

Introduction to Australian Family Law 1975 book 2007

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In mid 2007, it is a much easier task than in recent years to write about the changes over the preceding twelve months to the *Family Law Act 1975*, *Family Law Regulations 1984* and *Family Law Rules 2004*. Family lawyers and judges have been given a respite from the relentless legislative change of the past few years: financial agreements, super splitting, third parties, bankruptcy jurisdiction, family dispute resolution, parenting disputes, independent children's lawyers, principles for conducting child-related proceedings, expanded jurisdiction of the Federal Magistrates Court and a complete revision of the *Family Law Rules*.

Despite the minor legislative changes made in the past twelve months, significant changes take effect from 1 July 2007. These changes are mainly in or arise from the *Family Law Amendment (Shared Parental Responsibility) Act 2006*. The changes to the *Family Law Rules* over a broad range of practice including the forms, child support, spousal maintenance, pre-action procedures, appeals, costs and dispute resolution. Along with changes outside the *Family Law Act* to taxation law and superannuation law and the staged revamp of the child support legislation, the respite from legislative change is largely illusory.

Main Changes

The last edition of this book was updated to 1 July 2006. In summary, the main changes since the last edition are:

- The *Superannuation Amendment (Simplification) Act 2007* amended the *Family Law Act* from 15 March 2007. They are discussed further below.
- Minor amendments were made to the *Family Law Act* by the *Statute Law Revision Act (No 2) 2006* from 15 March 2007 and by the *Judiciary Legislation Amendment Act 2006* from 7 December 2006
- Amendments to the *Family Law Act* made by the *Child Support Legislation Amendment (Reform of the Child Support Scheme New Formula and Other Measures) Act 2006* commenced on 1 January 2007. The main effect of these is to remove the phrase “administrative assessment of child support” from the *Family Law Act* and refer instead to a person being assessed in respect of the costs of the child.
- Substantial amendments to the Regulations were made by the *Family Law Amendment Regulations 2007* to reflect changes introduced by the *Family Law Amendment (Shared Parental Responsibility) Act 2006*. These commenced on 17 April 2007 and are discussed further below.
- Amendments to the *Family Law Rules 2004* took effect on 1 July 2007. These are discussed further below.

Other changes relevant to family law but not dealt with in this book were:

- amendments to the child support legislation made by the *Child Support Legislation Amendment (Reform of the Child Support Scheme New Formula and Other Measures) Act 2006*, commencing on 1 January 2007. Further changes are due to commence on 1 July 2007
- changes to the *Income Tax Assessment Act 1997* from 12 December 2006 gave the same capital gains tax rollover relief to transfers made under financial agreements as is attracted by transfers made under court orders. This had the immediate and

practical effect of making financial agreements dealing with all property and spousal maintenance issues a more viable alternative to consent orders for many separated couples.

Before filing a Parenting Case from 1 July 2007

The *Family Law Amendment (Shared Parental Responsibility) Act 2006* emphasises “family dispute resolution” and the role of Family Relationship Centres. The Act commenced on 1 July 2006 and from that date there were significant changes in terminology, and the objectives and principles to be applied by the Court in making decisions. However, from 1 July 2007, a party filing an application in relation to children will usually be required to have obtained a certificate from a family dispute resolution practitioner under s 60I(8).

Sections 60I(7) to (12) apply to an application for a Pt VII order in relation to a child if:

- (a) the application is made on or after 1 July 2007
- (b) none of the parties to the proceedings on the application has applied, before 1 July 2009 for a Pt VII order in relation to the child (s 60I (5)).

A date will be set by which all applications must comply with s 60I(7) to (12), regardless of whether or not there has been a previous application.

If an application is made on or after 1 July 2007 and none of the parties have previously made an application under Pt VII in relation to the child, a court cannot hear an application for a Pt VII order in relation to the child unless the applicant files a certificate given to the applicant by a family dispute resolution practitioner under s 60I(8). The certificate must be filed with the application (s 60I(7)).

The four kinds of certificates which a family dispute resolution practitioner may give are:

- (a) that the person did not attend family dispute resolution in relation to the relevant issue or issues, but the person's failure to do so was due to the refusal, or the failure, of the other party or parties to attend;
- (aa) that the person did not attend family dispute resolution in relation to the relevant issue or issues because the practitioner considered, having regard to the matters prescribed by the Regulations, that it would not be appropriate to conduct the proposed family dispute resolution;
- (b) that the person attended family dispute resolution and that all attendees made a genuine effort to resolve the issue or issues;
- (c) that the person attended family dispute resolution but that the person, the other party or another of the parties did not make a genuine effort to resolve the issue or issues (s 60I(8)).

The requirements of s 60I(7) do not apply to an application for a Pt VII order in relation to a child in any of the following circumstances:

- (a) the applicant is applying for a consent order or is applying for an order in response to an application by another party for a Pt VII order
- (b) the court is satisfied that there are reasonable grounds to believe:
 - (i) that there has been abuse of the child by one of the parties; or
 - (ii) there would be a risk of abuse of the child if there is a delay in applying for the order; or
 - (iii) there has been family violence by one of the parties; or
 - (iv) there is a risk of family violence by one of the parties

- (c) a Pt VII order has been made in relation to the same issue within 12 months before the application is made, the application is in relation to a contravention of the order and the court is satisfied that there are reasonable grounds to believe that the person has behaved in a way that shows a serious disregard for their obligations under the order
- (d) the application is made in circumstances of urgency
- (e) one or more of the parties to the proceedings is unable to participate effectively in family dispute resolution (whether because of an incapacity of some kind, physical remoteness from dispute resolution services or for some other reason)
- (f) other circumstances specified in the Regulations are satisfied (s 60I(9)).

Changes to the Regulations

The amendments to the *Family Law Regulations 1984* were made by the *Family Law Amendment Regulations 2007* due to changes introduced by the *Family Law Amendment (Shared Parental Responsibility) Act 2006*. The changed Regulations put in place procedures for the compulsory dispute resolution of children matters, including the Family Dispute Resolution Register (new Pt 4B), interim accreditation rules for family dispute resolution practitioners (new Pt 4A), prescribed information to be given to dispute resolution users before family dispute resolution takes place (reg 62(3)) and matters regarding the dispute resolution certificate (see new form at Sch 7A).

The Regulations expand on the requirements in the Act. Before providing family dispute resolution, the family dispute resolution practitioner to whom a dispute is referred must be satisfied that:

- (a) an assessment has been conducted of the parties to the dispute, and
- (b) family dispute resolution is appropriate (reg 62(1)).

In determining whether family dispute resolution is appropriate, the family dispute resolution practitioner must be satisfied that consideration has been given to whether the ability of any party to negotiate freely in the dispute is affected by any of the following matters:

- (a) a history of any family violence among the parties
- (b) the likely safety of the parties
- (c) the equality of bargaining power among the parties
- (d) the risk that a child may suffer abuse
- (e) the emotional, psychological and physical health of the parties
- (f) any other matter that the family dispute resolution practitioner considers relevant to the proposed family dispute resolution (reg 62(2)).

The wording of the above suggests that the family dispute resolution practitioner need not do the assessment but must be satisfied that the person doing the assessment considered the relevant matters. If the family dispute resolution practitioner is satisfied that family dispute resolution is inappropriate, the family dispute resolution practitioner may not provide family dispute resolution (reg 62(4)) but may give a certificate under s 60I(8)(aa).

An applicant may only file a certificate within 12 months after the latest family dispute resolution or attempted family dispute resolution (reg 62A(1)). After that time a fresh certificate is required.

A family dispute resolution practitioner may give a certificate under s 60I(8)(a) only if the practitioner has contacted each party who has failed to attend at least twice, with at least one

contact in writing. The party must be given a reasonable choice of days and times for attendance at family dispute resolution and be told that, if the party does not attend family dispute resolution:

- (i) the practitioner may give a certificate under s 60I(8)(a); and
- (ii) the certificate may be taken into account by a court when determining whether to make an order under s 13C referring the parties to family dispute resolution or to award costs against a party under s 117 (reg 62A(4)).

Before family dispute resolution is started under reg 62(3), each party to the family dispute resolution must be given the following information:

- (a) it is not the role of the family dispute resolution practitioner to give people legal advice (unless the family dispute resolution practitioner is also a legal practitioner)
- (b) the family dispute resolution practitioner's confidentiality and disclosure obligations under s 10H
- (c) provided s 10J applies, evidence of anything said, or an admission made, at family dispute resolution is not admissible in any court (whether exercising federal jurisdiction or not) or in any proceedings before a person authorised by a law of the Commonwealth or a State or Territory, or by the consent of the parties, to hear evidence
- (d) the qualifications of the family dispute resolution practitioner to be a family dispute resolution practitioner
- (e) the fees (including any hourly rate) charged by the family dispute resolution practitioner
- (f) family dispute resolution must be attended if required under s 60I, before applying for an order under Pt VII
- (g) if a person wants to apply to the court for an order under Pt VII, the family dispute resolution practitioner may provide a certificate under s 60I(8), including a certificate to the effect that the person:
 - (i) did not attend family dispute resolution due to the refusal, or the failure, of the other party or parties to the proceedings to attend; or
 - (ii) attended family dispute resolution with the other party or parties to the proceedings but that the person, the other party or another of the parties did not make a genuine effort to resolve the issue or issues;
- (h) if a certificate under s 60I(8) is filed, the court may take this into account in considering whether to make an order under s 13C referring the parties to family dispute resolution or to award costs against a party under s 117
- (i) information about the mechanism for complaints about the family dispute resolution services (reg 63(1)).

In providing family dispute resolution services, a family dispute resolution practitioner:

- (a) must ensure that, as far as possible, the family dispute resolution process is suited to the needs of the parties involved (for example, by ensuring the suitability of the venue, the layout of the room and the times at which family dispute resolution is held)

- (b) must ensure that family dispute resolution is provided only in accordance with the Act and any record of the family dispute resolution is stored securely to prevent unauthorised access to it
- (c) must terminate the family dispute resolution if requested to do so by a party or if the family dispute resolution practitioner is no longer satisfied that family dispute resolution is appropriate
- (d) must not provide legal advice to any of the parties unless the family dispute resolution practitioner is also a legal practitioner or the advice is about procedural matters
- (e) must not use any information acquired from a family dispute resolution for personal gain or to the detriment of any person (reg 64).

If a family dispute resolution practitioner has acted previously in a professional capacity (otherwise than as a family dispute resolution practitioner, a family counsellor or an arbitrator), or has had a previous commercial dealings or is a personal acquaintance of a party to the dispute (reg 65(1)) there are limitations on whether the practitioner can provide family dispute resolution services. The services may only be provided if each party to the family dispute resolution agrees, the previous professional dealing (if any) does not relate to any issue in the dispute and the previous commercial dealing or acquaintance (if any) is not of a kind that could reasonably be expected to influence the family dispute resolution practitioner in the provision of the services (reg 65(2)).

Changes to the Rules

The major changes introduced by the amendments to the Rules are:

1. To enable parties to confer with a single expert witness to clarify an expert report. There must be agreement between the parties to convene a conference with the expert witness. The conference may be joint or with one party. If the parties do not agree about conferring with an expert, a party may apply to the Court for an order.
2. To cater for the commencement of the *Child Support Legislation Amendment (Reform of the Child Support Scheme - New Formula and other Measures) Act 2006*. In particular:
 - A summary of the types of child support applications and appeals which may be commenced in the Court, including appeals on a point of law from the Social Security Appeals Tribunal
 - Omitting references to the repealed provisions of the child support legislation and the substituting references to the new provisions
 - A form, *Notice of Appeal (Child Support)*, to be used for appeals on a question of law from the Social Security Appeals Tribunal
 - Clarification of documents to be produced by a party on the first court date and at the hearing
 - Catering for payee recovery of a child support liability
 - A person who makes an application in relation to a child support agreement must register a copy of the agreement with the court by filing an affidavit attaching the original agreement or a copy of the agreement stating that the copy is a true copy of the original
 - An application for a paternity declaration made under s 106(2) and 107 of the *Child Support Assessment Act 1989*, must be filed within 60 days after being served with a notice under s 33 or 34 of that Act

3. Division 4.2.4 now only deals with applications for spousal maintenance. Child maintenance is combined with child support in an amended division 4.2.5
4. Schedule 2 of the Rules was removed, except for the Form 4 Notice of Child Abuse or Family Violence. All forms are now referred to by their document titles. New forms will be introduced as required upon approval by the Chief Justice, in consultation with the Judges, rather than by amending the Rules
5. Some current Practice Directions were incorporated into the Rules, namely Practice Directions 4 and 6 of 2004 and Practice Direction 3 of 2006
6. Within 14 days of a costs assessment order, a party may request a Registrar to provide reasons for a decision about a disputed item. This addresses the concerns of the Full Court in *Brott And Abeles* [2007] Fam CA 28
7. The time for service of a lawyer's party and party itemised cost account is 28 days after the end of a case
8. The use of a proforma affidavit for interim applications for parenting orders in the Family Court is no longer mandatory .
9. A certificate of a Family Dispute Practitioner or an affidavit setting out the factual basis of the exception claimed must be filed with an Application for Final Orders, an Application in a Case seeking parenting orders, and an Application alleging Contravention of parenting orders. The affidavit is called a "Affidavit - Non filing of Family Dispute Resolution Certificate".
10. A proforma document must be filed in certain cases acknowledging receipt of information from a Family Counsellor or Family Dispute Resolution Practitioner about the services and options available in circumstances of abuse or violence.
11. Delegations to Deputy Registrars include the exercise of powers under s 60I(9), 60I(10) and 60J(1).

Superannuation

The *Superannuation Amendment (Simplification) Act 2007* made changes to the general superannuation law. The Act also included changes to the *Family Law Act* to repeal the definition of "eligible annuity" and "ETP threshold" and to insert new references to "the low rate cap amount" (see s 90ACA, 90MD, 90MQ(1) and 90MQ(3)). A separation declaration may be required for a financial agreement dealing with a superannuation interest if the parties have been separated for at least 12 months. Section 90MQ (1):

applies to a declaration if, at the declaration time, the total withdrawal value for all the superannuation interests of the member spouse is more than the member spouse's low rate cap amount for the income year in which the declaration time occurs.

The "low rate cap amount" is set by the *Income Tax Assessment Act 1997* (s 307-345(1)) for the 2007-2008 financial year at \$140,000.

Some of the other changes to the general superannuation law do not directly change the *Family Law Act* but effect how superannuation-splitting works in practice. For example, taxation on superannuation contributions and lump sums has changed significantly. This may impact on whether or not it is advantageous to one or both of the parties to split superannuation particularly where superannuation is a large amount and the non-superannuation assets are significant.

Reflecting on the operation of last year's changes

In the past twelve months the Family Law Courts have been interpreting changes to the *Family Law Act*, particularly changes brought about by the *Family Law Amendment (Shared Parental Responsibility) Act 2006*. This Act changed the terminology used and approach to disputes about children. The meaning of the presumption of equal shared parental responsibility has been interpreted in cases such as *Goode and Goode* (2006) FLC 93-286 and in relocation cases. Superannuation-splitting remains an area of uncertainty but the Full Court is gradually giving more guidance. *M and M* (2006) FLC 93-281 was one of the more significant cases.

Changes made to the interaction of the *Bankruptcy Act 1966* and the *Family Law Act* by the *Bankruptcy and Family Law Legislation (Amendment) Act 2005* have received little coverage in reported cases. In part this is because of the staged transitional provisions, but it is also because fewer cases are affected by these amendments than by the amendments to Pt VII (children) and Pt VIII B (superannuation) of the *Family Law Act*. The lower courts are, though, increasingly dealing with Pt VIII A A (third parties) and Pt VIII A (financial agreements) and over the next twelve months more guidance by the Full Court is likely in these areas.

The loosening of the requirements for providing procedural fairness to the trustees of superannuation funds has made life a great deal easier for practitioners and for courts making orders.

The Div 12A principles for conducting child-related cases commenced on 1 July 2006 and many cases now fall under them. In the coming twelve months it is likely that evaluations of the program will become publicly available and the courts and practitioners will be better able to assess the suitability of different aspects of the principles for particular cases.

The Year Ahead

Federal legislation intended to bring heterosexual de facto couples under the *Family Law Act* in all states and territories except Western Australia and South Australia was expected to have been passed, if not in effect, by now.

The tabling of the Bill in Parliament has been delayed, but depending upon the outcome of the Federal election, may still be passed late in 2007 or early 2008. If and when it is passed, the changes will be significant. There is a general expectation that the provisions will largely replicate those for legally married couples. However, there will be other issues to consider such as:

- How will a de facto relationship be defined?
- What is the effect of cohabitation agreements and separation agreements made under State and Territory law, particularly those without certification requirements?
- When will a de facto spouse be eligible for spousal maintenance?

Conclusion

The most significant change to the *Family Law Act* commencing on 1 July 2007 is the requirement that in most parenting disputes the applicant file a certificate from a family dispute resolution practitioner.

There will be uncertainty, at least initially, about the practicalities of accessing and arranging the services of a family dispute resolution practitioner, particularly as those who seek to provide the services will be in the process of applying for accreditation. More subjective difficulties will be how family dispute resolution practitioners assess whether a case is appropriate for family dispute resolution and how legal practitioners, court filing clerks and

the judiciary determine whether the case is such that the requirement for a certificate does not apply.

The changes to the Rules deal with many aspects of family law practice. On a day-to-day basis perhaps the most fundamental is the abolition of form numbers so that all forms will be referred to by name rather than the shorthand method of a number. Perhaps this will be the most difficult reform for legal practitioners.

Overall, the coming year will be one of consolidation and considerable growth in case law. Many more cases are being reported at a time when the Courts are dealing more confidently with the significant legislative changes over the past few years. There will be many changes over the next twelve months, but unless legislation is passed to bring de facto relationships under the *Family Law Act*, they will largely be through judicial interpretation of the existing legislation. It should be an interesting and exciting year.