FOLEY'S | LIST

FAMILY VIOLENCE

THE RELATIONSHIP (AND THE TENSIONS) BETWEEN INTERVENTION ORDERS AND ORDERS PURSUANT TO THE *FAMILY LAW ACT*.

Author: Caroline Jenkins

Date: 24 August, 2015

FOLEY'S LIST

Caroline Jenkins has been a Family Law Barrister for twelve years. Prior to coming to the bar, she was a police officer for ten years, attending numerous domestic disputes as well as educating police at the academy and at district level in family violence. After being admitted to practice she worked briefly as a family violence duty lawyer at the Ringwood Magistrates Court for the Eastern Domestic Violence Outreach Service before coming to the bar in 2003.

FAMILY VIOLENCE – THE RELATIONSHIP (AND THE TENSIONS) BETWEEN INTERVENTION ORDERS AND ORDERS PURSUANT TO THE FAMILY LAW ACT

With the current Family Violence Royal Commission there is an ever increasing focus on victim's rights and the need to protect genuine victims of family violence. Advocates groups are calling for simpler processes, easier access to the courts, greater police powers and more support systems.

Unfortunately those working in Family Law often see the system abused by parents wishing to exclude the other parent from either having contact with their children and/or from living in the home. This is extremely problematic when the courts are increasingly reluctant to refuse an order, preferring to err on the side of caution.

In addition, the state family violence legislation has evolved since the first act in 1987, the *Crimes Family Violence Act,* which contained just 29 sections. The current *Family Violence Protection Act* 2008 has 226 sections. This has included an increase in the powers of both police and the courts and has had considerable ramifications for respondents, especially respondents who are also seeking parenting orders under the Family Law Act.

This paper will deal with the particular sections of the state legislation that family law practitioners should be most aware of. It will then explore the connection between the state legislation and the Family Law Act ("the FLA") and the implications for parties in that jurisdiction.

The State Legislation

There are two main acts which concern intervention orders. *The Family Violence Protection Act* 2008 and the *Personal Safety Intervention Orders Act* 2010. The Family Violence Protection Act ("the FVPA") is the one considered in this paper as it is applicable to family members (see section 8 which sets out the broad definition of family member including any person who someone considers is like a family member).

A little about police powers

One difference between the FVPA and its predecessor is the broadening of police powers to direct and detain alleged perpetrators. Practitioners should be aware that police are able to direct a person to remain, go to a place or remain in the company of a person, for up to six hours or greater if extended (section 14) and the police have power to detain them if they do not comply (section 15).

Another change was the introduction of safety notices, giving the police (Sergeant or above) the ability to put in place the same conditions as an intervention order, after hours, without the requirement of going before a bail justice. The safety notice lasts until the matter can be brought before the court. (Section 24)

Interim orders and the potential for abuse of process

The main area of concern for family lawyers is the strategic use of interim intervention orders in family law proceedings. These concerns stem from the ability of applicants to obtain an order, ex-parte. What is not as well known is that the court can also make such an order without the requirement for oral evidence and can do so based on an affidavit alone or can wave this requirement altogether and make the order based on an application over the phone or by fax. (See section 55 (1)(b) and section 55(2)).

Section 59 of the FVPA states that where the court makes an interim order the court is obliged to ensure the hearing is listed for a final hearing as soon as practicable. However in practice there are at least two further hearings before a final hearing, being the mention following service of the order and a directions hearing. Furthermore contests are often not reached or are adjourned part-heard. The effect is that an interim order can be in place for between six to 12 months, often almost as long as the standard final order.

Practitioners acting for an applicant, who may wish to benefit from this quasi final order, should be aware that a court cannot proceed to hear a matter on a mention date unless all parties consent (see section 61).

Another reason the matter may be adjourned is if the respondent does not have legal representation. Most practitioners will be aware that the respondent is not allowed to cross-examine the applicant directly (section 70). It is therefore vital, from the respondent's perspective, that at the directions hearing, an order is made for legal aid to arrange representation and a warning given to the respondent that if he is not represented he will not be able to cross-examine or give evidence about the issues on which he is not allowed to cross-examine (section 71). (Note section 72 provides for the applicant to be represented where the respondent is represented under section 71).

Another lesser known cause for an adjournment is that a court may require a child, who is not the applicant or respondent, to have their own legal representation. (See section 62).

Evidence – matters to be aware of

A well known concern about intervention order proceedings is that applicants are not required to file affidavits and therefore respondents are often unaware of the specific allegations against them. Whilst applications contain a summary, they often fail to contain specifics and applicants frequently introduce new matters when giving their evidence in chief. The summary in the applications is compiled by the court staff from a handwritten application and is usually significantly shorter. As such, practitioners should request to see the hand written application from the file as these can be quite enlightening.

Practitioners should also seek the leave of the court at the first mention for an order for further and better particulars (pursuant to regulation 4.07 of the *Magistrates' Court (Family Violence Protection) Rules* 2008). Although in practice parties routinely fail to comply with such orders and their evidence is not confined to the particulars in any event.

Unfortunately the FVPA enables the court to inform itself in anyway it sees fit (section 65) and to allow in evidence by affidavit rather than oral evidence (section 66). There is thus a wide discretion as to what evidence will be allowed and what weight will be placed on it.

Intervention order conditions and the consequences for family law clients

Once the court has decided that there are grounds for an order, the court has broad powers to include any conditions it thinks are necessary or desirable (See section 81 of the FVPA).

For family law purposes the conditions that cause the most controversy are those which vary, suspend or revoke parenting orders made under the FLA and those removing a party from the home, preventing them accessing their home for say business purposes or to get documents for family law proceedings.

Suspension of Family Court/Federal Circuit Court orders

Section 89 of the FVPA provides that where an intervention order is made the court must enquire as to whether there are FLA orders.

Section 90 states that where a court makes an intervention order which is inconsistent with a FLA order, the court must use its powers under section 68R of the FLA to revive, vary, discharge or suspend the order to the extent of the inconsistency.

Section 68R of the FLA gives the court power, when making an intervention order (even an interim order), to suspend FLA orders, either on the application of a party or on the court's own initiative. However the court can only discharge orders if a final order is made. The only proviso is that the court has information available to it which was not available to the court that made the FLA order**.**

Section 68S of the FLA sets out the matters to be taken into consideration. Notably the best interests of the child are not paramount and the court can dispense with any applicable rules of court.

Pursuant to section 91 of the FVPA, if the court makes an intervention order the court must assess whether the child would be at risk living with, spending time with or communicating with the respondent.

Where the child or children are found not to be at risk, and there are FLA orders, the court should include in the intervention order the usual exception for such orders. Where there are no FLA orders, the court should include in the intervention order a provision for the parties to negotiate child arrangements in writing (section 92).

If the child is at risk and there are no family law orders, pursuant to section 93 of the FVPA, the court must include a condition prohibiting the respondent from living with, spending time with or communicating with the child.

So what recourse is open to the respondent?

The respondent should seek parenting orders in the Family Law jurisdiction and if successful a declaration that the orders are inconsistent with the intervention order. (See section 68Q of the FLA). Section 176 of the FVPA states that a family violence intervention order operates subject to any declaration made under section 68Q of the FLA by a court having jurisdiction under Part VII of that Act. (Section 68P of the FLA sets out the obligations of the court including serving a copy of the order on the court that made the intervention order).

Practitioners should note that in the case of interim orders, if FLA orders are suspended, the suspension automatically expires after 21 days and cannot be extended. (Section 68T of the FLA). If the respondent can wait 21 days, and indeed they may not get their application abridged anyway, there is no need to seek a section 68Q declaration.

One last option may be to issue an appeal to the FCA pursuant to section 96 of the FLA. This section allows for appeals to the FCA from a court of summary jurisdiction making an order under the FLA. In urgent circumstances, for example where a child is placed at risk as a result of the suspension of orders pursuant to section 68R, a Registrar of the FCA has the ability to list the appeal urgently. Although section 68T (2) states that no appeal lies from the suspension etc of an interim order, I am aware that at least in one circumstance, an appeal was successful. In the case of most interim orders, given an interim suspension order expires in 21 days, such an appeal won't be justified however if final orders are made it may be worth considering.

Exclusion from the home

Section 82 of the FVPA provides that where an order is made the court must consider whether to include a condition excluding a person from their home.

(2) In making a decision about whether to include an exclusion condition in the family violence intervention order, the court must have regard to all the circumstances of the case, including the following—

(a) the desirability of minimising disruption to the protected person and any child living with the protected person and the importance of maintaining social networks and support which may be lost if the protected person and the child were required to leave the residence or were unable to return to or move into the residence;

(b) the desirability of continuity and stability in the care of any child living with the protected person;

(c) the desirability of allowing any childcare arrangements, education, training or employment of the protected person or any child living with the protected person to continue without interruption or disturbance.

(3) Subsection (1) applies regardless of any legal or equitable rights the parties have in the residence.

There is obviously nothing in that section about the balance of convenience to the respondent or the respondent's ability to obtain other accommodation. The previous legislation included the requirement to assess the accommodation needs of all parties but this was not replicated in the current Act.

(The applicant is also able, pursuant to Division 1 of Part 6 of the Residential Tenancies Act 1997, where an exclusion order is made in a final order, to apply for an existing tenancy agreement to be terminated and a new tenancy agreement to be entered into with the landlord).

Although orders routinely include provision for an excluded respondent to return to collect personal property in the company of a police officer, this is problematic as respondents often struggle to arrange for police to attend and to wait whilst they gather their property. Police will also not adjudicate where there is a dispute over any items. Further to this the FVPA also gives power to the court to direct a respondent to return property (section 86) subject to a FLA order which will prevail (section 87).

So what options are there for an excluded party under the FLA? In particular, are they able to seek an order for sole use in the FCC or FLCA which overrides the intervention order?

Section 68Q only relates to orders concerning children.

Section 114AB (2) of the FLA states as follows:

(2) Where a person has instituted a proceeding or taken any other action under a prescribed law of a State or Territory in respect of a matter in respect of which the person would, but for this subsection, have been entitled to institute a

proceeding undersection 68B or 114, the person is not entitled to institute a proceeding under section 68B or 114 in respect of that matter, unless:

(a) where the person instituted a proceeding:

(i) the proceeding has lapsed, been discontinued, or been dismissed; or

(ii) the orders (if any) made as a result of the institution of the proceeding have been set aside or are no longer in force; and

(b) where the person took other action--neither that person nor any other person is required, at the time that the person institutes a proceeding under section 68B or 114, to do an act, or to refrain from doing an act.

This section would appear to prohibit a person excluded from the home by an intervention order from seeking a sole use order under section 114 of the FLA until the order has been set aside or is no longer in force.

The only option would appear to be to appeal the interim order. The appeal from the Magistrates' Court is to the County Court and is a hearing denovo. (Section 119). In my experience, the first return of appeals are listed quite promptly, within a week, with a contested date listed within weeks after that. The difficulty is that the Appeal, being denovo, is based on the same legislation and with the same discretion and County Court Judges are both unfamiliar with the legislation and reluctant to overturn decisions made by Magistrates. Nonetheless, it is an opportunity to deal with the matter afresh.

Issues to be aware of when consenting to orders

Respondents may choose to consent to orders, without admissions and without the inclusion of the children, under the belief that this will have little consequence. This can still be problematic.

Firstly in some locations the making of an order, even by consent, triggers the requirement for the respondent to be assessed as to their suitability for counselling. The court still has the discretion as to whether to make an order for counselling but the respondent must go through the assessment process. (Section 129 of the FVPA).

Secondly, and of more concern, is the potential impact on any family law proceedings.

Section 60CC 3(k) of the FLA sets out:

if a family violence order applies, or has applied, to the child or a member of the child's family--any relevant inferences that can be drawn from the order, taking into account the following:

(i) the nature of the order;

(ii) the circumstances in which the order was made;

(iii) any evidence admitted in proceedings for the order;

(iv) any findings made by the court in, or in proceedings for, the order;

(v) any other relevant matter

Unlike the previous 3(k), this section does not make specific reference to whether the order was consented to or not. In the context of the previous legislation, the court in *Safford and Safford [2007]* FMCAfam 878 found that where the intervention order had not been contested they could not find the presumption of equal shared parental responsibility under section 61DA (2) had been rebutted by family violence. However with the amended 3(k) it is clear that the court must consider factors far broader than whether a person consented to an order without admission.

Closing comments

Family violence is a very serious issue and there are clearly many people who genuinely need the protection of intervention orders. Unfortunately for those people, there are many others who take advantage of the intervention order system which allows them to circumvent or sabotage the family law process and those that otherwise use family violence to expedite the process. For example, a party who alleges violence is not required to attend family dispute resolution before filing an application for parenting orders (section 60J of the FLA) and the court is required to take prompt action where a notice of risk is filed including family violence (section 67ZBB of the FLA).

This is all the more disturbing because there is likely to be an increase in family violence allegations as a result of the requirement (introduced in January 2015) for all applicants and respondents seeking parenting orders in the Federal Circuit Court to file a Notice of Risk, whether they allege abuse or not.

Furthermore, with the introduction in 2012 of the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth), the definition of family violence under the FLA has been expanded to include assault, sexual assault, other sexually abusive behaviour, stalking, repeated derogatory taunts, intentionally damaging or destroying property, intentionally causing death or injury to an animal, unreasonably denying the family member the financial autonomy that he or she would otherwise have had, unreasonably withholding financial support needed to meet the reasonable living, preventing the family member from making or keeping connections with his or her family, friends or culture or unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

The upshot of this is that the number of intervention orders is likely to continue to increase in future. As such, family law practitioners would be well placed to

familiarise themselves with the ever expanding family violence legislation and how this impacts on family law in general.

CAROLINE JENKINS

Barrister-at-Law

Foley's List.