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RECENT DEVELOPMENTS IN SHARED PARENTING AND JOINT CUSTODY
A Personal View From the Court

JUSTICE ALWYNNE ROWLANDS AO

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Introduction

In recent years the Federal Government has shown a particular interest in child custody arrangements, following parental separation, with a Committee of the House of Representatives looking into the matter and the Executive releasing a discussion paper seeking input from the community in relation to wide-ranging reforms to the family law system. The Family Court of Australia has responded to both these consultation processes and I will refer to this.

First it is important that I make clear that the submissions emerging from the Court do not make any recommendations as to what the Government should do. It is for them, not the Court, to determine questions of policy which Parliament may then incorporate into legislation.[1]

Both the profession and the community will appreciate that we, as part of the Third Branch of Government, are umpires not legislators in the constitutional scheme under which a democratic Australia functions.

It is also useful to begin by clarifying terminology. Following the example of the *Children Act (UK)* the term 'custody' was removed from the *Family Law Act* in 1996 as part of an attempt to eliminate the view of children as property to be 'won' in a parenting dispute.[2]

Nevertheless the term 'joint custody' persists largely due to the prevalence of the phrase in the material coming from the United States. This is further complicated by the need to distinguish between:

[1] The Family Court of Australia Submission to the House of Representatives Standing Committee on Family and Community Affairs *Every Picture Tells a Story: Inquiry into Child Custody Arrangements in the Event of Family Separation*, 16 August 2003, p. 2.
[2] The Family Court of Australia Submission, 16 August 2003, p. 5.

(a) 'joint legal custody' denoting shared parental rights and responsibilities which include arrangements for schooling and elective medical treatment; and
(b) 'joint physical custody' referring to the shared physical possession of a child.[3]

Current law in Australia firmly incorporates a concept of shared legal parental rights and responsibilities so that each parent has parental responsibility for their children in the absence of a Court order to the contrary.

This, in any event, is the norm in orders of the Court although the worth and strength of such orders is not fully understood or exercised by many.

However the phrases 'joint custody' and 'shared parenting' are linked, more often, to the idea of a physical sharing of the children typically on an equal basis.

Judicial consideration of 'shared parenting'

The Family Court rarely makes orders for children to be physically shared by their parents and the reasons for this reluctance may be found in a number of decisions. They follows the general tenor of expert evidence provided to the Court by child psychiatrists, psychologists, social workers and Family Court counsellors.

Almost 15 years ago I delivered a judgment in *Padgen and Pagden* (1991) FLC 92-231 in which I considered whether the existence of certain preconditions could establish a standard for the implementation of 'joint custody'. This stemmed from a submission based upon an academic paper by Schepis and Formica (1990) as appears in the report of the case.

This case concerned the custody of a 13 year old child. The husband proposed a joint custody arrangement in which the child would reside with each parent for a block period being either six months or alternate school terms.

The husband contended that the existence of certain preconditions meant that joint custody was appropriate. The preconditions being the parents' geographical proximity,

[3] The Family Court of Australia Submission, 16 August 2003, p. 4.

compatible parenting values, the child's adaptability, an ability of both parents to properly supervise the child, mutual trust, co-operation and good communications.

I held that these preconditions provided a useful starting point. However the outcome must always depend upon the facts of the particular case and helpful criteria could not overshadow the factors recited in the legislation in the search for where the child's best interests lay.

Further given that the existing arrangement was functioning well and there were no apparent advantages to altering it, the child's welfare seemed to be advanced by maintaining the status quo rather than embarking upon a significant change at that time.

I also noted that there was some rift between the parents in mutual trust, co-operation and good communications, and cited *Hall v Fordyce* (unreported) to illustrate that in cases where there is any degree of conflict between the parties judges had not embraced the concept of shared parenting. In that case Kay J had said:

> *"I think it is fair to say that Judges of this Court have not generally embraced the concept of shared parenting in cases where there is any degree of conflict between the parties"*

Some 14 years before the Full Court in *Foster and Foster* (1977) FLC 90-281 at 76,511 had said:

> *"The best interests of a child and the full promotion of his welfare are not generally served by orders for joint custody unless his parents have demonstrated that degree of maturity and such an ability to communicate and co-operate with each other as to give a court some confidence that the order for joint custody will be workable, or that, with assistance from the counselling services of this court, it can be made workable."*

In *Forck and Thomas* (1993) FLC 92-372 Nicholson CJ explored the possibility of shared parenting arrangements and quoted the following American research finding of Steinman (1981) at 79,868:

> *"The most crucial and beneficial components of joint custody lie in the attitudes, values and behaviour of their parents. The cooperative and respectful relationship between the parents for the purpose of child rearing and each parent's support of the child's relationship with the other parent seem to be more significant in helping*

the children to adjust than making sure that time the children spent with each parent was precisely equal".

His Honour did not make a joint custody order, the parties had communication difficulties.

In a very recent case, *C v B* [2005] FamCA 94 Bryant CJ at para 68 said:

> *"Notwithstanding the hostility between the parties and their lack of communication which might in may cases mitigate against a shared arrangement, there are overriding benefits for [the child] in spending more time at his father's home, and in the circumstances I am satisfied that it is in his best interests to grant the application of the husband and order that he live with the husband and wife and share any school holidays between them."*

Her Honour mentioned the classic problem 'communications' but, relying on the 'best interests' principle, granted joint residence on a week about basis in the circumstances of that case.

The case involved a 13 year old boy who had been living with his mother. He had been defiant and had hit her. The Family Court counsellor recommended 50% shared parenting so that his medical practitioner father could provide a greater exposure to male company and more relaxed environment for his needs. The boy had no views on the matter.

Other judgments exploring shared parenting include:

- *H and H-K* (1990) FLC 92-128 a further rare example of the Court determining that a shared parenting order was more appropriate than sole custody

- *M v M* [2001] FamCA 1688 which has an extensive discussion on both decisions and research on shared parenting

- *M v G* [2003] FamCA 796 which canvasses most of the decisions

- *H v H* (2003) FLC 93-168 in which Ryan FM sets out a number of relevant factors to consider in proposals for shared parenting

- *M v M* [2005] FamCA 207 which also summarises decisions

Change on the Horizon

The House of Representatives Standing Committee on Family and Community Affairs began an inquiry in June 2003 to, among other things, explore whether a presumption of joint residence, that is 50 / 50 shared care should be incorporated into Australian family law.

The terms of reference for the Standing Committee included:

> *"(a) given that the best interests of the child are the paramount consideration:*
>
> *(i) what other factors should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted…"*[4]

In the submission made by the Family Court to this inquiry the Court indicated that its primary objectives were to:

> *"…explain the relevant provisions of the…Act…and the operations of the Family Court…as they relate to the children of disputing parents. It also seeks to reject some perceptions that the Court is biased in its determinations, or in some way motivated by considerations other than the best interests of children."*[5]

The Family Court submission went on to provide an overview of the Court's Case Management System and to explore the ramifications of the 1995 amendments to the *Family Law Act*. A supplementary paper presented a statistical survey of the cases

[4] House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation,* December 2003, Canberra, p. xvii.
[5] The Family Court of Australia Submission, 16 August 2003, p. 10.

before the Family Court and in particular emphasised that only about six percent of applications filed by parents result in a determination by a Judge.

The Court's submission says that in relation to a presumption of 50 /50 care:

> *"The difficulty is that if separated parents are exhorted to share their children equally the legislation will create a normative standard which will be unattainable in practice for many, which may jeopardise the best interests of the children and/or may bear no resemblance to the parenting responsibilities assumed in the pre separation family."*[6]

This appears to be pointing out potential problems based upon considerable experience in this area of the law. The Court took the view that such an insight, available to those with daily experience of the operation of family law dynamics, should be shared with those who have the responsibility for making the law.

The Parliamentary Committee tabled its report *Every Picture Tells a Story* on 29 December 2003. There has not yet been a formal response from the Executive Government to the report however there have been some preliminary developments including a discussion paper, "A New Approach to the Family Law System: Implementation of Reforms", 10 November 2004, in which the Government rejected some of the more problematic recommendations in the report.

The Government sought input from the community in relation to the proposed implementation of wide-ranging reforms to the family law system. These changes include the proposed establishment of a new network of 65 community based Family Relationship Centres with the aim of reducing the emotional cost to families and children as well as providing practical assistance to families to avoid separation.

The Discussion Paper also explored the Government's proposed changes to ensure that the option of shared parenting is considered by the Magistrate or Judge when making parenting orders. The Government suggests an amendment to section 60B of the Family Law Act to make one of the objects of the Children Part of the Act:

[6] The Family Court of Australia Submission, 16 August 2003, p. 22.

> *"…to ensure that parents are given the opportunity for a meaningful involvement in their children's lives to the maximum extent consistent with the best interests of the child.[7]"*

It also proposes amendments to strengthen existing underlying principles in the *Family Law Act*, including:

> *"…children having a right to be known and cared for by both parents and a right of contact on a regular basis with both their parents and other people significant to them. The new provisions would refer to the right of children to spend time on a regular basis, and communicate on a regular basis, with both parents (and other people significant to their care, welfare and development). This right would always be subject to the best interests of the child. As recommended by the Committee, the proposed provision would also refer to the need to protect children from physical or psychological harm."*[8]

The Family Court responded in January 2005, saying, in relation to the proposed legislative changes to the law to support shared parenting:

> *"The Discussion Paper does not invite comment on the desirability of the proposed legislative changes and the Court considers that it would be inappropriate for it to express a view on their merits. Some might have concerns that the proposed legislative encouragement of parental involvement might have some unintended negative consequences. It is a matter for the Government to assess the merits or demerits of particular approaches. On matters of legislative change, therefore, the purpose of the Court's submission is to assist the Government by drawing attention to some issues relating to the drafting of the proposals to give effect to the decisions that the Government has made."*[9]

The Court's response however does express concern with the suggestion that the Court play an educative role with clients in relation to the legislative intent of a presumption of 'shared parenting' stating that the fundamental responsibility of the Court is "to resolve disputes between the parties, not to educate them about how to deal with matters not in dispute."[10] That is its constitutional function.

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[7] Australian Government, Discussion Paper "A New Approach to the Family Law System: Implementation of Reforms", 10 November 2004, p.10.

[8] Discussion Paper, 10 November 2004, p.10.

[9] The Family Court of Australia, Response to the Australian Government's Discussion Paper "A New Approach to the Family Law System: Implementation of Reforms" January 2005 at pp.6-7.

[10] The Family Court of Australia Response, January 2005 at 36.

Those concerned to influence the outcome on the issue of shared parenting should use their energy now. It is not, in my view, likely to be potentially profitable to seek change from the Court after Parliament has spoken.

The Judicial Approach

I expressed my views straight forwardly at the Lawasia Conference in Tokyo in September 2003 upon the general issue:

> *"[T]he role of judges is an issue which some believe is at the historical crossroads in Australia. Do we want the next generation of law students to be inculcated with the view that judges should be "philosopher kings" correcting unfocused legislators and "finding" law to justify their "opinions" in all sorts of places (a treaty here, or an American state court there) or is parliamentary democracy, with all its faults, to be the preferred path?"*

Indicating then, as now, that I retain the views I expressed in *B v B* [2002] Fam CA 250:

> *"10. It is not for me to give litigants law based on my personal views of what the law should be (and I can make it be). Nor should an Appeal Court stand between the trial judge and the clear words of the Act which is the primary source of law.*
>
> *11. The duty of the Court is to attempt to discover the real intention of Parliament and to apply its law to the facts the Court finds in the particular case before it.*
>
> *…*
>
> *18. It is not for the Court to experiment with emerging ideas espoused by exciting thinkers which may or may not stand the test of time. The function of the Court is not to lead society upon new adventures for its own good but to apply values which have broad acceptance.*
>
> *19. The people, through their elected representatives, in the form of legislation, inform us of their changing desires which we must then apply to all.*
>
> *…*
>
> *21. In considering the common law (judge made law where parliament has not dealt with the topic), or when looking at old statutes which have not claimed parliament's attention for a long time, or in law concerned with the Constitution, principles are also available to assist the individual judge although there is a greater need for judicial leadership in the law's development (or modernisation) than is desirable in those areas where*

parliament has entered the field and maintains a continuing interest in its creation.

22. *The individual judge is not an island but part of a legal continent. Each is part of a continuance. The way the law is developed in those areas where parliament's presence is not apparent is through a pragmatic working from experience of particular cases using a process of analogy and extension within the spirit of the prevailing law.*

23. *The judge's pressure should not tear the existing fabric, gently restoring or updating perhaps, but not undertaking groundbreaking work of a nature the democratic process leaves to the parliament or, in the case of the Constitution, to the people directly.*

24. *Those who want more activity seem to welcome an adoption by the umpire of their own philosophy but call foul, often correctly, when an opposing idea is introduced as law."*

Conclusion

It is fair to say that the history of shared parenting within the Court has been one of caution. This has flowed from the legislative requirements with the 'best interest' principle at the core (earlier legislation used the word 'welfare' and that is why its in the older judgments). Lawfully the Court acted on the evidence including that coming from the general body of experts who did not generally support joint parenting unless communications were good between parents; other factors, already mentioned, could also intrude, the most obvious being geography.

However from the old case of *Padgen* to the recent case of *C v B* [2005] FamCA 94 the Court has demonstrated in trials its appreciation of the need to apply the fundamental requirement of the legislation, the best interests of the child, to the facts of the particular case after a consideration of the matters the statute requires to be considered. True it is that there have been some attempts to put a further 'gloss' upon the exercise but in the end the fundamentals are to be found in the Act of Parliament which is the charter for our activities.

The judicial process for the judge ever was the application of the given law to the found facts.

We await the law givers.

If the law changes so will the Court's approach.

Apart from technical and practical advice to the other two branches of government the Court is wise and I think duty bound, to keep out of the pros and cons argument. I say 'duty bound' for two obvious reasons:

(a) Umpires who start barracking for one side or the other have less credibility thereafter; and
(b) When a Court of forty something members expresses 'its' view, it, in reality, does not speak with confidence for all its members, particularly in areas of controversy. It can, of course, generally accept that X or Y is the law and to be applied. That is a different matter to saying what 'should' be the law, a much more personal matter.

Links

Inquiry website

http://www.aph.gov.au/house/committee/fca/childcustody/index.htm

FC Intranet links on Inquiry

http://sydnotes1.familycourt.gov.au/servlet/Joiner?contentURI=/production/Legislative%20Histories.nsf/($All)/BA1C48C80B6F18F7CA256D9D000DDE22

Notation

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