Chapter Six

PUTTING CHILDREN IN THE FOREFRONT OF CUSTODY AND ACCESS DISPUTES

by
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Considerable discontent has been expressed recently by men who complain that the Family Courts have a conscious or unconscious bias against fathers when they make decisions about the custody, care or contact with children. There is nothing new in this. More than 20 years ago the group Families Need Fathers made similar complaints. There have also been a number of women's groups making claims that the current Family Court system disadvantages women.

THE ADVERSARIAL MODEL OF RESOLVING FAMILY DISPUTES

New Zealand's family law was modelled on the British adversarial system of resolving disputes. It is, to some extent, an historical accident that the courts are charged with resolving family disputes. Originally they were dealt with as religious or moral issues in the Ecclesiastical courts but jurisdiction was later transferred to the civil courts.

When I started practising law 40 years ago there was no concept of family law. Separation and maintenance proceedings were heard in the Magistrates Court (known by lawyers as the 'agony court') with parties and children sharing a waiting room with those attending the criminal courts. Divorce proceedings were heard in the majesty of the Supreme Court with the Judge and lawyers wearing wigs and gowns. In order to obtain a separation or (with some exceptions) a divorce it was necessary to prove some fault on the part of the other spouse: desertion, failure to maintain, persistent cruelty, adultery. In most cases there was no contest as to the care of the children. In an era where there were clearly differentiated sex roles there was a shared expectation that the mother was best fitted for the parenting role.

There have been modifications to the adversarial system in the case of family law disputes. But, despite the opportunities for couples to resolve their differences through counselling, conciliation and mediation, there remain a number of cases in which the Family Courts are asked to make the decision and, in these cases, the process is modelled on the traditional adversarial approach with each party and their lawyers presenting their case as strongly as possible and trying to neutralise or demolish the other side's case. In any adversarial process there will be winners and losers. One parent will receive the accolade of the 'better parent', the other will feel diminished and rejected.

In any process that selects winners and losers, there is a tendency of the loser to ‘blame the referee’. The most bitter criticism of our Family Courts has always come from parents who are unhappy with the outcome of custody or access proceedings. While they may have justified criticisms it is sometimes obvious that their antagonism towards their spouse or partner has been transferred to the decision maker. The polarising nature of the adversary system also spills over into generalised assumptions that the present system is anti-men or disadvantages women.

The acrimony and bitterness arising from the breakdown of a relationship nowadays finds its outlet in disputes over children. The courts no longer have to rule which partner is at fault for the breakdown of the relationship but they increasing have to decide which parent has a superior claim to custody of the children and what access the non-custodial parent should have. Unfortunately the conflict that is engendered is damaging to children who get caught in the crossfire. Parents are encouraged to belittle the other parent's parenting ability and commitment. When the two people most important to the child are criticising and undermining each other's parental role the child will feel insecure and confused. The natural anxiety which most children feel when their parents separate is extended and heightened by the adversarial legal contest which may go on for months or years.

THE EXTRAORDINARY GROWTH OF FAMILY LAW

There is now a separate Family Law Section of the Law Society with seven hundred members. A standard New Zealand text on Family Law runs into seven heavy volumes each with over 1000 pages. Since 1980 we have had separate family courts with their own specialist judges, counselling co-ordinators, court staff and facilities.

Until 1969 there was no civil legal aid and until the mid-1970s there was no state benefit available to separated parents. This placed mothers (who were seldom in the workforce) at a considerable disadvantage and it was only the brave or the foolhardy who left their marriage.

In the course of my law degree I received only fifty minutes instruction in domestic proceedings and divorce law. There were no specialist family lawyers: the few lawyers that took on this work did so from a social conscience or from the hope that the woman would remarry and the new husband would pay for the costs of the divorce. There were a series of legal and social barriers which made it difficult for women to leave a violent or unhappy relationship.

THE COST OF OUR FAMILY LAW PROCESS

In the last 40 years family law has been a huge growth industry. Legal aid for family matters has been available since 1969 and there has been a massive government investment in funding family proceedings. Over $40 million is outlayed annually on legal aid for family matters of which only some $5 million is recovered from contributions and charges. Family legal aid represents nearly 80% of all civil legal aid spending and the majority of this goes on parenting disputes. It is not uncommon for both parents and the child to be represented by government funded private lawyers.

There are considerable additional costs to the government in providing courts, judges, court staff and counsellors (over $4m for 1998/99). There is also the considerable cost of funding private lawyers to act as counsel for the child (approaching $12m in 1998/99) and the cost of court appointed psychologists and other specialist report writers.

At a time when child protection and residential care services are struggling through lack of resources government may come to the conclusion that the huge outlay in resolving what is fundamentally a disagreement between parents is a luxury that it can no longer afford. The question might well be asked, 'What is the point of providing a high quality system for resolving parental disputes when the users of the system are highly critical of the process and the decisions that result?' At a time when the notions of family autonomy and 'user pays' are in the ascendant it is surprising that in family law matters the government funds a massive intervention into the affairs of families. The only justification for this huge investment in the family law system is that it brings significant benefits to children. This is increasingly open to question.

It can be argued that the heavy government subsidisation of family court proceedings can act as an encouragement for parents to litigate their differences. Even if the parents are paying private legal fees the total cost of litigation is likely to deplete their capital funds with the result that there is less money to pass on to their children.

FATHER INVOLVEMENT IN PARENTING

Forty years ago no self respecting father would be seen changing a nappy or even wheeling a pram. Rigid sex roles have become more fluid and gender stereotypes are weakening. Fathers are more involved in parenting and are therefore contenders for the care and custody of their children. The availability of the Domestic Purposes Benefit now allows fathers to abdicate their role as bread earners and to become full time parents. The law now requires the courts to make decisions about custody and access on the basis of the welfare of the child without any presumptions based on the gender of the competing parties. In statutory terms there is a level playing field.

Few people will regret the abandonment of the fault principle. No longer do we have the bitterly fought contests in which wives and husbands fight for the moral high ground of being the 'innocent party' when relationships breakdown. Instead we have equally embittered disputes between two parents each of whom is claiming to be the more able or more worthy parent. The reality is that in most of these cases either parent would be an adequate parent for the child and their parenting skills would not have come into question had it not been for their separation and their ability to work out an arrangement which best suits the needs of the child. The former dichotomy of innocent partner/guilty partner has been replaced by a new good parent/bad parent dichotomy.

INCREASING INVOLVEMENT OF CHILD PROFESSIONALS

There has been a considerable increase in the number of professionals involved in assisting the court to reach decisions about children. A distinguished international expert has described the current century as 'the century of child professionals'. In virtually every disputed custody or access dispute the court will have the benefit of a report from a court appointed psychologist (and increasingly frequently a second report from an independent psychologist who 'audits' the first report) and will have the

assistance of a lawyer appointed to represent the child. In some cases there will be reports by social workers or other specialists. We have all had to learn and apply the new psychological terminology of ‘primary bond’, ‘attachment issues’, ‘psychological parent’, ‘parental alienation syndrome’ and are now having to grasp a new wave of sociological concepts such as ‘welfarisation of the family’, ‘agency’ and ‘children as social actors’.

THE IMPACT ON CHILDREN

There is a common belief that providing a forum for angry parents to pursue their grievances is unlikely to benefit the children whose care and custody is in dispute. The adversary system has a tendency to encourage tactical games by lawyers and parties, it creates opportunities for misunderstanding and miscommunication, pours fuel on the flames of anger and bitterness resulting from the relationship breakdown, delays resolution of the parental differences, endows a person who has no knowledge of the children or the family with the power of decision making, obscures the children's wishes and needs and inhibits reaching a sensible arrangement which will best serve the children’s needs.

So often what starts as a genuine difference between two caring parents ends up as an intractable dispute between two people who have lost sight of the needs of their children and are continuing the battle for personal reasons which, however understandable, have little to do with the needs of the children. Have the interests of children been captured by a complex system involving judges, lawyers, counsellors, psychologists and other experts?

SEARCHING FOR ALTERNATIVES

I would urge those who argue that the present Family Court system is biased against fathers to move their focus from an attack on Family Court judges and court appointed experts to a reappraisal of the current system and a serious attempt to put forward alternatives. It is necessary to find answers to some difficult questions. Why should the state take responsibility for reordering the lives of families post-separation when there are no child protection or family violence issues? Is the quality of parenting offered by a father and a mother a justiciable issue? Are psychologists better qualified than judges to make judgments about parenting ability? If conflict and litigation are harmful to children is a state subsidised adversarial system the best means of promoting their welfare and interests? In the light of the considerable evidence that the wishes and perspectives of children can be vital factors in resolving parental disputes should not their views become the starting point of any inquiry into their care and custody? Have lawyers and the courts come to be seen as the first port of call when parental differences arise? Do current policies discourage parents from resolving family differences through family discussion and through listening to the wishes and feelings of their children?

I would urge those who are seriously discontented with the present family law system to attempt to devise and encourage public discussion of alternatives. Attacking the judges and experts is unhelpful and self-defeating. There is no imperative which requires that the courts assume the task of sorting out quarrels between parents. The courts have traditionally been loath to interfere with parental decision-making, taking the view that parents and families are the best people to make decisions about their children. There is, of course, a public interest in restraining family violence and in protecting children

from abuse and neglect. The former could be dealt with (as in some overseas countries) by an extension of the criminal law, the latter is already dealt with under the child protection provisions of the Children, Young Persons and their Families Act.

In this paper I outline six possible alternative approaches to the resolution of family disputes over children. Most involve a shift away from the adversarial process. Each promotes the view that children, parents and members of the wider family should be encouraged and assisted to work out suitable and flexible arrangements. There are no doubt other approaches and a combination of some of the approaches identified would be quite possible.

1. A reorientation of family law moving the focus to children and their rights

I would argue that the most pressing need is to reorient family law so that the focus is on the child and not on the embattled parents. Under our present system children are on the periphery of disputes about their care, custody and access. They do not qualify for free counselling in the Family Court (this facility is available only to adults) and they are not involved in conciliation or mediation conferences. They cannot initiate proceedings (except under Domestic Violence Act). While children have a lawyer appointed to represent them, the lawyer's role is not to argue for the outcome desired by the child but represents a hybrid welfare/advocacy approach which does not ensure that the child's perspective is put clearly and forcefully to the court at all stages of proceedings.

Changes in terminology

In England and Australia recent changes in family law have moved away from terms such as 'guardianship', 'custody' and 'access' which perpetuate the notion of parental ownership and control of children. In both countries the emphasis has shifted from parental rights over children to parental duties and responsibilities to children. The custody/access division has been replaced by parenting orders (Australia), parental responsibility orders (UK), residence orders and contact orders. The Australian legislation emphasises throughout that parenting is a shared responsibility and gives statutory encouragement to the view that parents should seek their own resolution of matters concerning children rather than seeking orders through the court. Support is given for 'parenting plans' which can be registered in the court and enforced through the courts.

Specific criteria in assessing the welfare of the child

The welfare of the child test has been described as 'pre-scientific myth', 'a slogan in search of definition' and 'the ultimate subjectivity'. It has also been criticised for encouraging a paternalistic approach to children and discouraging serious consideration of the views of the children concerned. In England the law has been amended to give more specific meaning to the 'welfare of the child' requiring certain matters to be considered before making a judgment about the child's welfare or best interests. The first item on the check-list to be applied by the courts is 'the ascertainable wishes and feelings of the child', a forceful reminder that children are individuals and the child's wishes must be the starting point of the inquiry.

Greater participation by children and more serious consideration of their views

If children are to be at the forefront of the court's consideration their views and interests should be considered at the start of the process and throughout the proceedings. Under the New Zealand family law system, the views of the children are often not considered until the final hearing and are often obscured or given little weight. This point is developed at length in a paper given by Mark Henaghan and Pauline Tapp at the conference *Children's Rights: National and International Perspectives* (July 1999). They make the memorable comment that 'Adult assumptions about the needs of children dominate the landscape in Family Law. The child's voice disappears'. They remind us that children should be treated as people, not marginalised as objects of concern. Tapp and Henaghan urge us to acknowledge that children have a valid perspective that should be factored into Court objectives and processes.

Opportunity to access family court services

The Australian Family Law Act 1975 child has a much clearer child-centred focus:

- Counselling provisions allow counsellors to interview children and allow the child's representative to seek a counselling order;
- A child may request that attempts be made to resolve parental disagreement by mediation;
- Children can initiate proceedings for a parenting order.

2. Primary caregiver presumption

The Commissioner for Children in a 1992 Discussion Paper *A Children's Rights Approach to Custody and Access* by Ian Hassell and Gabrielle Maxwell proposed that where parents separate the children should continue to live with the parent who has been the primary caregiver and continue to see as much as possible of the other parent. The paper sets out a check list of 22 child care tasks which are indicators of primary parenthood. This proposal (which is admittedly short on detail) received very little support at the time. Lawyers were opposed on various grounds including the fact that it would place too much power in the hands of psychologists and that the indicators emphasise historical allocation of child care tasks which may have little relevance at the time when a designation of primary parent becomes necessary. I believe that the idea deserves more careful consideration.

3. Family group conferences

The Guardianship Act takes little cognisance of the role played by relatives and people other than the biological parents of the child. Our child protection and youth justice laws have since 1989 recognised that grandparents, siblings, uncles and aunts and whanau members are an important part of most families and that, at a time when the parents are not sufficiently protecting or controlling their children, the resources of the wider family should be tapped when making arrangements for the child's care and welfare. There appears to be no logical reason why the family group conference should not be the decision making forum when parents are unable to work out satisfactory arrangements for the care of the children. There is the added advantage that the children would have the opportunity to be present and represented at the conference and to put forward their views. A right of veto might be given to the child (directly or through counsel for the child).

4. Continuity of pre-separation care arrangements

The author has argued elsewhere that the starting point for post-separation arrangements in respect of children might be the division of time and responsibility that the parents had arranged between themselves immediately prior to separation. Each parent would continue to have equivalent time with the child and the same responsibility for activities as he or she had prior to separation. A parenting profile could be developed (with the participation of the child) showing time spent with Mum, time spent with Dad, and time spent with third parties (e.g. school, sports activities, friends or grandparents, other relatives or pets) and this would be adhered to as closely as possible in the altered circumstances of separation. Time formerly spent on shared activities would be divided equally between the parents. The parent who had taken the child to the doctor, assisted with sports or cultural activities, attended 'meet the teacher' evenings or taken time off work to look after a sick child would continue to take on these responsibilities. Such an approach would provide continuity of arrangements with the least disruption of the child's routines and activities. Because this is a continuation of arrangements agreed between family members when they were a functioning family, the approach avoids the 'winners' and 'losers' dichotomy and recognizes to the maximum extent possible the choices made by the parents themselves as to the division and sharing of their parenting responsibilities. The arrangements would not be imposed by a judicial body but would be an extension of those worked out in a family setting. It would avoid the problem of the parent who, while the family was intact, had spent little time with the children but post-separation demands equal time. There would have to be a presumption that the child would remain in the family home. Currently the 'clean break' approach to matrimonial property means that children often have to move to another home, school and neighbourhood after separation.

The post-separation arrangements would replicate those agreed by the parents when they were sharing the parenting. Exceptions to the status quo would be allowed only when the child was at risk of violence or abuse from one parent.

5. Standard arrangements for sharing parenting

Another possibility would be that if a couple are unable to agree on post-separation arrangements for the care and custody of their children they would be bound by a rigid statutory parenting schedule. There would have to be different schedules according to the age of the child. With a baby, the non-custodial parent would have an allotted time which he or she could take over the care of the child, with a toddler there would be daily outings moving to weekend staying visits, primary school children would be spend alternate weekends from after school Friday to the commencement of school on Monday with the non custodial parent. Secondary school children should have the power to decide on the arrangements that best suit them.

While the idea of a rigid schedule may not be appealing, this is the way in which family law is moving. We have had a rigid scheme for division for matrimonial property. The government has introduced a Bill with standard rules for division of property of unmarried couples. The Child Support Act has replaced court determinations of needs and means with a rigid formula for assessment of child support. In cases of international child abduction the 'welfare principle' has been modified on the basis that parents who act unilaterally and without the imprimatur of the court should not be able to gain a benefit from taking the child overseas. The imposition of a fixed schedule on

parents who could not reach agreement would be an inducement to them to resolve the matter by agreement. The standard agreement would also give some structure to their discussions.

If litigation is damaging to children the imposition of standard arrangements on parents who cannot reach agreement will at least reduce the negative effects of bitterly contested litigation.

6. Parenting agreements

Couples are now encouraged to discuss and agree how their shared property will be divided post separation. In child protection and youth justice matters the family are given the responsibility of reaching a agreement. In adoption there is now considerable emphasis on getting birth parents and adoptive parents to agree on open adoption arrangements.

There is a case for encouraging parents, as a parental responsibility, to reach agreement about the care and custody of their children in the event of future separation. While this might be criticised for treating children like property, it can be argued that it is a proper discharge of their responsibilities as joint guardians to make post-separation arrangements for their children which will best suit the needs of the children. There is already provision in the Guardianship Act which recognises parental agreements as binding although they cannot be enforced where they are contrary to the welfare of the child.

CONCLUSION

The purpose of this paper has been to outline possible alternatives to the present adversarial system with its heavy cost to litigants and to the state and its emphasis on courts, lawyers, psychologists and other experts. We have developed a mind-set that resolution of parental disagreements about children is the proper business of the courts and of the new breed of child professionals. We have created a system which is expensive and highly dependent on legal and psychological expertise. Its focus is on the biological parents with little consideration of the other adults who are important to the child and only belated consideration being given to the child's perspective. It subsidises conflict and exacerbates negative feelings arising from the separation thus making shared decision making increasingly difficult. In treating children as objects of concern rather than participants in decision making they become marginalised and depersonalised. A system designed to ensure children's welfare can work to their detriment.

The question we should be asking is not 'How can fathers get a better deal from the Family Court' but 'How can we devise a system which recognises the contribution both parents have to make to the care and upbringing of their children and which has the individual child as the starting point of the inquiry'.