

The Care of Children Bill

The Family Court's most important task is arranging for the care of children when their parents separate.

The Guardianship Act deals with the care of children when relationships end. But it was passed 35 years ago.

Back then the typical family was Mum, Dad and the kids. Now we have to consider children from single parent families, de facto families, stepfamilies and same-sex parent families.

The new Care of Children Bill will be enacted in July 2004. It will change the status quo in several ways.

If a woman who gives birth to a child after artificial insemination has a same-sex partner, both women will be the child's legal parents. So same-sex partnerships will be treated in the same way as opposite-sex partnerships.

The Bill gives greater recognition to the role of unmarried fathers in rearing their children. A father will be a child's guardian if he lived in a de facto relationship with the mother either when the child was born, or at any time from conception to birth. A father whose name is placed on the birth certificate will also become a guardian.

Nowadays, fathers who do not live with their children day-to-day usually still play a significant part in their lives.

Under the new Act, custody will be referred to as "day-to-day care" and access will be referred to as "contact". Both of these types of orders will be referred to as "parenting orders" (e.g. a parenting order may specify that the child is to be in one parent's care for the whole of every second weekend and in the care of the other parent for the rest of the time).

At first glance, "parenting order" seems to be a vague term that means the same as custody and access. But the term "custody" is considered to stress the rights of the parent rather than the child, emphasising the right to have control of the child rather than the duty to nurture the child.

Having a "parenting order", rather than an "access order" is intended to give the parent who does not have the day-to-day care of the child a feeling of greater involvement in his or her child's life. It is hoped this will reduce feelings of resentment and increase commitment to the child.

The Bill stresses that children **must be allowed** to give their views on matters affecting them and that their wishes must be taken into account. At present the child's wishes are just one of the factors that the Court must consider. The Bill echoes the **United Nations Convention on the Rights of the Child, which gives children the right to express their views, either directly to the judge or through a representative.**

But some children do not want to be made to choose between their parents. Children have the right not only to express their views, but also to refuse to express them.

In certain circumstances a new partner may be appointed a guardian if both parents consent. While this is unlikely to be of much significance, it emphasises the importance step-parents can play in children's lives and the recognition of this by natural parents. Such appointments will be most likely where the natural parents have never lived together.

The Family Court could make non-paternity orders as well as paternity orders. At present the Court can make paternity orders only. The provision recognises that DNA testing can now both prove and disprove paternity.

The Bill will make some changes in enforcing orders. Parents who break orders will be made to go to counselling. A judge could “admonish” them and order them to pay costs to the other parent.

A person who has broken an order could be made to deposit money in Court. He or she will not get the money back if the order is breached again. Warrants to uplift the child and orders for imprisonment could be made as a last resort if they were believed to be in the child’s best interests.

The Bill says that reports of Family Court proceedings could be published if they did not identify anyone associated with the case. Judges could allow people other than the parties, their lawyers and witnesses to attend hearings.

It would be unlikely for reporters to be allowed to attend hearings. So any newspaper reports would have to be based on law publishers’ reports.

A party could ask the Court to listen to a person speaking on the child’s cultural background and its relevance to the orders the Court may make. This is most likely to be used when the parents come from different cultures.

The Bill has caused some laughter in parliament because it says that the “father of a child” also means” the same-sex de facto partner of the mother of the child”. This is a clumsy piece of drafting that should be altered before the Bill becomes an Act.

But we need to make sure that we don’t let that one piece of ineptness cloud the fact that the Care of Children Bill is a timely piece of legislation. Whether or not we are comfortable with the changes in family structures, legal changes are needed if the Family Court is to make orders that recognise how children are brought up today.

If you have any concerns in this area or would like to know more, contact your solicitor.

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