



What's new with Consent Orders?

A Registrar's perspective

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Presentation for FLPA

13 September 2012



Itinerary

- What's new(ish)?
- Framework – legislation and case law
- A 'day' in the life....
- Pitfalls to avoid - top 10 (this month)

What's new(ish)?

- *Family Law Amendment (Family Violence and other Measures) Act 2011*
 - *Section 69ZQ(1)(aa) – applications filed from 7 June 2012*

69ZQ General duties

- (1) In giving effect to the principles in section 69ZN, the court must:
- (aa) ask each party to the proceedings:
 - (i) whether the party considers that the child concerned has been, or is at risk of being, subjected to, or exposed to, abuse, neglect or family violence; and
 - (ii) whether the party considers that he or she, or another party to the proceedings, has been, or is at risk of being, subjected to family violence; and
 - (a) decide which of the issues in the proceedings require full investigation and hearing and which may be disposed of summarily; and
 - (b) decide the order in which the issues are to be decided; and
 - (c) give directions or make orders about the timing of steps that are to be taken in the proceedings; and
 - (d) in deciding whether a particular step is to be taken—consider whether the likely benefits of taking the step justify the costs of taking it; and
 - (e) make appropriate use of technology; and
 - (f) if the court considers it appropriate—encourage the parties to use family dispute resolution or family counselling; and
 - (g) deal with as many aspects of the matter as it can on a single occasion; and
 - (h) deal with the matter, where appropriate, without requiring the parties' physical attendance at court.

What's new(ish)?

- *Family Law Amendment Rules 2012 (No 1)*
 - **Rule 10.15A [amended from 7 June 2012]**
- 10.15A Consent parenting orders and allegations of abuse or family violence**

parenting order by

(1) *This rule applies if an application is made to the court in a current case for a*

(2) *If an application is made orally during a hearing or trial, each party, or if represented by a lawyer, the party's lawyer:*

 - (a) *must advise the court whether the party considers that the child concerned has been, or is at risk of being, subjected to or exposed to abuse, neglect or family violence;*
 - (b) *must advise the court whether the party considers that he or she, or another party to the proceedings, has been or is at risk of being subjected to family violence; and*
 - (c) *if allegations of abuse or family violence have been made—must explain to the court how the order attempts to deal with the allegations.*

(3) *For any other application each party, or if represented by a lawyer, the party's lawyer:*

 - (a) *must certify in an annexure to the draft consent order whether the party considers that the child concerned has been, or is at risk of being, subjected to or exposed to abuse, neglect or family violence;*
 - (b) *must certify in the annexure whether the party considers that he or she, or another party to the proceedings, has been or is at risk of being subjected to family violence; and*
 - (c) *if allegations of abuse or family violence have been made—must explain in the annexure how the order attempts to deal with the allegations.*

What's new(ish)?

- T & N [2003] FamCA 1129 – Moore J

- **[14]** It is the statutory responsibility of a judge of this Court, pursuant to Part VII of the Family Law Act 1975, to make orders consistent with the interests of children. On what I had been presented, I could not say unsupervised contact between the children and Mr T would be consistent with their best interests. I therefore declined to give the imprimatur of this Court to the arrangements by making orders to that effect. The most I could see as consistent with my responsibilities was to accept parental consent to supervised contact only.

- **[39]** In rejecting the proposed consent order, I acknowledge that parents' consent to arrangements about their children is a powerful, and in most cases a deciding, factor. I cannot say why Ms N gave her consent to an arrangement involving unsupervised contact to be followed by block periods. She was legally represented by barrister and solicitor and, of course, I could not know what instructions they had nor what advice they gave her. Whatever the case, her consent does not displace the obligation of this Court to make orders that are judged to be in the best interests of children.

What's new(ish)?

- De facto financial cause - separation more than 2 years prior to filing application
 - Governing provisions:
 - ss 44(5) Period in which to apply
 - ss 44(6) Exceptions to time limit
 - *“if the court is satisfied that... (a) ... hardship ...; or (b) ...maintenance ... unable support (self) without (pension etc)...”*
 - Contrast property proceedings involving married couple
 - ss 44(3) Time restrictions on maintenance and property proceedings
 - *“except by leave of the court .. or with the consent of both parties”*
 - Application for consent orders not appropriate

Framework

Legislation and case law

- *Family Law Act 1975*
- *Family Law Rules 2004* – Division 10.4
- High Court:
 - *Harris v Caladine* (1991) FLC 92-217
- Full Court:
 - Hickey & Hickey and A-G for Commonwealth of Australia (Intervenor) (2003) FLC 93-143, 78,396
- Application for Consent orders – Prescribed Form

Application for Consent orders – a 'day' in the life

- Procedure only available in Family Court of Australia
- Registrars exercise delegated powers – Chapter 18 FLR 2004
- Chambers process

Statistics

- Applications for consent orders filed
 - National - approx 10,500 per year
 - Brisbane – approx one-third
 - Average 70 new filings per week
 - Plus 'returns'

Nature of proceedings

- Chambers – on the papers; jointly submitted
- No court hearing - no oral submissions
- Proceedings not appropriate for consent orders process include
 - Section 65G
 - Where one party (pursuant to Rules) not a party to application eg undefended
 - Interim orders
 - Declarations about existence of de facto relationship; more than 2 years since separation – s 44(6)
 - Child maintenance for children to whom Child Support legislation applies

Overview of application

- 2012 - new version of form – new question 11
- Content
- Statement of truth
- Date of signing
- Attachments
- Requirements to support orders eg:
 - Superannuation splitting orders – procedural fairness and valuation; SMSFs
 - De facto financial cause jurisdiction

Rule 10.15A

- Amended from 7 June 2012
- Applications for consent orders as well as pending proceedings
- New form of Annexure
- Each party ‘an Annexure to the consent order’
 - attach Annexure by each party to each copy of orders

Enforceable orders

- Parenting orders
 - Terminology
 - Practical implementation
 - Complexity / precision / enforceability
 - Parental responsibility
- Financial orders
 - Precision
 - Timeframes
 - Jurisdictional issues – eg child support / maintenance – pay school fees
 - Superannuation
 - De facto financial causes
 - Default provisions – s 106A

Pitfalls to avoid – top 10

[this month]

1. Valuation superannuation interest – super splitting order
2. Just and equitable (financial); Best interests (parenting)
3. De facto financial cause – 2 years + separation
4. S 69ZQ(1)(aa) & Rule 10.15A - Annexures
5. Terminology
6. Declarations / notations expressed as orders
7. Child support
8. Completion of all relevant questions in Application including relevant parts Statements of Truth
9. Rule 10.18 lapse of Respondent's consent – 90 days
10. Third parties

Housekeeping pitfalls

- Jurisdiction – Family Court of Australia
- Rules – Part 10.4 *Family Law Rules 2004*
- Correct version of Application
- Coversheet / signing pages
- Orders and application - each page signed
- Where is the original?
- Copies certified
- Enough copies
- All attachments required with application
- Only relevant sections completed – confusion?
- Amended Application / new Statement of Truth
- Slip rule 17.02 - limited

Resources

- **Drafting the perfect consent order – tips, traps and must have clauses: A Registrar’s perspective** by Jennifer A Paxton (2008) – presented at National Family Conference 2008 Adelaide
- **Letter Co-ordinating Registrar Chris Spink to profession** (3 December 2010)



Questions, discussion

Thank you and congratulations

