Should English law adopt the Australian approach to shared parenting post-separation?

The Australian Family Law Amendment (Shared Parental Responsibility) Act 2006 ('the 2006 Act') imposes a rebuttable presumption of equal shared parental responsibility ('PR') post-separation and, where such an order is made, requires judicial consideration of an order for equal time with the child if in the child's best interests and reasonably practicable. In English law, s1(2A) of the Children Act 1989 ('the CA'), inserted by the Children and Families Act 2014 ('the CFA'), goes no further than to create a presumption in favour of the involvement of both parents. This essay will argue that, though the differences between the approaches are not so sharp as they might seem, the current English position is satisfactory, and should be preferred because it precludes development of ideas of a parental right to a certain amount of time with the child.

The Australian position

Crucially, the child's best interests remains the paramount consideration. In the same way that s1(1) of the CA continues to prevail over any presumptions in this jurisdiction, judges in Australia must only make an order for equal time if this would be in the child's best interests. Equally importantly, the presumption of equal shared PR will not arise where there is reason to believe that there is a history of domestic violence or child abuse. So the child's safety and wellbeing are not being subordinated to the interests of parents. However, Parkinson notes that a misunderstanding that a presumption in favour of equal time had been created by the Act easily arose, and that this misunderstanding could feed into an agenda of parental rights antithetical to the development of child-focussed arrangements. This primary criticism of the Australian approach, as we have seen apparently based on a fallacy, is nonetheless a strong one. A distortion of the post-separation process of making parenting arrangements into an adult-centred process takes away from the best interests principle and must be resisted.

Even if this criticism was not relevant, it should be noted that the change in approach has not necessarily been tide-changing. Problems with the definition of shared parenting have created difficulties in assessing the impact of the 2006 Act. Figures from the AIFS suggested a substantial increase in the number of shared care arrangements, based on 'shared care' being at least 35% of nights spent with each parent annually. Later research from Smyth doubted that there had been such a significant increase but defined 'shared care' as 45-55% of nights with each parent. Parkinson questions the usefulness of the AIFS statistics, but in any case, the Smyth research seems more focussed on the effect of the legislation's truly novel provision (that the judge must consider equal time if ordering equal shared PR). If the provision has not caused a significant increase in the amount of equal time arrangements it might be argued that it has been of little practical importance. Indeed, it seems the effect of the provision has been felt more in changing attitudes.

The English position

S1(2A)

S1(2A) was less stringent than it could have been. The initial proposal would have been more akin to the Australian regime. The Family Justice Review opposed a 50:50 presumption as undermining the paramountcy principle by introducing the idea of a parental right to a certain amount of time with the child, and s1(2A) avoids this pitfall. It now seems settled that s1(2A) has been more of a codification of the law than a substantive change, and indeed the strong pro-contact approach which existed before the CFA supports this. Taking a more demanding view of shared parenting, however, and requiring at least direct and regular contact with both parents, s1(2A) is hardly

revolutionary. The provision merely requires that the presumption apply unless involvement in any form would create the risk of significant harm to the child (s1(6)). Involvement in any form could range from direct and regular contact to indirect and infrequent contact, far short of meaningfully shared parenting. Thus, even s1(2A), ostensibly the strongest statement of English law supporting shared parenting, is limited, and falls short of the Australian approach.

Contact

The CFA also made important changes to the types of orders which could be issued under s8 of the CA, introducing child arrangements orders ('CAOs'). The current position is that contact will almost always be in the best interests of the child (Re O) even in cases involving domestic violence, with the court in Re L declining to follow Drs Glaser and Sturge's suggestion that there ought to be a presumption against direct contact in such situations. A similar presumption was omitted from the Australian reforms despite recommendation by the Family and Community Affairs Committee of the House of Representatives in 2003. However, as noted, the presumption in favour of equal shared PR does not apply in cases of suspected violence, and this might be an area to learn from the Australian approach.

Contact is one of few areas in English family law strongly supportive of shared parenting, and in fact could be said to force the notion on families for whom it is not the best option. Fortin argued in relation to the so-called right to be raised by one's biological parents that children's rights were being distorted in order to further the rights of biological parents. The Supreme Court's decision in Re B altered this but the argument can be adapted to the contact situation, where the child's right to maintain a relationship with both parents is being distorted in order to further the interest of the non-resident parent. The welfare principle should govern here, but rather than considering which path would be best for the child's welfare, the courts search for evidence that contact should not take place. It is argued that the courts should follow Re B in the contact context. English courts have denied they apply a pro-contact presumption but the present approach seems to belie a de facto presumption of this kind. Insofar as the requirement to consider equal time might be influencing judicial decisions on what is in the best interests of the child in Australia (recognised as plausible by Parkinson), there is a common problem of letting parental rights infiltrate best interests questions.

Adopting the Australian approach?

Parkinson highlights the role played by the Australian reforms in creating a norm for parents to aim for. If we accept the minimal practical effect of s1(2A), we may nonetheless recognise its capability of playing a similar educative role. Yet, English law tends to reject an application of family law which is more educative than practical. The current position in relation to CAOs deciding with whom the child will live demonstrates this pragmatic approach. Holmes-Moorhouse v London Borough of Richmond-upon-Thames returned us to the position elaborated by Hale LJ in R v R whereby there is no constraint on the awarding of an order arranging for the child to live with both parents provided such an arrangement would reflect reality. CAOs should not be statements of aspiration and should not create ideal standards that are unattainable for many families for various reasons. Shared parenting should be facilitated where it is both realistic (given the resources available to the family) and appropriate. Only by recognising that truly shared parenting (in the sense of equal) will not always be realistic and/or appropriate can we identify the cases in which it is both.

Shared parenting post-separation is widely considered to be the ideal: co-operation between parents and a meaningful relationship with both parents is beneficial to the child's welfare. Whether we need to strive for equal time in order to meet this ideal is more doubtful. It must be recognised

that equal time is simply not a viable option in some cases, and forcing the issue may be detrimental, as Fehlberg et al discovered in their research. They found that where there are high levels of conflict shared care can actually be more harmful for the child. Of course, the Australian approach allows room for a judge to find that this would be the case and to reject equal time on the basis it would not be in the child's best interests, consistently with the need to protect children in such circumstances. It would be facetious to argue, then, that the Australian approach is necessarily harmful, yet insofar as it does not actively cause harm it seems to have little meaningful effect.

Conclusion

It is argued that an adoption of the Australian approach would not represent a significant change, given the enduring centrality of the paramountcy principle. In Australia, judges continue to use their discretion to make arrangements which are in the best interests of the child. The greatest impact of reform would be educative in influencing expectations about post-separation parenting. However, the Australian experience has highlighted the potential for misinterpretation, and the creation of an expectation in parents of an entitlement to time with the child. Such an expectation is inappropriate in a process which ought to be child-focussed.