Dear Senate Inquiry - Shared Parental Responsibility Bill 2005

This is a my submission to the Senate Inquiry into the provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005

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Family Issues: Allegations of child sexual abuse in Family Court cases
By Geoff Monahan

In the recent decision of Re W (Sex abuse: standard of proof) [2004]1 the full court of the Family Court has reaffirmed that a finding of sexual abuse can only be reached by a strict application of the onus of proof established by the High Court in Bringinshaw v Bringinshaw (193cool2 and as now set out in s.140 of the Evidence Act 1995 (Cth).

The facts

The married mother and father lived in South Australia and were the parents of a son B (born in 1994) and a daugher G (born in 1997). In subsequent parenting proceedings the mother alleged that the father sexually abused G during the second half of 2002 and possibly into the early part of 2003. The mother claimed that the father had "rubbed himself" against his daughter, touched her genitalia and put his penis in her mouth. The allegations derived from statements that both B and G had made to the mother, to Ms C (an employee of a sexual assault support service) and to senior constable C (in a police record of interview). The police did not lay any charges as a result of their investigations. The allegations were also supported by Dr A, a psychiatrist, who gave evidence as the court-appointed expert but who, interestingly, had not interviewed the children himself nor seen the parents.

The father denied the allegations, suggesting that either the mother had induced the children to make up the allegations (to allow her move interstate to be with her "new boyfriend") or that B was in fact the perpetrator. There was evidence that both B and G had retracted their statements of sexual abuse at various times.

The matter was heard at first instance in late 2003 by Nicholson CJ (as he then was). His Honour rejected the father´s denials on credibility, rejected the children´s retractions as irrelevant and found that sexual abuse had occurred on the balance of probabilities. His Honour subsequently held that it would be inappropriate for the father to have contact with G, whether supervised or unsupervised. His Honour also took the view that contact with B alone would be detrimental to both children.

The father appealed, and the two main issues considered were as follows:3

- whether, no matter what the finding of the Chief Justice, his conclusion that the proposals for supervised contact in this case were more detrimental to the welfare of the children than no contact at all, ought not reasonably to have been open to him; and
- the positive finding that the father had abused G was unsound and ought not to have been made.

The decision

The father´s appeal was allowed. The full court4 held that Nicholson CJ´s finding of sexual abuse was "unsafe". In reaching that conclusion, the full court emphasised that an order prohibiting contact between a parent and child was only to be made in the clearest of cases. The father´s application for supervised contact was consequently remitted for rehearing on the basis that no positive findings of improper conduct by the father towards the children had been made out, but there remained an unacceptable risk to the children if contact was not supervised. Costs certificates were also awarded to the parties.

The full court found that Nicholson CJ´s reasoning was flawed, inter alia, for three reasons:

- the rejection of the father´s denials on credibility was unsound as it was understandable that he would propose alternative explanations for the allegations.5 Moreover, equal consideration should have been given to the children´s retractions as to their allegations;6

- positive findings of sexual abuse need to be particularised;7 and

- the opinion of an expert witness who had not seen the parties or the children was to be given very little weight.8

The standard of proof

In its judgment the full court examined the principles applicable in cases involving difficult questions of sexual abuse where the only witnesses to the alleged abuse are the alleged perpetrator and the alleged victim. The court acknowledged that "this is particularly difficult where the victim is of tender years and does not give any direct testimony that can be the subject of forensic testing".9 Their Honours commenced by noting the High Court´s decisions in M and M10 and in B and B,11 both delivered in 1988. In these cases the High Court considered the circumstances in which a trial judge should make a finding of sexual abuse in parenting disputes. In M v M the High Court12 stated that:13 "[T]he resolution of an allegation of sexual abuse against a parent is subservient and ancillary to the court´s determination of what is in the best interests of the child. The Family Court´s consideration of the paramount issue which it is enjoined to decide cannot be diverted by the supposed need to arrive at a definitive conclusion on the allegation of sexual abuse ...

"In considering an allegation of sexual abuse, the court should not make a positive finding that the allegation is true unless the court is so satisfied according to the civil standard of proof, with due regard to the factors mentioned in Briginshaw v Briginshaw. There Dixon J said: "The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences".

"His Honour´s comments have a direct application to an allegation that a parent has sexually abused a child, an allegation which is often easy to make, but difficult to refute. It does not follow that if an allegation of sexual abuse has not been made out, according to the civil onus as stated in Briginshaw, that conclusion determines the wider issue which confronts the court when it is called upon to decide what is in the best interests of the child.

"No doubt there will be some cases in which the court is able to come to a positive finding that the allegation is well-founded. In all but the most

extraordinary cases, that finding will have a decisive impact on the order to be made respecting custody and access. There will be cases also in which the court has no hesitation in rejecting the allegation as groundless. Again, in the nature of things there will be very many cases, such as the present case, in which the court cannot confidently make a finding that sexual abuse has taken place. And there are strong practical family reasons why the court should refrain from making a positive finding that sexual abuse has actually taken place unless it is impelled by the particular circumstances of the case to do so."

The full court also considered its earlier judgment14 in WK v SR (1997)15. This earlier case involved a finding of fact by a trial judge that a father had sexually molested both his daughter and step-daughter and was decided after the enactment of s.140 of the Evidence Act 1995 (Cth).

After noting that it was the evidence of another child of the parents [ZH] that was relied upon by Nicholson CJ in Re W in order to substantiate the allegations of abuse against the father, the full court stated:16

"26. ... Given the gravity of the allegations raised by the evidence, and the court´s duty to apply a rigorous civil standard of proof pursuant to the test enunciated by the High Court in Briginshaw (supra) and restated in s.140 of the Evidence Act 1995 (Cth), her evidence needed to be very carefully evaluated

...

"46. It is clear therefore, that a finding that abuse has occurred can only be reached by a strict application of the onus of proof as set out in Briginshaw. Section 140 of the Evidence Act 1995 (Cth) has adopted this test as follows:

´140 (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.

´(2) Without limiting the matters which a court may take into account in deciding whether it is so satisfied, it is to take into account:

´(a) the nature of the cause of action or defence; and

´(b) the nature of the subject matter of the proceeding; and

´(c) the gravity of the matters alleged.´

"47. In children´s matters under Part VII of the Family Law Act, where the issue is a child´s contact or residence with a significant person in his or her life, the grave consequences of a finding of sexual abuse cannot be overstated. Accordingly, before trial Judges find themselves impelled to make a positive finding of sexual abuse, as opposed to a finding of unacceptable risk, the standard of proof they are required to apply must be towards the strictest end of the civil spectrum as set out in Briginshaw and s.140 of the Evidence Act 1995 (Cth). Inexact proofs, indefinite testimony, or indirect inferences are insufficient to ground a finding of abuse."

In the context of Re W, the full court found that Nicholson CJ, in his examination of the case law, did not appear to pay any attention to the views expressed in WK where the court emphasised the very high standard by which a court needs to be satisfied on the balance of probabilities that something has actually occurred. The full court went on to state that:17

"18. ... Unless such a rigorous approach is taken, where the often-inevitable result of a positive finding is a cessation of the relationship between parent

and child, there is a major risk of inflicting upon the parent and child the disastrous effects of a positive finding that is reached in error.

"19. The termination of a worthwhile relationship between the parent and child ought in most cases be the course of last resort. The court should not shy away from reaching such a result in an appropriate case but at all times judges should be conscious that the adversarial or inquisitorial systems often reach results that are artificial. The truth does not always come out. A false negative finding accompanied by appropriate safeguards as to the future relationship between parent and child, such as adequate supervision to guard against possible abuse, may be far less disastrous for the child than an erroneous positive finding that leads to a cessation of the parent-child relationship. The court needs to be remain conscious of this imperfection at all times."

Conclusion

The recent decision of Re W reaffirms that the ultimate and paramount issue to be decided in parenting dispute proceedings is whether the making of the order sought is in the best interests of the child. The resolution of an allegation of sexual abuse against a parent is subservient to the court´s determination of what is in the child´s best interests. In their determinations the courts have tried to achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from contact with a parent. While a court will not grant residence or contact responsibility to a parent if that would expose the child to an unacceptable risk of sexual abuse, Re W reaffirms that a finding of sexual abuse can only be reached by a strict application of the civil onus of proof established by the High Court in Bringinshaw and as now set out in s.140 of the Evidence Act 1995 (Cth).

Endnotes

1. [2004] FamCA 768; 32 Fam LR 249; FLC 93-192.
2. (193cool 60 CLR 336.
3. [2004] FamCA 768 para [3]; 32 Fam LR at 251; FLC 93-192 at 79,211.
4. per Kay, Holden and O¹Ryan JJ.
5. [2004] FamCA 768 paras [42]-[47]; 32 Fam LR at 265-267; FLC 93-192 at 79,224-79,226.
6. [2004] FamCA 768 paras [49]-[52]; 32 Fam LR at 267-268; FLC 93-192 at 79,226.
7. [2004] FamCA 768 para [48]; 32 Fam LR at 267; FLC 93-192 at 79,226.
8. [2004] FamCA 768 paras [32]-[41]; 32 Fam LR at 263-265; FLC 93-192 at 79,222-79,224.
9. [2004] FamCA 768 para [13]; 32 Fam LR at 253-254; FLC 93-192 at 79,214.
10. (198cool 12 Fam LR 606; FLC 91-979.
11. (198cool 12 Fam LR 612; FLC 91-978.
12. per Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ.
13. (198cool 12 Fam LR at 610-611; FLC 91-979 at 77,080-77,081.
14. per Baker, Kay and Morgan JJ.
15. (1997) 22 Fam LR 592; FLC 92-787.
16 (1997) 22 Fam LR at 599, 602-603; FLC 92-787 at 84,691, 84,694-84,695.
17. [2004] FamCA 768 paras [18]-[19]; 32 Fam LR at 257-258; FLC 93-192 at 79,217-79,218.

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Thank you for reading my submission

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