Roundup of developments in family law

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Alternative dispute resolution options in property matters

The Attorney-General, Mr Robert McLelland, has flagged the possibility that alternative dispute resolution mechanisms in the family law context will be boosted (Attorney-General’s Department, 2010). In pre-election statements, Mr McLelland indicated that measures to increase the options available for resolving disputes out of court for parenting and property matters were being examined. He said possible changes could include the requirement to attend family dispute resolution (currently applicable to parenting matters except in circumstances of urgency or where there are concerns about family violence and abuse) being extended to property and spousal maintenance matters. He has also flagged the possibility of extending family dispute resolution to encompass conciliation and arbitration-type processes. Since the election, consultation on these proposals has been continuing.

Restructuring of the family courts

Legislation containing measures to create a simplified and more streamlined family court system, as recommended in the 2008 report Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance, has been referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report. The Access to Justice (Family Court Restructure and Other Measures) Bill 2010 removes the family law jurisdiction of the Federal Magistrates Court, creating instead a new division in the Family Court of Australia. Federal magistrates hearing family law matters will be offered commissions in this new lower-level division of the Family Court of Australia and the Federal Magistrates Court will exercise general federal law jurisdiction only.

In the second reading of the Bill on 24 June 2010, the Federal Attorney-General, Robert McClelland, cited findings from the AIFS (2009) Evaluation of the 2006 Family Law Reforms (in particular, concerns about inconsistencies in processes between the Family Court of Australia and the Federal Magistrates Court, as well as the way matters are transferred between the two courts) as being consistent with the aims of the proposed restructure. For more information, go to <www.openaustralia.org/debate/?id=2010-06-24.7.1>.

High Court decision on relocation

In the recent case of MRR v GR [2010] HCA4, the High Court allowed an appeal against a decision by the Federal Magistrates Court that a child spend equal time with each of her parents in Mt Isa, in spite of the mother’s application to relocate to Sydney. The Federal Magistrate’s order, in effect, prevented the mother from leaving Mt Isa, and given that affordable rental accommodation in Mt Isa is scarce, she (and therefore the child on a week-about basis) was living in a caravan park. In ordering that the
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mattered be heard de novo (i.e., heard anew), the High Court held that an order for equal or substantial and significant time can only be made where a court finds that such an order is in the best interests of the child and reasonably practicable in all the circumstances; and that the trial judge failed to consider the latter. The High Court held that the Federal Magistrate had erred in failing to consider explicitly whether the orders made were “reasonably practicable” (s65DAA[5]). This decision overturned a previous decision by the Full Court of the Family Court to disallow the appeal.

Family Courts seeking privileged information

Earlier this year the Chief Justice of the Family Court of Australia indicated in a media interview that courts hearing family law disputes over children’s living arrangements after separation should have access to information arising in mediation that indicates a potential risk to the child’s or the parent’s safety, such as that relating to violence, abuse, mental health or drug use issues. Aside from obligations to report such concerns to child welfare authorities, or the police, privilege currently prevents family dispute resolution practitioners from disclosing communications made in family dispute resolution (“Protect children”, 2010).

New program: Provision of legal assistance in Family Relationship Centres

The Federal Attorney-General has announced partnership arrangements between Family Relationship Centres (FRCs) and legal service providers (primarily community legal centres, with state and territory legal aid bodies playing a coordination role) that will see legal assistance being provided to FRC clients. The types of legal services provided at FRCs may include legal information sessions for parents, legal advice, assistance with the drafting of parenting plans and consent orders, lawyer-assisted family dispute resolution, and training and mentoring for lawyers and FRC staff. The aims of the program are not just to enhance services provided to clients but also to help to promote a closer and more constructive relationship between lawyers and family relationship services. AIFS has been commissioned to conduct an evaluation of the program. For more information on the program, see the Attorney-General’s speech to the Legal Aid NSW annual family law conference at <tinyurl.com/22w7ea4>.

Appointments to the Family Law Council

Four new appointments to the Family Law Council, including Dr Rae Kaspiew from AIFS, were announced on 14 July 2010. Associate Professor Helen Rhoades from Melbourne University Law School has been appointed Chair of the Council, while Federal Magistrate Kevin Lapthorne, Alison Playford from the Federal Attorney-General’s Department and Dr Kaspiew have been appointed as members of the Council. AIFS has been contributing to the work of the Council for many years in an “observer” capacity. The Family Law Council meets quarterly and advises government on matters related to the Family Law Act, family law more generally and family law legal assistance services.

Family violence in Indigenous communities

A report tabled in the Queensland Parliament in March this year by NSW criminologist Professor Chris Cuneen has found that Aboriginal women, who are six times more likely than non-Indigenous women to be victims of domestic violence, also experience violence of a more serious nature than non-Indigenous women, and are almost twice as likely to be seeking crisis intervention. Protection orders involving Indigenous parties (both aggrieved and respondent) are less likely to result in “no action” being taken and more likely to involve breaches than those involving non-Indigenous parties. Police were the applicants for protection orders in 73% of matters involving an Indigenous aggrieved party, compared to 52% of non-Indigenous matters. In some remote communities police are the applicants in more than 95% of the orders. The author suggests that this, combined with a tendency for Indigenous aggrieved parties and respondents not to turn up at court, indicate both disengagement with the legal system and a lack of services to assist with applications. One of the greatest barriers to women reporting and seeking protection from violence was found to be fear of removal of children by welfare authorities (Cunneen, 2010). To access the report, go to <www.parliament.qld.gov.au/view/legislativeAssembly/tableOffice/documents/TabledPapers/2010/5310T1801.pdf>.

Reform of Queensland adoption laws

Commencing on 1 February 2010, the new Adoption Act 2009 (Qld) brings Queensland’s adoption laws in line with those in other states and territories. Changed eligibility criteria for adoptive parents means that de facto couples can now adopt. The changes also allow for greater openness between all the parties involved in the adoption, provide greater access to information for birth parents and adopted people, and improve the information and support made available to birth parents considering adoption. For more information, go to <www.childsafety.qld.gov.au/legislation/adoPTION/reform/index.html>.
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NSW relationship register

In May 2010, the State Government of NSW passed legislation (the Relationship Register Act, 2010) establishing a relationship register to allow de facto and same-sex couples in “committed, exclusive” relationships access to the same legal entitlements as married couples, similar to registers that exist in other states and territories. The registration process does not create civil unions but removes the necessity of proving the relationship for the purposes of access to entitlements in a range of areas.

Same sex parenting rights: Tasmania

Legislation was passed in Tasmania in late 2009 recognising the parental rights of both members of same-sex couples who have had a child via assisted reproductive technology (ART) processes. The Relationships (Miscellaneous Amendments) Act 2009 addresses the previously discriminatory situation whereby the non-birth mother had no parental rights in matters affecting the child. In contrast, a male partner of a couple using ART has long been deemed to be the father of the child for legal purposes. The provisions have been backdated to include children born to two mothers via ART since changes to Tasmanian law six years ago (introduced by the Relationships Act 2003), which recognised same-sex couples via a registration system.

References


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