Inquiry into Child Custody Arrangement in the Event of Family Separation

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Introduction

One of the most frequent and vexing issues constituents bring to my office are their problems with child support and family law. The cases have two common themes: on going financial responsibilty and access.

A recurring story is of a father hiding his income and assets through clever accounting, claiming he is unable to afford to pay anything to the mother of his children. Given the higher rates of remarriage among men, the perception is of a father comfortably remarried and starting a new life.

Anecdotally it appears that women are generally financially disadvantaged by settlements. They often receive a greater percentage of the custody and do not work until the children are older. The mother, by necessity, often removes herself from the workforce, with the associated difficulties of returning to the workforce and the lost superannuation in the intervening years. Not surprisingly, statistics demonstrate that women in older age are more likely to receive some form of government assistance than males. Simply, males are better superannuated than females.

Conversely, my office regularly receives representations from fathers who claim there is an inherent bias in custody orders towards mothers. They claim Family Court judges apply a standard of "every second weekend and half the school holidays" instead of arrangements better suited to the actual living arrangements and employment of the couple. Fathers often complain that they have been excluded from the life of their child through emotional and financial exhaustion. The frustration over enforcing access orders further removes the father from participation in the child's life. Prison officers at Cobham Juvenile Detention Centre in my electorate have stated that they rarely see a father visiting inmates. There is more complete research on boys needing a father. Furthermore fathers who maintain strong links with their children are more likely to pay child support and provide other support.

I believe these two problems are exacerbated by the nature of the legal framework that seeks to resolve the life stories of mother, father and child as if it is an instant in time when one party was right or wrong.

The Adversarial Approach

Common law in English speaking countries has developed an adversarial approach to the assessment of evidence and truth. Conflict between the two parties (in the form of a controlled debate) is used to arrive at process driven justice determined by an impartial third party (the judge). Whilst this system has its strengths in some civil and criminal proceedings, its application to family law cases needs to be re-evaluated.

The 'debate' between the two parties is conducted in the language of the legal profession; as such they require legal counsel, which brings its own set of problems. Moloney, Love, Fisher and Ferguson recorded in the *Australian Journal of Family Law* the experience of some clients, including the following observation;
'You're putting your case forward. I mean the legal words have entirely different meaning of what-even when I did my own affidavit- what I actually told the lawyer and what she wrote down, had entirely different meaning... They used fancy words, I suppose that's what they get paid for.'
This is a complaint echoed by many of my constituents. Legal representation creates problems of equity and access and runs the risk of creating a 'legal divide'. Mothers and fathers in constrained financial circumstances face the possibility that their level of representation, and thus the strength of their debate, will suffer. This in turn can adversely impact their access to the child and their future financial situation.

Furthermore, we must face the fundamental question: is debate and conflict appropriate in cases where the aim is to promote the welfare of a third party- the child or children? As an English Law Lord recently observed 'The expression "adversarial" carries with it a connotation of confrontation and conflict. Ideally, these characteristics have no place in family proceedings.'

Put simply, how beneficial is it to the welfare of a child, to have two people who may loathe each other, 'slug' it out in a court, assisted by legal counsel, whose interest lies not with the child, but their client. As Pauline Tapp has observed in the *New Zealand Law Review* 'Emotionally needy parents can have difficulty separating their own needs from those of the child, and difficulty detaching emotionally from their former partner.' This can be far from helpful.

What are the alternatives? New Zealand Judge Boshier made the following argument in the mid 1990s,
'It is important to recognise that the common law adversarial approach to casework has lead to the creation of Judges experienced in the craft of fact-finding. However, the process of evolution to the next inevitable stage of diluting the importance of the adversarial system and strengthening the inquisitorial must now occur. Delays, expense and inefficiency will prevail until that occurs.'

The Inquisitorial Approach

In contrast to the adversarial approach, rather than have truth uncovered through debate between the parties, the inquisitorial approach places onus upon the judge to unearth the truth. The approach, usually found in legal systems based on Roman Law or the Code Napoleon, allows the judge to control what evidence is available to the court and the parameters of any questioning.

Debate in the legal community over the two systems in family law is ongoing, however there seems to be an emerging consensus that a mixed approach between the two may be of some benefit to the child or children, this approach has been used by Judge Boshier in New Zealand. It is worth outlining the features of this approach as identified by Pauline Tapp in the *New Zealand Law Review*.

Firstly, all primary evidence was in affidavit form. The Court relied on psychological reports, the children were represented by counsel, oral evidence was not heard, though counsel could address the Court on matters pertaining to the affidavit evidence, their client's instructions and the law, and the Judge, rather than the counsel, questioned the parents. Finally, the Judge spoke with the children in chambers with their counsel and sought to identify the wishes of the children.

Adopting an approach such as this may have several benefits. It has the real potential to reduce any 'legal divide', with the emphasis moving away from confrontation with the other parent through the proxy of one's counsel. The Judge is in a better position to assess the true financial and emotional state of parents, without the added difficulty of smoke screens from both a parent's counsel and their accountant. Most importantly, the emphasis of this approach is on the child or children and their welfare and wishes, away from the emotional turmoil and conflict of a marriage break down.

Conclusion

An approach of this nature has the potential to reduce many of the shortfalls associated with the current system, which evolved from civil proceedings. Obviously, what may work with a lawsuit over a bankrupt company is hardly appropriate for determining the potential welfare of the child until it is eighteen.

I urge the Committee to give broader consideration to the legal framework in which mothers and fathers operate. An entirely new system is required where school leavers are trained to be Family Law inquisitors and mediation experts (instead of judges) with the sole role of ensuring the welfare of children into the 21st century.