;
* closing dates will be 29th April and 27th August, 1977;
* contact Don Smith, Brigadier Reddie or Brother Ignatius for further information.

THE CHRISTIAN CENTRE (CHURCHES OF CHRIST), EIDS QLD)

The two cottages operated by the Churches of Christ at Eidsvold for Aboriginal children have been licensed under the Children's Services Act. The Governing Authority is the Churches of Christ Federal Aborigines Mission Board. (Secretary, Mr D.P. Butler, 26 Marradong Street, Mt Lawley, Western Australia) and the person in charge is Mr Lyle Morris. The work has operated for some time.

ENDEAVOUR TRAINING FARM, RIVERVIEW
OPAL JOYCE WILDING HOME, EIGHT MILE PLAINS

These two facilities have now closed and have ceased to operate as Residential Care services for children and young people.

DEPARTMENTAL STAFF

With the absences in the Department, the Residential Care Section continues to have people acting in all senior positions. The Senior Child Care Officer (Don Smith) is acting as Deputy Director of the Department during Mr McAllister's absence and positions in Residential Care are being filled as follows:—

Senior: **Cheryl Cooper.** Supervisors: Boys facilities, **Ian Schmidt;** Training Centres and Hostels, **Alec Lobban;** Care and Protection facilities, **Shane Ryan;** Care and Control Intake and Court, **Iltyd Loveluck.**

ASSOCIATE DIPLOMA IN RESIDENTIAL CARE

The second intake into this course at the Kelvin Grove College of Advanced Education is underway this semester.

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