

**HOCHELAGA LECTURES 2015: THE FAMILY COURT AND THE WELL-BEING OF THE CHILD (1)**

**24 JUNE 2015**

**The Handling of Parental Responsibility Disputes by the Australian Family Court following a Decade of Reform**

**The Hon. Justice Victoria Bennett**

**Justice Reyes:**

- Event co-organised by the Hague Conference of Private International law and the CCPL.
- The HCPIIL has been working in the Hague to promulgate conventions/treaty to unify private international law gradually
- The idea behind these lectures is to organize workshop seminar workshop lectures for sharing among judges in Asia-Pacific region; and ordinary persons and judges – to appreciate each other’s concerns; what judges do; what lay persons can look for.
- 2015- Hochelaga lectures- first lecture for protection of the child
  - Reforms in the family law- law court procedure in Australia - reflect in lessons learned in the decade
  - 2<sup>nd</sup> Lecture in October: Judge Huang Yongwei, the President of the National Judicial College of the People’s Republic of China, will be speaking on the approach to juvenile crime of the Courts in Mainland China.
  - 3<sup>rd</sup> Lecture in November: Chief Justice Diana Bryant AO of the Family Court of Australia will be speaking on the challenges of safeguarding the welfare of the child across international borders.

**Justice Victoria Bennett (Chief Justice)**

**Background of the Australian Legal System**

- Australia’s governmental system is one of cooperative federalism
- The Australian Constitution is based on implicit separation of powers between legislature, executive and judiciary
- Constitution confers judicial powers on Federal courts, of which the Family Court of Australia is one, which requires power to be exercised judicially
- Concerns private family law
  - not public law (e.g. children adjudged to require protection from the state/children who have committed crimes), for public law matters it is within the state federal courts
  - Family violence orders taken by family members or by the police on

behalf of the family member against another member is also a matter of state law

- In family law, courts make similar orders as matrimonial courts
- Family court was established in 1975 as a specialized court, jurisdiction under the Family Law and in certain jurisdictions

Corporations Law

- Matters involving contract, dispute resolutions
- Superior court of record and Intermediate court of appeal
- First judges are magistrates
- In 2000 federal magistrate courts are established – comprises around 60 judges across Australia
- Fed circuit courts is the trial court – incl. family law
- Family law – 85% filings go to the fed circ. Court, which deals with conflicts, long cases and cross appeals
- 40 years since its inception, the family law subject to number of parliamentary reviews, amended approx. 8 times
- Amendments done by Part VII of the Act, and the law is required to give paramount consideration to welfare of the child/best interest of child
- Some of the underlying ideas for change include how best interests of the child is to be ascertained

### **Reform (results of the past 10 years)**

- 1995: reform aimed at effecting an attitudinal shift in the way parents approach post separation parenting;
- Reforms discussed in some detail in 2005 report in family law
  - deal with child custody;
  - encourage parent remain involved with children post separation;
  - Looking in hindsight, legislation is changed in an incremental way rather than substantive way
  - Concepts pertaining to ownership such as “custody”, “access”, and “guardianship” were eliminated (“custody” became “residence”; “access” became “contact”; and “guardianship” became “parental responsibility”), this reflected the concern that these provisions encouraged a mind-set of parental ownership and control of children, in turn encouraging the perception of “winners” or “losers” in parenting disputes
- The 1995 reforms did not achieve their desired effects and some submissions

were made in the 2001

- Led to the 2005 Law Commission Report
- There were considerable lobbying by fathers' groups
- 2003: Prime Minister John Howard ordered parliamentary inquiry into post separation care arrangements
- December 2003: A parliamentary enquiry was set up with specific task to recommend what factors to be taken in account in determining the time each parent should spend with their child after separation
  - E.g. rebuttable presumption – on how long child should spend with parent, whether the child should spend equal time with each parent; in what circumstances a court should order that children of separated parents have contact with persons other than their parents (including grandparents); whether the existing child support formula was fair and proper to both parents in relation to the care of and contact with their children.
  - Conclusion: No presumption of equal time; however, parent responsibility will be shared except where there is entrenched family conflict, family violence, substance abuse or established child abuse including sexual abuse.
- 2006 Shared Parental Reforms:
  - provided 2 primary considerations to assess best interest for the child
    - (1) importance of a child having a meaningful relationship with both of their parents (and both parents being involved in decision-making in relation to their children)
    - (2) need to protect children from family violence and child abuse
    - Hence, presumption introduced in favour of shared responsibility rebutted by family rows, or court consider appropriate, no presumption of equal time, but substantial time was mentioned so many times in legislation, to many people (not just lay people), however easy to erroneous to think that equal time is the starting point
    - Primary considerations inserted in substantive provisions under s60CC of the Family Law Amendment (Shared Parental Responsibility Act 2006)
  - Page 9-10 of the paper:
    - additional considerations for the court to take into account

- the list is expanded
  - high level entrenched conflict is not a ground; but does not stop courts finding this and legislation now recognises it
  - other considerations: when the court is satisfied that there is a false allegation or statement in the course of proceedings, the Act obligates the court to order one party to pay some or all costs of another party to the proceedings
- Hong Kong:
  - court procedures v law reform
  - c.f. Australia we do that at the same time
- Australian procedural changes:
  - 2004 Family Court of Australia launched pilot project on changes in family procedural rules:
    - introduced less adversarial trial in children matters;
    - judges have more control and responsibility in case management practices
      - e.g. evidence rules will only apply partially (hearsay, qualified opinion have no application, unless there are exceptional circumstances)
  - 2006 reforms
- Family Consultants
  - Each family allocated one family consultant
  - In 1975 since the inception of Family Act, family consultants play an investigative role
  - 2006 – consultative and conciliation function moved to Family Relationship centres with mandate to conciliate parental disputes
- Child representatives became an independent children’s lawyer
- Shared parental reforms are not adequate – reforms take place on a pendulum basis:
  - fathers and mothers rights groups exist in response to these, but no children rights groups exist yet.
- Page 17-20 of the paper:
  - Attorney General Honourable Robert McClelland released consultation paper related to the November 2010 Exposure Draft Family Law Amendment (Family Violence) Bill [2010].
  - The Exposure Draft Bill became the basis upon which parliament reforms (inserted into legislation) were introduced in 2011 on family violence, shared care and infant development

- **2011 Family Violence Reforms**
  - Focus is to amend Part VII of the Act
  - Aim is to enable the courts and the family law system generally to respond more effectively to parenting cases involving violence or allegations of violence
  - Primary consideration in courts for considering what is the child's best interest: taking children from physical and emotional harm > maintaining child's relationship with both parents; hence, ability of parent to reach meaningful relationship was deleted
  - Page 17 of the journal: other important changes
  - Page 18 of journal: if courts are satisfied that there are false allegation and evidence, the party giving false statements will have to pay costs
  - Page 18 of journal: new definition of "family violence": now subjective definition which defines family violence as "violent, threatening or other behaviour by a person that coerces or controls a member of the person's family, or causes the family member to be fearful" and not objective requirement that a victim's fear or apprehension be reasonably held
  - Page 19 of journal: subparagraph provides non-exhaustive list of examples of behaviour which constitute family violence – see journal factors a) – j); also non-exhaustive list of examples where the child is "exposed" to family violence
  - Entrenched family conflict not mentioned in any part of the reform in spite of examples incorporating it by court and social science evidence accepted by the committees
- **Remaining challenges**
  - (1) Increasing complexity in the legislation
    - Page 23: e.g. section 71 of the Act; there are about 11 sections which deal with children; Part VII includes 238 sections, 637 subsections, organized into 14 Divisions and 44 Subdivisions
    - Inconsistency amongst the provisions
  - (2) Legislation that perpetuates the deep-seated community confusion of law which fuels the disappointment in legal outcomes (e.g. 2006 reforms gives a perception to parties that equal shared parental responsibility equates to equal time or 50/50 - page 21-23 of the journal)
  - See PowerPoint slides for actual legislative provisions
- **Problems:**

- (1) Since the legislation now set out the factors explicitly, court clients now read the legislation and see it as a checklist, consider that they tick every box as relevant and are not happy if they do not get the outcome they seek
  - Hence, the function of a judge in determining case is to understand the law intuitively rather than checklist
- (2) Community and judges may sometimes be distracted by important factors of the case; practitioners and litigants sometimes do not have a better case than they think
- (3) Entrenched parental conflict:
  - social scientists view this as destructive and harmful to the emotional being of children in long term; however this factor is not expressed in legislation
- **Comments**
  - (1) Attitudinal shift; father more involved; positive cultural change among profession and community e.g. significant change in the way settlements are negotiated, with time being spent with each parent being significantly more balanced between the parents; also greater awareness among court users that protection of children is to be prioritized over other concerns.
  - (2) authors identified streamlined procedures; 2 courts: they have concurrent jurisdiction, no provision showing when a case should be transferred; considerable delay
  - (3) procedural rules are not harmonized, parties have to re-document the case when transferred to another court– waste of money
  - (4) focus on mediation: courts have to encourage this so that they can vacate dates for cases that cannot be resolved by mediation
  - Various reasons why mediation does not work: parties refused to deal with one another; parties not equipped/ready to deal with the disputes etc.
- **Conclusion of the paper**
  - (1) do not over complicate legislation
  - (2) essential for government to clearly communicate to public why things are being changed in particular way, how they are implemented
  - (3) law should facilitate smooth resolution of disputes; should prevent undue delay with best interest of children in mind

## Questions from the floor

1: What is the role of family consultants; at what stage will they be expected to help the court? Are there no confidentiality between parties and consultants as they are expected to report to the court?

A1:

- yes; they are not mediators; they are previously mediators and assessment, and in 2006 they ceased to have the mediator role;
- Family consultants:
  - Two main types: ones in the court; outside court( some of them are psychologists);
  - Courts give short notice: matter of days/weeks; see full report and set out in 7- 14 pages on the problems in the family to assist judge to make decisions; if require further assessment, more thorough reports after spending more time with the family;
  - give court/assist court to make assessment of relationships between parent of child, parenting; it is not the function of family consultant on whether the child is sexually abused/abused; need to give social science evidence and child development; they see all the observations, judge is there to resolve all the evidence

Q2: it is advised by lawyers not to raise family violence as an issue in parental custody disputes, given impression that this will be a disadvantage to their case for custody; how do court view and receive info on family violence; is this something court view as a disadvantage to the P?

A2:

- pendulum swinging dilemma between 2006-2011;
- (1) questionnaire sent out to parties before doing assessment asking them what their experience with family violence be;
- (2) involvement of state agencies in court even though they do not do child protection law; sometimes they come as parties;

Q3: representation of children and listening to children; independent children lawyer (ICL) not instructed by the child; whether that has been encouraged by reforms?

A3:

- need to talk to children; empirical evidence; not something the judiciary would embrace, some do, some do not;
- duties of ICLs are set up by legislation and clear that it is not their job to take instruction from child; they can reveal the wishes of the child but they are not binding;
- judges are not experts and do not have necessary skills to talk to children; lack of money and resource in courts;
- There are already terrific family consultants by which judges can hear what children say; in terms of fact finding, judges have ability to be exposed to what children say;
- Function of judge with child is to have child to say things to assist their decision making process; and also to respect the child which will affect him more than anyone else
- Consideration: why talk to a child, respect child, sometimes they may have to directly meet the child

Q4: In England and Wales: children can be joined as parties; what is the situation in Australia if the child is competent enough to convey instructions?

A4:

- The ICL is bound to tell the court what the child says, and not what you should do; e.g. he wants to live with his father, he hates his mother, and he may run away if stay with mother; ICL cannot recommend causes of actions which the child does not want
- Maturity aspects: different from England and Wales; they are not special scientists etc.; family consultants in Australia assist court in dealing with what child says; e.g. where 15 year old with entrenched views and if he says something that are inconsistent etc.; the other party will apply for ICL for him to be discharged
- Out of the children's court jurisdiction; state legislation; whether child wants to subject itself to that jurisdiction

Q5: Mediation in Australia: child inclusive mediation process is very good- whether

we should do that in Hong Kong; e.g. family consultants are trained and they work with children and give feedback to court on children's views; great impact to the parent to hear directly from children; should we learn from the Australian law; at the end there needs an assessment in determining which parent is appropriate for the child

A5:

- Child inclusive mediation: part of the adversarial trial; should remain with family who enters into voluntarily; may not work in high conflict family.
- There needs to be a limited time between the publication to the parent of child and to judge to make assessment.
- Child is divulged to the family consultants.
- Not just assessment tools, but also settlement tools to the parents; and is being explained to the parents.
- Child in invidious position; since parents now know what the family consultant knows and may put pressure on child.
- Not viable to have repeated reports; because if parents know first time, members may not divulge again the second time
- Needs to work out a better timetable e.g. report in one week, mediation next week, litigation the next.