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1 February 2006

COMMENTS ON NEW DIVISION 11 OF THE FAMILY LAW ACT – FAMILY VIOLENCE (proposed in the Family Law Amendment (Shared Parental Responsibility) Bill 2005

Division 11 relates to the interaction between Federal family law orders and State family violence protection orders. In particular, it gives State Courts the power to change family law orders when making family violence protection orders. The proposed new Division 11 purports to be adopting Family Law Council recommendations 'with slight modifications'. We don't think it does that. The FLC recommendations were made in a letter to the Attorney-General dated 16 November 2004 which can be found at:
http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~18+Jan+CleanedLetter+of+Advice+Division+11+16++November+20.pdf/$file/18+Jan+CleanedLetter+of+Advice+Division+11+16++November+20.pdf

Principles for exercising Division 11 powers

Under FLC proposals – in considering whether to exercise powers court to consider (our numbering)

1. purposes of division – *proposed s68T(2)(b), referring to proposed s68Q*
   a. to resolve inconsistencies between contact orders and family violence orders; and
   b. to ensure that contact orders do not expose people to family violence.
2. Best interests of the child - *proposed s68T(2)(b)*
3. The need to protect all family members from family violence and the threat of family violence and *subject to that* to the child's right to contact with both parents and other people significant to the child's care, welfare and development, *provided it is not contrary* to the best interests of the child. *Proposed S68T (2)(e)*.

Under Bill – in considering whether to exercise powers court to consider (our numbering):

1. Purposes of division – *proposed s68R(5)(a)*
   a. to resolve inconsistencies between family violence orders and family law orders that provide/authorize child to spend time with person (paraphrased).
   b. to achieve the objects and principles in s60B (below is paraphrased):
      - (Objects) To ensure that the best interests of children are met by:
        - Ensuring children have benefit of both parents' meaningful involvement in their lives to maximum extent consistent with best interests of the child.
        - Protecting children from harm from abuse neglect or family violence.
        - Ensuring children receive adequate and proper parenting to help achieve their full potential
        - Ensuring parents fulfil their duties and meet their responsibilities concerning the care, welfare and development of their children

- (Principles) The principles underlying objects are that (except when it is or would be contrary to a child's best interests):
  - Children have right to know and be cared for by both their parents.
  - Children have right to spend time and communicate on regular basis with both parents and others significant to development.
  - Parents jointly share duties and responsibilities concerning their children.
  - Parents should agree about future parenting of their children.
  - Children have a right to enjoy their culture (including with others who share that culture).

2. Whether contact with both parents is in the best interests of child concerned – *proposed s68R(5)(b)*

Comparison between the FLC position and the Bill

Using our numbering –

FLC 1. a. is basically the same as Bill 1. a. (this is already in the Act: s68T(2)(b), referring to s68Q(a))

FLC 1. b. does not have a direct comparison in the Bill –it is much more weakly addressed by the reference in Bill 1.b. to one of the objects being to protect children from harm. But the FLC wording that one of the purposes is to '*ensure* that contact orders do not expose *people* [ie not just children] to family violence' is much stronger/better. It should be noted that this is actually the current wording in the Act (s68T(2)(b) referring to s68Q(b)).

FLC 2 (which is already in the Act s68T(2)(b)) is essentially the same as Bill 2. Although the way it is written in the Bill might suggest that it is *not presuming* contact is in the best interests of the child it still basically calls for a best interests weighing up – and of course under the Bill this weighing up would occur under new s60CC which has the two primary considerations of meaningful relationship and protecting from harm – which will essentially cancel each other out plus the new provision in s60CC(3)(c) about the willingness and ability of each parent to facilitate a relationship with the other parent. We therefore think in total this could actually make Bill 2 a worse weighing up for women in fear of violence than FLC 2.

That leaves us with FLC 3 and Bill 1. b (neither of these are currently reflected in the Family Law Act). FLC 3 makes it very clear what the priority is – protecting all family members from violence. *Subject* to that need to protect people from violence, the child's right to contact is relevant (but *only* where contact is not contrary to the child's best interests). One of the key criticisms made by the FLC was that Division 11 didn't tell state courts which considerations they had to give priority to. The Bill similarly does not tell state courts what considerations to give priority to – and it certainly does not clearly prioritise protecting people from violence – given that the new objects and principles in s60B are so heavily balanced in favour of contact rights.

Conclusion

The Bill does not give effect to the FLC recommendations. Although it is certainly easier to follow, it may even be worse than what we currently have because the reference in current s68Q (b) to one of the purposes being to 'ensure contact orders do not expose people to family violence' is only very weakly reflected in the reference in Bill 1.b. to one of the objects

being to protect children from harm. Also the focus on broader protection of *all* family members is not retained. Furthermore, the requirement on magistrates to weigh up a huge number of considerations is likely to make it even less likely that they will agree to hear an application to vary a Family Court Order, let alone make a change – they will see it as too complicated and are likely to refer people to the Family Court. See also comments below re proposed *s68R(3)(b)* in the Bill.

The Bill should give clear direction to state courts to prioritise the need to protect *people* (not just children) from violence over the other considerations. Without this clear direction, Division 11 will continue to be confusing. More importantly it will continue to be ineffective in actually protecting people from violence because this will just be one of a range of considerations state courts will apply when determining whether to change family law orders. The Division should be amended to give effect to the FLC recommendations, especially recommendation 3.

Requirement for new material

Under Bill (not in current provisions or in Family Law Council recommendations) a state court making a family violence order can't exercise powers to change family law orders unless that court has before it material that was not before the court that made that family law order – *proposed s68R(3)(b).*

In our experience, even under the current law, state courts do not change family law orders if they think *all* the evidence before them had already been put to the Family Court when those orders were made. The provision is therefore unnecessary.

However, we believe that s68R(3)(b) could operate to obscure a long history of violence when a state court is determining whether to exercise its Division 11 powers. In theory, under s68R(3)(b) a person *should* just need to show that further violence had occurred after the family law orders were made in order to get over the requirement in that paragraph – once they had got over the requirement the state court *should* then still be able to consider *all* of the history of violence even if some of that evidence had been given to the Family Court. However, we are concerned that s68R(3)(b) might lead to state courts not giving proper regard to a long history of violence if an applicant came before them with only one or two 'minor' incidents of violence after the family law orders were made – those further incidents might well be the 'straw that broke the camel's back' for the applicant and have led to them feeling unsafe. BUT, if the state court took the view that the Family Court considered that the preceding history did not warrant restrictive contact arrangements, the state court might be unwilling to restrict contact because of one or two further 'minor' incidents.

Conclusion

We think there is a very real risk that s68R(3)(b) could operate to obscure a long history of violence in the manner described above. We recommend that the provision not be introduced.

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