In an historic move, the Australian Government has acted to create a more inclusive family law system for separating couples by removing distinctions relating to marital status and sexual preference. And as the courts determine the scope and operation of the 2006 shared parenting provisions on a case-by-case basis, the announcement of an inquiry into the structure of the federal family courts may signal yet more changes ahead.

**Form and substance**

An evolving federal family law system

**A family law system for all?**

On 25 June 2008, legislation was introduced into the Commonwealth Parliament to bring separating de facto couples, including same-sex couples, under the umbrella of federal law relating to financial disputes following family breakdown (Attorney-General, 2008). The Family Law Amendment (De Facto Financial Matters and Other measures) Bill 2008 moves on a 2002 agreement by the states and territories to refer their powers to the Commonwealth in this area of law. This means that all separating families in participating jurisdictions (i.e., all states and territories except South Australia and Western Australia) who are unable to agree on arrangements for their children and/or the division of property have the same recourse as married couples to federal law and the services and expertise of federal family courts to help them resolve all family issues in dispute. At the time of writing, the Bill had been passed by the House of Representatives and assented to by the Senate.

Currently, de facto couples are subject to the same (Commonwealth) laws as married couples in relation to disputes about children, but in relation to financial matters only have recourse to a confusingly varied array of state laws and state courts for adjudication. The primary significance of the reforms is that they will for the first time allow both de facto couples without children and same-sex couples access to the federal family courts (i.e., the Family Court of Australia and the Federal Magistrates Court) and remove inconsistencies in the application of the substantive law based on marital status. This includes enabling non-married separating couples to apply for superannuation funds to be divided, a power the federal courts have had in relation to married couples since 2002. The amendments will allow non-married separated couples to have all matters heard in the one forum—one that is both less formal and less costly than the state courts. In addition, separating de facto couples involved in family law litigation will also be afforded the same protection of their privacy as married couples under federal laws that prohibit publication of identifying information.

The provisions in the Bill afford the court significant discretion in determining whether a particular relationship, which has a geographical link with a participating jurisdiction, is a “de facto relationship” for the purposes of the legislation. Factors that can be taken into account include cohabitation on a genuine domestic basis for at least two years, that the couple have had a child together and/or have made contributions to the relationship in circumstances where serious injustice would be caused if an order were not made. Registration of a relationship under state or territory law is also a relevant threshold consideration. Parties must make their application within two years of the breakdown of the relationship.

The reforms will remove differences between the state and federal legislative regimes, which can result in considerably different outcomes for the less financially secure partner. In exercising their jurisdiction under the Family Law Act 1975, when determining an equitable post-separation property distribution, the federal courts have always been able to take into account the future needs of the parties to a marriage. This power is of particular relevance in families where the care of children affects the earning capacity of one party. However, when determining the property interests of unmarried parties, the jurisdictional patchwork of state law, as at early 2007, meant that courts in NSW, Victoria, the Northern Territory and South Australia could only take into account contributions made to property, while legislation in the ACT, Queensland and Tasmania allowed for future needs to be part of the equation. Similarly, in all states and territories except Victoria, South Australia and Queensland, state courts had the power to order spousal maintenance for de facto couples.

As reported in previous Family Law Updates, the original referral of power made by the states covered both heterosexual and homosexual couples. However, at the time,
the then Howard government declined to act on the aspect of referral relating to same-sex couples; federal legislation drafted to implement the referrals in relation only to heterosexual couples did not survive the 2007 federal election. Just prior to the introduction of the current reforms, the former Chief Justice of the Family Court, the Hon. Alistair Nicholson joined in calling for a more uniform and inclusive system (Schubert, 2008).

The passage of this legislation will mean that federal family law will catch up with Western Australia, which opted out of the federal system and since 2003 has had uniform laws relating to property and children’s issues applying to married, heterosexual and same-sex de facto couples. Apart from Western Australia, at the time of writing, South Australia remains the only other non-participating jurisdiction.

**Emerging case law**

This update continues to track the judicial interpretation of the amendments to the provisions in the *Family Law Act 1975* relating to the resolution of disputes over children’s issues, seen below through the prism of relocation-type cases. The summary of the latter two (unreported) cases is drawn from the insightful summary by Federal Magistrate Altobelli (2007).

**Sampson & Hartnett (No 10) [2007] FamCA 1365**

In this appeal from a decision by Justice Moore, the full court of the Family Court examined both whether the court has the power to make orders that have the effect of requiring or preventing interstate relocation and the circumstances in which this should occur. It also provides some authority for the proposal that Division 12A of the *Family Law Act 1975* (the provisions relating to less adversarial trials and the more active role played by judicial officers in the case management of parenting matters before the court) gives the court greater scope to make orders that go outside the parties’ proposals.

The two children of the marriage (both under school age) were living primarily with the mother in Geelong after she had moved there from Sydney following the separation some three years previously. The father was living in Sydney with his son from an earlier relationship and was seeing the children periodically in Geelong. Neither party was seeking an equal shared parenting arrangement; the mother sought to continue the role as the primary carer and the father sought to have the children live primarily with him in Sydney unless or until the mother were to move back to Sydney, in which case he would agree to equal shared care.

Notwithstanding that neither parent offered to relocate, nor sought to compel the other party to do so, the effect of the order made was that by February 2009 (when the children were to start school), there would be in place a shared parenting arrangement in Sydney. While the orders did not directly mandate the mother’s relocation to Sydney, they would be unworkable if she chose not to do so.

On appeal, the majority of the full court found that there were gaps in the findings necessary to support the orders—namely, the trial judge made no finding as to whether, if the children were ordered to live in Sydney, the mother would choose to relocate, nor to whether, if she chose not to relocate, the children would be best living with the father.

In this case, the issue to be determined was not so much a question of whether the court had the power to effectivly, though indirectly, restrict the movement of a parent (which it does) but whether the trial judge applied the relevant legal principles to the facts. The orders made by the trial judge were seen to be “at the extreme end of the discretionary range” (para. 83, p. 22) and therefore required a strong evidentiary basis for them.

The court held that, even before the enactment of the *Family Law (Shared Parental Responsibility) Act 2006*, the court was not restricted to making orders in accordance with the proposals of the parties, and to see itself so confined would inhibit its ability to ensure that the best interests of the child remained the paramount consideration (para. 89, p. 103). Their Honours went on to state further that the introduction of less adversarial trial processes reinforces the view that the court has the ability to fashion orders outside the proposals of the parties. The appeal was allowed and the matter was remitted back to the trial judge for hearing.

**M & S (2006) Fam CA1408**

In this 2006 decision, Justice Dessau allowed a mother to relocate to the United Kingdom with her 8-year-old daughter for three years. Altobelli (2007) notes that, while this case sheds some light on the intersection between relocation law and the new parenting provisions introduced by the *Family Law (Shared Parental Responsibility) Act 2006*, it may have limited application as a precedent due to the particular facts of the case. The mother was not proposing a permanent move, the child had expressed a desire to move with the mother and the father was only seeing the child for two weekends a term and half the school holidays under the pre-existing arrangement. The fact that the amount of time the child would be able to spend with her father following the move would result in little change to the status quo meant that the new s65DAA of the *Family Law Act 1975* (requiring the court to consider making an order for equal time or substantial and significant time with each parent) did not apply. Justice Dessau nonetheless examined the provisions relating to the presumption for shared parental responsibility and held:

> The legislature has not specifically prohibited the relocation of a child away from one parent. It has not introduced a specific presumption against it, nor an onus of proof on the moving party. Nor has it suggested that just because the relationship between a child and a parent will inevitably be affected by a move away, that in itself should preclude the court from permitting the relocation. (Para. 38)

**Goodwin & Stevens (2007) Fam CA 102**

Another judgment from Justice Kay, sitting as the full court of the Family Court of Australia, involved an appeal from a decision of a Federal Magistrate denying the relocation with their mother of two children, aged 11 and 7, from country Victoria to Brisbane. The father was seeing the children every third weekend and during the school holidays and relocation would decrease his contact to one long weekend each term. The mother offered to set aside a sum of $60,000, proceeds from the sale of her new partner’s house, to cover airfares for the children and their father. In his reasons for judgment, the Federal Magistrate both expressed doubts about the genuineness of the mother’s offer and noted that the use of the money in this way would place too great a financial burden on the new family.

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Phase 3 of child support reforms come into effect

The third and most significant component of reforms to the Child Support Scheme came into effect on 1 July 2008. As reported in a previous Family Law Update, these provisions include:

- the introduction of a new formula that is more closely tied to the costs of children (providing for higher child support for older children), treats the incomes and living costs of both parents more equally, factors in the cost of contact, and equalises the position of children from first and second unions as far as possible;
- the exclusion from child support calculations of extra income earned by non-resident parents who take on overtime and second jobs in the first three years following separation, to help them re-establish themselves;
- increased flexibility for parents to capitalise their child support, for example, to transfer ownership of the family home to the resident parent in lieu of periodic payments; and
- the recognition of the obligation to provide for unsupported step-children in the calculation of child support.

Child Support Agency (CSA) customers began receiving their new child support assessments from March 2008. A website set up by the agency provides information relating to the changes and can be found at www.csa.gov.au/schemereforms/introduction.aspx

The implementation of these changes runs in tandem with new enforcement measures announced on 23 June 2008.

On appeal, Justice Kay found that the children already had a meaningful relationship with their father, and that as long as they were able to spend adequate time with him on a regular basis, the relationship could be maintained. Notwithstanding that there were no submissions made as to what would constitute a meaningful relationship on the facts, Justice Kay did not hesitate in finding that the level of contact proposed amounted to a meaningful relationship. He stated at paragraph 36 that, “even if the move results in a diminution of the quality of the relationship, what the legislation aspires to promote is a meaningful relationship, not an optimal relationship” (emphasis added by author).

To address the Federal Magistrate’s concerns about the financial arrangements, the mother was ordered on appeal to place $20,000 in a trust account to be used solely for travel purposes.

The Federal Magistrate was held to have erred in two respects: firstly, in concluding that the continuance of the existing level of contact was more significant to the welfare of the children than “allowing their primary caregiver to get on with her life as she chose and to endeavour to maximise the opportunities for the children to be adequately supported” (para. 44); and secondly, in not taking a more proactive role in devising workable alternatives.

This case provides an indication of the possibility for a new, more active judicial role in looking beyond the proposals of the parties in order to arrive at more realistic or appropriate arrangements (Altobelli, 2007, p.9) while at the same time suggesting parameters to their obligation under the new provisions in promoting the child’s meaningful relationship with both parents.

Inquiry into the structure of the family courts: A sign of changes to come?

The Federal Attorney-General, Robert McClelland, has announced the establishment of an inquiry into the structure of the federal family courts and the Family Court of Western Australia. Consultant Des Semple was asked to report by May 2008 on how best to “integrate” the federal family law system and also to review the funding arrangements for the Family Court of Australia and the Federal Magistrates Court.

The widening of the original brief to include the Family Court of Western Australia has delayed the release of the report, which was not available at the time of writing.

The announcement of the review received bipartisan support. It has also been welcomed by the Chief Justice of the Family Court of Australia, Diana Bryant, who said at the 13th National Family Law Conference in Adelaide in April that, “unless the Government were to indicate that it was intending to provide significant additional funds to the courts, unlikely in the current environment, a review of how the Courts can operate more efficiently and make savings to free up resources is timely and essential” (CCJ, 2008b).

The Federal Magistrates Courts family jurisdiction was established in 1999. The expansion of that jurisdiction since then is such that in the 2006–07 financial year, 67.2% of all applications for final orders were filed in the Federal Magistrates Court, and 32.8% in the Family Court (Federal Magistrates Court, 2007, p. 33), yet their funding in 2007 was only 40% of what the Family Court received (Drummond, 2008b).

Developments on this issue will be monitored in future updates.
These include: the trialling of covert optical surveillance of CSA clients who are suspected of committing offences under the Act; a requirement that both parents lodge tax returns; an arrangement with the Insolvency Trustee Service of Australia (ITSWA) to seize and sell assets of parties defaulting on a court order for payment of child support; and the inclusion of income foregone under salary sacrificing schemes in child support calculations.

Postscript: A report on the population-level impact of the new assessment formula, prepared by FaHCSIA, was released on 7 August 2008 (FaHCSIA, 2008c).

Victorian Legal Aid family law funding

Increased demand for grants of aid in family law matters in Victoria, combined with Victoria Legal Aid (VLA) exceeding its budget for trials in other areas of federal law, has led to what some commentators have described as a crisis in the funding of family law matters in that state (CGH, 2008a). The financial pressures faced by VLA led to an announcement in February 2008 of restrictions on legal aid grants in family law matters. The main areas affected include the representation of children’s interests via the appointment of Independent Children’s Lawyers (ICLs) and the funding of family reports—both potentially pivotal in assisting the resolution of matters in difficult cases.

The Law Institute of Victoria and the Victorian Bar joined the Victorian Government in calling for increased funding for legal aid in Victoria (Law Institute of Victoria, 2008).

The recent Federal Magistrates Court’s decision of Lancet v Lancet [2008] FMCAtam 525, provides a snapshot of the implications of legal aid cuts such as these for the courts and the families who appear before them. In that case, Federal Magistrate Reithmuller found that an order for the appointment of an ICL was appropriate, given the very serious allegations of violence in the case. These included a situation in which the father broke into the mother’s home at 1 am armed with an axe and threatened to kill her, an incident that occurred while the children were present in the house. Notwithstanding the making of the order for the appointment of an ICL, legal aid funding for that purpose was declined, and the parties were found not to be in a position to cover the costs privately.

In the Federal Magistrate’s view, the inability to have the children’s interests represented in a case such as this compromised the court’s ability to provide a fair trial for the children and, as such, ran the risk of bringing the administration of justice into disrepute. However, while confirming the power of the court to order the appointment of an ICL, Federal Magistrate Reithmuller stressed that the court had no power over VLA as to whom, or to what extent, a grant of aid is made. The Federal Magistrate found it “remarkable” to discover that VLA makes an indiscriminate allocation of funding for 40 ICLs at the beginning of each month on a first-in/first-served basis.

He rejected the submission by the parties for the court to “remake” an order for the appointment of an ICL at the beginning of the month, and thereafter until funding is secured. He also declined to stay proceedings until an ICL is appointed, but ordered that the parties, and not the court, should pursue the matter with VLA until all avenues have been exhausted.

Endnotes

1 Territories cannot refer their powers, but the passage of the Commonwealth legislation will apply in the ACT and the NT by virtue of s122 of the Constitution.

2 From 1998 to 1999, de facto parties with children’s matters before the Family Court were able, by virtue of cross-vesting provisions, to have disputes over property also determined by that court. However, this practice ceased in 1999 when the High Court case of Winkin v Winken (ex parte McNally) (1999) HCA 27 found the cross-vesting provisions to be unconstitutional.

3 The CCH De Facto Relationships Commentary (2007) indicates that there has been a gradual shift towards greater consistency between state laws since 2002.

4 Note, however, that the Family Court of Western Australia does not have the power to split the superannuation interests of separating de facto couples in the way that the federal family courts do in the case of separating married couples. Western Australia made a limited referral of power to the Commonwealth relating to the superannuation entitlements of de facto in 2006. The current Commonwealth Bill does not activate this referral, as a full and unconditional referral is required. Western Australia is currently in discussion with the Commonwealth in relation to this power.

References


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