

FAMILY LAW COUNCIL

PROPOSAL FOR A NEW PROCESS FOR DEALING WITH POST- ORDER CONTACT DISPUTES

When Prof. Dewar gave evidence before the Parliamentary Inquiry, he offered to provide further details of our proposals for a new way of dealing with contact enforcement. The Council has also considered this issue in the wider context of finding non-adversarial processes for dealing with at least some parenting disputes, within the constraints of Chapter III of the Constitution.

The Council is aware that members of the House of Representatives' committee have been considering a multidisciplinary tribunal to take much of the work of the Family Court and Federal Magistrates Court in children's cases. The difficulties of achieving enforceable orders outside of the courts are considerable in federal law, and it is against this constitutional background that the Council wishes to propose in outline more modest, but achievable options to consider for dealing with some contact disputes.

1. Background

There is growing acceptance that an adversarial system of adjudication is not an optimal process for resolving many parenting disputes. Ever since its inception, the Family Court has endeavoured to assist parties to resolve children's issues by agreement. In the modern law, primary dispute resolution is given a prominent place, and in both the Family Court and the Federal Magistrates Court, cases are managed in such a way that a matter does not proceed to hearing without attempts being made to resolve problems through mediation.

It would be ideal if all parents could resolve their disputes outside of the courts and without the need for court orders. However, when parties are in dispute, they seek from the family law system not only a resolution of their dispute but a resolution which is backed up by the law. It is necessary to involve the courts so that there is a means of enforcement of the decisions taken and orders made.

There is nonetheless no reason in principle why at least certain decisions taken within the framework of the court system and subject to judicial oversight and review, should not be made by processes other than an adversarial system of justice. Subject to the constraints of Chapter III of the Constitution, these are matters for Parliament.

Contact disputes are one area where it may be possible to apply the basics of the substantive law concerning parenting disputes without involving all the technicalities of procedural and evidential law. In such a way, the system could be made user-friendly for non-legally represented parties. There is no reason in principle why contact disputes should be caught up in procedural technicality, nor why lawyers should be needed to navigate the process in all cases. The administrative system for making departures from the child support formulae is an example of how decision-making in disputed cases in one area of family law can be made simply, quickly and effectively without complex legal procedures, but subject to the right of people to seek a new hearing before a judge if dissatisfied with an outcome.

The Danish system of dealing with contact disputes, described by Prof. Parkinson in a supplementary submission to the Committee,¹ demonstrates how contact disputes can be resolved through an administrative decision-making process. This model is not replicable in Australia for constitutional reasons. Nonetheless, it shows how a different way of dealing with contact problems can work, and it may be that there could be adaptations of the concepts to the Australian context.

2. Constitutional limitations on alternative processes

In *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254 Dixon CJ, McTiernan, Fullagar and Kitto JJ at 270 held that:

"... when an exercise of legislative powers is directed to the judicial power of the Commonwealth it must operate through or in conformity with Chap. III. For that reason it is beyond the competence of the Parliament to invest with any part of the judicial power any body or person except a court created pursuant to s.71..."

Decisions about residence and contact have traditionally been exercised by courts, and so can be said to involve the exercise of judicial power, even though they involve a very large element of discretion.² In *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, the High Court unanimously held that legislative provisions that required determinations of the Human Rights and Equal Opportunity Commission to be lodged in the Federal Court, in order that they may be enforced, were invalid. The legislation effectively made the Commission's determinations enforceable as an order of the Federal Court, (although the Court did have the power to review issues of fact and law). That

¹ Supplementary submission, Nov. 10th 2003.

² Cf *Cominos v Cominos* (1972) 127 CLR 588.

impermissibly mixed judicial and non-judicial functions. This decision is a major obstacle to the development of a tribunal as an effective intermediate stage before taking a matter to the Family Court or the Federal Magistrates Court.

It is nonetheless, possible for decisions which are judicial in character to be exercised by officers of a Court who are not judges, so long as certain conditions are fulfilled. Mason CJ and Deane J said in *Harris v Caladine* (1991) 172 CLR 84 at 94-95:

“The legislative power of Parliament to authorize the exercise by officers of the Family Court of part of its jurisdiction, powers and functions is subject to some limitation, as is the power of the Court to delegate some part of its jurisdiction, powers and functions, whether in the exercise of its rule-making power under s.123 of the Family Law Act 1975 (Cth) ("the Act") or in the exercise of its inherent jurisdiction. The limitation is that the legislative power and the power of delegation cannot be exercised in a manner that is inconsistent with the continued existence of the Family Court as a federal court constituted under Ch III. In other words, both the legislative power and the power of delegation must be exercised in conformity with the requirement that the Court's federal jurisdiction, powers and functions are to be exercised by a court whose members are judges appointed pursuant to s.72 of the Constitution. Because a federal court, in common with other courts, may be organized or structured in a variety of ways for the purpose of the exercise of its jurisdiction, it does not follow that all the jurisdiction, powers and functions of the Family Court must be exercised by a judge or judges of that Court. But the requirement does mean that the judges of the Court do effectively control and supervise the exercise of its jurisdiction, powers and functions by participating in the hearing and determination of cases and otherwise by having the capacity to review the decisions of officers of the Court and other persons to whom jurisdiction, powers and functions may be delegated. We must emphasize that the role of the officers of the Court such as Judicial Registrars and Registrars is secondary to that of the judges. The role of the officers is to assist the judges in the exercise of the jurisdiction, powers and functions of the Court. Although it is a commonplace characteristic of modern courts that officers such as masters and registrars exercise jurisdiction, powers and functions in a wide variety of matters, those matters are, generally speaking, subsidiary in importance to matters which are heard and determined by judges.

It seems to us that, so long as two conditions are observed, the delegation of some part of the jurisdiction, powers and functions of the Family Court as a federal court to its officers is permissible and consistent with the control and supervision of the Family Court's jurisdiction by its judges. The first condition is that the delegation must not be to an extent where it can no longer properly be said that, as a practical as well as a theoretical matter, the judges constitute the court. This means that the judges must continue to bear the major responsibility for the exercise of judicial power at least in relation to the more important aspects of contested matters. The second condition is that the delegation must not be

inconsistent with the obligation of a court to act judicially and that the decisions of the officers of the court in the exercise of their delegated jurisdiction, powers and functions must be subject to review or appeal by a judge or judges of the court. For present purposes it is sufficient for us to say that, if the exercise of delegated jurisdiction, powers and functions by a court officer is subject to review or appeal by a judge or judges of the court on questions of both fact and law, we consider that the delegation will be valid. Certainly, if the review is by way of hearing de novo, the delegation will be valid. The importance of insisting on the existence of review by a judge or an appeal to a judge is that this procedure guarantees that a litigant may have recourse to a hearing and a determination by a judge. In other words, a litigant can avail him or herself of the judicial independence which is the hallmark of the class of court presently under consideration."

Dawson J wrote (at 121-2):

"As appears from that case, the fact that a court must consist only of judges, as a federal court must, does not mean that it cannot exercise its functions through an appropriate organization which is made available to it. Nor does that conclusion result, as Isaacs J. appears to have thought it did, in judicial power being vested in every officer of the court. It merely means that the court may, subject to any restrictions imposed upon it by Parliament, delegate to such of its officers as are suitable such of its functions as it thinks fit. It may do so pursuant to express powers given to it, pursuant to its rule-making power or pursuant to an inherent power to order its own affairs. No doubt it is beyond the power of Parliament to compel a federal court to exercise any of its judicial functions through an officer of the court. The exercise of those functions by that officer would not then be as a delegate of the court and that would be inconsistent with the requirement that the court consist only of judges. For the same reason a federal court must retain effective supervision and control over the exercise of its functions by its officers. If it does not do so, those functions may be seen to be exercised by an officer of the court, not as a delegate, but as a person of independent authority. A federal court must be able to exercise a real choice for itself over those matters, if any, which are to be delegated. Effective supervision and control will not be maintained if there are insufficient judges for the purpose or if for any other reason the court lacks the necessary capacity. Where the judicial power of the Commonwealth is vested in a federal court, the exercise of that power must be by or on behalf of the court itself, that is, the court consisting of judges, notwithstanding that the court may employ for that purpose an organization extending beyond the judges themselves. Whether or not the exercise of judicial power is by or through the court itself will be a matter of practical as much as of theoretical judgment."

It is also possible for powers which were once exercised judicially to be exercised administratively, subject to a review by the Court. In *Hendy and Deputy Child Support Registrar and Webb* (2001) 27 Fam LR 641, the Full Court had to consider the constitutional validity of Part 6A of the Child Support (Assessment) Act 1989 which provides for administrative decision-making to depart from the formula. The Full Court quoted with approval, a lengthy passage from the decision of

Drummond J in *Whittaker v Child Support Registrar* [2000] FCA 1733. He said *inter alia*:

“It is plain that the legislative intent, in conferring power to make assessments of child support and departures from those assessments on the Registrar, was to confer non-judicial, administrative power only. ...Importantly, though an application be properly brought before the Registrar for determination by way of departure from an administrative assessment, that official can decline under s 98EA to make a decision if 'the issues raised by the application are too complex to be dealt with under this Part' and leave it to the applicant to make application to the Family Court. That, I think, is a powerful indication against the Registrar's power being characterised as judicial. One feature always present in judicial power (subject only to the ancillary power to postpone by adjournment the time for making the decision) is the duty to make a binding decision. The right to avoid making a decision is wholly foreign to judicial power.”

It would be possible to prescribe standard contact arrangements by legislation, and to allow departures from it by agreement or by an administrative review process similar to Part 6A. The difficulty is that administrative departures from the child support formulae depend on the collection machinery of the child support legislation for their enforcement, whereas contact orders would require a court's enforcement powers and the power to punish for breach if necessary. It follows that no administrative system can be devised along the lines of Part 6A to make contact arrangements which would yield enforceable orders, consistent with Chapter III.

3. Options for an alternative process

There are two obvious options for developing an alternative adjudication process which adopts a more inquisitorial and informal approach to adjudication. The first is an arbitration approach to at least some children's disputes. The second is the creation of a simple decision-making structure within the court system and by delegation from Chapter III judges and magistrates. The effect of the High Court's decision in *Brandy*, (above) is that arbitration in children's matters could probably only be done by consent. Nonetheless, the current provisions of the Family Law Act provide for arbitration by consent only in property matters under Part VIII, not in children's matters.

The Inquiry may wish to consider the option of allowing the Court to encourage the parties to consent to arbitration of at least some disputes about children. Suitably qualified arbitrators with relevant disciplinary expertise could seek to conciliate, and if necessary, make a decision subject to review by the Court. Arbitration offers a speedy and effective means of decision-making if the couple cannot agree. There is already a substantial panel of lawyers who have been trained and accredited as arbitrators in property matters, and who would be able

to arbitrate disputes about children. There is no reason in principle why an arbitrator should be a lawyer as long as the fundamentals of procedural fairness are observed. There is also no reason why an arbitrator should be bound by the rules of evidence.

Another option is to have decision-makers in parenting cases acting under the delegated authority of the judges, on the same basis as was confirmed by the High Court in *Harris v Caladine*. The advantage of this is that at least some orders might be made by a non-adversarial, and simple process of adjudication, without the difficulty and expense of utilising the normal court processes.

The Council considers that as a pilot project, this might most usefully be attempted in relation to disputes which arise after orders have been made (by consent or otherwise). Many of these present now as contact enforcement issues, but often the underlying problem is that the original orders are unworkable, and need to be varied. Contact orders reflect the circumstances at the time they are made. As circumstances change, so orders may need to be varied. It would be of great benefit to families, as well as to the family law system as a whole, if parents could be assisted to vary their orders, and to resolve difficulties which arise over contact, without having to file court applications and with little expense.

When contact problems arise, it would be beneficial if people could go to a person, or to an office, to get advice and to help them resolve their dispute, without the need at that stage to commence court action. Two options are presented to achieve this.

a) Option 1: A Contact Support Registrar

The first option involves the appointment of Contact Support Registrars to the Family Court and the Federal Magistrates Court, who would be available to assist parents experiencing difficulties with contact arrangements by helping them to sort out problems with contact orders which were no longer workable, and, subject to some limitations, to make decisions on how to vary orders if the parties could not reach agreement themselves. This adjudication role can only occur by delegation from the judges and magistrates, and within the constraints explained by the High Court in *Harris v Caladine*.

The process for seeking assistance would be very simple. An aggrieved parent would be able to write a letter, or make an appointment. The Contact Support Registrar would invite the other parent to attend a meeting. The experience of case assessment conferences in the Family Court, and of mediation processes outside the court environment, is that such meetings work best if the lawyer works in a team with a psychologist or other counsellor when seeking to advise

and assist the parties to reach agreement, and if there is a balance of genders. The environment in which such a meeting would be held would be an informal, office-style environment similar to that used in mediation.

In that meeting, the Contact Support Registrar and counsellor would explore options for conciliation, explain to the parties the benefits of mediation, or offer other advice or assistance to help them resolve the issues about contact. Where there has been a history of domestic violence, special arrangements could be made, as the courts do at present, to assist the parents by means other than a face to face meeting.

If agreement is reached, the Contact Support Registrar would make orders by consent.

This option also allows a further possibility, that within the constraints of *Harris v Caladine*, the Contact Support Registrar perhaps assisted by the psychologist or other counsellor, could proceed to decide the case if the parties cannot agree. The kinds of situations in which the Contact Support Registrar would have such delegated authority could include minor variations in the amount of contact, changes in arrangements for picking up and returning the child, varying contact arrangements for birthdays and major public holidays such as Christmas Day and other religious festivals, and other such matters.

More major disputes would need to be heard by a judicial officer. However, the Registrar will be able to assist the parties by providing information about the legal process and relevant forms.

For such an approach to be effective in achieving the goals of this process, the filing of evidence would not be necessary – the parents could present their cases in whatever oral or written form they thought best. Furthermore, lawyers, while permitted, would not be necessary. As far as possible, the process should avoid adopting the modus operandi of an adversarial system.

The Contact Support Registrar ought to be able to make orders requiring parties to attend a counselling program for couples in conflict about parenting issues, such as has been piloted in Parramatta, Hobart and Perth. Many contact problems are really relational problems, and the prospects of bringing an end to the conflict is bleak unless the parties can be helped to deal with the relational factors which hinder them from being able to look at the children's interests.

A litigant who is dissatisfied with the outcome would have access to a hearing de novo before the Court. At that point, the parties would need to file affidavits, decide on possible witnesses and to prepare the matter for a trial. However

experience with the decisions of judicial registrars indicates that few would take advantage of a right to a rehearing.

There could also be an option for publicly assisted enforcement where necessary. To avoid establishing a new agency, the Contact Support Registrar could refer the aggrieved party to Legal Aid, which would be given a budget to provide non-means tested representation for enforcing contact where on the merits, it considers that there has been a serious violation of court orders without a reasonable excuse.

b) Option 2: An Agency to deal with contact disputes

Under this proposal, an office would be established within Centrelink, or some other such accessible public agency, to provide advice and assistance to people who have contact problems, and if necessary to take enforcement action.

A person with a contact dispute would be able to ring up and make an appointment with a contact support officer, or to write a letter seeking assistance. The contact support officer, who would need to be a lawyer, could then contact the other parent and ask him or her to come in for a meeting to try to resolve the issue. In certain cases, such as where there has been a history of violence, it may be necessary for the contact support officer to talk to each of the parents separately, or by telephone only. The Child Support Agency's review process has dealt with such issues successfully for a number of years.

As in option 1, it would be desirable for any meeting with the parents to involve a contact support officer, together with another counsellor in a gender-balanced team. At such a meeting, both parents would be able to give their perspectives on what the problems are, and the contact support officer and the other counsellor, using conciliatory processes, could seek to assist the parties to reach an agreement, or to refer the parties out to mediation or to parenting programs.

If the dispute can be resolved, the contact support officer would assist the parties by drafting a revised agreement which could then be filed in the court by consent in accordance with the normal processes for making consent orders.

If the dispute cannot be resolved, then the contact support officer would provide information about the legal process, and give the parents the relevant forms to initiate legal proceedings. The matter would then need to proceed through the court system like any other.

If the contact support officer considers that the issue is one of a serious breach of court orders, he or she could refer the matter to a colleague in the agency to assist

an aggrieved party to pursue enforcement action through the courts at public expense. The threat of this might indeed be useful in helping to resolve serious conflicts where a parent is wilfully violating court orders.

4. Conclusion

There are no doubt many variations on these options. They do offer the prospect of a quick and cost-effective intervention to add to the available PDR resources. The Council prefers the first of the two options because it has a greater capacity for resolving disputes and making binding orders.

Any system of this kind, however, needs to be well-resourced to ensure that parents experiencing difficulties are able to obtain timely assistance. In relation to both options, what the Council is proposing is a strategy of early intervention in relation to post-order conflicts, to complement the other initiatives the Committee is considering concerning mandatory educational processes before filing.

A system which helps parents in a timely way to resolve conflicts over orders, and to vary orders which are unworkable or no longer appropriate, will be likely to reduce considerably the number of cases proceeding in the courts as enforcement actions. However, where there has been a significant breach of orders, and the problem is not simply one of an unworkable or outdated order, an aggrieved parent could be provided with legal assistance and support to uphold those orders just as child support is enforced through a publicly funded scheme. If these reforms were introduced, they should be accompanied by significant changes to the present legal regime for the enforcement of contact orders.

The Council commends these ideas to the consideration of the Committee.

November 13th 2003.