The Family Law Practitioners Association of Tasmania

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The Committee Secretary
Standing Committee on Family and Community Affairs
Child Custody Arrangements Enquiry
Department of the House of Representatives
Parliament House
CANBERRA ACT 2600

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INQUIRY INTO CHILD CUSTODY ARRANGEMENTS

Introduction

An inquiry has posed, as a general proposition, there should be a codified presumption of shared custody in the event of family separation.

It is understood the genesis for the inquiry arises from, inter alia, the following:-

i. the belief there is a perceived gender/familial bias in favour of "mothers" in Family Court proceedings;

ii. contiguous with i. a concern those involved in Family Court proceedings, including the Courts on occasions, have failed to give efficacy to the Reform Act provisions of 1995 which sought to remove the propriety notions attendant to "custody" and "guardianship". The concern being there has been a creeping return to a presumption that a "residency order" meant more than that i.e. where a child lives from time to time; to the notion of custody which imported into it preferential parental rights.

iii. There seemed to be a formulaic approach to parenting orders especially orders as to contact .Such formulaic approach being inconsistent with inherent individuality of each case and, by its application, the Court was giving greater weight to a universal

precedent than an individual family focussed which each case demands.

iv. such presumptions are necessary to preserve and maintain the ongoing relationship between children and their respective parents.

v. as a consequence of i. and ii. above the perceived unjust financial consequence arising from separation due to the consequential child support obligations and/or Part VIII proceedings;

We adopt the NLA response.

Is it necessary to enshrine such presumption?

The Family Law Act recognises the importance of the relationship between children and their parents; see Section 60B. Though the section and its subsections are prefaced to be "children's rights"; the stated objects and principles should be given an inclusive interpretation respecting parental "rights". If one juxtaposes same with sections 61C and 61D(2) which prescribes the responsibility of parenthood it is submitted there is recognition of the rights of parents.

As can be seen the Family Law Act 1975 (as amended) recognises the concepts of parental responsibilities (rights) and children's rights [see also section 43(c)]. The noted sections encourage the sharing of parental responsibility and it is submitted it is a rebuttable presumption of fact same is in the best interest of the children.

It is a fundamental tenet a Court will only make Orders departing from the statutory aspirations noted in Section 60B, Section 61C and Section 61D(2) where same are necessary and in the best interest of the child (remembering Section 65E is the overarching principle to be applied in part VII proceedings). See as example VR and RR (2002) FLC 93 – 099 where the Full Court recognised the importance of giving effect to the legislative scheme [S61D(2)] and stating it will only interfere with same where it is in the best interest of the child.

As the Full Court said in B and B (1997) FLC 92-755 (at 84, 219-20) the Court must take into account the matters set out in Section 60B as this represents a deliberate statement of the objects and principles which the Court is to apply in proceedings under Part VII. Though not stated; it is clear this proposition recognises the principles set out in Section 61C and Section 61D(2) and cumulatively the mentioned provisions provide significant guidance to the Court's consideration of what Orders are to be made under this part.

Since the earliest cases the court has authoritatively stated there is no judicial preference for either the "mother" or "father". Rather the court recognised its obligation is to make a full investigation of all the relevant circumstances so an accurate assessment of the suitability of each parent is made. An arbitrary

presumption about the roles and characteristics of men or women is incongruent with such an approach. See Re Evelyn (1998) FLC 92-807.

In answer to the criticism the courts are ignoring the objects of the Reform Act (1995) and treating "residency" to mean "custody"; the Full Court in Re G (children's schooling) (2000) FLC 93 – 025 has authoritatively dispelled the notion a Residency order is a revised version of the concept of Custody which, of itself, vests to the Residential parent the unquestioned right to make decisions over and above those necessary for the day to day care of the child. See also VR and RR (2002) FLC 93 – 099 which recognised the importance of S61D (1)

Thus it is submitted both by legislative enactment and judicial pronouncement the perceived rationale for a codified presumption is already addressed.

Reasons Against a Positive Codification of a Presumption

As Justice Hayne in AMS v AIF (1999) FLC 92-852 @ page 86, 052 (paragraph 204 – 205) recognises; the challenge with Family Law is that it deals with human problems with all there attendant variety and complexities.

The legislation grapples with a complicated mass of human experience which cannot easily be reduced to or amenable to binary reasoning. Due to the variety and complexity of human problems the legislation is framed to reflect statements of aspirations than legal prescriptions. It is for the above reasons the discretion reposed to the Court is wide. Having said that the Court must act judicially giving effect to the matters set out in the legislation.

The codifying of a presumption of shared custody as either a starting point or default concept displaces the guiding principle of Part VII proceedings i.e. the best interest of the child is paramount.

It is submitted in light of the above dicta of Hayne J and the significance placed on S65E by the Full Court in B and B (opcite) a codified presumption is incongruent with the paramountcy principle.

If the presumption is incorporated to (conceptually) set off "status quo" those advocating same fail to understand the Courts approach to "status quo" i.e it is not a fundamental precept rather reflects the reality that it is generally in the children's best interest to remain in an environment which is known and certain than to move them to one of uncertainty.

Implicitly the presumption of shared custody in the event of family separation assumes facts which may be unworkable, impractical and/or unrealistic. They include:-

a) the ability of the parties to co-parent on a day to day basis;

b) the ability and affordability to both parties that such shared custody brings e.g. proximity of household, working arrangements sympathetic to the day to day exigency of the child and the other parent;

c) the assumption of reciprocity between the individual parent and their capacity to deal emotionally with that parent post separation.

d) the minimisation of any emotional, social or physical burden upon children in "living" between two households.

Other Considerations

There is a suspicion the present inquiry is driven by perceived inequitable financial consequences which arise following separation i.e. child support and/or Part VIII of the Family Law Act considerations.

It is the belief amongst many non-residential parents (essentially fathers) that the combination of onerous child support obligations and Part VIII Orders favourable to the residential parent is an unjust and unreasonable burden of the separation which they (a non-residential male) bear the brunt of. There is a belief the cost of the contact parent setting up a "home" for the children is not adequately recognised or addressed in either a child support formula (part 5) or Section 117 of the Child Support (Assessment) Act 1989 or by Section 79(4) and/or Section 75(2) of the Family Law Act (in Part VIII Orders). This aggrieved belief is further aggravated where the residential parent repartners to that parent's benefit and security.

If the impetus for the inquiry is financially driven then it should be explicitly stated to be so. The perceived unjust financial consequences (if accepted to be so) could be addressed without the need for a codified presumption in Part VIII of the Act Rather it could be dealt with elsewhere e.g. review of Section 8 or grounds for departure under Section 117 (2) of the Child Support (Assessment) Act or Section 75(2) of the Family Law Act.

Considerations centred on remoteness, cultural ,S65C and diversity of family structures issues are dealt with in the NLA submissions. We adopt them and have nothing further to add.

The President
For and on behalf of
The Family Law Practitioners Association of Tasmania