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FAMILY LAW BREAKFAST

THE VEXED ISSUE OF THE VEXACIOUS LITIGANT

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Anyone who has practiced in the area of Family Law for any period of time will have come across the vexatious litigant. The litigant may be a person who cannot accept final orders, one who brings numerous and unjustified contravention applications or for whom the court process has otherwise taken over their life. Vexatious litigants come in many forms so what can we do about them?

Whilst the issue of having a person declared vexatious is often raised in passing, more often than not respondents merely seek to have their application dismissed with costs. Given many vexatious litigants are self-represented, are not incurring costs themselves and may not have the capacity to meet a cost order, such an order may be of little deterrence.

Prior to June 2013, the only other option available was to seek an order under section 118 of the *Family Law Act* 1975 ("the Act") or pursuant to 11.04 of the Family Law Rules. However such applications were difficult to establish and rarely used.

However in June 2013 the section 102Q provisions came into force. These provisions provide for a less stringent test and offer the Court a wider range of possible orders for dealing with the vexatious litigant.

THE SITUATION PRIOR TO JUNE 2013

Section 118 formerly read as follows:

(1) The Court may, at any stage of proceedings under this Act, if it is satisfied that the proceedings are frivolous or vexatious –
(a) dismiss the proceedings;
(b) make such orders as to costs as the court considers just;
and
(c) if the court considers appropriate, on the application of a party to the proceedings – order that the person who instituted the proceedings shall not, without leave of a court having jurisdiction under this Act, institute proceedings under this Act or of the kind or kinds specified in that order
and an order made by a court under paragraph (c) has effect notwithstanding any other provision of this Act.
(2) A court may discharge or vary an order made by that court under paragraph (1)(c).

In addition Rule 11.04 of the Family law Rules (as it then was) broadened the courts powers as follows:

(1) If the court is satisfied that an applicant has frequently started a case or appeal that is frivolous, vexatious or an abuse of process, it may:
(a) dismiss the applicant's application; and
(b) order that the applicant may not, without the court's permission, file or continue an application.

(2) The court may make an order under subrule (1):
(a) on its own initiative; or
(b) on the application of:
(i) a party;
(ii) for the Family Court of Australia – a Registry Manager; or

(iii) for the Family Court of a State – the Executive Officer.

(3) the Court must not make an order under subrule (1) unless it has given the applicant a reasonable opportunity to be heard.

This legislation had two main limitations.

The first limitation was the test to be applied. The Full Court in *Marsden & Winch* [2013] FamCAFC 177 at para 81 approved what was known as the Roden Test which was established by Roden J in the case of *Attorney-General v Wentworth* (1988) 14NSWLR481.

Roden J (albeit with respect to different legislation) established the requirement that a vexatious litigant is one who *habitually and persistently and without any reasonable ground institutes vexatious legal proceedings*.

The test therefore had three cumulative elements namely that proceedings had been brought:

- Habitually and persistently; AND
- Without reasonable grounds; AND
- Were vexatious.

Roden J at paragraph 168 of *Attorney-General v Wentworth* went on to define vexatious proceedings as follows:

1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.
2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.
3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.

The second limitation was that it was an all or nothing approach. Effectively the only order that could be made was that a person be prohibited from instituting proceedings or continuing proceedings.

The court was understandably reluctant to make such an order which effectively removed a person's right to access the court.

THE INTRODUCTION OF SECTION 102QB – IN JUNE 2013

In June 2013 section 118 was amended to remove sub-section (c) and rule 11.04 (as it then was) was repealed.

(It should be noted that the court still retains the power under the remainder of section 118 to dismiss proceedings which are frivolous and vexatious).

The New Test

Pursuant to 102QB 1(a) a *vexatious proceedings order* can be made in relation to a person who has frequently instituted or conducted vexatious proceedings.

There are thus two requirements for the test:

1. Frequently instituted proceedings; AND
2. Proceedings are vexatious.

What is meant by 'Frequently' and 'Vexatious Proceedings'?

Section 102Q provides the following definitions:

Proceedings:

> *(a) In relation to a court--has the meaning given by subsection 4(1); and*

(b) In relation to a tribunal-- means a proceeding in the tribunal, whether between parties or not, and includes an incidental proceeding in the course of, or in connection with, a proceeding.

(Section (4)(1)- *"proceedings "* means a proceeding in a court, whether between parties or not, and includes cross-proceedings or an incidental proceeding in the course of or in connection with a proceeding)

Vexatious proceedings include:

(a) proceedings that are an abuse of the process of a court or tribunal; and
(b) proceedings instituted in a court or tribunal to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and
(c) proceedings instituted or pursued in a court or tribunal without reasonable ground; and
(d) proceedings conducted in a court or tribunal in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

It can be seen from this definition that the intention is to capture both proceedings which are instituted to harass or annoy etc. (or instituted without reasonable grounds) and proceedings which are conducted in a way so as to harass or annoy etc. (or pursued without reasonable grounds).

This test is less stringent when compared to the old test as set out in *Marsden & Winch.*

Firstly, it has broadened the definition of vexatious including proceedings which are conducted so as to cause delay or detriment or to achieve another wrongful purpose.

Secondly, it provides an inclusive definition of vexatious which is not limited to the categories listed therein.

Thirdly, it is not cumulative and thus it is no longer necessary, for example, to find the proceedings were instituted to harass and instituted without reasonable grounds.

Frequently

There is no definition of frequently in the Act.

Notably 102QB (1) (a) contains the word frequently rather than the wording in the traditional test being habitually and persistently.

THE CASE LAW

Given the legislation has only been in force for a few years, there have not been a lot of cases dealing with s102Q. There are however a number of cases concerning very similar state legislation (the first of which was enacted in Western Australia in 2002).

One case which has recently dealt with 102Q was *Pedrana & Roberts* (No 2) [2015] FamCA 231 (2 April 2015), a decision of Cronin J.

In *Pedrana & Roberts*, His Honour made reference to some of the cases relating to the state legislation, in paragraphs 60 to 65 of his judgment.

In that case Cronin J helpfully dealt with both the issues of what constitutes 'Frequently' and 'Vexatious proceedings'.

In regard to the definition of 'Frequently' Cronin J said at para 63:

> It is conceivable that a small and limited number of proceedings could fall within the definition of "frequently instituted" if they were an attempt to relitigate or get around an issue that had already been determined (see *Siteberg Pty Ltd v Maples* [2010] NSWSC 1344 and *Brogden v Attorney-General* [2001] NZCA 2008).

In regard to the definition of 'Vexatious Proceedings' Cronin J said at para 61:

> The words "vexatious proceedings" are defined in s 102Q of the Act to include proceedings instituted designed to harass or annoy another person or

pursued in a court without reasonable ground. That is, the proceedings must relate to baseless applications (*Attorney-General for New South Wales v Wilson* [2010] NSWSC 1008) or repeated oral applications with no basis (*Wilson*).

Cronin J went on to clarify the issue of reasonable grounds in paragraph 61:

> The question of whether or not proceedings are without reasonable grounds is one which must be gauged objectively and not from the perspective of the litigant (see *Attorney-General v Altaranesi* [2013] NSWSC 63). The provision is concerned with effect and consequence rather than motive and design (see *Pascoe v Liprini* [2011] NSWSC 1484) but on any view, those proceedings must be more than lacking of success; they must be seriously and unfairly burdensome, prejudicial or damaging or productive of serious and unjustified trouble and harassment (see *Mudie v Gain River Pty Ltd (No 2)* [2002] QCA 546).

Relevant Facts in *Pedrana & Roberts*

- The parties separated in 2011 when the one child of the relationship was 18 months old;
- The father made an application for parenting orders in 2013;
- In April 2013 parenting orders were made for the father to spend supervised time with the child with a supervisor as agreed. (The father's time was supervised due to a serious anger management problem);
- The parties never reached agreement on the supervisor and time did not take place;
- In 2014 the father filed an application seeking to implement the 2013 orders, which was opposed by the mother;
- In February 2015 the father filed an amended application including an interim application for his partner to supervise the time;

- There was no evidence the father had addressed his anger management issues or complied with the recommendations of his forensic psychologist as was anticipated by the 2013 orders.

Findings in *Pedrana & Roberts*:

Frequently

Cronin J found that the limited number of applications in this case could easily fall within the definition of frequent.

It would seem the father made only three applications in this case, one of which was an amended application in the same proceeding.

His Honour held at para 64:

> The first step therefore is to consider whether the father's proceedings have been frequent. In my view, the endeavours since the middle of July 2014 have been an attempt to get the contact with the child going but without addressing any of the issues earlier mentioned. In my view, the limited number of applications albeit they may have been the same application and adjourned, could easily fall within the definition of frequent.

Vexatious

Reasonable grounds?

At para 64 His Honour found:

> Insofar as the application or applications have been pursued without reasonable ground, as observed above, that must be examined objectively. It is much easier to examine that objectively if the father has been warned of the necessity to obtain the evidence to overcome the major problem that is now

> clear, he has not addressed. It would be difficult to accept that the father's application was baseless because it unashamedly seeks contact which the Court found in 2014 should occur because it was in the best interest of the child. However, it is the repetitious nature of the same approach which must be said to have been made without proper basis after being warned of the necessity of getting the proper evidence. What has now occurred however is that the father has filed material indicating that there is a pathway being adopted that might produce an outcome that is good for the child. As I observed earlier, counsel for the Independent Children's Lawyer said that it was too late for that but I disagree. If the child is ever to benefit from a relationship with his father it has to be after all of the issues about which the father was criticised, have been addressed. I am not prepared at this stage to say that his application is baseless.

Cronin J uses the word 'baseless' which is seemingly more relaxed than the previous test which required the proceedings to be 'so obviously untenable or manifestly groundless as to be utterly hopeless'.

Otherwise Vexatious?

Despite finding the application was not 'baseless' Cronin J concluded at para 65:

> Having said that, I take into account that the overriding purpose of the Act is to stop the father bringing actions which are seriously and unfairly burdensome to the mother or which cause her unjustified trouble. On any objective view, that is exactly what has occurred. That would justify a finding that the proceedings have been vexatious within the definition in the Act.

What Orders were made?

Before considering the orders made in *Pedrana & Roberts,* let us turn back to the legislation.

102QB (2) – Sets out the types of orders the court can make having found a party to be vexatious

The court may make any or all of the following orders:

(a) an order staying or dismissing all or part of any proceedings in the court already instituted by the person;
(b) an order prohibiting the person from instituting proceedings, or proceedings of a particular type, under this Act in a court having jurisdiction under this Act;
(c) any other order the court considers appropriate in relation to the person.

Note: Examples of an order under paragraph (c) are an order directing that the person may only file documents by mail, an order to give security for costs and an order for costs.

The court therefore has a wide discretion.

So what did Cronin J do in this case? At para 65 of the judgment he held:

> How the discretion is to be exercised is to be guided by the very protective purpose for which such an order was designed to achieve. Having regard to the fact that I accept that the father may have started something that he should have long ago undertaken and the control can be given over the litigation pathway to the extent that the mother does not have to incur the unjustified trouble and harassment, I would not exercise the discretion against the father at this time. That is not to say that if the continued pathway was, as the Independent Children's Lawyer suspected and as the mother has predicted, another application could not be made. At this stage, <u>the mother has not established to my satisfaction that there is a justification for a complete restraint but there is a justification for not permitting the matter to go further to trial without the father first establishing that he has evidence which justifies a reconsideration of the matter.</u> There will be orders accordingly.

WHAT ORDERS SHOULD BE SOUGHT?

At first instance it may strategically be better to seek orders pursuant to section 102QB (2)(a). ie a finding that the proceedings were vexatious with an order for the proceedings to be stayed (as per *Pedrana & Roberts* until certain action is taken) or that the proceedings be totally dismissed

This finding can then be used to support a later application under 102QB(2)(b).

It may be that you require a number of findings under 102QB (2)(a) before you achieve the ultimate goal and consideration should be given to making such applications with respect to vexatious interim applications and contraventions.

Any decisions made under the previous legislation can also be used to support an application under 102QB(2)(b).

OTHER THINGS TO KNOW

Who can apply?

- The party against whom the person has conducted the proceedings;
- A person who has sufficient interest in the manner (This may enable for example an ICL to make the application where the proceedings are not brought against them or even perhaps an adult child);
- The court on its own initiative. See 102QB (3).

Must the proceedings all be in the one court or tribunal?

The court can have regard to proceedings instituted or attempted to be instituted, or conducted in <u>any</u> court or tribunal – 102QB (6)

Thus, for example, an application could be based on a combination of Family Law and Intervention order proceedings.

Consequences of a Vexatious Proceedings Order

Once you achieve a Vexatious Proceeding Order the subject of the order requires the leave of the court to institute proceedings or proceedings of the particular type included in the order.

Section 102QE – sets out the process including the requirement to file an affidavit.

The affidavit must include details of all previous applications for leave, all proceedings instituted in any tribunal or court, as well as supporting material for the application.

The court can also have regard to any record of evidence given or any affidavit filed in <u>any</u> court or tribunal, in which the applicant was at <u>any time</u>, a party.

It is notable that the application cannot even be served upon the other party without an order of the court under 102QG.

The court must dismiss the application if it's vexatious and may dismiss the application if the affidavit does not substantially comply with 102QE.

Consequences of a Contravention of a Vexatious Proceedings Order

If a person does file an application without leave, then under 102QD the court can of its own volition stay the proceedings and make an order for costs.

Concluding Comments

This little known division is slowly beginning to find favour amongst Family Law practitioners. Whilst achieving a complete restraint on a party instituting proceedings may still be difficult to achieve at first instance, practitioners should be encouraged to have proceedings dismissed under the 102Q provisions, with the view to setting up the foundation for such an application in the future.

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