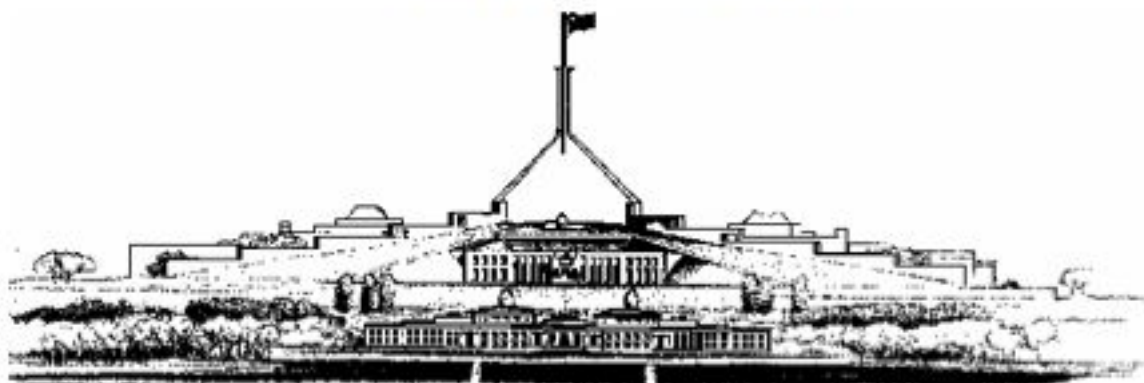




COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



THE SENATE
PROOF
ADJOURNMENT
Access to Justice
SPEECH

Tuesday, 25 March 2014

BY AUTHORITY OF THE SENATE

SPEECH

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Questioner
Speaker Madigan, Sen John

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Senator MADIGAN (Victoria) (22:34): I rise tonight to speak about what a barrister has described to me as the all but complete denial of access to the courts for ordinary people due to the severe and extreme cost of litigation. This barrister, an experienced and objective advocate in criminal and commercial matters, despairs at the legal injustices that go unaddressed. He despairs at the ongoing harm caused by a legal culture that has priced access to the courts completely out of the reach of ordinary Australians. The gravy train legal culture that prevails is most dangerous when it impacts the weakest and most vulnerable in our society. Our legal practitioners, this barrister said, have increasingly lost their identity as officers of the court, with all of the obligations that entails. They are, he said, preoccupied with commercial advancement.

Representing people before a court is so time consuming and demanding that ordinary people can no longer afford it. Those who need the protection of the law the most—the poor and alienated—have no hope of getting the considered and experienced representation they desperately need. Ironically, and all too frequently, litigation causes financial ruination to the parties and creates problems which dwarf the original dispute. The long-term harm and distress persist long after the legal issue is resolved or abandoned for want of resources.

Last week saw a case in point. On Wednesday I excused myself from this place to attend the Federal Court in Melbourne in support of a constituent. Appearing before the court was a farmer from western Victoria, someone I have known for many years. His farm was bankrupted by his own law firm. This firm had represented this individual in a family farm partnership dispute that began in 2005. Anyone who has worked on the land would not be unfamiliar with the concept of a family farm partnership dispute. Farm partnerships and farm succession planning are an inevitable part of almost any rural operation. But in this case the farmer in question—I will call him Murray—has had his life destroyed by the legal firm he appointed to protect his interests.

According to his affidavit, Murray obtained a projected legal cost in 2005 from law firm Russell Kennedy of approximately \$30,000. He was further advised in 2007—when the costs were already \$83,990, according to the affidavit—that the proceedings might

cost a further \$100,000, including disbursements. At the time, according to documents presented in the court, part of Murray's costs would be recovered—Russell Kennedy told him. But, by the conclusion of the matter, Murray's fees from Russell Kennedy were in excess of \$380,000. I repeat: an initial estimation of costs to Murray by Russell Kennedy of \$30,000 had grown to \$380,000.

But that is not all. A key part of Murray's action in this partnership dispute was a diary. In this diary was a record of an agreement between Murray and his father. And this diary was lost by Russell Kennedy some time in 2008, according to documentation attached to Murray's affidavit. In an earlier court action, it was ruled the discovery of the original diary should be made. This is stated in a letter dated 1 September 2008, and written by Russell Kennedy principal Michael Main. In that same letter, Mr Main said: 'We will continue our search for the diary, and would be grateful if you could also check to ensure that it is still not in your possession or has been returned to you by mistake.' That is right: Murray's own law firm, it appears, lost a crucial piece of evidence.

On the website of Russell Kennedy it says the firm is committed to making a difference to their clients. Certainly, Murray's involvement with Russell Kennedy has made a difference in his life. Because of their incompetence, because of their extraordinary poker-machine-style fee-accrual system and because of their sheer legal bloody-mindedness, Russell Kennedy decided to bankrupt a sole individual farmer.

Murray's prospects of financial recovery, of rebuilding his life, have been severely threatened by this action. And how much money did Russell Kennedy get back against their \$380,000 bill? Not a cent. Murray was already virtually destitute. It was an action based on the strict confines of the law, as futile it was vicious. And, while Russell Kennedy's action may have been legal, was it appropriate? Was it fair? Was it ethical?

Needless to say, it was the same Mr Main who appeared at court last week in his firm's proceedings against my constituent. The Federal Court is, of course, only one platform in our legal industry. There is the High Court, the Supreme Court, the County Court and the Magistrate's Court. It is a labyrinth, with top lawyers commanding fees of \$10,000 a day or higher for their

services. According to research by Ibis, legal services in Australia are a \$21 billion industry, employing nearly 100,000 people. It is a gravy train with many, many carriages.

But for the moment I would like to drill down into one aspect of this labyrinth, the Family Court. In many ways, this is both the most important and the most divisive part of our legal system. I say that because it goes to the heart of Australian society—our families and our children. The current state of the Family Court points to a tragic legacy left behind by the previous government.

The Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 was passed by the Senate and came into effect in 2012. This legislation changed the Howard government's shared parenting reforms via a spurious claim to provide greater protection for children from family violence. The objective was to improve the Family Court's decision making by giving priority to a child's safety when determining what is in their best interests. The aim was also to make it easier for allegations of family violence and sexual abuse to be brought before the court. And was this successful?

Last year a retiring Family Court judge gave his view, which was reported in the Fairfax press. Justice David Collier had 14 years on the bench. And, keep in mind, it is rare for Family Court judges to speak publicly about their views. Many of us would recall the 1980 murder of Justice David Opas and the 1984 bombings of the Parramatta Family Court building and the homes of two judges. The Family Court is the flashpoint for the breakdown in family life. It is a place of heat and anger and stress. It is a place where lives collapse and are changed forever.

Justice Collier gives us clear insight into what is currently forging this tragic metallurgy of Australian families in crisis. He said unprecedented hostility was infiltrating the Family Court, with a willingness by parents to use their children to damage one another. 'Allegations of child sexual abuse are being increasingly invented by mothers to stop fathers from seeing their children', Justice Collier said. I quote from Justice Collier: '

When you have heard the evidence, you realise that this is a person who's so determined to win that he or she will say anything. I'm satisfied that a number of people who have appeared before me have known that it is one of the ways of completely shutting husbands out of the child's life.

Justice Collier called this 'a horrible weapon'.

The continued use of false claims is undoubtedly fuelling the crisis of our Family Court system. Member for Dawson George Christensen has been a strong campaigner against our unfair family law and child support systems

He referred to the Gillard government amendment as a Trojan horse, loaded with consequences that would undermine some of the most basic human rights of children and parents, particularly fathers. This reform to the act provided for two primary concerns for the Family Court to consider when making parenting orders. The first concern was the benefit to the child of having a meaningful relationship with both of their parents. The second concern was the need to protect children from harm and abuse. On the surface, both of these seem valid. However, the Gillard government's amended act clarified the second primary consideration of violence over the shared parenting provisions. Where there is a conflict between these two primary considerations, the act now requires the courts to give more priority to the protection of children from harm and abuse. Is that a good idea? Of course it is in principle. But this amendment has allowed the introduction of many false allegations in the court. According to many Family Court practitioners—the judges, the clerks, the barristers and others—the system is on the brink of collapse.

The Chief Justice of the Family Court of Australia told ABC radio earlier this month that cuts to legal aid have led to more and more people representing themselves. Chief Justice Diana Bryant said that the Family Court system was unquestionably compromised. She said that the Family Court produces decisions that do not stick and then you have people who are unhappy with decisions or who take matters into their own hands. Chief Justice Bryant said:

... there are mental health issues and the court needs to know about those issues and to know the extent of them, and you don't have parties with the capacity to bring the right evidence, then you are certainly putting children at risk.

Aiding this breakdown of the Family Court system was the repeal of the sections—including 60CC(3)(c)—that were known as the friendly parent provisions. This meant the court is no longer required to consider the willingness and ability of a parent to facilitate a relationship with the other parent in determining the best interests of the child. Reforms by the Howard government were designed to get away from the adversarial system and allow a court to consider giving custody to the parent who was most likely to include the other parent in the child's right to have a meaningful relationship with both parents.

Additional consideration under the aforementioned section also requires the court to consider the extent to which each parent has fulfilled or failed to fulfil his or her obligations to maintain the child. This includes the extent to which the father or mother has taken the opportunity to participate in decision making in relation to the child, as well as spending time with and communicating with the child. As divorce is no fault, the reasons for failing in this area are seldom considered, so parental alienation becomes a successful tactic. One parent presents an accusation against the other parent for failing to be involved. Excluding the other parent becomes the grounds to further eject the alienated parent.

Additionally, hearsay evidence of children is now allowed in Family Court proceedings. The provisions of the Evidence Act 1995 do not apply to child-related proceedings. The Gillard government repealed the section which allowed the courts to order costs against a party who has been found to have knowingly made false allegations or statements before the court. This means any accusations can be made in a Family Court hearing with impunity. Frequently, we hear unsupported accusations of abhorrent behaviour by one parent. As I said earlier, Justice Collier called this 'a horrible weapon'. Lastly, we operate under a new definition of family violence. This means family violence now means just about anything. So it is open slather; there are claims, counter-claims and a veritable river of unsubstantiated accusations in Family Court proceedings.

A survey of 68 New South Wales magistrates concerning apprehended violence orders—AVOs—found that 90 per cent agreed that some AVOs were sought as a tactic to aid a person's case in order to deprive a former partner of contact with their children. About a third of those who thought AVOs were used tactically indicated that it did not occur often, but one in six believed it occurred all the time. A similar survey of 38 Queensland magistrates found that 74 per cent agreed with the proposition that protection orders are used in Family Court proceedings as a tactic to aid a parent's case and to deprive their partner of contact with their children.

It is time to ask ourselves if we are falling short of the ideal professed under the international Convention on the Rights of the Child. Included in this are the child's right not to be separated from his or her parents against the child's will, the child's right to maintain contact with both parents if they separate, the child's right to be heard in any judicial and administrative proceedings, and the child's right to freedom of expression. Lastly, the convention provides that parents or legal guardians have the primary responsibility for the child's upbringing.

As the member for Dawson said earlier this month, family law and child support are messy areas and there are no winners. But under the current system some of the losers are being turned into massive losers. That is even to the extent of losing their children and their lives. The current system is blatantly unfair and negligent. It is biased against fathers. It is unfair to children, who are the most vulnerable members of our communities. It must be fixed, as a matter of urgency.

Senate adjourned at 22 : 51