GETTING BACK IN THE GAME -

Can you discontinue a discontinuance in Family Law Proceedings?

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Introduction

1. A person files an Application in the Federal Circuit Court, whether in the Court's family law jurisdiction or the Court's general federal jurisdiction, then decides to discontinue the Application by way of filing a Notice of Discontinuance. The Respondent files a Response. Then, the Applicant has a change of heart and seeks to set aside the Notice of Discontinuance by way of an Application in a Case.

2. The Respondent, however, opposes the Application to set aside the Notice of Discontinuance and seeks orders by way of an undefended hearing.

3. What should you do, as a practitioner, if you are acting for the Applicant? What should you do if you are acting for the Respondent? What do you think the Court will do?

4. Do different considerations apply if the subject matter of the discontinued application is under the *Family Law Act 1975* rather than in the general federal law jurisdiction? If the matter is a family law matter, do different considerations apply if the discontinued application is for parenting orders rather than property or other financial orders?

5. These were the questions that were asked of me by a young solicitor late in 2019, who was due to argue the case for the Respondent before his Honour Judge Altobelli in October last year.

6. My immediate answer was "That's a very interesting question", which to the uninitiated is barristers' code for "I haven't the faintest idea".

The factual situation

7. The Applicant mother filed an Application-Contravention in the Federal Circuit Court on 7 May 2018 and an Initiating Application for parenting orders on 6 February 2019. Obviously, there had been previous family law parenting orders.

8. The Respondent father filed a Response on 20 March 2019.

9. On 21 May the Applicant filed a Notice of Discontinuance in respect of both Applications.

10. The Respondent then filed an Amended Response on 19 August, seeking to proceed to an undefended hearing for parenting orders.

11. However, three days later, on 22 August 2019, the Applicant filed an Application in a Case, asking the Court to set aside her Notice of Discontinuance. In her affidavit in support, the Applicant deposed that she had filed the Notice of Discontinuance in circumstances where she had lost her job and owed her solicitor a lot of money, saying:

    "I felt it was too much financially and emotionally for me to continue with the matter at the time".

12. However, she went on to depose that, since then, she had found stable employment and had paid her outstanding solicitors' costs.

13. In listing the application in a case for hearing, his Honour Judge Altobelli told the parties' solicitors that he was aware of the decisions of the Federal Circuit Court in *Laramie & Caul* [2018] FCCA 1371 and *SZFOZ v Minister for Immigration & Citizenship* [2007] FCA 1137, but he was seeking specific family law precedent.

14. His Honour heard submissions from my instructor, the Applicant's solicitor and the Independent Children's Lawyer on 4 October 2019 and delivered his decision on 20 December 2019.

Spoiler Alert

15. For those of you who want to know what the answer is without going to the end of the paper, Judge Altobelli followed the decision in *Laramie & Caul* and dismissed the Application to set aside the Notice of Discontinuance (*Olofsson & Olofsson* [2019] FCCA 3467).

16. Interestingly enough, a similar application had been heard by her Honour Judge Harland in Melbourne on 8 November 2019. In her decision handed down on 20 November, her Honour also followed *Laramie & Caul* and dismissed the application to set aside the notice of discontinuance. The citation for her Honour's decision is *Dalal & Dalal (No. 2)* [2019] FCCA 3332.

What do we learn from these decisions?

17. First, you are much better off acting for the Respondent rather than the Applicant in a case like this.

18. Second, *Laramie & Caul* is the bomb. It is the decision to follow, because it reviews the authorities and sets out the principles to be followed.

19. Third, the circumstances in which the Federal Circuit Court will set aside a Notice of Discontinuance are very limited indeed, and the Court's discretion to do so is not a discretion at large.

What are the principles?

20. The principles to be followed are clearly set out in *Laramie & Caul,* where Judge Jarrett reviewed relevant earlier decisions on the subject.

21. Whilst most of the decisions considered by his Honour in *Laramie & Caul* are ones where the substantive applications were in the Court's general federal jurisdiction, the subject matter of the substantive application is irrelevant. Whilst *Laramie & Caul* related to an application to set aside a notice of discontinuance of two applications under the *Family Law Act,* the decision is not a decision under that Act but a procedural decision under the *Federal Circuit Court Rules 2000.*

22. His Honour considered and approved the decision of Wilson FM in *Maddison v Qualtime Association Inc* [2010] FMCA 25, where it was held that, in determining whether or not to set aside a notice of discontinuance, the Court has power to do so in the following limited circumstances:

    a) The notice was procured by fraud or as an abuse of process;

    b) It is necessary to avoid an injustice; or

    c) The notice was filed arising from an agreement that is void or voidable.[1]

23. Judge Jarrett also considered and followed the decision of her Honour Judge Whelan[2] in *MZZIO v Minister for Immigration and Anor* [2014 FCCA 618, where her Honour identified the following questions to assist in determining an application to set aside a notice of discontinuance:

    a) Did the applicant knowingly and voluntarily file a notice of discontinuance?

[1] Cited by Judge Harland in *Dalal & Dalal (No 2)* at [9]

[2] Now sadly deceased

b) Was the notice of discontinuance procured by fraud or duress?

c) Was it filed under a void or voidable agreement?

d) Did the filing of the notice otherwise involve an abuse of process?

e) Is it necessary to set aside the notice of discontinuance in order to ensure the Court's processes do not cause an injustice?

f) If the notice is set aside, does the substantive application have a reasonable prospect of success?[3]

Is a Discontinuance the same as a dismissal?

24. No. Discontinuance is an action by a party and does not involve an order of the Court. Thus, it is always open to an Applicant in those circumstances to file a fresh Application. Ideally, this should be done as soon as possible and before a decision is made by the Court after an undefended hearing. Otherwise, the Court would be considering whether there is a sufficient change of circumstances, in accordance with the principles enunciated in *Rice v Asplund* (1979) FLC 90-725.

25. The distinction between a dismissal of an application by means of a withdrawal and a discontinuance was set out by Wilson FM in *Maddison v Qualtime* at [35]:

"The mere filing of a Notice of Discontinuance does not, of itself, preclude a party from bringing fresh proceedings to enforce the same cause of action (subject, of course, to matters such as statutes of limitation…"

26. This proposition is given force by subrule 13.02(3) of the *Federal Circuit Court Rules*

[3] Cited in *Dalal* at [11]

"If an order for costs is made against a party and the party brings against the party to whom the costs are payable a further proceeding on the same or substantially the same matter, the Court may stay the further proceedings until the costs are paid.

Are the principles the same in the Family Court?

27. They are similar, but not identical. A useful guide can be found in the decision of Wilson J[4] in *Cao & Trong* [2019] FamCA 336 at [55]:

    a) *Whether a valid explanation has been given as to why the notice of discontinuance was filed;*

    b) *Whether there is any prejudice to either party if the order is made setting aside the notice of discontinuance or if the granting of such an order is refused;*

    c) *Whether in all the circumstances it is just to set aside the notice;*

    d) *Whether there are discretionary grounds for setting aside the notice.*

28. In my respectful submission, these principles are a little bit wider than the very limited circumstances that apply in the Federal Circuit Court.

In conclusion

29. You cannot go too far wrong by reading the decision in *Laramie & Caul* very thoroughly. Judge Jarrett followed not only decisions at first instance but also the decisions of *SZFOZ v Minister for Immigration and Citizenship* [2007] FCA 1137 and *BZAGD v Minister for Immigration and Border Protection* [2016] FCA 670, both of which were decisions on appeal from the Federal Magistrates Court (as it

[4] No relation to the former Wilson FM

then was) and the Federal Circuit Court. These decisions are binding on the Federal Circuit Court.

BIOGRAPHICAL NOTE

Stephen Scarlett was a Judge of the Federal Circuit Court until he retired on 28 July 2016. He is now practising as a barrister in Sydney. He is also a mediator and an arbitrator.