FORTÉ
FAMILY LAWYERS

OVERVIEW OF CHANGES IN THE LAW

BUT WAIT - THERE ARE MORE AMENDMENTS TO THE *FAMILY LAW ACT* IN 2018

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The two Bills restructuring the Family Law Courts have been delayed by Parliament for further consideration in 2019. This gave family lawyers hope that 2018 would be a quiet legislative year. But, we were mistaken. Instead, the floodgates have opened. First we had the *Family Law Amendment (Family Violence and Other Measures) Act 2018,* [see - Family Violence - changes to the Family Law Act]. Then, the *Civil Law & Justice Legislation Amendment Act 2018* ("Amendment Act") received Royal Assent on 25 October 2018. The Amendment Act introduces changes to the *Family Law Act 1975* (FLA) with respect to a wide range of matters, including bankruptcy, when de facto property settlement proceedings can be issued, costs orders against case guardians, disclosure of the fact of an offer to a judge, widening the scope of the conduct where overseas child abduction will be considered to be a criminal offence, making arrests, the Rules Advisory Committee, and renumbering Part VIIIB FLA.

Limitation of proceedings

The amendments to s 44 FLA in the Amendment Act address two main problems:

1. Section 44(2) was interpreted in *Hedley & Hedley* (2009) FLC 93-413 to extend the limitation period for the issue of property settlement proceedings when parenting proceedings have been issued and the property settlement application is included in a Response to an Initiating Application seeking parenting orders. This method of extending the usual limitation period for issuing property settlement or maintenance proceedings of 12 months after a divorce order was final was artificial and in contradiction to the intent of s 44(3). Section 44(2) has now been repealed.

2. Section 44(5), which applies to de facto couples, unlike the equivalent provision for married couples (s 44(3B)), did not provide the automatic right for the institution of property settlement proceedings if a financial agreement was found to be not binding or set aside. There was also no provision for parties to consent to the institution of proceedings out of time as for married couples (s 44(3)). Section 44(5) has been amended so that property settlement proceedings can be issued within 12 months after a financial agreement between the parties to a de facto relationship is set aside, or found to be invalid, or at any time if both parties consent. The fact that the rights of de facto parties were so different to those of married couples in these respects was, presumably, an oversight when the FLA was amended to allow de facto parties to have their property rights dealt with under the FLA.

These changes commenced on 26 October 2018.

Costs orders and offers of settlement

Section 117 has been amended to make the following changes:

1. Prior to the Amendment Act, the fact that an offer has been made and the terms of any offer made by a party to settle proceedings could not be disclosed to the court except where the court was considering whether it should make an order for costs under s 117(2) and the terms of any such order. After the amendment, the fact that an offer has been made can be disclosed, but not the terms of the offer. According to the Revised Explanatory Memorandum (paragraph 281), the amendment is "intended to promote early settlement of matters". One circumstance where the amendment will be useful is if one party has made offers to settle and the other party has made no offers. Being able to tell the judge that this is the situation, although valuations and disclosure have been completed, will allow the judge to encourage the party who has not made any offers to do so. Also, a judge will be able to ask if the parties have made any offers and express their displeasure if no offers have been made at all.

2. The court cannot make an order against a guardian *ad litem* (case guardian) unless the court is satisfied that one or more acts or omissions of the guardian relating to the proceedings are unreasonable or have delayed the proceedings unreasonably (s 117(6)). The reason for this amendment was that the risk of a personal costs order was discouraging people from consenting to being appointed as case guardians.

These changes commenced on 26 October 2018.

Offences of taking or sending a child outside Australia or retaining a child outside Australia

Currently international child abduction from Australia is only a criminal matter in some circumstances. The removal of the child must be in breach of parenting orders made under the FLA, or in the course of proceedings for such orders. The primary emphasis in most matters is on the civil aspects, being locating the children, whether the country the children were abducted to was a signatory to *The Hague Convention on the Civil Aspects of International Child Abduction* and how the country to which the children were abducted applies the *Convention*.

Sections 65X and 65Y remain (although s 65Y in particular, has been re-worded), but the range of circumstances which will amount to criminal conduct will be expanded to cover:

- the retention of a child overseas in contravention of a final parenting order and without the written consent of the other person or persons exercising parental responsibility for the child (s 65YA);

- the retention of a child overseas where parenting order proceedings are pending under the FLA, and the child is retained by a party to those proceedings without the written consent of the other party or parties to the pending proceedings, or an order of the court (s 65ZAA).

Specific defences to s 65Y and s 65Z are in ss (2) of each section and apply if:

(a) the person (whether or not the person is or was the party to the proceedings) takes or sends the child from Australia to a place outside Australia because the person believes the conduct is necessary to prevent family violence; and

(b) the conduct is reasonable in the circumstances as the person perceives them.

Widening the scope of the offence of taking or sending a child outside Australia and having specific defences has been discussed for at least 20 years. In its 1998 Report "Parental Child Abduction: a Report to the Attorney-General", the Family Law Council recommended that parental child abduction not be criminalised, but that if its recommendation was not accepted, there should be general exceptions or defences. These included fleeing from violence, and protecting the child from imminent harm. (Recommendation 6(b))

In its 2011 submission to the "International Abduction to and from Australia" Senate Standing Committee on Legal & Constitutional Affairs, 31 October 2011 ("Senate Committee"), the Family Law Council was in favour of the extension of the FLA provisions to cover retention of children overseas beyond the agreed or authorised period. However, the Family Law Council repeated its 1998 view that there should be specific defences if fleeing from family violence, protecting children from danger or imminent harm and a reasonable excuse for failing to return the child to Australia (such as flight cancellations or ill-health).

The advantages and disadvantages of s 65X and s 65Y FLA and extending their scope also apply to the introduction of a discrete criminal offence for international child abduction (which has not been done). They were summarised by the Senate Committee.

The advantages include:

- ensuring that international parental child abduction matters are afforded priority in the allocation of policy resources;

- ensuring that additional investigation and enforcement mechanisms are made available to assist in locating a child. These mechanisms include the use of telephone interceptions and listening devices, the ability to request the assistance of Interpol and overseas police forces to locate abducted children, and the availability of extradition and mutual assistance procedures to return abducting parents to Australia. (p.25)

The disadvantages include:

- such an offence would deter abducting parents from voluntarily returning children or participating in negotiations, and cause them to further evade law enforcement authorities for fear of prosecution;

- the prospect of the taking-parent being subject to criminal proceedings on their return would undermine the effectiveness of the *Convention* because the existence of a criminal offence may trigger an Article 13(b) exception;

- even if an Article 13(b) exception cannot be established, there is the potential that the child's best interests would be damaged if a parent is convicted of an offence which may result in his or her imprisonment (thus denying the child the opportunity to have a meaningful relationship with, and be cared for by, that parent);

- the threat of criminal prosecution would have a negative impact on disadvantaged parents such as those who have committed international parental child abduction to escape family violence or child abuse committed by the other parent. (p.26-27)

In addition, the Senate Committee reported that the then Chief Justice of the Family Court, the Hon. Diana Bryant, was opposed to a stand-alone criminal offence (at p.27):

> "I have to say that I am not in favour of it, for this reason. What you would say in favour of it is that it is my understanding that it does assist the police and Interpol to look for children overseas, but one would have hoped there might be some other way of doing that. Surely the AFP here can have arrangements in relation to abduction of children short of necessarily having to have criminal offences created. The second reason for doing it, I suppose, is a community perception, particularly from the left-behind parent, that there should be some punishment, but the problem is that in the cases that we see regularly where the children are sought to be returned to a country where there are laws whereby criminality is created by removing a child - typically that is some of the state in the United States, where it is regarded as kidnapping - you often end up having to try to get some kind of undertaking from the other parent not to prosecute so the child can be returned, and that is not always possible if the prosecution is by a district attorney or something. One of the defences that might then arise would be if the father, for example, is not able on the face of it to care for the children and the mother is going to be jailed upon return and there is no-one to look after the child. Then the 'intolerable situation' defence would arise. So this problem arises all the time, and it is not uncommon to be seeking for other jurisdictions to forgo prosecution so that the children can be returned. So it is a real issue."

Again, these arguments also apply to s 65X and s 65Y FLA, and the extension of their operation.

The Committee, in its 2016 Report (Senate Standing Committee on Legal & Constitutional Affairs *Family Law Amendment (Financial Agreements & Other Measures) Bill 2015*, February 2016, p.26-27), declined to support an offence-specific defence for persons fleeing from family violence on the grounds that the new wrongful retention offences should provide a comprehensive and certain legal

basis upon which authorities could take action to recover children who were wrongfully removed or retained, and should serve as a general deterrent to such behaviour. The Committee commented that "complex situations where family members are fleeing with children to escape violence or abuse should be dealt with in Australia". A differently constituted Committee in 2017 took a different view and recommended that there be specific defences.

A new section 65ZDE provides that section 15.4 of the *Criminal Code* applies to an offence against any of s 65Y to s 65ZB which deal with the taking, sending or retaining a child outside Australia. This gives category D extended geographical jurisdiction to the offence so that it can be prosecuted whether or not the conduct occurred in Australia. A nexus to Australia or an Australian person is not required.

These changes commence by 25 April 2019 (being six months after Royal Assent).

Bankruptcy

The *Bankruptcy Act 1966* has been amended to expressly provide that the Family Court has jurisdiction in bankruptcy where the trustee in bankruptcy is an applicant for an order to set aside a financial agreement under s 90K(1) or (3) or 90UM(1) or (6) FLA (new s 35(1)(b)(ii) and 35(1A)(b)(ii)). This is in addition to the Family Court having jurisdiction in bankruptcy where the trustee in bankruptcy is a party to property settlement proceedings under s 79 or s 90SM, maintenance proceedings or proceedings to set aside or vary a property settlement order under s 79A or s 90SN FLA.

The definition of a "bankrupt" in the FLA has been expanded to include a person who has been discharged from bankruptcy whose property remains vested in the bankruptcy trustee (s 4(6) FLA).

These changes commenced on 26 October 2018.

Re-numbering Part VIIIB

In the wake of the Australian Law Reform Commission's *Discussion Paper on the Review of the Family Law System* recommending the re-numbering of the FLA, that sensible proposal has already been partially implemented in relation to Part VIIIB. The downside is that all the decided cases and other parts of the legislation will have incorrect legislative references and any pending orders will need to be changed. This change takes effect on 23 November 2018. The benefits are that the alpha-numeric numbering will now be consecutive and it will be easier to find the required section in the approximately 120 of section 90s in the FLA.

The new numbering is as follows:

Renumbering		
Item	**Column 1 Provision**	**Column 2 Renumber as:**
1	Section 90MA	Section 90XA
2	Section 90MB	Section 90XB
3	Section 90MC	Section 90XC
4	Section 90MD	Section 90XD
5	Section 90MDA	Section 90XDA
6	Section 90ME	Section 90XE
7	Section 90MF	Section 90XF
8	Section 90MG	Section 90XG
9	Section 90MH	Section 90XH
10	Section 90MHA	Section 90XHA
11	Section 90MI	Section 90XI
12	Section 90MJ	Section 90XJ
13	Section 90MK	Section 90XK
14	Section 90ML	Section 90XL
15	Section 90MLA	Section 90XLA
16	Section 90MM	Section 90XM
17	Section 90MN	Section 90XN
18	Section 90MO	Section 90XO
19	Section 90MP	Section 90XP
20	Section 90MQ	Section 90XQ
21	Section 90MR	Section 90XR
22	Section 90MS	Section 90XS
23	Section 90MT	Section 90XT
24	Section 90MU	Section 90XU
25	Section 90MUA	Section 90XUA
26	Section 90MV	Section 90XV
27	Section 90MW	Section 90XW
28	Section 90MX	Section 90XX
29	Section 90MY	Section 90XY
30	Section 90MZ	Section 90XZ
31	Section 90MZA	Section 90XZA
32	Section 90MZB	Section 90XZB
33	Section 90MZC	Section 90XZC
34	Section 90MZD	Section 90XZD
35	Section 90MZE	Section 90XZE
36	Section 90MZF	Section 90XZF
37	Section 90MZG	Section 90XZG
38	Section 90MZH	Section 90XZH

Miscellaneous amendments

Other amendments include, in summary:

- The admissibility of communications with family consultants has been changed, with a new s 11C(3) replacing the old s 11C(3);

- Clarification that the Family Court "is and is taken always to have been, a court of law and equity" (s 21(2)). This is relevant to the interpretation of the court's implied powers;

- Registrars of the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia conducting property settlement conferences have the same protection and immunity as a Judge of the Family Court (s 38Z). This was uncertain before;

- The process and power for making arrests have been changed, with a major re-write of s 122A and 122AA FLA. The arrest provisions in the FLA are now in line with similar powers of the Federal Court of Australia and the Federal Circuit Court of Australia. There is greater clarity as to who can make arrests. In line with similar powers in the *Crimes Act 1914*, an arrester's power to enter and search premises and stop and detain conveyances (which include a vehicle, a vessel and an aircraft) for the purposes of making an arrest is more limited (Revised Explanatory Memorandum para 33).

- Section 160 *Evidence Act 1995* (Cth) has been amended so that where legislation does not otherwise provide, a postal article sent by pre-paid post is presumed to be received by the recipient on the seventh working day after being posted, rather than on the fourth working day. This change reflects the fact that the postal service is now less frequent.

- Central Authorities under the Child Abduction Convention now have clearer and greater powers to apply for location orders (s 67K(2)).

- The Rules Advisory Committee of the Family Court of Australia will now be appointed by the Chief Justice of the Family Court rather than by the Governor-General after consultation with the Chief Justice (s 124(1) amended and s 124(3) deleted). This is presumably in line with the intention of the Chief Justice that he have greater control over changes to the Rules of both Courts, rather than the decision for any changes having to be decided, as at presect, by a majority of judges of each court.

- The definition of "Registry Manager" has been broadened so that the Family Law Courts have a broad discretion in relation to the appointment, possibly foreshadowing the changes which will occur with the restructure of the Family Law Courts.

The above changes commenced on 26 October 2018, except for the arrest provisions which will commence when the changes to the child abduction provisions commence - probably 25 April 2019.

Conclusion

The various changes in the Amendment Act cover many aspects of the FLA. The renumbering of Pt VIIIB will have the most impact on legal practitioners on a daily basis. There will presumably be a period of confusion whilst everyone adjusts to the new numbers. One of the most significant change is probably the extension of conduct which will amount to criminal offences with respect to international child abduction. It will be interesting to see what, if any, impact this has on the number of parents who abduct children. For lawyers, it will affect the advice given to left-behind parents who need to decide whether to push for criminal charges to be instituted. It will also impact how the return of children is voluntarily negotiated and how and whether the orders are made by overseas courts when there is a greater likelihood that the abducting parent will face criminal charges upon their return to Australia. Other major changes are to the rights of de facto parties to commence property and maintenance proceedings and the ability of parties to tell the court that offers have been made, but not the terms of the offer).