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THE IMPACT OF INTERVENTION ORDERS—*FAMILY LAW ACT*

Andrew Combes

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THE IMPACT OF INTERVENTION ORDERS ON FAMILY LAW ACT ORDERS

Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011.

(the Bill) will affect the way Courts and practitioners deal with parenting proceedings that involve parties subject to state family violence orders.

A family violence order (including an interim order) is generally made under a prescribed law of a state or territory to protect a person from family violence.

Family violence orders are called different things in different states :

Intervention Orders (VIC)

Protection Orders (QLD and ACT)

Apprehended Domestic Violence Order (NSW)

Restraining Orders (NT, SA and WA),

Restraint Orders (TAS).

Under the Family Law Act, 1975 (FLA) all state and territory orders are described as family violence orders.

The Family Court's approach to domestic violence is to identify the issues and to determine whether the evidence establishes unacceptable risk. To make a finding of an unacceptable risk to the child, findings of fact in relation to allegations of domestic violence will need to be made if possible *A v A*(1998) FLC 92-800. To this end the

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Court employs the civil standard of proof contained in s. 140 of the *Evidence Act 1995* as modified by s. 69ZT(3) of the *FLA*.

The amendments contained in the Bill further emphasize the insidious nature of family violence. In *Blanch and Blanch and Crawford* (1999) FLC 92-837 Mullane J. referred to the serious dangers that abusive parents present to children other than the obvious dangers of physical harm. These can include the harm children suffer from insecurity, fear, unhappiness, anxiety and hyper vigilance from witnessing abusive behaviour of a parent. These effects present a threat to the child's emotional development. Significantly, probably the worst danger to children, according to His Honour, is the role model that violent parents provide which can lead to the children themselves suffering the serious social disability of using violence in their dealings with other people, including those that they love.

Family violence is a phrase that is scattered throughout the *FLA*, for example s. 60C(2) and (3) s. 60CG together with Division 11 of the Act. The current definition is contained in s. 4(1):

“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 reasonably to fear for, or reasonably to be apprehensive about, his or her wellbeing or safety.”

The proposed amendments as set out in the Bill broaden the definition of Family Violence. s. 4AB reads as follows:

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- (1) For the purpose of this Act family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member) or causes the family member to be fearful.
- (2) Examples of behaviour that may constitute family violence include (but are not limited to):
 - (a) an assault; or
 - (b) a sexual assault or other sexually abusive behaviour; or stalking; or
 - (c) repeated derogatory taunts; or
 - (d) intentionally damaging or destroying property; or
 - (e) intentionally causing death or injury to an animal; or
 - (f) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
 - (g) unreasonably withholding the financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person's financial support; or
 - (h) preventing the family member from making or keeping connections with his or her family, friend or culture; or
 - (i) unlawfully depriving the family member, or any member of the family member's family of his or her liberty.
- (3) For the purposes of this Act a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effect of family violence,

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- (4) Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child:
- (a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or
 - (b) seeing or hearing an assault of a member of a child's family or another member of the child's family; or
 - (c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or
 - (d) cleaning up a site after a member of the child's family has intentionally damaged the property of another member of the child's family; or
 - (e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by any other member of the child's family.

The new definition of family violence is similar to the definition of family violence in the definitions and interpretations sections contained in Part 2 of the *Family Violence Protection Act 2008 Vic*. In s. 5 of that Act the meaning of family violence is defined

- (1) For the purposes of this Act family violence is:
- (a) behaviour by a person towards a family member of that person if that behaviour:
 - (i) is physically and sexually abusive; or
 - (ii) is emotionally or psychologically abusive; or
 - (iii) is economically abusive;

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- (iv) is threatening; or
- (v) is coercive; or
- (vi) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or

(b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a) and the legislation sets out examples “the following behaviour may constitute a child hearing, witnessing or otherwise being exposed to the effects of behaviour referred to in paragraph (a).

- overhearing threats of physical abuse by one family member towards another family member.
- seeing or hearing an assault of a family member by another family member;
- comforting or providing assistance to a family member who has been physically abused by another family member;
- cleaning up a site after a family member has intentionally damaged another family member’s property;
- being present when police officers attend an incident involving physical abuse of a family member by another family member.

(2) Without limiting sub-section (1) family violence includes the following behaviour:

- (a) assaulting or causing personal injury to a family member or threatening to do so;

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- (b) sexually assaulting a family member or engaging in another form of sexually coercive behaviour or threatening to engage in such behaviour;
- (c) intentionally damaging a family member's property, or threatening to do so;
- (d) unlawfully depriving a family member of the family member's liberty, or threatening to do so;
- (e) causing or threatening to cause the death of or injury to, an animal, whether or not the animal belongs to the family member to whom the behaviour is directed so as to control, dominate or coerce the family member;
- (f) to remove doubt it is declared the behaviour may constitute family violence even if the behaviour would not constitute a criminal offence.

Often the first time Family Violence is raised in the Court process is in the State Court. In Victoria it is generally under the *Family Violence Protection Act 2008*; and orders are made employing the above definition must be considered under FLA parenting proceedings.

s. 60CC(3)(k) provides a consideration for the Court being any family violence order that applies to the child or a member of the child's family, if:

- (i) the Order is a final order; or
- (ii) the making of the Order was contested by a person:

The new sub section (k) in the Bill reads as follows:

“any family violence order that applies to the child or a member of the child's family.”

This simpler definition now includes interim Orders in the State Courts.

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Section 68J provides obligations on the parties to the proceedings and those who were not party to the proceedings, but were aware of the existence of Family Violence Orders to inform the Court of that fact. See also Rule 2.05 and s. 68P.

Courts are obliged to resolve inconsistencies between any family violence orders and orders, injunctions and arrangements made under the *Family Law Act*, but still to ensure that people are not exposed to family violence s. 68P.

Section 91 of the *Evidence Act* 1995 provides that an order made by the State Courts such as under the *Family Violence Protection Act* 2008 Vic is not proof of the facts alleged in those proceedings, but the family Court must take into consideration that an Order has been made. The Family Courts definition of Family Violence with the implementation of the Bill is very similar to that which a Magistrate in Victoria has used to justify a State Order. Further, the material and circumstances surrounding the making of a State Order are relevant. There will be a complaint and a transcript of evidence. Furthermore, the circumstances surrounding the intervention such as police involvement may of itself constitute family violence as defined by the Bill.

In addition, apart from any evidence, the fact that a State order has been made will influence proceedings under the FLA. as Section 60CG(1). This section compels the Court to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the Order:

- (a) is consistent with any family violence order; and
- (b) does not expose a person to unacceptable risk of family violence.

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The implementation of the Bill will mean that Courts exercising Jurisdiction under the FLA dealing with parenting arrangements are likely to give even greater consideration to State Protective Orders and the circumstances surrounding them.

How do the Victorian Courts approach applications under The *Family Violence Protection Act 2008* ? (the State Act)

The State Court has never had a consideration enshrined in legislation equivalent to s. 60 CC(2)(a) of the FLA that emphasizes the benefit of a child having a meaningful relationship with both parents. The State Act focuses on the protection of affected family members and their children.

Section 53 of the State Act states;

- (1) The Court may make an interim order if –
 - (a) a person has applied to the Court for a family violence intervention order and the Court is satisfied, on the balance of probabilities, that an interim order is necessary pending a final decision about the application-
 - (i) to ensure the safety of the affected family member; or
 - (ii) to preserve any property of the affected family member; or
 - (iii) to protect a child who has been subjected to family violence permitted by the respondent.
- (2) The Court may also make interim orders by consent or upon a family violence safety notice issued when it affects a family member.

and

Section 74 empowers the Court to make a final order.

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- (1) The court may make a final order if the court is satisfied, on the balance or probabilities, that the Respondent has committed family violence against the affected family member and is likely to do so again.

Section 77 relates to the protection of children on the court's own initiative. Before making a final order the court must consider whether there are any children or family members of the affected family member or the respondents who have been subject to family violence committed by the respondent. The court, if satisfied of the above, may make an order including the child or make a separate final order under s. 74 or 76.

Upon making an order the Victorian Court **must** consider the safety of the affected person and children as being paramount in deciding what conditions to place on either the interim or final family violence order (s.80).

If either party is a parent of a child then the Court **must** decide whether any time spent with or communication with the respondent **may** jeopardise the safety of a protected person or child (s. 91(1)). Safety is defined as safety from family violence.

Section 91(2) provides for a situation where there has been previously a lack of violence by the respondent towards the child and indicates that it is not sufficient reason to decide the child's safety will not be jeopardised by contact simply by the absence of violence to the child. If the child's safety **may** be jeopardised then an intervention order prohibiting any child contact with the Respondent **must** be made (s. 93).

If there are existing *FLA* orders Division 8 of the Victorian Act provides for the Court to use its powers pursuant to s. 68(R) of the *Family Law Act* to revive vary discharge extend the family law orders to the extent that is inconsistent with the intervention order.

The discharge power of s. 68R(4) is only applicable to final intervention orders. If there are no Family Court orders and there is no risk to the child to contact with the respondent the Court must still include a condition that provides for terms of child contact that are agreed including changeover and must be in writing. There must also be a condition specifying how the arrangements in relation to s. 92(1)(a) are to be negotiated to maximise the safety of a protected person.

The Court, by its own initiative, can make an intervention order for a child or children pursuant to s. 77 and may refuse to make a final intervention order by consent if the Court believes that those orders, if approved by the Court, may pose a risk to the safety of one of the parties or a child of a protected person.

There are considerable obligations on the State Court under The *Family Violence Protection Act 2008* to prevent contact between children and respondents if the court forms the view there may a risk to the child. These Orders are not uncommon.

In the 2010 to 2011 year there were 32,921 Intervention Orders initiated in the Magistrates' Court Of Victoria and 11,392 Interim Orders were made. (2010-11

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Annual Report Magistrates' Court of Victoria) The numbers are enormous and are increasing at least by 5% per year since 2008.

There is significant pressure on the State Court System and parties are naturally encouraged to settle proceedings.

A significant proportion of respondents are advised to settle by their lawyers and to consent to Orders without making admissions.

The Bill which focuses on the protection of children from physical and psychological harm and from being subjected to or exposed to abuse, neglect or family violence will mean that the Courts and practitioners will need to modify their approach to State Orders.

Clients who consent to even interim intervention Orders without admitting to the allegations will need to be advised that the consent Order will now become directly relevant to parenting proceedings pursuant to Section 60CC(3) (k)

The High court in *M and M* (1988) 166CLR 69 said that "in deciding what order it should make the Court will give very great weight to the importance of maintaining parental ties..." When the Bill is implemented we could almost replace "maintaining parental ties" with "protection from family violence."

At the moment with the existing balance between the current primary considerations in S.60CC(2) numerous orders pursuant to the *Family Violence Protection Act 2008* prohibiting time between children and respondents have been varied under the FLA. It may now be much harder, certainly at a first return date, for the respondents to vary no contact orders made under the State Act notwithstanding that they may have been made by consent and without admissions.

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The *Family Law Legislation Amendment (Family Violence and Other Measures) Bill* 2011, when implemented (7th June 2012) is likely to have a significant influence on parties to parenting proceedings that are subject to state protective orders. Consideration may now need to be given to challenging interim Intervention Orders at the first opportunity and to contesting final Orders.

ABJ COMBES

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