

Submission

on the

**Family Law Amendment
(Shared Parental Responsibility) Bill 2005**

to the

Senate Legal and Constitutional Committee

Department of the Senate

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1. Introduction

*The quality of the relationships between mothers and fathers and their children will determine the destiny of Australia.*¹

The *Family Law Amendment (Shared Parental Responsibility) Bill 2005* (the Bill) proposes to amend the *Family Law Act 1975* (Cth) (the FLA). The Bill was originally a response to the report from the House of Representatives Standing Committee on Family and Community Affairs, entitled *Every Picture Tells A Story* (the Report), which was then referred to the House of Representatives Standing Committee on Legal and Constitutional Affairs.

After receiving numerous submissions from interested parties, the House of Representatives heavily amended the Bill, which now comes before the Senate. On 8 February 2006, the Senate referred the Bill to the Senate Legal and Constitutional Committee for inquiry and report by 27 March 2006, with consideration given to the following proposed changes:

- (a) the introduction of a presumption of joint parental responsibility;
- (b) the requirement for parents to attend dispute resolution and develop parenting plans before taking a matter to court;
- (c) improvements to enforcement of parenting orders;
- (d) and better recognising the interests of children in spending time with grandparents and other relatives.

2. Presumption of joint parental responsibility

Underlying any discussion regarding the care of children is the need to provide them with the best environment for their healthy development. That optimal environment cannot be achieved except by ensuring that children have the loving example and instruction of a mother and a father.²

2.1 Mothers and fathers

2.1.1 The need for a mother

Studies of children who have spent a large amount of time in child care reveal the hazards of separating a child from his or her mother.³ When infants are placed in daycare for more than twenty hours a week, they are more likely to lack a secure attachment to their mother, and are more likely to be uncooperative, less popular, have poorer grades and study skills, and have lower self-esteem.⁴

But the poorer development of children who spend a lot of time away from their mothers cannot be explained away by the lack of personal attention in daycare centres. A study of affluent families compared children who were cared for by their mother with children who were cared for by an employed full time caregiver. The study found that the latter group was more likely to have the same insecure relationship with their mothers.⁵

The effects of the absence of a mother are apparent not only in relation to infants, but also in relation to young children. A study found a higher incidence of hitting, kicking, threatening and arguing among those children between the ages of five and eight who had spent more time in daycare.⁶ While children can spend more time away from their mother as they age, being confident in the mother's availability, responsiveness and helpfulness promotes the development of a secure attachment which can positively affect the child as they become an adolescent, young adult and parent.⁷

2.1.2 The need for a father

The father has an important position in the family - demonstrated by the damage which results from his absence. The bulk of single parent families have an absent father, and children from such a home, on average, obtain fewer years of education, are more likely to commit delinquent acts, engage in drug and alcohol abuse and have a lower socio-economic status.⁸ Criminal activity is also higher in a community where the father is generally absent, regardless of the level of poverty in that community.⁹

In Australia, a study concluded children with regular contact with their father were more cooperative and self-reliant in school, and more paternal contact is generally linked with better achievement in the first year of school.¹⁰ A girl who has a good relationship with her father is also less likely to have difficulty relating to men in later life.¹¹

In terms of mental health, a study of preschool children admitted to hospitals in New Orleans as psychiatric patients over a period of approximately three years concluded nearly 80 per cent came from fatherless homes. A study on admissions of teenagers to psychiatric hospitals determined only 16 per cent were living with both parents when they were admitted.

2.2 Shared parenting

Children to develop best into responsible adults when they are provided with the best environment during their formative years. As the optimal environment for a child's development is created by biological parents who are married to each other,¹² the aim in the circumstances of separation or divorce should be to deviate from this ideal as little as possible. Therefore the mother, the father and the court have a duty to ensure that each child maintains contact and involvement with both their mother and their father.

2.2.1 The bill proposes...

The Bill proposes to institute a presumption of joint parental responsibility, which means that decisions about major long-term issues for the child must be made by both the mother and the father, together. The mother and father are therefore required to consult and make a genuine effort to agree about major decisions, and a party who will not agree can apply to the court for a decision on a matter. This presumption could be rebutted when the court has reasonable grounds to believe that one parent has committed violence or abuse, or the court deems that it is not in the best interests of the child.

While a presumption that children should be able to spend equal or substantially equal time with each of their parents after separation was rejected by the Report, the Bill would require the court to consider an order that a child spends substantial time with both mother and father. That consideration must take into account the wishes of the parents and the practicality of spending time with each parent, and of course the presence of violence and abuse.

2.2.2 Our response...

Article 7(2) of the *Convention on the Rights of the Child*, to which Australia is a signatory, provides that a child has the right to know and be cared for by their mother and their father, and as established above, the mother and father each perform specific and different roles in a child's upbringing. Accordingly, substantial contact with both the mother and the father is necessary for the optimal development of a child - the human right of each child.¹³ While the separation of their mother and father will always have a negative impact on a child, the best situation that can be salvaged after a separation is that a child spends substantial time with both mother and father.

However shared responsibility does not do anything to assure the involvement of both the mother and the father. The concept requires a parent to have responsibility for their child, but provides absolutely no guarantee that they will have any contact with that child. The aim of maintaining the involvement of both parents in a child's life is not achieved unless contact with that child is involved. The mother and father can only nurture the healthy development of their children through contact with them.

The presumption of 50/50 shared custody was rejected in the Report in part because it would approach all families in the same manner without regard for individual practicalities. The Bill now proposes to include a meaningful relationship with both parents as one of the primary considerations of the court when determining the best interests of the child.¹⁴

While the legislative recognition that it is in the best interests of a child to have a meaningful relationship with both parents is a positive step, it unfortunately falls short of a presumption of joint custody. A rebuttable presumption is only a starting point, not a final decision. A rebuttable presumption of joint custody would still allow justifiable departures from that presumption to deal with those situations where it is impractical, while remaining a clear guide as to the contact a child should have with each parent.

If this presumption were instituted, mothers and fathers, or the courts, could depart from this presumption to deal with individual needs. However this presumption is a vital affirmation of the importance of mothers and fathers both having continued contact with their children. Legislating this presumption would also establish that the federal government takes seriously the importance of maintaining contact between children and both their mothers and fathers, and indicate their responsiveness to the concerns raised by the community.

Recommendation

The Bill should be amended to ensure that children of separating or divorced parents enjoy equal access to the company, love and guidance of both father and mother unless the parents mutually agree on other arrangements or unless clear and convincing evidence establishes that such an arrangement would not be in the best interests of the child.

Furthermore, the Bill should be amended to recognise that depriving a child of access to one of its parents can seriously prejudice the development of the child and should only be imposed if clear and convincing evidence shows that the child would be at risk of harm from such contact.

3. Requirement for dispute resolution

The most important arrangement that must be made after a separation is for the care of any children of the relationship. The presence of bitterness and vindictiveness will further damage the relationships between each parent and their children. Ideally, separating mothers and fathers would agree to a fair arrangement guaranteeing that both the mother and the father will spend substantial time with the child, without interference of the court.

3.1 The bill proposes...

The Bill proposes to promote shared parenting by encouraging people to take responsibility for themselves in a non-adversarial manner. In support of this objective, a court is prevented from hearing an application for a parenting order unless parents have used a family dispute resolution service, such as mediation. Furthermore, the Bill would prevent a parent from seeking a court order unless they have participated in the family dispute resolution process in good faith. Of course in those circumstances where there is a real threat of violence or danger of psychological harm, this requirement does not apply.

3.2 Our response...

The process of mediation is a better alternative than a degeneration into an entrenched conflict where the mother and father contend against each other for the purpose of winning, regardless of the effect on their children. Ideally, parents should be able to come to agreement regarding the arrangements for parenting of their children, but the nature of the separation may prevent that discussion.

However, the effectiveness of a mediation process depends critically on the likely outcome if mediation fails and the matter is determined by the Family Court. If one party to the dispute believes that a court determination will be more favourable than a mediated settlement, any mediation is likely to be a sham. For mediation to have a high likelihood of success, there are three requirements.

The first is to ensure that people who are staffing the Family Relationship Centres (FRC) are committed to shared parenting, and ideally, family reunification. Family dispute resolution will only keep matters out of the Family Court if those who operate the family FRCs are committed to these ideals.

Secondly, the FLA must require the Family Court to ensure the separating father and mother have equal rights to the care, custody and guidance of their children to the maximum extent consistent with the best interests of the child. This is necessary in order to make the process of family dispute resolution worthwhile for both parties by ensuring that neither will believe they will be favoured in court.

Thirdly, as a parent can avoid the family dispute resolution system by a claim of threat or risk of violence, there must be a mechanism to prevent false allegations. The Bill would provide the court with the power to institute a cost order if it became satisfied there had been false allegations on the balance of probabilities. This standard of proof is easier to satisfy than the criminal standard of “beyond a reasonable doubt” necessary to make out a charge of perjury, and is appropriate in these circumstances.

Recommendations

The Bill should be amended to require that staff employed by the Family Relationships Centres be committed to the ideal of family reunification, and where that is impractical, providing the child with equal or substantially equal time with the child’s mother and father.

The Bill should be amended to ensure that, in the event of mediation failing, the separating father and mother have equal rights to the care, custody and guidance of each of their children to the maximum extent consistent with the best interests of the child.

Furthermore, the Bill should allow the Family Court to depart from the presumption of equal rights to the care, custody and guidance of their children only with clear and convincing evidence that such an outcome would not be in the best interests of the child.

4. Improvement to the enforcement of parenting orders

4.1 The bill proposes...

The Bill seeks to address concerns about the breach of court orders. Its main objective is to ensure that children can have a meaningful relationship with both parents to the maximum extent possible. The Bill would remove the old compliance regime in the FLA and replace it with a system of contravention orders.

A contravention occurs when a person who is bound by an existing parenting order intentionally fails to comply with the order, or has otherwise hindered another person complying with the order. A person accused of contravening an order can claim a reasonable excuse, but the court must be satisfied on the balance of probabilities that the excuse existed, and that the person should be excused. Matters establishing a reasonable excuse include the reasonable belief that the child needed to be taken to a hospital.

If one parent does not have a reasonable excuse for contravening a parenting order and the contravention has resulted in the other parent losing contact time with the child, the court must consider making an order for the disadvantaged party to be compensated in time with the child. The court may also require a contravening party to enter into a bond, which might involve conditions such as attendance at family counselling or family dispute resolution.

The standard of evidence required to establish the contravention of a parenting order or a false allegation is on the balance of probabilities. However the court has the power to impose orders such as community service and fines, or even imprisonment in more serious cases. In these cases the court requires evidence to be established beyond a reasonable doubt.

4.2 Our response...

The separation of a child from his or her parents is a most serious interference in the child's development, and is also devastating for the parents. When establishing matters such as a contravention of a parenting order or the existence of a false allegation, the standard of "beyond a reasonable doubt" may be impractical, while the "balance of probabilities" standard may be too low.

In accordance with the principle that children should have equal or substantially equal contact with each parent, any order that would interfere with that contact should be subject to a higher standard. Any judicial decision that would reduce the contact between a parent and a child should be established to a clear and convincing standard of evidence.

Recommendation

Any judicial decision that would involve reducing contact between a parent and his or her child should require clear and convincing evidence to establish the matter for which the reduction is to occur.

5. Recognition of time with other relatives

5.1 The bill proposes...

The Bill would recognise that it is in the child's best interests to have contact with both parents, but also to have contact with other relatives, including grandparents. The Bill would also make it easier for grandparents and care-giving relatives to obtain custody of a child, where other relevant parties give consent.

5.2 Our response...

The FLA has thus far been focused on the parents, and not on the wider family who are also inevitably hurt by a family separation. Grandparents serve as a vital link between the old generation and the new generation, and have an important role in the transmission of wisdom.

The importance of the family in developing the next generation of Australians should not be underestimated, and any measure that advocates the role of the family should be encouraged. These provisions should be enacted.

Recommendation

Recognition that it is generally in the child's best interests to have contact not only with both parents, but also with other relatives, including grandparents should be enacted

6. Other issues

6.1 Protection of children from violence and abuse

Children are the most vulnerable members of our society and deserve to be protected from violence and abuse. The worthy aim of protecting children from violence and abuse has however resulted in a system where the mere suggestion of violence or abuse by one parent can be enough to separate the other parent from his or her children. Although it might be claimed that such a position is necessary to act in a child's best interests, this argument is seriously flawed.

As has been established above, a child develops best when in the household of its married mother and father. The separation of a child from either mother or father will have serious consequences for that child's development, which are obviously not in the best interests of the child.

The mere accusation of an ex-spouse or ex-partner should not be sufficient to separate the other parent from their child. The challenge is to find an appropriate balance between protecting a child from violence and abuse, and protecting a child from unwarranted separation from mother or father.

6.1.1 *The bill proposes...*

The Bill would allow the court to remove legal rights and provisions whenever it deems that a parent is a perpetrator of violence or a form of abuse. The Bill applies the civil standard of proof as a general principle, but when it is considering imposing a fine, a community service order or imprisonment, it must apply the criminal standard of evidence.

Many parents would consider the denial of reasonable contact, care and guidance of their own children to be a more severe punishment than a jail sentence, which can only be imposed if a crime is proved beyond reasonable doubt. It is astounding, therefore that a parent accused of violence or abuse is denied the presumption of innocence and denied the normal requirement to prove the allegation.

6.1.2 *Our response...*

Any claim that a child is suffering violence or any form of abuse must be treated seriously, in order to protect children. However an accused parent should also be entitled to the presumption of innocence and only penalised if an accusation is established by an appropriate standard of proof.

One approach would be for the Family Court to take into account an accusation of child abuse if the accused has been convicted of a related offence in another court.

Another approach would be for the Family Court itself to decide whether an accusation is supported by sufficient evidence. The standard of proof required should depend on whether or not the child is the biological offspring of the parent. Evidence is readily available that the incidence of child abuse by biological parents is much lower than by step-parents or other adults.¹⁵ Consequently, the standard of proof required for an allegation of abuse by a biological parent should be higher than that for another adult.

Since the consequence of fracturing the relationship between a child and a biological parent is severe, an allegation of violence or abuse in this case should require the highest standard of proof: beyond reasonable doubt.

In the case of an allegation against an unrelated adult, such as a step-parent, the standard of proof should be on the balance of probabilities.

The Family Court should be empowered to deny an accused parent access to his or her own children only when the accusation is proved in accordance with the rigorous standards described above.

Furthermore, other unacceptable behaviour by a parent may render them unfit to have custody of their child. Such behaviour could include violence, drug abuse or other addictive behaviour including gambling, or infidelity including engagement homosexual activity or prostitution.

Custody of a child may also be unacceptable if the parent is suffering from a mental illness diagnosed by a qualified psychiatrist.

Recommendation

The Bill should be amended to allow the Family Court to order the separation of a child from his or her parent only if an allegation of child abuse, violence, drug abuse, infidelity, mental illness or other unacceptable behaviour is established by:

- (a) a conviction for a related offence in another court,*
- (b) the allegation, in the case of a biological parent, being proved beyond reasonable doubt, or*
- (c) the allegation, in the case of a biologically unrelated adult, being proved on the balance of probabilities.*

6.2 Appeals to the high court

In order for the proposed amendments to be effective, the court must apply the intent of the legislature, without a liberal interpretation due to bias. One example is that orders to penalise mothers for breaching parenting plans are rarely applied. As the cost of an appeal of such a decision to the High Court is usually prohibitive, the Family Court therefore operates with little supervision as it blatantly ignores the legislative direction to which it is supposed to be beholden.

The appropriate mechanism for the correction of a Family Court order is a High Court decision, and it is in the interest of good government that the highest judicial opinion in the land be available on such important issues. The government should therefore make available financial and legal assistance for an appeal to the High Court of Australia if a decision of the Family Court is apparently in breach of legislative direction.

Recommendation

The federal government should make financial and legal assistance available to facilitate an appeal to the High Court, if a decision of the Family Court appears to be unjust and in breach of legislative direction through the Family Law Act.

6.3 Certainty of paternity

The first two terms of reference deal with the involvement of parents with children, but there have been many reported cases of a purported father discovering through underhanded application of a DNA test that the child for which he has been paying child support is another man's child. Apart from the injustice, the childless man is usually left without capacity to recover the money that he has paid out as a result of fraud.

Recommendation

The Bill should be amended to enable a purported father to be able to demand a DNA test at any time in relation to a child in order to establish paternity.

7. Conclusion

Marriage and relationship breakdown in Australia is devastating our nation and has produced a generation of children who have little or no contact with one parent - usually the father. As both the mother and the father have important and distinct roles to play in the raising of a child, it is important for children to maintain contact with both parents even if they separate or divorce. The current application of family law in this country fails to recognise the importance of children maintaining contact with both parents.

While the Bill is a step in the right direction, further steps must be taken in order to achieve a cultural shift in the family law system towards shared parenting. The FRCs also have the potential to have a positive impact on both the divorce rate and the continued access of a child to both his or her parents, but only if further measures are taken to ensure the FRCs are committed to the goal of encouraging shared parenting.

Members of federal parliament have consistently reported for years that they receive more complaints about the unsatisfactory operation of the Family Court than on any other subject. The Commonwealth Government has the clear responsibility to address the contribution of the failed *Family Law Act 1975* (Cth) to huge social problems in Australia today and this responsibility should not be ignored.

8. References

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