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 NATIONAL ABUSE FREE CONTACT
CAMPAIGN

NAFCC is a national (and international) coalition of organisations who have formed to advocate on behalf of women and children going through the Family Court system with concerns about domestic violence and child abuse.

Marie Hume
PO Box 380
Mannum SA 5238

7th July 2005

The Secretariat
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House Canberra ACT 2006
e-mail: laca.reps@aph.gov.au

Dear Secretariat

Please find attached the submission of the National Abuse Free Contact Campaign to the inquiry into the provisions of the Family Law Amendment Bill 2005.

The submission specifically addresses the terms of reference drafted to implement the measures set out in the Government's response to the House of Representatives Standing Committee on Family and Community Services inquiry into child custody arrangements in the event of family separation, titled *Every Picture Tells a Story*, namely to:

- a) encourage and assist parents to reach agreement on parenting arrangements after separation outside of the court system where appropriate
- b) promote the benefit to the child of both parents having a meaningful role in their lives
- c) recognise the need to protect children from family violence and abuse, and
- d) ensure that the court process is easier to navigate and less traumatic for the parties and children.

NAFCC would like the opportunity to support this submission with oral evidence.

Yours faithfully

Marie Hume
National Abuse Free Contact Campaign

Background of the Bill

On 24 June 2005 The Attorney General's Department released the Government's response to *Every Picture Tells A Story*, an exposure draft of proposed legislation and explanatory statement. In addition to the introduction of the Family Relationship Centres and the more prominent use of Family dispute resolution in Family Law matters, the proposed changes to the Family Law Act could be the most significant changes to the family law system since 1975.

The exposure draft has been referred to the House of Representatives Legal and Constitutional Affairs Committee for consideration. Any comments are **due to be submitted to the Committee by 8 July 2005**. The Committee is due to report by 11 August 2005.

This submission makes recommendations on various sections of the Bill taking into account all four criteria of achievement listed below.

- a) encourage and assist parents to reach agreement on parenting arrangements after separation outside of the court system where appropriate
- b) promote the benefit to the child of both parents having a meaningful role in their lives
- c) recognise the need to protect children from family violence and abuse, and
- d) ensure that the court process is easier to navigate and less traumatic for the parties and children.

Schedule 1 – Shared Parental Responsibility

Content

Item 2 of the Schedule amends the objects provision of Part VII of the Act to provide that, subject to safety issues, children have the right to know and be cared for by both parents.

Comment

We believe that the priority should be given to the safety of children from abuse and violence. This has not been given sufficient emphasis in the proposed changes.

Recommendation

The primacy of children's rights to safety, as a basic human right should be expressed in the Family Law Act.

Family Dispute Resolution (FDR)

Content

Item 9 provides that people applying for a parenting order will be required to first attempt to resolve their dispute using family dispute resolution services. A court cannot hear an application for a parenting order unless the applicant provides a certificate of attendance at family dispute resolution or that failure to do so has been caused by the other party's refusal or non-attendance.

Exceptions to attendance are

1. Where the parties have agreed to consent orders.
2. Once substantive court proceedings have commenced.
3. Where there is or has been family violence or abuse, subject to the party satisfying the court that there are 'reasonable grounds' to believe that abuse or violence has occurred or may occur.
4. Where there is an existing order relating to an issue in a current contravention application and the person has shown 'serious disregard' of the order.
5. In cases of urgency such as relating to location and recovery of a child including cases of child abduction,
6. Where a party is 'unable' to participate effectively in family dispute resolution due to incapacity (significantly intellectually impaired or substance addicted) or physical remoteness without access to a telephone.

Even where a person meets a ground of exemption, the court may still order them to attend family dispute resolution.

Where a party does not attend family dispute resolution due to the existence or risk of family violence or child abuse, parties must obtain information about the issue/s in dispute from a family counsellor or family dispute resolution practitioner before the application is considered by the court.

All applications made after July 1 2008 will need to be fully compliant with these

provisions.

Comment

Forced mediation has a history of disadvantaging women (Astor, 1994).

The requirement to make dispute resolution compulsory provide exceptions to cases where there is or has been family violence or abuse. However, there is no explanation as to how the Court will determine what are 'reasonable grounds' to believe that abuse or violence has occurred or may occur.

Circumstances of violence or abuse often occur in private, are under-reported and often minimized or denied by parties.

The possible increased requirements to document or prove violence or abuse creates risks that women will be discouraged from disclosing violence and abuse and/or that matters will be inappropriately forced into FDR processes.

Services that provide FDR will also play a role in screening for violence in families. In order to effectively screen for domestic violence and child abuse, workers will need to have a high degree of skill and experience in the area of violence and abuse. However, even with the most sensitive screening tool and highly skilled and experienced worker, not all cases of domestic violence will be identified. Keys Young (1996) in their research on mediation services found that almost two thirds of cases attending mediation involved family violence and that less than one third identified as such.

Unfortunately the proposed reforms have not availed themselves of the opportunity to develop protocols for supporting victims of family violence within dispute resolution and legal processes.

Recommendation

Where a sworn statement is made by a party that violence or abuse has occurred should be sufficient to make an exemption from attending mediation.

Content

"Substantial time with each parent – shared parenting

Advisers (as defined in the Bill and including legal practitioners, FDR practitioners, family counsellors) assisting in the making of a parenting plan are required to inform their client(s) of the possibility of the child spending substantial time with each of the parties if it is practicable and in the best interests of the child.

Comment

This appears to be a de-facto way of developing a presumption of shared care. This will place undue pressure on women who are already in a disempowered position to agree to an arrangement which may well put themselves and their children at risk. The notion of a preconceived template for dividing children between their parents on the basis of parental rights does

not ensure that the best interests of children will be given priority. The child's best interests need to be at the centre of any arrangement, and those best interests need to be assessed based on the unique situation of every child. In particular, all decision making needs to be on the basis of protecting children and other family members from abuse or violence.

Recommendation

That this proposal to require advisers to discuss the child spending substantial time with each parent be scrapped. Each decision regarding a child should be made on the basis of the child's unique position.

Presumption of Joint Parental Responsibility

Content

Item 11 provides a new presumption for the court to consider in making an order, that parents have joint parental responsibility for the child except where there are reasonable grounds for the court to believe that a parent of a child or a person who lives with a parent of a child, has engaged in child abuse or family violence. The presumption will also be rebutted where the court considers that joint parental responsibility would not be in the best interests of children.

Comment

A requirement to consult and communicate where family violence has occurred will enable abusive ex-partners to insist on their preferences in key decisions relating to their child. It will also provide the opportunity for the abuser to intimidate, harass and abuse their ex-partner. This requirement may in fact endanger children.

Requiring victims of violence to counter a presumption of shared responsibility may further discourage women from leaving violent relationships, for fear of their safety and that of their children.

Whilst the presumption will be against equal shared parenting responsibility in cases involving violence and abuse, we are concerned about the standard of proof that would be required to prove violence or abuse has occurred. There is no provision for how to ensure that such evidence can be presented to courts, or where this would fit within the process of the new family law system. Greater consideration and clarification of this process is needed.

Further reforms must address the problems of access to legal representation and resourcing of community and legal aid services.

Domestic violence is a greatly under-reported crime. Many victims deliberately avoid formal reporting processes (such as seeking police protection or medical assistance) when dealing with violence for a number of reasons, including fear of escalation of violence. Both adult and child victims of assault and violence experienced being disbelieved. Their capacity to clearly demonstrate why a perpetrator should not have shared responsibility is therefore hampered by their very experiences of violence and abuse.

Even when victims can supply evidence of abuse, research suggests that it may not be considered relevant when determining issues relating to parental responsibility.

The onus here is on the victim of abuse proving that she has been abused. Consideration is not being given to the State and Federal governments' responsibilities to protect women and children from abuse and violence. Consistently research has shown that the system fails victims of violence.

Recommendations

There should be no 'presumption of joint parental responsibility'. Each individual case should be decided on the facts and the unique circumstances of each child before it in the Court's decision making responsibility.

Substantial Time with each Parent

Content

Item 14 provides that Advisers (as defined in the Bill and including legal practitioners, FDR practitioners, family counsellors) assisting in the making of a parenting plan are required to inform their client/s of the possibility of the child spending substantial time with each of the parties if it is practicable and in the best interests of the child.

Item 23 provides that the court must consider making an order that a child spend substantial time with each parent, if a parenting order provides parents with joint parental responsibility for the child. The court must consider whether both parents wish to spend substantial time with the child and whether it is reasonably practicable for the child to spend this time with each parent and whether it is in the child's best interests.

Comments

The proposal to start from a position of equal parenting time undermines the capacity to begin from what is in the best interests of children. It suggests a preconceived notion of what is optimum for all children, and worse, suggests an arrangement that has not been shown to be suitable for most children or parents.

In cases, where family violence exists, there are serious concerns that a preference for equal shared parental time opens the possibility to perpetrators of utilizing formal avenues to continue to threaten, harass and abuse their ex-partners and children. It is not uncommon for violent men to threaten to seek greater access to their children. This provides another means for perpetrators to remain connected to their ex-partners and children (Kaye et al 2003, Judicial Council of California (2002), Jaffe et al, 2003; Rhoades 2002)

Research has shown that the 'right to contact' principle within family law has taken precedence over concerns about children's exposure to domestic violence and child abuse (Rhoades 2002, Kaye et al, 2003)

There are already significant concerns that, within the existing framework, the Family Law Act privileges the importance of children maintaining contact with both parents – even in cases where there is clear evidence that one parent is perpetrating violence against a child (Kaye, M., Stubbs, J. and Tolmie, J. 2003).

Within existing legislation, violent parents are granted access and/or custody of their children.

Shared parenting both exposes children to ongoing violence and requires mothers to regularly negotiate with, and be in the presence of, violent ex-partners. This is unsafe for both women and children.

The safety of children must be paramount in determining post-separation parenting arrangements. It is not in the interests of children to have both parents equally share responsibility, let alone time, if violence or the potential for violence is present.

Recommendations

There should be no assumption that children should spend substantial time with each parent and the circumstances of each child should be taken into account in determining her/his best interests, consideration should be given to the capacity of the parents to communicate effectively. Adequate flexibility is already provided in the legislation.

Best Interests of the Child

Content

Items 26 to 36 provide for determining the best interests of the child and include a first tier of two factors –

1. the benefit to the child of having a meaningful relationship with both of her/his parents and
2. the need to protect the child from violence or psychological harm.

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Comments

The second tier lists factors already existing in subsection 68F (2) of the Act.

The need to protect the child from violence is represented as subordinate to the child's 'benefit' from a meaningful relationship with both parents. The primary factor in determining the best interests of children should be safety of children from violence and abuse.

Recommendation

The need to protect the child from violence or psychological harm must stand alone as the prime factor.

A new factor that the court must consider is the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent. This provision is influenced by legislation in

the State of Florida in the United States of America.

Comments

This is also known as the 'friendly parent' provision. We totally reject this legislation.

A parent may be unwilling to facilitate and encourage shared care if there are concerns that the children are being exposed to violence and abuse. The parent may be unable to meet the evidentiary legal requirements to prove this. It should not be inferred that not meeting these requirements means her allegations are false, rather that the requirements are not appropriate. In fact, behaviour that prevents or reduces contact may be an indicator of genuine actions to protect a child from harm. The Florida legislation will punish victims of violence, while offering perpetrators the use of legal weapons with which to further harm children.

Shared parenting should be an option for families only when this is informed by a history of cooperative and safe parenting.

Australian research reveals that many cases that involve allegations of child abuse and/or family violence, the testimony and actions of the non-abusive parent to protect their child are seen as obstructive rather than protective. There is a prevailing notion that the concerns of a parent (usually the mother) are fictitious and are used to alienate the child from the other parent. In fact, children going through the Family Court express frustration that any disclosure of abuse or a preference for no contact with an abusive parent is minimised and rejected as maternal influence. There is no research evidence to support the view that mothers regularly alienate children from their fathers.

Recommendation

There should be no 'friendly parent' provision in the Family Law Act. Willingness to facilitate and encourage close relationships is closely linked to the breaching of contact orders and therefore should not be included as a factor in s68 (F).

There is also an amendment providing explicit direction that uncontested or interim family violence orders are not an independent factor in considering a child's best interests.

Recommendations

- 1. It is highly recommended that interim and ex-parte orders must also be taken into account.**
- 2. NAFCC recommends that the New Zealand Guardian Act should be considered in amendments to the Australian Family Law Act, specifically s16B of the New Zealand Guardianship Act 1968. This section requires a court to determine 'as soon as practicable' whether an allegation of violence is proven. Where it is, the court**

must not order residence or unsupervised contact to the violence parent unless satisfied that the child will be safe by reference to a range of factors enumerated in the legislation. An evaluation has demonstrated that the New Zealand legislation has improved the safety of children (Chetwin et al, 1999).

Changes to the Family law Act

Proposed Changes to S60B: Objects of Part and principles underlying it

- “ (1) The objects of this Part are:
- (a) to ensure that children receive adequate and proper parenting to help them achieve their full potential; and
 - (b) to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children; and
 - (c) to ensure that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child.

Comment

The Objects and Principles should include ensuring the right to safety of the child and her/his family.

Recommendation 15

The Objects and Principles should include ensuring the right to safety of the child and her/his family.

Schedule 2 – Compliance Regime

Content

The Bill proposes amendments reflecting the changes to the object in s60B - that children have a meaningful relationship with both of their parents to the greatest extent possible. Make up contact can be ordered and the Bill provides directions about when the court must consider making a costs Order and/or ordering compensation for costs incurred in relation to contact that did not take place because of the breach. The court is also given broader powers to impose bonds. The Bill clarifies that there is a low standard of proof for compliance matters at the 1st and 2nd stages on the basis that the sanctions are not criminal. If the matter is a stage 3 contravention matter - there is a presumption that the court will order costs against the party in breach unless it is not in the child's best interests.

Comment

Research by Rhoades (2002) identifies the most common reasons for contravention proceedings are concerns about safety and changes in life circumstances which make it harder to meet the terms of the orders/agreement.

There are other complex reasons for breaches occurring, such as substance

abuse, gambling, poverty etc.

The proposed changes will result in discouraging women from withholding the children from spending time with the other parent where they think violence or abuse is occurring. Punitive responses to parents' concerns about the safety of their children from violence and abuse are unnecessary and not warranted.

Filing contravention applications is often a method of legal harassment of an ex-partner. Persons filing such applications should have to establish that contact was not provided and face penalties for frivolous or non-meritorious applications. The capacity to withhold contact to protect the child needs to be available to parents.

Recommendation

Any proposed changes must take account of the priority that must be given to safety issues and the complexities around disclosure of violence and abuse. The capacity of parents to withhold contact to protect their children from exposure to violence or abuse needs to be supported.

Schedule 3 – The Conduct of Child Related Matters

Content

The Bill provides for changes in the way child related matters are conducted. These changes are based on the Children Cases program that has been piloted by the Family Court in NSW. They allow for the Court to act in a more inquisitorial manner. Principles are set out in the Bill to guide the Court in a less adversarial approach. These Principles include:-

- Ensure the proceedings are focussed on the child
- The Judicial Officer must control the conduct of the hearing
- Ensure that the proceedings are conducted in such a way to encourage the parents to focus on the children and on their ongoing relationship as parents
- The proceedings should be conducted as expeditiously and with as little formality as possible

The proposed new s60KE provides a number of general duties that the Court must carry out to give effect to the principles. This includes considering whether the likely benefits in taking a step in the proceedings justify the costs of taking it.

Significant changes are proposed in relation to the rules of evidence. Even where the rules of evidence in relation to hearsay evidence are applied a representation made by a child about a matter that is relevant to the welfare of that or another child is admissible.

Comments

New processes are needed to ensure allegations of abuse be properly investigated. The Family Law Council has recommended that a national approach to child protection needs to be implemented. There is a need to ensure that all allegations of violence have thorough and professional investigations. The changes need to ensure that there is an early and careful

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