Equal Shared Parental Responsibility and Children’s Rights in Australia

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I Introduction

The United Nations Convention on the Rights of the Child (‘CRC’) has made it unequivocally clear that promoting the best interests of the child should be a primary consideration in decision-making regarding the wellbeing of children. Australia has arguably gone further by making the best interests of the child as the paramount consideration under s 60CA of the Family Law Act 1975 (Cth) (‘FLA’). However, the idea of promoting the best interests of the child is a contested field which varies based on culture and values. In Australia, the paramountcy principle is statutorily understood to mean that the best interests of the child are promoted by a legal presumption of equal shared parental responsibility. This article shall explore the rise of parental responsibility in Australia, particularly the presumption of equal shared parental responsibility and children’s rights.

II The Australian Ratification of the CRC

The CRC was adopted by the United Nations General Assembly on 20 November 1989 and was ratified by Australia on 17 December 1990. The drafting and adoption of the CRC demonstrated the emerging awareness and promotion of children’s rights. The CRC sets forth the rights and needs of children universally, promoting a commitment to both children’s wellbeing and rights. The CRC is quite comprehensive in scope, affording ‘provision, protection and participation’ for children’s rights. Article 3(1) of the CRC states, ‘[i]n all actions concerning children … the best interests of the child shall be a primary consideration’. This is accompanied by art 3(2) which stipulates that the rights and duties of parents, legal guardians or other responsible caregivers are to be taken into account in decision-making for children.

The model of rights given to children recognises that children are vulnerable and developing in nature, but they are entitled to the right to have their interests protected by virtue of their humanity. These rights create obligations owed to children, typically by parents who become ‘duty bound to protect or promote certain interests of the right-holder’. Children should be protected from serious harm, but views formed by a mature minor should be respected. To enable children to exercise their own decision-making promotes not only the protection of children, but also their participation in asserting their rights. Decisions regarding parenting orders are made in the best interests of the child with parental responsibility starting from a procedural presumption of equality. The principles of the CRC have been adopted into Australian domestic legislation and given effect...
through the paramountcy principle found in pt VII of the FLA, as the CRC is not given separate consideration under Australian law.15

III The Rise of Parental Responsibility in Australia

The Family Law Reform Act 1995 (Cth) (’FLRA’) introduced the concept of parental responsibility.16 Under the reform, children had the ‘right to know and be cared for by both parents’.17 One of the main aims was to stop children being viewed as property of their parents in heated custody disputes, thus juxtaposing the rights of children with the responsibilities of parents.18 In the years following the 1995 amendment, the evidence seemed to point towards little change in practice as the majority of child-rearing and caring work was still being undertaken by mothers.19 Although there was a shift towards recognising the legal status of both parents as caregivers, many fathers did not attempt to become significantly involved in their children’s lives.20 The majority of parents who entered into shared parenting agreements did so without reference or even knowledge of the FLRA.21 The 1995 amendment was also found to have been used by the non-resident parent to harass or control the resident parent because of the exploitation of continuing parental responsibility.22 This concern has been articulated in recent years, whereby the legal presumption of equal shared parental responsibility leaves open almost ‘endless possibilities of conflict, disagreement, power and control’.23

In 2003, the House of Representatives Standing Committee on Family and Community Affairs was formed to inquire into matters relating to parenting orders and arrangements.24 The inquiry was in response to the widespread dissatisfaction with the family law process, particularly the negative effects that adversarialism had on families during litigation.25 Despite data showing a significant increase in the number of parents who could not agree about the care of their children since the 1995 amendment, the movement towards shared parenting was desired.26 The parents generally interested in shared parenting are the ones most likely to co-operate and least likely to use the family law system to solve their dispute.27 Conversely, the sort of parents that are likely to use the family law system are less likely to cooperate on shared parenting.28 The Committee recommended a rebuttable presumption to be implemented in favour of equal shared parental responsibility.29 This is reflected in s 61DA(1) of the FLA. They also recommended a presumption against equal shared parental responsibility in cases of ‘entrenched conflict, family violence, substance abuse or established child abuse, including sexual abuse’.30 This is reflected in s 61DA(2) of the FLA, with parents also able to rebut the application of the presumption.31 The Committee rejected a legal presumption for equal time because of concerns over a ‘one-size-fits-all’ model to the wide diversity of Australian families and their care arrangements.32 The incorrect assumption that equal time is derived from the presumption of equal shared parental responsibility has led to much of the contention surrounding the presumption.33

IV Equal Shared Parental Responsibility in Australia

Introduced on 1 July 2006, the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) created a presumption of equal shared parental responsibility with the aim for both parents to be involved in their children’s lives after separation.34 The provisions were inserted into pt VII of the FLA, which provides the court with a wide and largely discretionary power to make orders about parental responsibility, the care and living arrangements of children, and any other parenting orders it deems relevant to a child’s welfare.35 There are often broader issues that may affect the realisation of children’s rights, particularly the interests of parents.36 There is potential for a winning mentality to result based on which parent is perceived to win the most rights held over the child.37 This is heightened by the adversarial process of the Australian legal system. With the introduction of the presumption, it has promoted the rhetoric of parental responsibility with parents at the centre.38

The Commonwealth Parliament’s intention behind the presumption was to ‘change the culture of family breakdown from litigation to cooperation’, with children having an undeniable right to know both parents.39 However, the amendments required parents to participate in often litigious family dispute resolution meetings to resolve disputes about the care of children.41 The amendments also sought changes aimed at protecting children from harm and family violence.42 Some scholars have

15 Ralton v Ralton [2017] FamCAFC 182, [18].
16 Family Law Reform Act 1995 (Cth) pt VII div 2 (’FLRA’).
17 FLA (n 2) s 60I(b)(a).
20 Ibid.
21 Ibid 1–2.
22 Ibid 5.
26 Rhoades, Graycar and Harrison (n 19) 253.
27 Ibid.
28 Ibid.
29 Every Picture Tells a Story (n 24) 19.
30 Ibid 41.
31 It should be noted that a 60CC(2A) of the Family Law Act 1975 (Cth) was introduced to give greater weight to the protection of children from harm and family violence as a competing primary consideration in determining the child’s best interests over the benefit to the child of having a meaningful relationship with both parents: Family Law Act 1975 (Cth) s 60CC(2). This section was introduced as a result of the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth).
35 FLA (n 1) pt VII; Family Law for the Future (n 25) 158.
40 FLA (n 2) s 60I(1) 8.
41 Parliamentary Debates 27 March 2006 (n 39) 79.
expressed concerns over the idea of parents holding equal shares in children with the presumption having the potential to focus more on parents’ rights than warranted for under the legislation.42 The problem here is that there is too much focus on how much the interest of the parents should be taken into account when determining whether the presumption should apply equally. Instead, the focus should be about promoting the best interests of the child in having a meaningful relationship and spending significant time with both parents after separation in an appropriate way.

The FLA promotes the best interests of the child as the paramount consideration when judges exercise discretion in making parenting orders in Australia.43 According to s 60CA of the FLA, ‘a court must regard the best interests of the child as the paramount consideration’. The stronger expression of ‘the paramount consideration’ was chosen in the FLA rather than that of ‘a primary consideration’ found in the CRC. Australia has taken the view that the paramountcy principle in the CRC should be of chief importance.44 This is accentuated by s 60B(4) of the FLA, which states: ‘An additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989’.

After the implementation of the presumption of equal shared parental responsibility in 2006, the Full Family Court of Australia ruled that the presumption should be applied, unless it would not be in the best interests of the child.45 The court would be required to consider how the child would spend equal time or substantial and significant time with each parent in applying the presumption according to s 65DAA of the FLA.46 In Bondelmonte v Bondelmonte,47 the High Court of Australia stated, ‘[t]he term “consider” imports an obligation to give proper, genuine and realistic consideration but this cannot affect or alter the terms of the provision so as to require a child’s views to be ascertained’.48 The best interest of the child continues to be the overriding consideration in Australia with a strong promotion of the child’s right to express his or her views.49

While it is important to be attentive to both parents being given an equal opportunity to make decisions, abusive or highly conflicted relationships must be approached with caution. The Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth) was introduced to protect children from the risk of child abuse or family violence. Family violence was given an expansive definition to include ‘violent, threatening or other behaviour by a person that coerces or controls a member of the person’s family (the family member), or causes the family member to be fearful’.50 The court can make an order that it considers appropriate to protect the best interests of the child as a result of family violence.51 This helps to recognise that children’s rights and interests are paramount.

In 2019, the Australian Law Reform Commission recommended that the presumption of equal shared parental responsibility should be replaced with a presumption of joint decision-making about major long-term issues.52 This recommendation would be consistent with the changes in family law that have developed since 1995 on affirming shared parental responsibility. Moreover, it recognises the rights and duties of both parents to care and make decisions for their children under the CRC.53 Significantly, the recommendation would help remove confusion by getting rid of any misconceptions that parenting orders require the child to spend equal time with both parents.54 Such misunderstandings have partly contributed to Graham Perrett MP introducing a Bill in the House of Representatives on 15 June 2020 to abolish the presumption of equal shared parental responsibility from the FLA.55 While the concept of equal shared parental responsibility as a starting point should be maintained, it must be clarified to avoid its conflation with equal time.56

v Conclusion

The rhetoric of equal shared parental responsibility highlights two issues. The first is the issue of the Government being too influenced by political exigencies. There is no doubt that these changes were made with the best interests of the child in mind, but such significant amendments appear to have been influenced by fathers’ rights groups and women’s advocates.57 This creates particular unease given that this legislative change is in relation to children, who are one of the most vulnerable groups in society. The second issue is that the rights-based rhetoric in the presumption of equal shared parental responsibility is centred on the parents rather than focusing on the best interests of the child.58 Consequently, there appears to be a disparity between the perceived rights of a parent and the legal reality that the best
interests of the child are paramount in parenting orders. The introduction of equal shared parental responsibility was supposed to promote the child’s right to have a meaningful relationship with both parents, but judges and lawyers continue to have to educate litigant parents on focusing on what is in the best interests of their children.59 The issue here is that many parties confuse equal shared parental responsibility with equal time. A misunderstanding of the meaning of the presumption of equal shared parental responsibility and an assumption that it is about equal time with the child has led to an increasing focus on parents’ rights rather than advancing the best interests of the child.60

59 Ibid.
60 Ibid 220.