

## FAMILY LAW UPDATE

# Two new amendment Bills

Since the last edition of *Family Matters*, important developments have occurred in relation to the Family Law Amendment Bill (now Act) 2000, and the Child Support Legislation Amendment Bill (No 2) 2000. **BELINDA FEHLBERG** reports.

### *Family Law Amendment Act*

The Family Law Amendment Bill 2000 has now been passed by both houses of parliament, and became operative in December 2000. As previously described (in *Family Matters*, no. 53, Winter 1999, pp. 53-54, and *Family Matters*, no 55, Autumn 2000, pp. 52-55), the legislation addresses two important issues: (1) financial agreements (including allowing couples to enter into legally binding pre-nuptial agreements); and (2) enforcement of parenting orders.

When debate on the Bill was resumed in the House of Representatives, the Government proposed various amendments all of which were adopted. In relation to financial agreements, only independent legal advice is now required before entry into an agreement (rather than independent legal *or* financial advice, as originally proposed). Also, the grounds for avoiding financial agreements have been changed so that a 'material' rather than 'exceptional' change of circumstances relating to the care of a child will suffice.

In relation to enforcement of parenting orders, amendments were made which will make the three-pronged enforcement approach – educative, remedial, and punitive (as previously set out in *Family Matters*, see above) – less rigid, allowing the court greater discretion regarding whether to impose a sanction where there is a contravention of a parenting order without a reasonable excuse.

Just before the Bill was passed by the Senate, other changes were made. In relation to financial agreements, an additional ground for avoiding agreements was added: unconscionability. In law, this refers to a situation where, in the process of entering a contract, a person having a 'special disability' (or disadvantage) is taken advantage of by the other side. This ground did not really need to be added to those originally in the Bill. The grounds for avoiding agreements already included 'the agreement is void, voidable, or unenforceable', which draws in all the established grounds for avoiding contracts, including unconscionability.

Given the quite restrictive grounds available under the Bill for avoiding financial agreements once they have been entered, vulnerable parties would have been better served by stricter entry requirements (for example, court registration and/or approval), and a broad-based unfairness ground for avoiding agreements. In New Zealand, for example, a pre-nuptial agreement is not enforceable if the court concludes that giving effect to the agreement would be 'unjust' having regard to a number of factors, including whether the agreement has become unfair in the light of any changes in circumstances since it was entered (Matrimonial Property Act 1976 (NZ) s 21(1)).

In relation to enforcement of child contact orders, just before the Bill was passed by the Senate, an addition was made to the list of options available to the court when deciding its response regarding a contravention made

without reasonable excuse, at the second (remedial) stage of the process.

As previously set out in *Family Matters*, the Bill as originally introduced into Parliament provided that when a contravention of a parenting order occurred without reasonable excuse, the court would have the power to order the recalcitrant parent to attend a post-separation parenting program or the court could make an order for compensatory ('make up') contact.

The additional option introduced will allow the court to adjourn the contravention proceedings to enable an application to be made by either of the parties for a further parenting order. If an application is made, this would allow the court to examine whether the original contact order (the order allegedly contravened) was the right one, and if not, to vary or re-make the orders. Factors weighing in favour of an adjournment include: whether the initial orders were made by consent (meaning by the court, but sought on the basis of the parties' own agreement), whether the parties were legally represented when the initial orders were made, the length of time since the initial orders were made, and any other matters the court thinks relevant.

This amendment is important because it extends considerably the court's options when faced with a contravention application. This is a particular advantage for children whose current contact arrangements were made (as is often the case) by consent and may not be in their best interests. As noted above, consent orders are made by the court on the application of the parties. They are court orders which do not involve the court's full consideration of the evidence in the matter. Risks arising from, say, domestic violence may not be evident and thus may not be reflected in the orders made. In practical terms, the contravention application may be the first time that the matter is fully before the court. Similar problems may arise where one or both of the parents are not legally represented in the initial court proceedings.

The amendment, by allowing the court to adjourn contravention proceedings, provides an opportunity in such circumstances for the court to re-make contact orders to

restrict or deny a contact parent contact with the child, and dismiss the contravention application. Conversely, the opportunity would also be there to vary or re-make orders in favour of the non-resident parent, and to proceed with the contravention application.

## ***Child Support Amendment Bill***

As noted in the last *Family Matters* Family Law Update, various proposals to change the child support scheme were announced in the Federal Budget. Of particular note were proposals to reduce child support payable by non-resident parents: (1) who have contact with their children for between 10 and 30 per cent of nights per year, and/or (2) have very high incomes.

The proposals, along with other changes, were embodied in the Child Support Amendment Bill (No 2) 2000. The Bill was the subject of a Senate inquiry (Senate Committee 2000), and was passed by the House of Representatives. In the Senate, both of the proposals referred to above were defeated on the combined votes of the Labor Party and Australian Democrats.

In the report of the recent Senate Committee inquiry, the Labor Party expressed sympathy in relation to the position of contact parents facing high contact costs, and has since indicated a desire to continue discussions on this issue with the Government. As a result, discussions on the costs of contact and the nexus between contact and child support appear likely to continue. The research that surrounds these topics is considered in greater detail in the article by Fehlberg and Smyth elsewhere in this edition of *Family Matters*).

### ***Reference***

Senate Community Affairs Legislation Committee (2000) Consideration of Legislation referred to the Committee: Child Support Legislation Amendment Bill (No 2) 2000, October 2000.

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