THE IMPACT ON THE COMMUNITY, FAMILY CULTURE AND FAMILY PRACTITIONERS OF CHANGES TO FAMILY LAW LEGISLATION, ADMINISTRATION AND PRACTICE

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An analysis of the impact of the new Part VII of the Family Law Act which came into operation on the 11th of June 1996 is now being undertaken quite extensively with researchers in various disciplines.

Whilst I intend to share with you some of the findings of several pieces of research on the topic I would like to also share with you some personal experiences of the impact of not only the changes in the Family Law Act but the changes in our legal system generally as society now looks to the law and the legal system as only one of a number of competing means of creating and sustaining social order.

In a very interesting analysis by Professors' John Dewar and Steven Parker in an article printed in the Australian Journal of Family Law (Vol.13 No.2September 1999) they suggest that the 'top down' model of law and legislation that traditional jurisprudence leads us to expect is being replaced by 'law' that has become the product of different forces working on each other horizontally or side by side – by legislators enacting laws, Judges interpreting them, Courts applying case management policies, solicitors, counsellors and mediators drawing on them to achieve settlement or legal aid authorities administering the limited funds available to them. These forces though numerous and interacting in complex ways are identifiable but only by using techniques borrowed from the empirical social sciences. It is no longer as easy as looking at court statistics and case law to give us an accurate guide of how our family law system is operating in practice.

There is no doubt that in my own private family law practice 80% of my family law matters never reach a Court except for the filing of consent agreements. We have high rates of settlement without litigation. These settlements, however, are not always achieved without the assistance of outside services. As one family law solicitor succinctly described the role of the family lawyer now it is to predominantly "produce a rational client who is then able to negotiate and work towards consent agreements". We now spend a great deal of time in our initial interviews preparing our clients to have realistic expectations and guiding them to particular outcomes. I personally will use different techniques depending on how I find the client. I often refer parties to counsellors, to mediators, to support groups and even to appropriate social outlets to assist them in their personal grieving and setting of realistic goals and expectations for the future.

Until a client is at a point where they are able to negotiate with a minimum of bitterness and desire for revenge I am well aware that beginning a negotiation process may well be counter productive, destructive and lead to polarisation of the parties.

As a mediator myself for the past eight years I strongly believe that if parties are provided with a forum for communication at the appropriate time in a supported environment such as a mediation setting the changes of success are great.

Modern family law legislation has a far wider function than merely providing Judges with a set of instructions for adjudication. Instead it speaks increasingly to a broad audience of separating parents and does so by 'radiating messages about how responsible parents should settle their differences'. Power and authority is now disbursed throughout different parts of the legal system including lawyers, counsellors, mediators and the judiciary. Because of this it is essential that forums for cross disciplinary discussion be provided.

Dewar and Parker's research highlights that where parents 'enter the family law system' will have an impact on expectations and behaviours. If their first point of entry is a lawyer their experience of the family law system will be entirely different then if their first point of call is a counsellor of a mediator. This is even disregarding the vastly different approaches now being taken by lawyers depending on their own model of legal service.

For an increasing number of parents the first point of entry is when they file an application without representation in the Family Court. One of the biggest challenges facing the Family Court at the present time is the rising numbers of unrepresented parties.

The rise in unrepresented parties has been brought about by a complex array of factors which include the diminished availability of legal aid, the greater confidence of non-resident parents that they should have a voice in parenting issues, inability to afford a private solicitor and a diminishing respect for the family law process generally.

"Family litigation is profoundly affected by non-legal factors including immature or short lived relationships, lack of trust between the parties, family violence, allegations of child abuse, controlling behaviour by one of the parties, the involvement of grandparents, friends or relatives, children's alienation from one or both parents and psychiatric or substance abuse problems" Review of the Federal Civil Justice System case and hearing management in the Family Court of Australia - Australian Law Reform Commission interim report April 1999 page 3.

The amendments to the Family Law Act in 1996 were first and foremost designed to bring about an attitudinal change in the approach taken by parents towards their children following the breakdown of their relationship. Legislators, partly due to the strong lobby groups from non-resident parents, hoped to achieve continuing joint parental

responsibility and remove notions of guardianship, custody or proprietary rights over children.

A statement of objects and the principles underlying those objects set the framework for reforms.

The most important sections of the new Part VII of the Family law Reform Act(1995) are:

- Section 60B(2): children have a right of contact on a regular basis with both their parents and with other people significant to their care, welfare and development except when it would be contrary to a child's best interests.

- Section 71C(1): each parent has parental responsibility.

- Section 63B: parties are encouraged to enter into parenting plans

- Section 64B(1): defines the new terminology of residence, contact and specific orders.

- Section 65E: the child's best interest remains the paramount consideration in making a parenting order.

- Section 65F: counselling before the making of parenting orders is required.

- Section 68F: a check list on how a Court determines what is in the child's best interests.

- Section 68K: the Court must consider any risk of family violence and in Division 11 the Court should deal with inconsistencies between parenting orders and family violence orders in a particular way.

What has been the impact of these changes three years on?

The University of Sydney's interim report dated April 1999, *"The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations"* by Helen Rhoades, Reg Graycar and Margaret Harrison: summarises its findings by asking five key questions:

1. How (if at all) does the advice given to separated parents differ from that given before the Reform Act.

2. Are contact parents being given the opportunity to spend more time with their children than access parents did before the Reform Act?

3. Are contact parents given the opportunity to exercise more responsibility for their children then access parents did before the Reform Act?

4. Have litigated disputes between parents reduced or increased as a result of the Reform Act?

5. To what extent (if at all) have orders for contact been affected by the provisions dealing with family violence and the principal that children have a right of contact on a regular basis with both parents?

I intend to deal with each of these questions in turn.

1. How (if at all) does the advice given to separated parents differ from that given before the Reform Act.

For the research in May 1997 61 family law practitioners were asked how the Reform Act terminology differed from or was

similar to the terms previously used ‘guardianship’, ’custody’ and ‘access’

The change from guardianship to parental responsibility was considered to be a change in name only by 32%, of some importance to 49%, fundamental to the law by 19%.

When reinterviewed in April 1998 72% of the respondents then acknowledged their advice had changed.

Many family law practitioners failed to understand the legal change from custody to residence as anything other than a change in name. Unlike custody, residence is in fact only where the child will live and has no legal rights or responsibilities attaching to it.

The concept of parental responsibility seems also to be confusing and misunderstood. There is an evolving understanding that parents have an equality of status under the new legislation and more specifically that the resident parent has less control of the children then custodial parents had been able to exercise. A child’s right to contact with both parents is justifying father’s pushing more vigorously for increased time with their children. Some solicitors see this as increased recognition of contact fathers others see the shift in terms of control and harassment to the primary carer.

One of the difficulties with the new concept of parental responsibility is what does sharing of responsibilities mean in practice.

Does it extend to the essential consent of the other parent for any changes of schooling, housing etc. Legal practitioners vary markedly in their understanding of this concept. One

interpretation is that consultation with the other parent is required but not consent, another that a parent could make any decision provided there was no specific issues order to the contrary. While others believe that a Court order is essential for any change.

The Full Court in B & B (1997) 21 Fam.LR 676 implied that consultation was required but not necessarily consent. This is the key case for settling the ground rules for judicial interpretation of the Reform Act.

Lawyers, counsellors both Family Court counsellors, private and community based practitioners were quite pessimistic about the likelihood of change by the Reform Act. Mediators on the other hand were more optimistic about the law bringing about a change of attitude. In the University of Sydney research practitioners from each professional group were critical of the advice given to clients by members of other professions. It is clear that solicitors appear to have a cynicism about the co-parenting reform agenda but the majority of solicitors appear to have changed their advice to clients about post separation parental responsibility despite this. Most counsellors and mediators said they had not altered their advice to parents as the reforms simply reflected long standing counselling mediation practices.

A practitioner's advice to parents is often based upon their personal views of the reforms rather than a strictly professional view.

There has been no noticeable change of advice to clients by lawyers about the use of primary dispute resolution services nor of the use of parenting plans.

The practical affect of the advice given appears to be that it is now easier to convince the wife/mother to agree to give contact to the husband/father. If they don't the Court will because children have a right of contact with their fathers.

2. Are contact parents being given the opportunity to spend more time with their children than access parents did before the Reform Act.

There seems little doubt that there is an increased expectation of fathers to have more time with their children than before the Reform Act.

It appears however that Final Orders for shared residence are still rare particularly after a trial. On an interim basis however week about or split week residence for each parent has become common place in the Adelaide registry. Orders for shared residence are most common when the children are of pre-school age.

Judges interviewed felt the term 'residence/residence' was not appropriate where it was likely to be used to harass the children's primary care giver or where there was a high level of conflict between the parents. The use of residence/residence orders diminished with final orders. The general practice is to oppose residence/residence orders in favour of residence/contact.

Despite this there has been a substantial increase in applications for contact orders in the Family Court since the Reform Act. In 1997/98 throughout Australia 23,958 contact orders were sought compared to 14,144 in applications in 1994/95.

There appears to be a greater enthusiasm for shared residence arrangements among counsellors than among lawyers and

Judges. 76% of Court counsellors and 58% of private counsellors said a shared residence arrangement was likely to increase the possibility of co-operative parenting between separated parents. Only 35% of lawyers and Judges agreed with this.

Only 12% of final orders or judgments delivered since the Reform Act began in 1996 involved a residence/residence arrangement.

In the University of Sydney study all solicitors noted that contact was ordered with fathers in circumstances "where they would not have been successful before the introduction of the Reform Act, for example, where there has been domestic violence". The rate of orders refusing contact has declined dramatically.

3. Are non resident parents exercising more responsibility for their children then access parents did before the Reform Act.

Day to day care, welfare and development of a child has become the common terminology used in drafting orders. These go hand in hand with residence or contact and help to clarify who makes decisions for the child day to day.

Despite the terminology supporting increased involvement by the non resident parent there are practical realities of the difficulties of shared parenting. These include the unwillingness of a parent to accept responsibility, the unwillingness of a resident parent to share the care, the persistence of proprietorial custody and access concepts and the logistical difficulty of co-parenting across two households. Unfortunately shared parenting can be used to continue abuse and harassment of the other parent.

4. Have litigated disputes between parents reduced or increased as a result of the Reform Act.?

There has been a marked increase in the number of applications for contact orders as well as applications for residence/specific issues orders since the Reform Act came into operation. There has also been a substantial increase in the number of litigated disputes arising out of alleged breaches of parenting orders (Form 49 Applications). It appears that many of the Form 49 Applications are brought by unrepresented contact fathers, many of these applications are unmeritorious and are used as a mechanism to harass the resident parent and much Court time is being wasted in dealing with them.

5. To what extent (if at all) have orders for contact been affected by the provisions dealing with family violence and the principal that children have a right of contact on a regular basis with both parents?

Unlike the United Kingdom Children's Act, upon which some of these reforms have been drawn, the inclusion of a recognition of the problem of domestic violence and the impact both directly and indirectly on children was seen as a necessary amendment to the Reform Act.

Prior to the Reform Act for several years there had been a heightened awareness of the need to take seriously the impact of domestic violence in the home environment and the impact this had on children. Any suggestion of domestic violence although unsubstantiated at the time of an initiating application could often result in the denial of contact to the father until further investigations were undertaken. Certainly a domestic violence order would be respected by the Family Court and had some further impact on the contact orders made.

There is no doubt that the 'right to contact' principle has been overwhelmingly embraced by practitioners and Judges at the expense of the domestic violence aspects of the reforms. An interim order refusing contact has become more difficult to obtain despite allegations of domestic violence. It is also more difficult for victims of domestic violence to relocate due to an increased awareness of the ability to put in place protective orders to avoid parties moving without the consent of the Court.

There is an increasingly identifiable pattern of the family law system being tilted more and more against women. Victims of domestic violence tend to be dependant on legal aid and are far more unlikely to act in person than the male non resident parent. Interim proceedings are the decisions made are now crucial proceedings in children's matters because of the large delay in the Family Court hearing final orders. This presently stands at approximately nineteen months.

Because legal aid is unlikely to be available for a final trial in any event the interim proceedings are crucial in setting in place a status quo. For many parties interim decisions are final decisions. The opportunities for interim hearings to test evidence, especially where there are allegations of violence or abuse are limited, and decisions at interim hearings are generally likely to preserve contact and to favour the non resident parent.

Interestingly when these matters do proceed to final hearing a complete denial of contact where there is serious domestic violence is still a prevalent order. The conclusion that is easy to draw therefore is that orders being made at the interim stage are not being sufficiently scrutinised for impact of domestic violence on children.

WHERE IS THE CHILD'S VOICE IN THE NEW REFORM PACKAGE?

There is no doubt that practitioners believe that the new provisions are making it easier to achieve distributive justice between parents. There is little evidence, however, to suggest that the child's perspective or point of view is given any great weight in negotiations between parties.

The new emphasis on shared parenting may have even further down graded the child's point of view particularly where separate representatives or counsellors have not become involved. The language of children's rights to contact has benefited the non resident parent, usually the father, far greater than it has benefited the child whose wishes and feelings can be totally excluded from the process.

This is a very sad indictment on our obligation to make paramount the best interests of children.

PRIMARY DISPUTE RESOLUTION

Despite great emphasis in the Reform Act that alternative methods of dispute resolution, including counselling, mediation and arbitration, should become primary and not secondary there is little evidence that family law practitioners in South Australia in any event have embraced this concept.

There seems to be a continuing cynicism and reluctance to encourage clients to adopt primary dispute resolution processes.

PARENTING PLANS

The most minimal impact of the Reform Act in terms of advice given to clients relates to parenting plans. 91% of solicitors interviewed for the University of Sydney research project reported that parenting plans were used less frequently than child agreements prior to the Reform Act. The statistics certainly confirm this.

There appears to be very little support in the counselling section of the Family Court for the use of parenting plans as well.

It is clear that the primary focus of the Australian Government and our Attorney General at the present time is to keep people out of the Family Court to reduce the need for it and to direct people to counselling and mediation services.

Despite the Reform Act, however, there has been substantial increase in the number of applications made in the Family Court. In South Australia there is no mediation available through the Family Court. The Governments current policy appears not to be working in practice and the urgent need is for the impact of abuse and family violence to be taken seriously both in the Family Court and in determining parties suitability for mediation.

The Attorney Generals latest scheme is to develop a Federal magistracy. Whether this will assist or add further complexity to an already strained system has yet to be seen.

Whatever the changes in law or systems I remain convinced that the greatest service we can all offer is a personal service of compassion, support and for lawyers solid legal advice as we assist clients to negotiate through a complex, intimidation and confusing maze that we call the family law system.

FURTHER READING

Australian Journal of Family Law (Vol.13 No.2September 1999).

Review of the Federal Civil Justice System case and hearing management in the Family Court of Australia - Australian Law Reform Commission interim report April 1999 page 3.

"The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations" by Helen Rhoades, Reg Graycar and Margaret Harrison.

Ryan J. *"A Legal Aid Practices Reflections on the Implementation of the Family Reform Act 1995"* current Family Law Journal volume 5 no. 3 1999.

Kaspiew R. *"Equal Parenting or the Effacement of Mothers"* B & B and the Family Law Reform Act 1995 – Australian Journal of Family Law volume 12 no. 1 March 1998