

OVERVIEW OF CHANGES IN THE LAW

Introduction to Family Law Act Book 2016

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INTRODUCTION TO FAMILY LAW ACT BOOK 2016

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Every year there are obvious amendments to family law legislation, but also many other pieces of legislation which do not, by reference to their name, alert family lawyers to their relevance. These amendments are, of course, incorporated into the online version of the *Australian Family Law Act 1975 with Regulations and Rules* as they occur. This hard-copy of the 34th edition includes amendments relating to s 121 *Family Law Act 1975*, the *Court Security Act*, orders for delivering up of travel documents, the merging of the services of the Family Court and Federal Circuit Court with the Federal Court, arbitration, subpoenas, surrogacy and the costs scale in the *Family Law Rules 2004*.

The major changes to the *Family Law Act 1975* with respect to financial agreements and other matters proposed by the *Family Law Amendment (Financial Agreements & Other Measures) Bill 2015* were stalled at the Senate Committee stage and, due to the calling of a Federal Election, the future of the Bill is uncertain. These proposed amendments are not, therefore, included in this edition.

Another change in this edition is that, by popular demand, the full *Federal Circuit Court Rules 2001* are included, not just the part dealing specifically with family law matters.

As this book becomes bigger with the expansion of the *Family Law Act* and associated Rules and Regulations, the comprehensive index at the end of the book is useful, but the Cross-Referencing Table is a very practical guide. This Table lists the sections of the *Family Law Act* cross-referenced to the relevant Regulations, Rules, cases and the commentary in *Australian Family Law & Practice*. In this edition the Cross-Referencing Table has been moved so it is easier to find. It is now located at the start of the book.

Surrogacy

As the number of applications for parenting orders to the Family Law Courts in relation to children born under surrogacy arrangements is increasing, the *Family Law Rules* were amended, commencing 1 January 2016 to ensure that the court has sufficient evidence to determine these applications. These Rules apply to applications not covered by the various State and Territory schemes, so primarily overseas surrogacy arrangements which will usually be commercial arrangements.

The evidence required is set out in r 4.34 - 4.36:

1. A copy of any surrogacy agreement
2. Evidence of the personal circumstances of the applicant including in relation to the surrogacy arrangement.

3. Evidence of the personal circumstances of the surrogate mother including in relation to the surrogacy arrangement.
4. Evidence of the identity of the child.
5. Evidence about the relevant law in the child's birth country.

At the first hearing date of the application the court must:

1. Make procedural orders.
2. Consider an order for the appointment of an independent children's lawyer.
3. Consider ordering a family consultant to prepare a family report.
4. Consider whether a condition in s 65G(2) has been met. Section 65G deals with the making of a parenting order about whom a child lives with or the allocation of parental responsibility by consent in favour of a non-parent. Section 65G(2) provides:

"The court must not make the proposed order unless:

- (a) the parties to the proceedings have attended a conference with a family consultant to discuss the matter to be determined by the proposed order; or
- (b) the court is satisfied that there are circumstances that make it appropriate to make the proposed order even though the conditions in paragraph (a) are not satisfied."

An application for a parenting order cannot be made by filing an application for consent orders. It must be commenced by an Initiating Application (Family Law) (r 10.15(3)).

Arbitration

Although *the Family Law Act* provides for parties to use arbitration by consent, this dispute resolution process has been rarely utilised in family law matters. The *Family Law Regulations 1984* deal with the conduct of arbitration and the registration of awards. The *Family Law Rules 2004* have now been amended to address certain gaps, particularly regarding disclosure and subpoenas. According to the Explanatory Memorandum to the *Family Law Amendment (Arbitration and Other Measures) Rules 2015*, the gaps "were seen as impediments to efficacious arbitration".

Each party has a duty to the arbitrator and to each other party to give timely, full and frank disclosure of all information relevant to the arbitration including information about the parties' financial circumstances (r 26B.01).

The rules relating to subpoenas in arbitrations are generally consistent with subpoenas for court proceedings.

The main amendments are:

1. To state that each party has a duty to the arbitrator and each other party to give timely full and frank disclosure of relevant information including financial information.
2. To specify the process for the production, inspection and copying of documents.
3. To specify the use of the documents produced.
4. To specify the process for objection to production due to claim of privilege or inability to produce the document.
5. To specify the process for applications by a party or an arbitrator for orders relating to disclosure.
6. To provide for disclosure of documents by electronic communication.
7. To permit an application for a court order if the cost of complying with the duty of disclosure would be oppressive.
8. To specify the process for issuing a subpoena to give evidence in an arbitration
9. To specify the process for production, inspection and copying of documents in relation to subpoena for production.
10. To provide for the consequence of non-compliance with a subpoena.
11. To state the procedure for an arbitrator to refer a question of law under s 13G of the Act to the court for determination.
12. To state the requirements for referral of other matters to the court that ordered the arbitration.
13. To require an arbitrator to notify the court that ordered the arbitration of certain matters when an arbitration has ended and an award has been made.
14. To specify the requirements for service of a Form 8 application to register an arbitration award pursuant to Reg 67Q(2) of the Regulations.
15. To provide that an arbitrator may search and copy the court record relating to the case.

Orders for delivery up of travel documents

Amendments have been made to the *Australian Passports Act 2005*. The term "passport" has been replaced in many sections of that Act with the term "travel documents". An "Australian travel document" is defined in s 6 of that Act as "an Australian passport or a travel-related document".

Section 67ZD *Family Law Act 1975* has been amended to give a Family Law Court the power, if it considers there is a possibility or threat that a child may be removed from Australia, to order an Australian travel document or a passport or other travel document issued by the government of a foreign country to be delivered up to the court.

The *Passport Act* was also amended to ensure that the reference to "parental responsibility" in that Act is consistent with the concept and its use in the *Family Law Act* to remove any confusion as to who is required to consent to a child leaving on an Australian travel document.

Section 121 – Publication of court proceedings

An amendment has been made to s 121 *Family Law Act*, which is the section restricting publication of Court proceedings. A further exception has been added to s 121(9):

“(aa) the communication of any pleading, transcript of evidence or other document to authorities of States and Territories that have responsibilities relating to the welfare of children and are prescribed by the regulations for the purposes of this paragraph.”

This additional exception applies to communications made on or after the commencement of s 121(9)(aa). The exception confirms that as such disclosure is not disseminated to the public or to a section of the public it is not a breach of s 121.

Regulation 19A *Family Law Regulations 1984* is new and prescribes authorities for the purpose of s 121(9)(aa). They are:

- (a) for New South Wales - the Department of Family and Community Services;
- (b) for Victoria - the Department of Health and Human Services;
- (c) for Queensland - the Department of Communities, Child Safety and Disability Services;
- (d) for Western Australia - the Department for Child Protection and Family Support;
- (e) for South Australia - the Department for Education and Child Development;
- (f) for Tasmania - the Department of Health and Human Services;
- (g) for the Australian Capital Territory - the Department of Community Services;
- (h) for the Northern Territory - the Department of Children and Families.

Court Security Act 2013

The *Court Security Act 2013* allows courts to appoint security officers or other court officers to exercise a range of security powers. Security orders can be made in circumstances where there is an ongoing risk of significant disruption to those courts or a risk of violence affecting persons or property connected with a court covered by that Act. These orders are restraining or protection type orders which restrict the behaviour of a specified person in or around court premises, or in relation to a member or officer of the court. The Family Court of Australia, the Family Court of Western Australia and the Federal Circuit Court of Australia are all covered by this Act.

Amendments to the *Family Law Act* give appeal rights with respect to orders made by the Family Court of Western Australia and clarify the process of varying and revoking court security orders.

Merging of courts' corporate services

As of 1 July 2016, the corporate services functions of the Federal Court, Family Court and Federal Circuit Court are shared, with the CEO of the Federal Court being responsible for managing the corporate services of each of the 3 courts with a requirement to consult each of the heads of jurisdiction and the other CEOs. The Federal Circuit Court is to be given its own CEO rather than share one with the Family Court. From 1 January 2018 the Family Court CEO and the Family Court Principal Registrar will be merged. The Explanatory Memorandum to the *Courts Administration Legislation Amendment Act 2016* states that the merging of the court's corporate functions is expected to deliver efficiencies to the courts of \$9.4m over the six financial years to 2020-2021 and ongoing annual efficiencies of \$5.4m from that time.

Subpoenas

The amendments to the *Family Law Rules* bring the process for production and inspection of documents in line with that under the *Federal Circuit Rules 2001*, thereby streamlining the process and reducing the number of court appearances. When a subpoena is issued an administrative production day is set rather than listing a hearing date. Inspection can occur provided there has been service, compliance by the named person, the absence of any objection and the issuing party files a notice of request to inspect. Automatic copying of child welfare, criminal, medical and police records is prohibited. Medical records may be inspected by the person whose records they are, prior to inspection by the parties, their lawyers and independent children's lawyer, in order to determine whether to object to inspection or copying.

Any objections are listed for hearing by the court.

Costs

The costs in Schedule 3 of the *Family Law Rules* were increased by 3% from 1 January 2016.

Conclusion

The recent amendments to the *Family Law Rules* are designed to streamline processes, particularly in the areas of arbitration, parenting applications with respect to surrogacy applications, and subpoenas. Recent amendments to the *Family Law Act*, such as with respect to s 121, and the delivery up of travel documents, clarify and tidy up the existing law, rather than make substantive changes.