# YOUTH AFFAIRS

## Children in the Family Court The new law

In 1989 English child law underwent a dramatic overhaul, with the introduction of the *Children Act 1989* (UK). That legislation had two major goals: the harmonisation of public (for example, child protection) and private (for example, parenting disputes and adoption) child law and the reduction of state involvement in child welfare matters. While Australia's Commonwealth Government is constitutionally constrained from intruding into much of the public child law arena, the private law has recently been overhauled by amendments to Part VII of the *Family Law Act 1975* (Cth). This 'new law' is largely borrowed from the UK's *Children Act*, although there are some significant points of departure.

Much of the debate that led to the Act's amendment was outlined in a report by the Australian Family Law Council.[1] The main complaint about the existing guardianship/custody/access regime was that many non-custodial parents felt they were effectively excluded from the parenting enterprise. The Report, having concluded that 'cooperative parenting after separation is a desirable goal' (p.37), went on to say that:

> (l) Cooperative parenting will be enhanced by the use of terminology that discourages ideas of ownership of children;
>
> (m) In the end result, the division of post-separation parental roles into custody vs access reinforces the win/lose attitude and discourages ongoing parental responsibility. [p.37]

These concerns have been addressed predominantly through the introduction of:

- the notion of parental responsibility,[2] which is shared jointly by parents and which survives the parents' separation or divorce,
- residence and contact orders which replace those for custody and access (the concept of guardianship having been eliminated),
- specific issues orders, which can be sought to resolve parenting disputes not concerning residence or contact, and

  parenting plans, which the parties can register with the court so that their agreement is enforceable.

The new law emphasises that both parents have a continuing responsibility towards their child. If the parents cannot agree where the child shall live, then a residence order will be made. All a residence order does is to determine this one issue, with both parents continuing to have joint responsibility (and thus decision-making power) for the child. Likewise, a contact order can be made where this issue cannot be amicably resolved.

### Rights of children to co-operative parenting

While these changes may be welcomed by some parents, do they really address the needs of children involved in Family Court proceedings? That the legislature had child welfare clearly in its sights when framing these provisions is made patent by the new s.60B:

> the object of . . . Part [VII] is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfill their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

The legislature has identified the principles underlying this object to be that:

- children have a right to know, and be cared for, by both parents,
- children have a right to regular contact with both parents and with other significant people,
- parents share their duties and responsibilities concerning the care, welfare and development of their children, and
- parents should agree on the future parenting of their children (s.60B(2) FLA).

The ideal of co-operative parenting outlined in the last two principles must surely be a crucial factor in the attainment of Part VII's broader stated object, namely the improvement of a child's developmental environment. In fact, where co-operative parenting is genuinely achieved, the rights expressed in the first two principles might be presumed to be reasonably safe.[3] Just how far, though, do the other new provisions go in the promotion of this goal of post-separation co-operative parenting?

One of the major thrusts of the amendments has been to ensure, legally at least, continuing joint parental responsibility after separation. This directly addresses the claim that under the old regime non-custodial parents had little legal basis for participating in the day-to-day care of their child. Giving both parents this responsibility will not, of course, guarantee co-operative parenting. It is, however, an important statement of principle. Children are entitled to expect that *their* right to joint parental support is recognised equally in this area as it is, say, in the child maintenance arena. What will be necessary to give full effect to this new concept is some judicial strength. It would be quite easy to reproduce the old system by giving to the residential parent (via a specific issues order) the day-to-day responsibility for the child. That is, bundles of rights and responsibilities akin to guardianship and custody could be divided between the parents in an effort to reduce future litigation. While this is technically possible, and possibly appropriate in some cases, by and large it would seem to be a retrograde approach, as the risk of the 'floodgates' opening would seem to be small. In the first place, even under the old system, a custody order was not a bar to future litigation over some specific point concerning parenting. Secondly, where the issue involved is relatively trivial the costs of litigation would normally act as a sufficient deterrent to most parents. Finally, as s.60B highlights, children have a *right* to be cared for by *both* parents, and only where the child's best interests dictate it, should the parents' opportunity to fulfill that obligation be fettered.

This explicit emphasis in the amendments on children's rights points us to the wider significance of the co-operative parenting goal. The wording of s.60B intentionally mimics various articles of the UN Convention on the Rights of the Child. The promotion of co-operative parenting thus not only addresses public demands for change, it is a strategy for meeting Australia's obligations under the Convention.

Assuming then that joint parental responsibility together with bare residence/contact orders becomes the judicial norm, how is this supposed to foster co-operative parenting? Will this regime reduce hostility and how will it cope with parental disagreements? These changes may foster co-operation simply by encouraging residential par-

ents to accept the role of the other parent and by empowering the non-residential parent to participate more fully in parenting. As was suggested above, it is unlikely that non-residential parents will use this as an opportunity to undermine the residential parent over trivial matters. Where, however, the issue at stake is more significant (say, for example, religion or schooling) then the mere introduction of joint parental responsibility will have little effect on the dispute resolution process.[4] Such matters historically came under the umbrella of guardianship, and were thus usually joint decisions anyway. The only change under the new regime will be that any order needed to resolve the dispute will be called a specific issues order.

## No-order rule

In amending the *Family Law Act*, the legislators specifically rejected a central tenet of the UK regime: the no-order rule. The *Children Act* prohibits a court from making an order under that Act unless it can be shown that the child will be better off if that order is made (s.1(5)). It is commonly said that this section was introduced to stop the widespread practice of making unnecessary consent parenting orders as part of the divorce package. The Family Law Council was not convinced of the value of this non-interventionist provision, seeing only (although not explaining) its 'inflexibility'.[5] However, anecdotal evidence in the UK suggests that it is the no-order rule, rather than the change to residence/contact and joint parental responsibility, which is having the most significant impact on parenting disputes in that jurisdiction. Many English lawyers and judges apparently take very seriously the obligation to impress on parents their duty to try to resolve parenting disputes themselves. Furthermore, routine consent orders will not be made — if the parents have reached agreement then there is seen to be no need for a court order to that effect.

## Parenting plans

It is hardly surprising, however, that a different approach was taken in Australia, given the traditionally interventionist bent of the *Family Law Act,* and thus the Family Court. Take, for example, parenting plans, which have no equivalent in the UK regime. Not only has the formalisation of parenting agreements been encouraged in Australia, an avenue has been provided for them to operate as (and thus be enforced as) court orders. How could the Family Court consent (as it must) to the registration of a parenting plan, if faced with the no-order rule? While UK parents who have reached agreement are assured that a court order is uncalled for, in Australia judicial supervision is courted. One of the advantages of parenting plans is, of course, the visibility of the agreement's terms. A criticism of the English provisions has been that they promote any agreement, regardless of its content.[6] Parenting plans, on the other hand, requiring as they do the court's consent before registration, are susceptible to judicial scrutiny, although the extent to which the court will avail itself of this opportunity remains to be seen.

So, will parenting plans promote co-operative parenting? While the process of registration may to some extent allay the fears of English critics, the whole notion of registered parenting plans seems to ignore the fundamentally mutable character of parenting. Parenting is not a static occupation. The complexity of the task stems, in part, from the continually changing conditions under which it is performed. While parenting plans may be a good starting point, what is to be gained by having them set in stone? While these plans can be revoked (and a new plan registered) they cannot be varied by the parties (s.63D FLA).

Registrable written agreements are, of course, something that the Family Court of Australia is very comfortable with, both in respect of children and property matters. Before the introduction of parenting plans there existed the (registrable) child agreement. Those agreements typically looked something like consent orders, detailing guardianship, custody and access rights. From a lawyer's perspective they were seen to provide some measure of protection for the (parent) client. Some effort will thus be required to make parenting plans live up to their name (that is, to be plans for the future parenting of children) rather than allowing them to simply reproduce the role of the child agreement. Lawyers are unlikely to be the ones making that effort, as it is not within the sphere of their expertise and yet it will be lawyers that many people turn to when finalising their separation. And even if useful parenting plans are devised (perhaps with the assistance of counsellors), what is to be gained by their registration? Will that increase or decrease future co-operative parenting? Moreover, a really good parenting plan will surely have many provisions that are simply not enforceable.

Consider for a moment the approach being adopted by English local authorities for children in foster homes. Under their new 'Looking After Children' scheme, authorities are trialing the use of detailed forms to monitor, and hopefully improve, the care of these children.[7] These lengthy forms vary depending on the age of the child concerned and deal in detail with the issues most relevant to that particular age group. Most importantly, they are seen as a structured conversation between the carer and the authority, with every question designed to generate further discussion. Caring for a foster child no doubt highlights the tensions inherent in parenting, as there are usually two sets of carers and a local authority involved. However, we should also be thinking innovatively about the multitude of children struggling with what is now, after all, a common event — parental separation. Will (or should) parenting plans develop beyond the limits of their predecessor, the child agreement? Who should be assisting parents in drafting them and how should they be utilised as the child develops? What is to be gained by encouraging parents to involve the court in post-separation parenting? If resort to the court were to be reduced, as in the UK, how might we most effectively redirect resources to improve co-operative parenting? These are difficult questions, but they will need to be addressed if the recent changes are to live up to expectations.

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### References

1. *Patterns of Parenting After Separation,* AGPS, Canberra, 1992.
2. This term has been defined to mean 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children': s.61B FLA.
3. Although there might conceivably be a situation where a grandparent, for example, sought contact in the face of joint parental opposition. Even *with* s.60B(2) it is likely that such an application would be unsuccessful.
4. There are, of course, other aspects of the amendments which might impact on this process, such as the role of what is now called 'primary dispute resolution': Part III, FLA.
5. Family Law Council, *Letter of Advice to the Attorney General on the Operation of the UK Children Act 1989,* 1994, pp.4-5.
6. See for example Bainham, Andrew, 'The Privatisation of the Public Interest in Children', (1990) 53 *MLR* 206, p.210.
7. Clare, Mike, 'The 'Looking After Children' Project in WA and in the UK', *Australian Association of Social Workers Ltd Western Australian Branch Conference*, Perth, 24-26 September, 1996.