

New legislative developments



Of particular note among the recent developments in family law are proposed changes to the Child Support Scheme, and developments related to the Federal Magistrates Service and the Family Law Amendment Bill. Also discussed in this Update are proposed reforms in the area of superannuation and property division under the Family Law Act 1975. Finally, in the Family Court, two recent decisions have been handed down on the difficult issue of resident parents who wish to relocate with their children.

Child support

Proposed changes to the Child Support Scheme were announced in the Federal Budget on 9 May 2000. Changes have been proposed (Department of Family and Community Services 2000: E2-E5) in the following three areas.

Contact-child support nexus: Reduced child support payments are proposed for non-resident parents exercising contact with their children for between 10 and 30 per cent of nights per year.

High income non-resident parents: A lower 'cap' on non-resident parent income subject to the child support formula is proposed, with the impact that high income earners (for this purpose, those earning over \$78,378 per annum) will pay less child support.

Non-resident parents with subsequent families: Non-resident parents who have subsequent families will be able to apply to exclude income earned from a second job from their income subject to the child support formula. This group will also be able to exclude their child support liability from their household income, for the purposes of determining entitlement of their subsequent family to Family Tax Benefit and Child Care Benefit.

Legislation to implement the changes (Child Support Legislation Bill (No 2) 2000) was introduced into the House of Representatives on 30 August 2000.

In addition to these changes, the government has announced the implementation of a pilot program to help non-resident parents improve post-separation relationships and parenting skills. The government has indicated that: 'The pilot program will provide intensive practical assistance and ongoing support by assisting clients to access existing community and government programs such as: access to parenting skills, training, peer support, relationship management help, legal advice, and financial counselling' (Department of Family and Community Services 2000: E1). The pilot will involve two delivery methods: face-to-face community advisers, and an advisory service attached to the Men's Access Line.

Federal Magistrates Service

A further development since the last edition of *Family Matters* is that the Federal Magistrates Service, discussed in the last edition of *Family Matters*, has begun operations in Melbourne, Sydney, Adelaide, Brisbane, Canberra, Launceston, Parramatta, Townsville, and Newcastle. The

Magistrates Service began hearing cases in some locations on 3 July 2000. The Family Court and the Federal Court are providing registry services for the Magistrates Service.

Family Law Amendment Bill 2000

The Family Law Amendment Bill 2000 had its second reading in parliament on 17 August 2000, with the government proposing certain amendments. The Bill was passed by the House on 30 August, and at the time of writing has not yet been introduced in the Senate. The Bill, which covers changes to the Family Law Act 1975 regarding enforcement of parenting orders and financial agreements, was discussed in this column in the last edition of *Family Matters*.

Superannuation and division of property

Currently under the Family Law Act 1975, the court can take into account any superannuation interests in dividing property on marriage breakdown, but superannuation cannot be divided either by court order or by agreement between the parties. This situation has become more problematic over time, especially given the increasing importance of superannuation as an asset with the introduction of the Superannuation Guarantee. In marriages where there are few assets apart from the superannuation interest of one of the parties, the current 'take into account' approach is clearly inadequate.

Legislation has been introduced into parliament to permit the division of superannuation on divorce. The Family Law Legislation (Superannuation) Bill 2000, if enacted, will amend the Family Law Act 1975 and the Superannuation Industry Supervision Act 1993, to provide for the division of superannuation interests on marriage breakdown. Parties will also be able to agree on how such interests are to be split. Superannuation would be divisible both at its accumulation phase and benefit phase.

The Bill was introduced into the House of Representatives on 13 April 2000. The second reading was adjourned and the provisions of the Bill were referred to the Senate Select Committee on Superannuation and Financial Services on 10 May. The Senate Committee is now receiving submissions on the Bill, with the closing date for submissions advertised as being the end of August. However, the draft Regulations to accompany the Bill are not likely to be released until after 8 September, and so submissions will be received after the current close date. The revised closing date is likely to be near the end of September. The Committee is planning to hold a public hearing on 6 October 2000 in Canberra.

Relocation

Since the decision in *B and B* (1997) FLC ¶92-755, relocation cases – cases in which the resident parent (usually the mother) wants to move, with the children, a considerable distance from the contact parent – have become one way in which the state of the law relating to children disputes can be measured.

Relocation cases raise difficult issues regarding the importance of children having contact with their fathers,

but also the desirability of resident mothers being able to create new and better lives for themselves and their children (financially and otherwise), by relocating. As a result, the jurisprudence of relocation cases has framed much of the debate surrounding the impact of the Family Law Reform Act 1995 (the 'Reform Act') amendments, five years after their inclusion. The Reform Act amended the Family Law Act to (among other things) place greater emphasis on the importance of the child's right to know and be cared for by both parents, subject to the best interests of the child (Harrison 1997).

On 1 August 2000, the Full Court of the Family Court handed down two decisions in which mothers who had residence of their children pursuant to previous court orders sought to relocate with the children (*A and A* (2000) and *H and L* (2000)). In *A v A*, the mother appealed a decision of Moss J preventing her from relocating from Sydney to Portugal with the ten-year-old daughter of the marriage. The mother's appeal was allowed, and the matter was sent back for re-hearing. In *H and L*, the mother appealed a decision of Flohm J preventing her from relocating with the children of the marriage, aged eight and six, from Sydney to Lismore, 800 km away. Applying the approach set out in *A v A*, the court dismissed the mother's appeal, with the result that she was unable to move with the children.

In deciding both cases, the court noted that *B and B* was delivered less than 13 months after the commencement of the Reform Act. The court considered that, with the benefit of further experience in the practicalities of applying the relevant provisions of the Family Law Act, it was now necessary to reconsider the relocation test in light of more recent trends. The new cases are thus less important for their facts than for the principles set out, especially in *A v A*.

In *A v A*, the court began by looking at relevant decisions that were binding on it, and the circumstances in which a Court may depart from previous authority (*AMS v AIF* (1999); *Paskandy v Paskandy* (1999), and *Martin v Matriglio* (1999)). In particular, it was recently held by the High Court of Australia in *AMS v AIF* that in determining a parenting dispute that involves a proposal to relocate the child, the best interests of the child remains the paramount, but not sole, consideration. In that case, the High Court had also held that a parent wishing to relocate a child was not required to show 'compelling grounds' justifying the move.

The Full Court held that in determining a relocation case, it is necessary for the court to evaluate each of the proposals made by the parties, weighing how each proposal would hold advantages and disadvantages for the child's best interests. The issue of relocation was not discrete from those of residence and the best interests of the child. In the task undertaken by the court, the objects and principles set out in Part VII of the Family Law Act ('Children'): 'Provide guidance to a court's obligation to consider matters in s 68F(2) [which sets out factors relevant to determining the child's best interests] that arise in the context of a particular case' (*A v A* (2000): para 108).

The Full Court held that in determining a relocation case, the reasons for the decision are expected to display three stages of analysis:

- identify the relevant competing proposals;
- for each relevant s 68F(2) factor, set out the relevant evidence and the submissions with particular attention to how each proposal is said to have advantages and/or disadvantages for that factor and make findings on each factor as the Court thinks fit having regard to s 60B;

- on the basis of the prior steps of analysis, determine and explain why one of the proposals is to be preferred, having regard to the principle that the child's best interests are the paramount but not sole consideration. (*A v A* (2000): para 82)

At stage two of the above analysis, the court (*A v A* (2000): 15) emphasised that:

- The reasons for the proposed relocation would be weighed with the other matters to be considered under s 68F(2), rather than being treated as a separate issue; to this extent, *B v B* (referred to above) is no longer an accurate statement of the law.
- The ultimate issue is the best interests of the children and to the extent that the freedom of a parent to move impinges upon those interests it must give way.
- Courts will not necessarily restrain removal of a child to another country, despite the impact on contact with the parent who stays in Australia.

The Full Court held that at stage three of the above analysis, the court must have regard to the following issues:

- Neither the applicant or the respondent bear the onus of establishing that a proposed change to an existing situation or continuation of an existing situation will best promote the best interests of the child.
- Care must be taken by a court to ensure that it frames orders which are in accordance with a party's constitutional right to freedom of movement (s 92 of the Commonwealth Constitution). The court must consider the arrangements that each parent proposes for the child and whether they protect the child's right to know and have contact with both parents.
- The Court must consider all relevant matters referred to in ss 60B and 68F(2) and then indicate to which of those matters it has attached greater significance and how they balance out. No single factor should determine the issue.

The court considered that the use of a structured series of analytical steps aids in decision-making transparency, and minimises the risks of a court falling into appealable error. Certainly, the amalgamation of a number of previous decisions into one test is to be applauded as it offers a more convenient way of considering how such cases are likely to be decided in the future. However, the above test appears to offer little in the way of clarification. The complex, wide, and to some extent overlapping, range of factors that need to be considered in relocation cases would seem to point to cases continuing to be decided on their individual facts as a matter of discretion, as they must be under the Family Law Act. In the end, formulaic approaches are unlikely to provide a great deal of assistance in predicting outcomes.

References

- Department of Family and Community Services (2000), *What's New. What's Different?* Budget 2000–2001.
- Harrison, M. (1997), 'Family law reforms' and 'Relocation dispute decided', *Family Matters*, no. 47, Winter, pp. 24–27.

Cases

- A and A* [2000] FamCA 751.
- AMS v AIF* (1999) FLC ¶92-852.
- H and L* [2000] FamCA 752.
- Martin v Matriglio* (1999) FLC ¶ 92-876.
- Paskandy v Paskandy* (1999) FLC ¶92-878.

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