

OVERVIEW OF CHANGES IN THE LAW

Introduction to CCH Family Law Act Book 2015

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Introduction

Legislative change in family law has been unusually slow in the past 18 months which has allowed time for the Family Law Courts to consider and consolidate their approach to recent legislative and judicial changes.

Since the last edition of this book, there have been two sets of amendments to the *Family Law Rules 2004*, and one set each to the *Federal Circuit Court Rules 2001* and to the *Family Law Act 1975*. The major changes have been to the Rules of both Courts, some of which are summarised here.

Notice of Risk and Notice of Abuse

In the Federal Circuit Court, a new Form 1 Notice of Risk replaced the former Form 4 from 12 January 2015. This form has been piloted in South Australia since 4 February 2013. The report on the pilot noted:

The comparative statistical information gathered in the pilot indicates that throughout Australia there is currently a general lack of compliance with the legislative requirements in respect to the reporting of risk.

This finding was consistent with anecdotal feedback from Judges indicating there was a significant level of non-compliance with the requirement to file a Form 4. This under-reporting of risk was an issue of real concern, particularly as most parenting applications are issued in the Federal Circuit Court.

The new form specifically identifies a wider range of risks than the previous Form 4. This will be very useful for litigation in person including the mental illness of a parent, drug and alcohol abuse and serious parental incapacity.

A person who files an application or response seeking parenting orders must also file a Notice of Risk, regardless of whether the person believes that there is any risk to the children (r 22A.02).

The Notice of Risk can be filed by an “interested person”. This is defined by reference to the *Family Law Act*, and can be a party, an independent children's lawyer or a person described in the *Family Law Regulations*. The Regulations do not currently prescribe anyone.

The Notice of Risk must set out particulars of the facts and circumstances on which each allegation (if any) set out in the Notice is based (r 22A.06). An affidavit in support must be filed if there are allegations in the Notice. The affidavit must state the evidence relied on to support each allegation (r 22A.02(2)).

The Notice of Risk in the *Federal Circuit Court Rules* differs from the new Notice of Child Abuse, Family Violence or Risk of Family Violence under the *Family Law Rules* in name, content and form number. The *Family Law Rules* form is still known as a Form 4 while the *Federal Circuit Rules* form is now a Form 1.

The Form 4 is much longer than the Form 1. The Form 1 is also simpler to complete and asks for boxes to be ticked, such as whether an allegation has been made that a party to the proceedings or another person relevant to the proceedings, suffers mental ill health, abuses drugs or alcohol, or suffers a serious parental incapacity. However, details of the allegations must still be given.

Family Violence Orders

The *Federal Circuit Rules* have been strengthened in relation to notification to the Federal Circuit Court of a family violence order. A party to a proceeding who is seeking a parenting order relating to a child, must file a copy of any family violence order affecting the child or a member of the child's family (r 22A.08(1)). If a copy of the order is not available, a written undertaking must be made to file the order within a specified time.

Family Reports

Prior to the recent amendments to the *Federal Circuit Rules*, if a Family Report was prepared in accordance with an order made under r 23.01A, the Federal Circuit Court was limited in its ability to deal with the report. For example, copies could only be given to each party, or the party's lawyer, and to any independent children's lawyer. Following the amendment of r 23.01A, the Court may give copies of the report to any of:

- *a party, a lawyer for a party, or an independent children's lawyer, in the proceeding*
- *a children's court (however described) of a State or Territory*
- *a prescribed child welfare authority (within the meaning of the Family Law Act)*
- *an authority established by or under a law of a State or Territory for the purposes including the provision of legal assistance*
- *the convenor of any legal dispute resolution conference*

These amendments are consistent with recommendations contained in the March 2014 report by Professor Richard Chisholm AM - *The Sharing of Experts' Reports Between the Child Protection System and the Family Law System*. This report recommended that court rules be amended to make it explicit that the courts can make orders allowing the disclosure of reports to appropriate bodies in the child protection system and to legal aid bodies.

Where *Federal Circuit Court Rules* are insufficient

A new r 1.07 in the *Federal Circuit Rules* largely replicates r 1.21 of the *Federal Court Rules 2011*. The utility of including such a rule was considered in *Thompson & Berg* [2014] FamCAFC 73 where the husband argued that the *Federal Circuit Court Rules* were insufficient or inappropriate and therefore the *Family Law Rules* should apply with respect to the requirements of parties to engage in pre-action proceedings.

The Full Court said (at paras 51-2):

However, mere silence does not mean a court's rules are insufficient or inappropriate. As Nygh J said in Rubie & Rubie (1991) FLC 92-253 at [78, 699], a question arises whether the omission of a rule on the point "... is an insufficiency or a defect, without which the Court cannot effectively operate, or whether it is a provision which, for reasons of policy or even sheer neglect, the Court has not seen fit to adopt.

As a general approach, a court would be slow to conclude that its rules are insufficient or inappropriate where the court has rules of court that:

- *form a coherent whole;*
- *include statements of purpose or objects; and*
- *provide for the court to give directions in cases of difficulty or doubt (e.g. r 1.09 FLR, r 1.21 FCR).*

The Full Court noted (at para 53) that the *Federal Circuit Rules* did not include a provision equivalent to r 1.09 *Family Law Rules* or r 1.21 *Federal Court Rules 2011* which "are supplementary to other rules and stand with them in an attempt to ensure that the courts have all the requisite power in their own rules to conduct and conclude proceedings."

Other amendments to the *Family Law Rules*

An amendment was made to the *Family Law Rules* so that the seal of the Court may now be attached to a document, not only by hand or by electronic means, but also "in any other way" (r 1.22). A coversheet must be attached to all documents that are not forms but nonetheless are required to be filed (r 24.01(1)(h)).

The Rules were amended to enable the court to produce a certificate stating whether a person is or has been the subject of a vexatious proceedings order (r 11.04). The procedure for requesting the certificate is also set out.

An amendment to r 24.13(1) allows a child welfare officer to search the court record relating to a case and inspect and copy a document if the case affects, or may affect, the welfare of a child.

The inadvertent repeal of Schedule 2 *Family Law Amendment Rules 2011 (No. 2)* was rectified. This inserted Chapter 27 into the Rules which applies to cases to which the *Trans-Tasman Proceedings Act 2010* applies.

Conclusion

The most significant amendment to the Rules of both family law courts was the introduction of a new Notice of Risk in the Federal Circuit Court and a Notice of Child Abuse, Family Violence or Risk of Family Violence in the Family Court. One impact of the new Rules in the Federal Circuit Court for notifications of risk of family violence and abuse is that the Court is far more aware of such matters. There will be practical and legal challenges for the Court in dealing with these increased notifications.