

A practitioner's guide to 'default' in Family Law

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Overview

- 'Default'?
- Enforcement proceedings
 - Financial / Property orders
- Contravention proceedings
 - Children related orders
 - Financial / Property orders
- Contempt proceedings

“Default”

- Non-compliance with Parenting / Children orders
 - Part VII Div 13A of *Family Law Act 1975*
 - Ch 21 of *Family Law Rules 2004*
 - Part 25B of *Federal Circuit Court Rules 2001*
- Non-compliance with Financial/Property orders
 - s35 *FLA*; Parts XIII, XIII A & XIII B *FLA*
 - Chs 20 & 21 *FLR*
 - Part 25B *FCCR*
- Exceptions do apply
 - s67U *FLA* for breach of a recovery order dealt with under Part XIII A *FLA*

Enforcement proceedings – Financial Overview

- Enforce Property / Financial orders
 - pursuant to Part XIII *FLA* ‘Enforcement of decrees’
 - power of Judges to make Rules of Court relating to enforcement pursuant to ss.109A & 109B *FLA*
 - procedure for enforcement of financial orders/obligations set out in
 - Chs 20 & 21 *FLR*
 - Div 25B *FCCR*

Enforcement proceedings – Financial

Ch 20 *FLR*

Chapter 20 *FLR* sets out various methods of enforcement including:

- a summary procedure for obtaining information for the enforcement of obligations (r 20.10(1), (2))
- third party debt notice (Pt 20.4)
- enforcement warrant (Pt 20.3) (formerly seizure and sale of personal property)
- sequestration (Pt 20.5)
- receivership and management (Pt 20.6)
- an application for an enforcement hearing compelling the respondent to attend court to provide information and produce documents to facilitate the making of enforcement orders (Div 20.2.1)
- order for person to sign documents pursuant to s 106A *FLA*
- warrant for possession of real property (Pt 20.7)
- warrant for delivery (Pt 20.7), and
- warrant for seizure and detention of property Pt (20.7).

Enforcement proceedings – Financial s.106A

- Section 106A *FLA* provides for execution of instruments by order of court where:
 - a person has been directed under the *FLA* to execute a deed or instrument AND
 - has refused or neglected to comply, or court considers it necessary for any other reason
- Court orders, consent or otherwise, relied upon must be able to be enforced for s.106A to have effect

Enforcement proceedings - Financial Procedure

- Application for enforcement orders (and related procedural orders) made by Application in a Case and supporting affidavit
- Prescribed forms exist for enforcement warrant and third party debt notices
- Supporting affidavit must:
 - contain the information set out in r 20.06 *FLR*
 - be sworn no more than two days before it is filed (r 20.06(d) *FLR*)
 - be served by special service (rr 7.06, 7.07, 7.08 *FLR*) unless *ex parte*
- Order may only be enforced against a person if r 20.57 *FLR* relating to service of an order is complied with

Contravention proceedings – Children

Part VII Div 13A

- Part VII Div 13A *FLA* governs enforcement powers affecting children
- s70NAA *FLA* sets out Div 13A progress from lesser to greater seriousness or punitiveness:
 - Subdiv A: Preliminary matters, definitions, standard of proof (refer s70NAF)
 - Subdiv B: Varying parenting orders
 - Subdiv C: Contravention alleged but not established
 - provision for costs orders against applicant
 - Subdiv D: Contravention alleged but ‘reasonable excuse’
 - provision for make up time and costs orders
 - Subdiv E: Contravention (less serious) with no reasonable excuse
 - Provision for post-separation parenting, good behaviour bonds, costs orders
 - Subdiv F: Contravention (more serious) with no reasonable excuse
 - Provision for fines and imprisonment

Contravention proceedings – Children

Part VII Div 13A cont

- ‘Contravene an order’ defined in s70NAC *FLA*
- ‘Reasonable excuse’ defined in s70NAE *FLA*
 - An inclusive definition; may be circumstances outside the section that constitute a reasonable excuse: *Northern Territory v GPAO* (1999) 196 CLR 553 per Gleeson CJ and Gummow J

Contravention proceedings – Children

Part VII Div 13A cont

- Standard of proof pursuant to s70NAF *FLA*:
 - Civil standard (balance of probabilities) in contravention proceedings under Div 13A except where court seeks to make specific orders:
 - Community Service Orders
 - Fines (up to 60 penalty points)
 - Bonds
 - Imprisonment
 - Court prevented from making these specific orders unless criminal standard (beyond reasonable doubt) is met (s.70NAF(3))
 - s.70NAF considered by the Full Court in *Dobbs v Brayson* (2007) FLC 93-346 (Finn, Warnick and Boland JJ)
 - Court's ability to make the orders sought depends on whether the necessary findings can be made to the requisite standard
- Onus is on the Applicant to prove the contravention
- Respondent bears the onus when raising 'reasonable excuse' on the 'balance of probabilities'

Contravention proceedings – Children

Part VII Div 13A cont

- For sentences imposed for more serious contraventions (subdiv F) s70NFB *FLA* applies
 - Considered by Full Court in *McClintock v Levier* [2009] FamCAFC 62:
 - General deterrence not to be considered
 - Suspended sentence to be considered
 - Court must give reasons when imposing imprisonment
 - Court must have regard to matters listed in *FLA*, BUT can also seek guidance from matters considered historically relevant in considering exercise of sentencing discretion
 - Danger exists in dealing with several breaches together in a global approach

Contravention proceedings – Children Procedure

- Procedural requirements for contravention applications set out in:
 - r 21.08 *FLR*
 - r 25B.04 *FCCR*
- Quasi-criminal in nature; strict compliance required;
 - *Sahari & Sahari* (1976) FLC 90-086
 - *Jets & Maker* [2010] FamCAFC 55 at [89] per O’Ryan J
 - *Caballes & Tallant* (2014) FLC 93-596 per Strickland and Ryan JJ

Contravention proceedings – Children

Procedure cont

- Application for contravention of orders made by specific Application and supporting affidavit:
 - Part 21.1 *FLR*
 - Part 25B Div 25B.1 *FCCR*
- Supporting affidavit must:
 - contain the information set out in r 21.02 *FLR* or r 25B.02 *FCCR*
 - be served by special service (rr 7.06, 7.07, 7.08 *FLR*)

Contravention proceedings – Financial Part XIII A

- Part XIII A *FLA* governs sanctions for failing to comply with orders and other obligations that do not affect children
 - s.112AA *FLA* lists by express exception those orders that are not covered by Part XIII A
 - NOTE: s67U *FLA* for breach of a recovery order dealt with under Part XIII A *FLA*

Contravention proceedings – Financial Part XIII A cont

- s112AD *FLA* key operative provision regarding imposition of sanctions
- ‘Contravene an order’ defined in s112AB *FLA*
- ‘Reasonable excuse’ defined in s112AC *FLA*
 - An inclusive definition; may be circumstances outside the section that constitute a reasonable excuse: *Northern Territory v GPAO* (1999) 196 CLR 553 per Gleeson CJ and Gummow J

Contravention proceedings – Financial

Part XIII A cont

- Standard of proof pursuant to s.140 *Evidence Act 1995* (Cth):
 - Civil standard (balance of probabilities) in contravention proceedings under Part XIII A since proceedings under s.112AD are civil proceedings:
 - *In the Marriage of Lindsey* (1995) 19 FamLR 649 per the Full Court
 - Regard to be had to s.140(2) *Evidence Act* in relation to the gravity of the facts to be proved:
 - *Briginshaw v Briginshaw* (1938) 60 CLR 336
 - *In the Marriage of Lindsey* (1995) 19 FamLR 649 per the Full Court
- Onus is on the Applicant to prove the contravention
- Respondent bears the onus when raising ‘reasonable excuse’ on the ‘balance of probabilities’

Contravention proceedings – Financial

Part XIII A cont

- Part XIII A *FLA* applies to contraventions that do not involve a ‘flagrant challenge to the authority of the court’
 - Part XIII B *FLA* re contempt may otherwise be applicable
- Part XIII A does not limit operation of s.105 *FLA* re enforcement of orders (s.112AO)
- Imprisonment is to be a last resort and is limited to 12 months’ duration (s.112AE)
- Sentence under Part XIII A is not a federal sentence within the meaning of the *Crimes Act 1914* (Cth) and sentencing principles do not apply
 - *In the Marriage of Schwartzkopff* (1992) 15 FamLR 545
- Person cannot be punished twice for the same offence where a contravention of orders also constitutes a criminal offence (s.112AM)
 - Contravention proceedings may be adjourned or dismissed pending criminal proceedings

Contravention proceedings – Financial Procedure

- Procedural requirements for contravention applications set out in:
 - r 21.08 *FLR*
 - r 25B.04 *FCCR*
- Quasi-criminal in nature; strict compliance required;
 - *Sahari & Sahari* (1976) FLC 90-086
 - *Jets & Maker* [2010] FamCAFC 55 at [89] per O’Ryan J
 - *Caballes & Tallant* (2014) FLC 93-596 per Strickland and Ryan JJ

Contravention proceedings – Financial Procedure cont

- Application for contravention of orders made by specific Application and supporting affidavit:
 - Part 21.1 *FLR*
 - Part 25B Div 25B.1 *FCCR*
- Supporting affidavit must:
 - contain the information set out in r 21.02 *FLR* or r 25B.02 *FCCR*
 - be served by special service (rr 7.06, 7.07, 7.08 *FLR*)

Contempt proceedings

Overview

- Family Court / Federal Circuit Court do not have inherent power to punish for contempt
 - Dependent on statute that created them:
 - *In the Marriage of Vergis* (1977) FLC 90-275 per Emery J
- Two types of contempt:
 - Civil:
 - Contravention of a court order
 - Criminal:
 - A flagrant challenge to the authority of the court / interference with administration of justice
 - Contravention of a court order AND a flagrant challenge to the authority of the court

Contempt proceedings

Overview cont

- Contempt power under Family Law legislation:
 - s.35 *FLA* (& s.17 *FCCA*):
 - provides the Family Court (& Federal Circuit Court) with the same general contempt powers as the High Court
 - s.112AP *FLA*:
 - Within Part XIII B *FLA*, provides that every court exercising jurisdiction under the *FLA* has power to punish for criminal contempt
- ‘Quasi-contempt’ power:
 - Part XIII A *FLA*:
 - Provides that every court exercising jurisdiction under the *FLA* has power to punish for breach of an order not relating to children
 - Quasi-contempt provision for civil contempt, but term ‘contempt’ not used
 - Part VII Div 13A *FLA*:
 - Provides for sanctions for breaches of orders relating to children; term ‘contempt’ not used

Contempt proceedings

Part XIII B

- Provides a code for dealing with contempt under the *FLA*
- Contempt power is discretionary and procedure is summary, conducted in accordance with *FLR / FCCR*
- s.112AP applies to contempt of court that:
 - does not constitute a contravention of court orders under the *FLA*; or
 - constitutes a contravention of court orders under the *FLA* and involves a flagrant challenge to the authority of the court
- s.112AP(9) defines ‘orders under the *FLA*’ to include orders affecting children and orders made under Part XIII A

Contempt proceedings

Part XIIIB cont

- Standard of proof for all proceedings for contempt is ‘beyond reasonable doubt’:
 - *Witham v Holloway* (1995) 183 CLR 525
 - *Tate & Tate* (2002) FLC 93-107
- Contempt under s.112AP has the following elements to be proved beyond reasonable doubt:
 - The Respondent knew the terms of the orders:
 - *Mead & Mead* (2006) FLC 93-267
 - The contempt must be wilful (as distinct from incidental), but not necessarily contumacious:
 - *In the Marriage of English* (1986) FLC 91-729
 - *Bande & Cade* [2011] FamCAFC 93
 - The contempt must involve a flagrant challenge to the authority of the court:
 - *Bande & Cade* [2011] FamCAFC 93
 - *Ibbotson & Wincen* (1994) 18 FamLR 164

Contempt proceedings

Procedure cont

- Contempt power should only be used sparingly and in the most extreme cases:
 - *Lewis v Judge Ogden* (1984) 153 CLR 682
- Bryant CJ in *A Bank & Coleiro* [2011] FamCAFC 157 sets out summary of matters to be addressed in contempt applications

Contempt proceedings

Procedure cont

- Procedural requirements for contempt applications set out in:
 - r 21.08 *FLR*
 - Part 19 *FCCR*
- Application for contempt of court made by specific Application and supporting affidavit:
 - Part 21.1 *FLR*
 - Part 19 *FCCR*
- Supporting affidavit must:
 - contain the information set out in r 21.02 *FLR* or Part 19 *FCCR*
 - be served by special service (rr 7.06, 7.07, 7.08 *FLR*)

Contempt proceedings

Sentencing

- Discretion in relation to penalty for conviction for contempt must be exercised with great care:
 - *LGM v CAM (Contempt)* (2008) FLC 93-355
- Purpose is twofold:
 - deter contempt in the interest of the public and administration of justice
 - punish non-complying parties
 - *Kendling and Anor & Kendling (Contempt)* (2008) FLC 93-384
- Each case turns on its own facts; no sentencing guidelines have been developed:
 - *LGM v CAM (Contempt)* (2008) FLC 93-355

QUESTIONS

