

Submission to the Senate Legal and Constitutional Affairs Committee

The Family Law Amendment (Family Violence and Other Measures) Bill 2017

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Introduction

I am pleased to support the enactment of this Bill. I propose one amendment.

Overview

The intent of various amendments in this Bill is to allow for more work in family law matters to be done by State and Territory Magistrates' Courts, particularly in cases involving family violence. It was preceded by an Exposure Draft. The final form of the Bill suggests some pushback by the States and Territories against enlarging the jurisdiction of their courts in family law matters, which is disappointing. Nonetheless, incremental progress is still progress.

Short-form reasons for decision

Section 69ZL is of some potential importance. While drafted as a way of encouraging state courts to make more interim parenting orders, it is applicable, helpfully, to all courts making interim parenting orders.

One of the difficulties that state magistrates would be likely to face is that the statutory provisions and accompanying case law governing parenting decisions are far from simple. Judge Riethmuller of the Federal Circuit Court memorably explained the difficulties in giving judgment in a parenting case in an article entitled "Deciding Parenting Cases under Part VII - 42 Easy Steps".¹

Section 69ZL provides that all judicial officers may give short form reasons in making interim parenting orders:

- (1) A court may give reasons in short form for a decision it makes in relation to an interim parenting order.

¹ (2015) 24(3) *Australian Family Lawyer* (online).

(2) Subsection (1) does not otherwise affect the obligation of a court to give reasons for a decision it makes in relation to any matter arising under this Act.

If enacted, this will apply to cases filed before the commencement of the section. In a joint submission made in February 2017,² former Family Court judge Richard Chisholm and I explained the difficulties with a provision of this kind which makes no amendments to the substantive law.

Judgments in parenting cases need to be somewhat detailed, essentially for two reasons.

The first and main reason is that the determination of a child's best interests depends on a wide range of factual matters. The extent of these matters varies from case to case. In some cases, the parties agree on some of the facts, and this enables the court to determine those facts without needing to set out a lot of evidence. And the relevant factual matters are more extensive in some cases than in others. Sometimes the parties agree on significant issues, and this too can reduce the size of a judgment. This applies equally to final and interim judgments.

Typically, the amount of evidence is much greater in final hearings than in interim proceedings, where cross-examination is typically not permitted, and where the evidence is often less extensive than at the final hearing. But under the current form of the legislation, with interim proceedings as much as final proceedings, the judgment needs to deal with the issues and evidence and explain why the proposed orders are in the children's best interests.

The second reason is that the current legislation requires the court to engage in a complex analysis. The complexity of the provisions, and the need for judgments to examine each of the various criteria laid down in the Act, is essentially the same for final and interim judgments, although there is provision made for a judge not to apply the presumption of equal shared parental responsibility in interim parenting proceedings.

We agreed with the intent of the provision, that there should be scope for interim judgments to be much shorter. This may encourage state courts to exercise Part VII jurisdiction. We proposed that this would be better achieved by amendments along the following lines:

Amend s.60CC(1) to read as follows:

“(1) Subject to subsections (5) and (6), in determining what is in the child's best interests, the court must consider the matters set out in subsections (2) and (3).”

² P. Parkinson and R Chisholm, *Submission on the 2017 Exposure Draft Family Law Act Amendment*, February 10th 2017.

Insert new subsection (6):

“(6) When the court is considering whether to make an interim order, the court need only consider the matters in subsection (2) and such factors in subsection (3) as appear to be of particular relevance to the making of the interim order.”

Regrettably, this was not taken up. The question then arises what, if enacted, the new s.69ZL will mean. It is clear enough what a short form judgment means in relation to appeals. An appeal court, dealing with an appeal from a discretionary decision, may readily give short form reasons for dismissing the appeal if the grounds for appeal disclose no justification for interfering with the decision. What is less clear is how trial judges can give short-form judgments if they are still required to address all the matters that the court must consider under s.60CC(2) and (3) and if their reasons must be adequate. Subsection 69ZL(2) affirms the obligation of all judicial officers to provide reasons, even in interim parenting matters, because s.69ZL(1) “does not otherwise affect the obligation of a court to give reasons for a decision.” Maybe all this section means is that judges may give briefer reasons than they would do for a final hearing on the same matter. That is already the case; since interim parenting hearings ordinarily do not involve oral evidence and cross-examination, there is less to say about the evidence presented to the court.

While our recommendation was not taken up in this Bill, something like it was accepted in relation to the Parenting Management Hearings. Proposed s.11JB(4) of that Bill provides:

Additional considerations are the following matters, to the extent they are relevant to the particular parenting management hearing (emphasis added).

If this is so for final determinations of the Panel, there seems no reason why judges making interim parenting decisions in the courts should not also have more flexibility.

Recommendation

Amend s.60CC(1) to read as follows:

“(1) Subject to subsections (5) and (6), in determining what is in the child's best interests, the court must consider the matters set out in subsections (2) and (3).”

Insert new subsection (6):

“(6) When the court is considering whether to make an interim order, the court need only consider the matters in subsection (2) and such factors in subsection (3) as appear to be of particular relevance to the making of the interim order.”