Topic 5: Child's Best Interest

The 2011 amendments to the *Family Law Act 1975* introduced wide definitions of 'child abuse' and 'family violence' as well other reforms relating to the 'best interests' of the child.

'The "best interests" of the child involves a subjective test as each family has different dynamics'. Discuss and refer to the legislation and case law. Do you agree with any of the 2011 reforms introduced about how a court is to determine 'best interests'?

Although the paramountcy principle is an *objective* test, the decision as to what constitutes the best interests of the child is *subjective test* depending on the views of the DM. Discuss.

The FLA promotes two co-existing but potentially conflicting philosophies. On the one hand, children have the right to have a meaningful r/ship with both parents and other parties significant to their care, welfare and development. On the other hand, courts must ensure that children are protected from direct and indirect harm and abuse.

Discuss this comment with reference to provisions in the FLA and any relevant case law.

- s 60CC(2)(a) and (b)

BEST INTERESTS

- The central principle relating to children in family law is that any decision made by a court should be in the best interests of the child. The *Family Law Act* requires the best interests of the child to be the paramount consideration when making or altering parenting orders.
    - It has been a long-standing principle (in existence since the commencement of the *Family Law Act* in 1975), that a child's welfare is to be the paramount consideration in relation to any decisions affecting the child. The *Family Law Reform Act 1995* amended the *Family Law Act* to specifically include the term 'best interests'. The principles underlying the amendments are derived from the *United Nations Convention on the Rights of the Child* (CROC). For more details about CROC see International obligations.

HOW TO DETERMINE BEST INTERESTS

- **Some objectivity**
    - Must be determined with some objectivity, having regard to the wide range of contemporary social standards. It is not a totally subjective test based on the views/standards of the individual parent, BI is on a case by case basis (***Horman***)
    - Where the court is convinced that the proposed mode of behavior of a parent seriously offends even the most elastic views of conventional morality and the mode of living may seriously jeopardize the future welfare of the child, the court has a duty to act upon that view
    - There is no single right answer, each judge will order based on what he/she thinks is in the child's best interests. BI is not a question of fact, but **a question of value judgment (*CDJ v VAJ*)**
- **Section 60CC considerations**
    - Section 60CC is NOT ALL THAT THE COURT MUST CONSIDER in determining parenting arrangements. It must also make a decision about whether there should be equal shared parental responsibility (s 61DA), and if there should be, then it must also consider whether it is in the best interests of the child, and reasonably practicable, to make an order that the child spend equal time with both parents (s 65DAA(1)). If that is contra-indicated, then it must consider whether the court should consider whether it is in the best interests of the child, and reasonably practicable, to make an order that the child spend substantial and significant time with each parent (s 65DAA(2)).
    - In this methodology, the s 60CC considerations are relevant throughout. They are not merely relevant at one stage of the decision-making process. They determine the general nature of the parenting order that ought to be made (the direction) and then the detail of what orders would be appropriate and best for the child in the circumstances (the route). Throughout the process, the best interests of the child, as interpreted with reference to the s 60CC considerations, remains the paramount consideration.

2006 REFORMS

- **The 2006 *Amendment Act* divided the list into two tiers: 'primary considerations' and 'additional considerations'.**
    - The intended operation of the two-tier system is not explained in the Act but the courts have since stated that though the primary considerations will usually be given more weight, they will not necessarily determine the outcome, as against the additional considerations, in every case (see Mulvany v Lane [2009] FamCAFC 76)

- **Conclusion:** However, the 2006 amendments are clearly also directed at how judges should determine the cases that are in dispute. That doesn't make the most difficult cases any easier, but at least there is a clear indication of Parliament's intentions in terms of the purposes that judicial officers should seek to promote when deciding post-separation parenting cases.

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- **Changes made to s60B**
  - Even if the Parliament had not enacted the two tiers of considerations, the changes made to s 60B should have been enough on their own to bring about major changes to the law as applied in individual cases. This is because these objects provide much more guidance than previously about how to decide disputes about post-separation parenting arrangements.
  - **Family violence**
    - Before amendments there was evidence that provisions promoting contact between children and parents and pro-shared parenting overwhelmed family violence provisions
    - Only extreme violence would lead a judge to call into question whether there should be contact despite negative implications for children being exposed to FV
    - Some judges promoted contact over protecting child from violence
    - **Further changes to strengthen protection given to victims of violence**
      - More weight given to protecting child than building meaningful relationships
        - Orders to promote meaningful relationships should be made only to extent that it is possible while still maintain safety

      - For a substantial proportion of separated parents, issues relating to violence, safety concerns, mental health, and alcohol and drugs are relevant.
      - However, there is also evidence that the 2006 changes have improved the way in which the system is identifying and responding to families where there are concerns about family violence, child abuse and dysfunctional behaviours. In particular, systematic attempts to screen such families in the family relationship services sector and in some parts of the legal sector appear to have improved identification of such issues.
      - The link between mothers' safety concerns and poorer child wellbeing outcomes, especially where there was a shared care-time arrangement, underlines the need for these sectors to have a more explicit focus on identifying the minority of highly vulnerable cases in which concerns about child or parental safety must take priority in decisions about care-time arrangements.

- **RELATIONSHIP BETWEEN PRIMARY AND ADDITIONAL CONSIDERATIONS**
  - Under the law prior to 1 July 2006, no one factor was given a higher status than another.
  - **Additional considerations MAY outweigh primary – explanatory memo:**
    - There may be some instances where these secondary considerations may outweigh the primary considerations. For example the court may have a case of a teenage indigenous child who wants to keep living with a parent to maintain their connection to traditional culture. The other parent who lives far away and is unable to travel regularly also seeks residence. They also have demonstrated that they will not facilitate connection with culture. In such a circumstance the court may well decide that for that particular child the secondary factors may effectively outweigh that consideration and that it would not be in the best interests of that child to change residence, the court may consider other ways the child and parent can maintain a meaningful relationship.
    - NOT a good example – not a relocation case
  - **While there may be examples of additional considerations proving decisive over the primary ones, <u>it is submitted that it will be very unusual indeed</u> for the primary and additional considerations to point the trial judge in opposite directions in determining an individual case.**
  - "The object and principles (s 60B) and the primary considerations (s 60CC) provide the general direction in which the camera should be pointed, while the additional

considerations are the means by which the camera can be focused on the scene to provide a clearer picture.

- The major reason for stating that there is no necessary conflict between the primary and additional considerations is because the Parliament has not stipulated in all cases that, in the absence of the need to protect the child from physical or psychological harm, the court must ensure that the child has a meaningful relationship with both parents. Rather, it has asked the court to consider 'the benefit to the child of having a meaningful relationship' with both parents. That is very different. The additional considerations will help the trial judge to determine whether such a benefit is possible in a given case.

- **Have the additional considerations been downgraded?**
  - Some of the **controversy** surrounding the two tier approach has arisen from a perception that the factors which were contained in s 68F(2) prior to the 2006 amendments have **<u>been relegated to a status of subsidiary importance</u>** in determining parenting cases.
  - For example, **children's views**, which in the case of older children have often proved to be a major or decisive factor are contained in the list of additional rather than primary considerations.
  - If the additional considerations are understood as amplifying the primary ones, then much of the difficulty disappears about treating such matters as additional considerations. **Children's views, for example, may be a highly relevant factor in choosing who should be the primary caregiver and how much time they should spend with the other parent.** This factor assists the court in working out the detail of the parenting arrangements given the objective of ensuring that the child has a meaningful relationship with both parents. Where an older child is strongly opposed to contact with one parent then this will be a highly relevant consideration in determining whether he or she will benefit from a meaningful relationship with that parent.

BENEFIT TO A CHILD OF HAVING A MEANINGFUL R/SHIP WITH BOTH PARENTS – ALWAYS POSSIBLE?

- Section 60CC clearly indicates that the court should so exercise its discretion in relation to post-separation parenting arrangements that meaningful relationships between parents and children are maintained, in the absence of violence or abuse. A child will almost always benefit from a meaningful relationship with both parents in the absence of violence, abuse or very high conflict.

- Reasons why a child may in fact **NOT benefit** from a close relationship with both parents <u>*even in the absence of violence or abuse.*</u>
  - Child strongly resistant to contact
    - In some situations the court may reluctantly have to conclude that given the views of the child (additional consideration (a)), there would be no benefit to the child in trying to maintain a relationship that has irretrievably broken down.
    - For example, in In the Marriage of P A and J A Litchfield,[17] the court had to consider an application for access by a father to a 9 year old girl. The mother and daughter were involved in the Exclusive Brethren. The father had been put out of the fellowship and the mother argued that he was an 'adulterer' because he was living with another woman. Because the daughter regarded her father as an evil person who should be shunned, contact with him caused her deep distress. While the judge felt considerable sympathy for the father, he concluded that access would not benefit the girl, and indeed would expose her to extreme stress and anxiety. Consequently, access was denied.
  - Parent unable to offer meaningful relationship
    - In other situations, the evidence may indicate that while the child would benefit from a meaningful relationship with a non-resident parent if it were possible, the limitations on the capacity of that parent to provide for the needs of the child (additional consideration (f)), are such that the relationship may not be very meaningful at all. This might be the case for example where, as the consequence of alcoholism or mental illness, a parent has great difficulty in caring for the

children, and at best, all that can be managed is a visiting relationship for relatively brief periods.

- Parent unwilling to keep up a meaningful relationship
  - Another situation where consideration of the possibility of having a meaningful relationship may arise is where the court has to decide whether to vary a parenting order to deprive a non-resident parent of the regular contact to which that order entitles him.
- Parents with intractable conflicts
  - Another situation where the child may be unable to benefit from a meaningful relationship with both parents is where there is such intractable conflict between the parents on an ongoing basis that the court concludes a meaningful relationship with both parents is simply not possible. This situation may arise, for example, where after parenting orders have been made, the non-resident parent brings the case back to court on several occasions for alleged minor breaches that are not substantiated; referral to a contact orders program or similar community resource has not proved effectual in reducing the levels of conflict, and the parents continue to have legal conflicts over different aspects of post-separation parenting such as decisions on education. Intractable high conflict in the relationship between the parents is not, per se, an additional factor to be considered in s 60CC(3).

CHILDREN'S VIEWS

- Under the *Family Law Act*, any views expressed by a child must be taken into consideration to some extent, even if the child is very young. The weight that the child's views will have on the final decision will, however, be affected by the child's age, maturity and level of understanding, and the court may eventually conclude that that the child's views on an issue are not the same as the child's best interests when all the other factors are considered.
- **It is arguable that the child's views have less weight since the 2006 *Amendment Act* as against the 'primary considerations'. The child's views are listed under 'additional considerations'.** If there was a conflict between a child's views and a factor listed as a 'primary consideration' (for example, the benefit of the child keeping a relationship with both parents) then it is **likely that the primary consideration will be given more weight** in the final assessment of what is in the child's best interests.

- **Traditional form of litigation**
  - Prior to the 2006 amendments, a parenting case in a family law court proceeded in the same way as any other civil law case. There were usually lawyers for each party who gathered whatever evidence they could find to convince the court that their party's version of the facts was the correct one, and then to make the orders that they wanted. Even when the parties did not have lawyers and represented themselves in court, the process was inevitably 'adversarial', being in practice, as much about trying to destroy the case of the other party as to convince the court of your own.
  - This often led to the public airing of unpleasant, personal, irrelevant or untrue facts about people and increased the level of hostility between the parties. Children, particularly, suffered considerably by exposure to the high-levels of stress and conflict involved in a long-running family court case run in the traditional mode.