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Welcome

Wilson's Update informs and assists you to manage professional and personal risk on a broad range of issues.

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Geoff Wilson

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Who Should Children Live With?

The Family Law Amendment (Shared Parental Responsibility) Act 2006 amended important areas of the Family Law Act 1975 (Cth.) ('the Act') primarily in relation to children and with whom they should live when families separate. The amendments aim to bring about a cultural shift in attitudes and the management of family separation by moving away from litigation and towards less adversarial procedures of cooperation and co-parenting. This discussion focuses on the significant changes to the way in which a Court determines parenting issues and in particular with whom a child should live with (previously termed "residence") and spend time with (previously termed "contact"). Although the amendments also aim to assist families to resolve disputes outside the Courts and litigation, for example, by way of non-Court based family services such as the new Family Relationship Centres, this article does not address those issues.

Objects of the Act

The Act now explicitly provides that the best interests of children are met by, among other factors, "ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child" and "protecting the children from physical or psychological harm."

Presumption of Equal Shared Parental Responsibility

The major change is that now, when making a parenting Order in relation to a child, the Court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child. Parental responsibility means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children. This presumption is new in Family Law. However, the presumption may be rebutted if there is evidence that this would not be in the best interests of the child, such as in cases of abuse or family violence.

Child's Best Interests

In deciding what parenting Order to make, the Court must still regard the best interests of the child as the paramount consideration. However, the Court is now directed to consider a number of primary considerations, and then additional (or secondary) considerations.

Primary Considerations

The Court must consider two primary considerations: (i) "the benefit to the child of having a meaningful relationship with both of the child's parents"; and (ii) "the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence."

Additional Considerations

After considering the primary considerations, the Court must consider a list of 14 additional considerations. These include views expressed by the child, the nature of the relationship between the child and each parent, the practical difficulty and expense of a child spending time with and communicating with a parent, and the capacity of each parent to provide for the child's emotional and intellectual needs. The Court must also consider the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the child and the other parent. These considerations reinforce the legislative focus on equal shared parental responsibility and reflect the objects as described above.

The focus is not only on the willingness of parents to encourage relationships between the child and the other parent, but also on the relationship between the parents and

the way in which they interact. In a significant change, the Court must consider if a parent has facilitated the other parent's participation in making decisions about the child. The Court must also consider the extent to which each parent has fulfilled their obligation to maintain the child.

Court to Consider Child Spending Equal Time or Substantial and Significant Time with Each Parent

If a parenting Order provides that parents are to have equal shared parental responsibility for the child, the Court must consider whether the child spending equal time with each of the parents would be in the best interests of the child. The Court must also consider whether equal time with each parent is reasonably practicable.

If a parenting Order provides for equal shared parental responsibility, but not equal time with each parent, the Court must consider whether the child spending "substantial and significant time" with each parent would be in the best interests of the child and, if so, whether this is reasonably practicable.

"Substantial and significant time" means weekdays, weekends, holidays and occasions that allow the parent to be involved in the child's daily routine. Substantial and significant time also includes occasions and events that are of particular significance to the child or parent such as birthdays and special celebrations.

When determining what is reasonably practicable for a child, the Court considers things such as how far apart the parents live from each other, the parents' current and future capacity to implement the child spending equal or substantial and significant time with each parent, the parents' current and future capacity to communicate and resolve difficulties in implementing an arrangement of that kind, the impact that such an arrangement would have on the child and any other matter the Court deems relevant.

Conclusion

The amendments have ushered in significant changes reflecting a push towards equal shared parental responsibility while ensuring that the best interests of the child remain the paramount consideration in making a parenting Order. The Court is required to consider the way in which parents interact with their children and, in a significant legislative change, with each other. It remains to be seen how these factors will be interpreted by the Court and if it will deter parents from making demands of their former spouse [some say "blackmail"] that had to be met before allowing children to see the other parent.

Contrary to popular opinion, the new legislative changes do not provide for children automatically spending equal time living with each of their parents. The Court must apply the presumption that there should be equal shared responsibility and, if there should, it must then consider whether spending equal time with both parents is in the child's best interests and reasonably practicable. Parents should always remember that what may be appropriate living arrangements for one family may be entirely inappropriate in another. In Family Law matters, even where, on the face of it, two cases have similarities the outcome in one case may be completely different to another. Obtaining early assistance and advice from professionals, such as counsellors and family lawyers, is advisable to assist parties in understanding what the appropriate legal position may be and then moving on with discussions or negotiations with the other party.

Law Chases Mokbel's Millions

It reads like a script from *The Sopranos*: multi-millionaire drug trafficker and gangland murder suspect, Tony Mokbel, is sentenced to 12 years in jail, while police investigate the local property developer's whereabouts following his 'disappearance' during the trial.

Mr Mokbel was first arrested in 2000 for allegedly importing \$2 billion worth of ephedrine; a charge that was later reduced. A separate charge relating to alleged cocaine importation was also laid. Although he was initially granted bail, this was revoked in 2001, around the time that his assets were frozen. Later, the expectations of a lengthy trial delay saw him granted bail again in 2002.

Only recently, the long-running trial in the Victorian Supreme Court ended with a guilty verdict for the importation of two kilograms of pure cocaine. However, before the judgment was handed down, Mokbel vanished (allegedly overseas) and his defence team withdrew from the trial.

Despite his absence, the 12-year sentence was imposed. Mr Mokbel's sister-in-law was ordered to pay to the Court the sum of \$1 million, representing the amount that had been put up as surety for his appearance when Mokbel was granted bail in 2002.

When arrested, Mr Mokbel's assets, including businesses, properties and luxury cars estimated at \$20 million, were frozen by the Victorian County Court. Despite his attempts to overturn the Order, claiming it did not make provision for him to meet reasonable living expenses, the Supreme Court upheld the County Court Order. More recently, in December 2005, he was served with a \$4 million back-tax order as part of a crackdown by federal agencies on organised crime. Mokbel was penalised even further in July 2006, when the County Court ordered that five Mokbel-owned properties were to be sold in order for the National Australia Bank to recoup money it claimed Mokbel still owed.

At both the state and federal level, legislation exists to extract from offenders the proceeds of their crimes. Measures in place seek to prevent financial profiteering from illegal activities. Orders in relation to property can include the freezing of assets, forfeiture, search and seizure and, ultimately, the confiscation of assets.

The Asset Confiscation Office looks after the enforcement of confiscation orders under the Crimes (Confiscation of Profits) Act 1986 (Vic) and the Confiscation Act 1997 (Vic). Confiscation usually involves the offender surrendering the proceeds of a crime to the State by having property that is used to commit a crime seized and forfeited, or paying back to the State the dollar value of the benefit received as a result of the crime (a Pecuniary Penalty Order). Seized assets are then usually sold at auction, the process of which is administered by the Asset Confiscation Office. In some cases, the victim of the crime may be able to seek restitution or compensation from proceeds of the forfeited assets where they have obtained a Compensation Order from the Court.

On 26 October 2006, Justice Simon Whelan ordered that Mokbel was deemed convicted under the Confiscation Act 1997 (Vic.) of three drugs charges laid in 2001. As a result of this Order, authorities are permitted to sell Mokbel-owned properties at Noosa and Bulleen and a seized Ferrari Roadster motor vehicle, with proceeds going to the state. The deemed convictions also mean that the Department of Public Prosecutions can apply for a Pecuniary Penalty Order, after extensive forensic accounting investigations have been undertaken, against Mokbel that could amount to tens of millions of dollars.

Despite these Orders, it is believed that Mokbel was still able to successfully send \$20 million overseas around the time of his disappearance. Clearly, it is difficult for authorities to confiscate all the profits of crime, but the chase continues.