New mantras in FAMILY LAW

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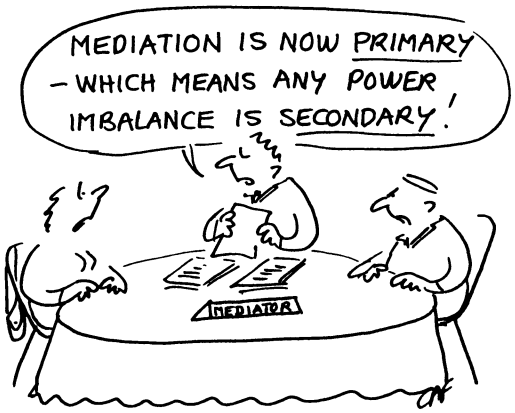
The impact of recent changes to the Family Law Act.



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An article in the October issue of the *Alternative Law Journal* considered the recent changes to the *Family Law Act 1975* (Cth) and how they fail to address the social and economic disadvantages for women. This article examines recent changes from a different perspective, particularly with regard to mediation as a method of primary dispute resolution and new provisions about family violence and the relationship to children's matters. These changes serve to exacerbate rather than alleviate problems experienced by women in the family law system.

The *Family Law Act* came into effect on 5 January 1976. One of its main features was to establish the Family Court of Australia and that court recently celebrated 20 eventful years of operation. In the past two decades there have been numerous amendments to the principal Act, changes to the court's Rules, management and procedures, practice directions, High Court rulings and volumes of case law and commentary. The most significant legislative amendments have included widening the scope of the marriage power (1983), referral of State powers over ex-nuptial children (from 1986 to 1990), cross-vesting (1987), additional jurisdiction over such matters as bankruptcy and income tax (1988), introduction of the Child Support Scheme (1988) and provisions about alternative dispute resolution (1991).

The 1995 amendments

On 11 June 1996 substantial amendments pursuant to the *Family Law Reform Act 1995* (Cth) came into operation. These have radically altered the philosophical underpinnings and practical application of the *Family Law Act*, particularly in relation to children. The amendments are largely modelled on the *Children Act 1989* (UK)[1] and also reflect notions embodied in the United Nations Convention on the Rights of the Child which was ratified by Australia in December 1990 with effect from January 1991.

The 'old' concepts of guardianship, custody and access have been replaced with 'new' concepts of parental responsibility and parenting orders as to residence, contact and specific issues. New s.61B defines parental responsibility in terms of duties, powers, responsibilities and authority in relation to children and new s.64B defines 'parenting order'. Parents are encouraged to reach agreement about day-to-day and long term matters concerning their children rather than seeking a court order and s.63C introduces the new entity of a 'parenting plan' to incorporate such parental agreement. Parenting plans remain private informal agreements between parents unless registered with the court, in which case they become binding and enforceable. The Family Court has already produced 'parenting plan kits' for do-it-yourself parenting plans.

Parenting plans can be formulated with the assistance of counselling and mediation services. Such forms of alternative dispute resolution, together with conciliation and arbitration, have been elevated under

the *Family Law Act* from the status of 'alternative' to the higher status of 'primary'.

Another feature of the *Family Law Reform Act* is the new Division 11 about family violence (ss. 68N-68T). This Division primarily deals with the relationship between contact orders and family violence orders and s.60D defines and expands old and new expressions in the Act, including 'abuse' and 'family violence'.

Other amendments under the Reform Act relate to child maintenance (ss.66A-66W), location and recovery of children (ss.67H-67Y), injunctions relating to children (ss.68A-68C) and presumptions of parentage and parentage testing (ss.69P-69ZD).

Any resemblance to the *Income Tax Assessment Act* in terms of the numbering of sections is purely coincidental!

This article examines a few of these recent changes and their impact in the area of family law and its application in practice as we head towards the 21st century.

Mediation

Mediation is sweeping the nation. From its humble introduction into the Family Court in 1991 through the *Courts (Mediation and Arbitration) Act* mediation services have climbed to prominence in the private sector and are receiving large budgetary allocations in the public sector of court-annexed and government-funded agencies. The latest amendments to the *Family Law Act* now ensure that mediation-like services are entrenched as permanent fixtures and accorded the status of 'primary' methods of dispute resolution.

The underlying rationale

In my view the change in name from 'alternative' to 'primary' is not merely cosmetic. Rather it reflects an underlying philosophy that promotes and legalises private ordering and informal justice and is premised on a conscious and calculated intention of maintaining power differences between men and women in family relationships.

Mediation and counselling both encourage the private ordering of family affairs. Personal norms, behaviour and relationships within the family context are respected and protected. Power bases remain immutable.

When challenged, those with greater power and resources will seek to maintain their superior positions, be it within the informal mediation context or through litigation and formal court processes. That is to be expected. Men usually occupy such positions of social and economic advantage. That is the norm within the home and within the workforce and community at large. Mediation is a much 'safer' forum within which to resist challenge. The process protects and replicates such power differences and the outcome usually entails minimal disruption to sources of power and control of resources.

Litigation and adjudication are much more 'risky' and pose a threat to those who seek to retain their power and control — be it over children, financial matters or the apportionment of property. Litigation adheres to clear rules and procedures, and court hearings afford a more objective evaluation of parties' relationships and resources. Court-imposed determinations are more likely to redress imbalances of power by providing far more equitable distributions and solutions than those reached privately. Courts, too, attract public scrutiny and accountability, whereas mediation and mediated outcomes remain private and untouchable.

Private ordering and agreements reached through mediation and counselling are therefore more attractive to those who want power imbalances to remain intact, that is, men, for it is men who dominate positions of power in all arms of government and regulation, who by definition comprise half of the divorce population and who have succeeded in ensuring that mediation and like methods are near-mandatory legislative requirements.

Rather than acknowledging such a sinister and raw rationale in favour of promoting mediation services, legislators and the legal fraternity rely on research and evaluations of mediation versus litigation to support the recent amendments. At best the available research is limited and inconclusive. At worst it is self-serving, methodologically questionable and therefore unreliable. Most of the research here and abroad as to the purported benefits of mediation is little short of propaganda published by exponents of mediation with preconceived notions and with vested interests in the maintenance and funding of mediation programs. Nonetheless some of the purported benefits need to be examined to enable meaningful debate.

Mediation saves time and money?

There is some limited evidence in the United States, that mediation is cheaper than litigation.[2] Mediated settlements can be reached more quickly and expeditiously than awaiting judicial determination. Other evidence, however, suggests the opposite. Failed mediation can be more expensive than litigation[3] and may even prejudice one of the parties by prolonging a status quo in favour of one party in a children's matter or affecting the size or value of the asset pool in a property case. It may also mean a longer delay to reach a final hearing. Indeed, evidence in Canada suggests that mediation is actually more expensive than litigation, *irrespective* of whether an agreement was reached.[4]

Mediation is party-controlled?

Mediation is also praised as a party-controlled process with party-determined outcomes. This purported benefit too is transparent and flawed. Parties do not come to mediation with equal bargaining power, skills and resources. Women generally have less access to information and legal advice and are not fully aware of all the issues to be discussed. Full disclosure is not required. Through socialisation, women are generally less able to articulate their needs and advance their interests and are treated with lower credibility and attentiveness in negotiating situations. Outcomes reached through mediation are therefore likely to reflect and reinforce such differences.

There is also a power differential between parties on the one hand and the mediator on the other. Parties who have experienced mediation complain of being ignored, dismissed and pressured into agreements. Mediators are far from neutral. They are purveyors of certain beliefs and personal and professional biases and inevitably 'direct' parties into favoured outcomes. The mediator, not the parties, controls the process and what outcomes are reached. As such, mediation is simply legalised informal adjudication.

Problems with mediation

Objections to mediation at both theoretical and practical levels are many. To canvass them all is not the purpose of this article. However, the new amendments ignore the above objections and provide no safeguards against the disadvantages discussed. Redefining mediation as a 'primary' method of dispute resolution merely exacerbates problems as to power imbalance between parties, inequities regarding

access to resources and legal advice, mediator power, non-disclosure, family violence, economic pressures and the absence of court scrutiny. Some of these concerns were voiced in 1994 in both the Access to Justice Action Plan and the Law Reform Commission's Equality Before the Law Report but have been ignored by the legislators.

Promoting mediation may also have serious consequences on the availability of legal aid. Legal aid funding is being severely cut by the Federal Government in all States. Mediation is seen as a cheap alternative to litigation and legal aid bodies may require parties to attend mediation irrespective of the parties' relationship and problems involved rather than provide funds for traditional court procedures.[5] This would effectively remove choice and make mediation mandatory for those who could not afford private lawyers. This would discriminate against those in lower socio-economic classes (primarily women) who would otherwise qualify financially for legal aid. Women form the vast majority of legal aid recipients in family law matters and with the push for mediation they would be denied the choice which they would otherwise enjoy if in better financial positions. Men in the main would still have the choice of whether to pursue mediation or to opt for litigation. Access to justice in the area of family law would continue to be gender-determined.

Child abuse and family violence

In 1991 the definition of 'abuse' in relation to a child was inserted into s.60 of the *Family Law Act*. The definition of 'abuse' in new s.60D(1) remains the same and reads as follows:

> 'abuse' in relation to a child, means:
>
> (a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or
>
> (b) a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person.

This definition focuses upon sexual and physical abuse of a child with the child as a direct or primary victim and this has limitations. However, a new definition in s.60D(1) of 'family violence' expands the concept of child abuse and abuse between family members. It reads as follows:

> 'family violence' means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for, or to be apprehensive about, his or her personal well being or safety.

The definition of 'family member' is very broad and is contained in s.60D(2) and (3).

Although well overdue, given raised public awareness as to family violence and the existence of family violence legislation in all States, this new definition is a welcome insertion. It encompasses family violence which is direct or indirect violence towards a person or property, including threats, that causes harm, fear or apprehension. The prevalence and impact of violence in family life before and after the family unit breaks up has been further recognised in the expanded definition of factors in s.68F as to how a court is to determine what is in a child's best interests. Pursuant to s.68F(2) the court must consider:

> (f) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
>
> (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
>
> (ii) being present while a third person is subjected or exposed to abuse, ill-treatment, violence or other behaviour;
>
> (h) any family violence involving the child or a member of the child's family

This is considerably wider than the former s.64(1) factors which focused on direct harm. The new factors include not only direct harm but also being *exposed* to family violence or being present where there is family violence. This clearly recognises the situation where children may be indirect or secondary victims, such as seeing or hearing their mother being abused, yelled at, threatened or hit or experiencing the aftermath in terms of their parents' language, behaviour and interaction.

On the face of it these new definitions and expanded considerations reflect a significant change in case law since 1994. Before then, family violence was largely ignored or dismissed as irrelevant if a child was not a direct victim. In the case of *Heidt and Heidt* (1976) FLC 90-077, the judge recognised the husband's violence to his wife but held that 'his affection for his children is evident, and in assessing his potential as a custodial parent I have largely disregarded his behaviour as a husband'(p.75,362). In the case of *Chandler and Chandler* (1981) FLC 91-008 the judge stated that:

> whatever may or may not have been the relationship between the parties themselves, I am only concerned with the acts and conduct of the parties insofar as these directly affect the welfare of the children. There was no evidence of violence directly affecting the children, even if the wife's allegations were accepted as true. [p.76,107]

An abusive husband could nonetheless be considered an appropriate father and role-model.

Such judicial statements remained the prevalent view until 1994. In several reported cases since then, most significantly by the Full Court in *Jaeger* (1994) FLC 92-492 and by Chisholm J in *JG and BG* (1994) FLC 92-515, it has been held that family violence *can* be relevant to the welfare of children even if not directed at or even witnessed by children.

In my view the recent legislative amendments and the recent changes in judicial attitudes are appropriate trends as they recognise the prevalence of violence in the home, the relevance of past conduct of the parties in children's matters (notwithstanding the underlying 'no fault' philosophy of the principal Act) and how such family violence and conduct can affect the quality of parenting, the role-models offered for any children, the relationship between parents for purposes of contact and parenting responsibilities and the general well-being and development of children of all ages. In furtherance of this, new s.68J requires parties to inform the court if there is a family violence order that applies to a child or a member of the child's family and new s.68K requires the court to avoid making orders regarding children that are inconsistent with a family violence order or that expose a person to family violence.

Relationship between family violence orders and contact orders

Unfortunately the benefits of recent case law and statutory changes have been diluted by other provisions of the Reform Act which need to be examined. New Division II of Part VII on Children is headed 'Family Violence' but its stated pur-

pose in s.68N is to deal with the relationship between contact orders and family violence orders. Further, s.68Q(b) enunciates the laudable purpose of the Division that contact (formerly access) orders are not to expose people to family violence, but goes on in s.68Q(c) to say that a further purpose is:

> to respect the right of a child to have contact on a regular basis with both the child's parents where:
>
> (i) contact is diminished by the making or variation of a family violence order; and
>
> (ii) it is in the best interests of the child to have contact with both parents on a regular basis.

There is an inherent contradiction here. On the one hand, the court is not to make contact orders exposing people to family violence but on the other hand, the court must respect the right of a child to have contact with parents even if a family violence order exists. To further this 'right' of the child to have contact, s.68R provides that if a contact order is inconsistent with a family violence order, the contact order is to prevail and the family violence order is invalid to the extent of the inconsistency. (This complies with s.109 of the Constitution.)

This therefore enables a court to make a contact order that expressly overrides or diminishes the effect of a family violence order which was made for the protection usually of the care-giving parent and any children. The court would be informed of the existence of a family violence order, but would not necessarily be apprised of the need for or circumstances of obtaining such an order as courts of summary jurisdiction are not courts of record and family violence orders are primarily made on oral evidence.

In practice, therefore, if a mother with the day-to-day care of a child has a Victorian intervention order (or equivalent in other States) restraining her former husband or de facto husband from attending at or near her home (because of threats or assault or property damage in the past), the former partner may nevertheless obtain a contact order permitting him to attend the mother's premises for contact purposes. This naively suggests that the abusive husband can 'behave' himself at pick-up and drop-off times and the mother's order for protection is suspended during those periods even though such times are exactly the occasions when conflict and disagreement and tension arise. Handing over or returning a child for contact purposes is often conflictual, emotional, volatile and stressful for both parents and for children.

Because a contact order now prevails over an inconsistent family violence order, the effectiveness and reliability of the protective order is diminished for the woman and children and the unacceptability and criminality of the man's past behaviour is ignored. This suggests that a parent's right to see his or her child is akin to a proprietary interest which can be enforced whether or not the child has been a direct or indirect victim of family violence.

This 'right of contact' mirrors the provision in Article 9(3) of the United Nations Convention on the Rights of the Child which prescribes that:

> State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

This philosophy, together with s.68Q discussed above, and recent allocation of federal money to establish 'contact centres' (formerly known as 'access centres') suggests a reversion to the pre-1994 position where a court will again be loathe to suspend or discharge contact or even order no contact at all where there has been family violence in the child's home and family environment. Contact via a change-over service may become a soft option. The right of contact may reign supreme and override the right of the child and that of the child's care-giver to be safe and protected.

In this context it must, however, be acknowledged that s.68T does at last incorporate proposals that in the course of making or varying a family violence order, a State court may make, revive, vary, discharge or suspend a contact order.[6] In practice, though, magistrates are unlikely to tamper with contact orders most probably made by the Family Court, a superior court, and are more likely to adjust or tailor the family violence order to co-exist with any existing contact order in order to avoid inconsistency. Again, the right of contact may receive greater priority than the right to protection and safety.

Conclusion

The amendments to the *Family Law Act* discussed here will have a serious impact on existing family law practice. The main changes relevant to this discussion are:

- Methods of alternative dispute resolution are now 'primary' methods to be utilised first, almost in a mandatory sense, before initiating traditional court processes. No safeguards are provided.
- Private ordering of family matters is encouraged through the use of counselling and mediation and the formulation of parenting plans and agreements.
- Family violence and child abuse now encompass physical, sexual and psychological harm to children and to members of a child's family involving the child as a primary or secondary victim.
- Contact orders are to prevail over family violence orders to the extent of any inconsistency.
- The right of contact between a child and parent is a priority over and above the right of a child or other member of the child's family to protection against family violence.
- Power imbalances between men and women and between parents and children continue unaddressed and unchallenged.

References

1. This Act commenced in the United Kingdom in 1991.
2. Pearson, J. and Thoennes, N.,'Mediating and Litigating Custody Disputes: A Longitudinal Evaluation', (1984) XVII(4) *Fam. L Q* 497; and Kelly, J.B., 'Is Mediation Less Expensive: Comparison of Mediated and Adversarial Divorce Costs' (1990) 8:1 *Mediation Q* 15.
3. Pearson & Thoennes, above, p.507.
4. Richardson, C.J., 'Court-based Divorce Mediation in Four Canadian Cities: An Overview of Research Results', Dept. of Justice, Ontario, Canada, 1988.
5. This was trialed by Victoria Legal Aid in 1992-1993 for 12 months. Clients were refused legal aid (except in cases of family violence) unless they had first pursued mediation.
6. This idea was first advanced in 1992 by Victoria's then Labor Attorney-General to the Standing Committee of Attorneys-General. It was then adopted by the SCAG in July 1994, pre-empting legislative changes.