



FAMILY COURT (ORDERS OF REGISTRARS) BILL 1997

A BILL FOR

AN ACT relating to certain ineffective orders of Registrars under the Family Court Act 1975.

PROPOSED LEGISLATION	COMMENTS
<p>Short title</p> <p>1. This Act may be cited as <i>the Family Court (Orders of Registrars) Act 1997</i>.</p>	<p>Short title of Act.</p>
<p>Commencement</p> <p>2. This Act comes into operation on the day on which it receives the Royal Assent.</p>	

Interpretation

3. (1) In this Act —

“**corresponding law**” means a law in force in the Commonwealth that is declared by order of the Attorney General to be a corresponding law for the purposes of this Act;

“**court**” means a court having jurisdiction under the *Family Court Act 1975*;

“**liability**” includes a duty or obligation;

“**proceedings**” has the meaning it had in the *Family Court Act 1975* as in force immediately before the commencement of this Act and includes an initiating application;

Most people affected by the ineffective orders of Registrars are, or were, married to each other. A smaller number of affected people are those who appeared before Registrars where ex-nuptial children were involved.

The solution requires a combined approach by the Commonwealth and the State to address the problem of ineffective orders in both cases. The Commonwealth Attorney General has agreed to the need for a joint approach and has approved the drafting of Commonwealth legislation along these lines. In short, the aim is for the Commonwealth and State legislation to complement each other.

The corresponding law means the corresponding Commonwealth legislation which the Western Australian Attorney General would declare after its passage through the Commonwealth Parliament.

This would include the Family Court of Western Australia, registrars who are also Stipendiary Magistrates and country Magistrates.

“Registrar” has the meaning it had in *the Family Court Act 1975* as in force immediately before the commencement of this Act;

“right” includes an interest or status.

(2) A reference in this Act to an “**ineffective order**” is a reference to an order that a Registrar has purported to make, before the commencement of this Act —

- (a) in the exercise or purported exercise of a delegated judicial power; and
- (b) by way of a non-reviewable judicial determination,

and, where there has been a purported variation, revocation, revival or suspension of such an order, includes a reference to the order in the form in which, and to the extent to which, it purports or purported to have effect from time to time.

"Registrar" includes Deputy Registrars

In February 1997 the Full Court of the Family Court of Australia in the matter of *Horne V Horne* - 13 February 1997, No. PT 3069 of 1995 - held that a consent order of a Registrar of the Family Court of Western Australia was invalid.

For some years Registrars of the Family Court of Western Australia have purported to make such orders in such matters as maintenance payments, property rights and access to children. This arose out of amendments to the Federal Family Law Rules which purported to apply to Registrars of the Family Court of Western Australia.

Under the Federal Family Law Rules a Registrar of a Family Court was empowered to make consent orders.

However the Part of the Family Law Act which provided for judicial review of registrars decisions defined "court" to be the Family Court of Australia. By contrast the Rules defined the "Family Court" to include a State (Western Australian) Family Court. As this was beyond power, there was no basis under the Family Law Act and Rules for judicial review of decisions of registrars of the Family Court of Western Australia. No provision had been made in the rules under the Family Court Act for such reviews.

This absence of judicial review was the basis of the invalidity of Western Australian Registrars' decisions.

Rights and liabilities declared in certain cases

4. If an ineffective order purports or purported to have effect in or in relation to any proceedings, the rights and liabilities of all persons are, by force of this Act, declared to be, and always to have been, the same as if the ineffective order had been made by a court.

The Bill has been drafted to address the invalid consent orders made by Registrars, or Deputy Registrars, of the Family Court of Western Australia.

In short, this clause declares rights and liabilities.

The approach in the Bill has not been to validate the past procedures, but rather to give substantive rights and liabilities to the extent of the purported orders.

The Bill declares that affected persons have substantive rights and liabilities in accordance with the tenor of the purported consent orders dealing with property, access and custody amongst other matters, made by Registrars of the Family Court of Western Australia.

That is, in the case of an order that a Registrar has purported to make, the rights, liabilities, obligations and status of all persons will, by force of the Bill, once enacted, be the same as if the purported order had been made by a court having jurisdiction to do so.

This approach, which was previously approved by the High Court in the case of *R v Humby ex parte Rooney* (1973) 129 CLR 231, is based upon a recognition of the respective roles of the courts and the legislature. The principle expounded in Humby's case has been approved by the High Court in subsequent decisions. For example, *Polyukhovic v the Commonwealth* (1991) 172 CLR 500 - see Mason C J at page 533.

Importantly, the Bill provides that the substantive rights and liabilities have effect both for past and future purposes.

Effect of declared rights and liabilities

5. A right or liability conferred, imposed or affected by section 4 —

- (a) is exercisable or enforceable; and
- (b) is to be regarded as always having been exercisable or enforceable,

as if it were a right or liability conferred, imposed or affected by an order made by a court in or in relation to the proceedings referred to in section 4.

Having declared rights and liabilities in clause 4, clause 5 provides for their past and future effect. The rights and liabilities would be both exercisable and enforceable in the same way as if an order had been made in those terms.

Effect of things done under rights and liabilities declared under this Act or under a corresponding law

6. Any act or thing done or omitted to be done before or after the commencement of this Act under or in relation to a right or liability conferred, imposed or affected by section 4 or a corresponding law —

- (a) has the same effect and gives rise to the same consequences for the purposes of any written or other law; and
- (b) is to be regarded as always having had the same effect and given rise to the same consequences for the purposes of any written or other law,

as if it were done or omitted to be done to give effect to, or under the authority of, or in reliance on —

- (c) an order made by a court in or in relation to the proceedings referred to in section 4; or
- (d) an order made by a court exercising the federal jurisdiction with which it is invested by or under the *Family Law Act 1975* of the Commonwealth in or in relation to the relevant proceedings under that Act,

as is applicable to the case.

Note: See for example Part IVD of the *Stamp Act 1921*.

Clause 6 is concerned with the effects of the declared rights and liabilities in relation to other laws of the State. The corresponding Commonwealth legislation will contain a similar provision in relation to Commonwealth laws.

The clause is concerned with the effects (both in the past and in the future) on rights and liabilities declared under this Bill or the corresponding Commonwealth legislation in relation to other laws of the State.

For example, a person may have a right, declared under the corresponding Commonwealth legislation, for real property to be transferred to that person. The provision of the *Stamp Act* by which the ad valorem duty need not be paid on the transfer of the property under the *Family Law Act* or *Family Court Act* would apply to that person because of this clause.

For purposes of clause 6 (a) and (b), "written law" is defined in the *Interpretation Act*.

<p>See proposed Committee stage amendment:</p> <p>Clause 6</p> <p>Page 4, line 15 - To insert after "1975" -</p> <p>" , <i>the Child Support (Assessment) Act 1989 and the Child Support (Registration and Collection) Act 1988</i></p>	<p>The Federal jurisdiction is not limited to the <i>Family Law Act</i>, but is also invested by the provisions of these two other Commonwealth Acts.</p>
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<p>Proceedings as for contempt</p> <p>7. If, before or after the commencement of this Act, a person has —</p> <ul style="list-style-type: none"> (a) interfered with a right conferred or affected by section 4; or (b) failed to satisfy or comply with a liability imposed or affected by section 4, <p>the interference or failure is, and is to be regarded as always having been, a matter that can be dealt with in the same manner as if the matter were the subject of proceedings in relation to a contempt of court.</p>	<p>The purpose of this clause is to give a court the power, both for past and future purposes, to enforce rights and liabilities in a way that is analogous to the Court's power to deal with wilful disobedience to court orders.</p>
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Section 4 regarded as having ceased to have effect in certain cases

8. If, before the commencement of this Act, a court made an order (the “**subsequent order**”) having effect in relation to proceedings referred to in section 4 and —

- (a) conferring or imposing rights or liabilities similar to or different from those purportedly conferred or imposed by the ineffective order referred to in section 4; or
- (b) affecting rights or liabilities in the same way as they were purportedly affected by the ineffective order referred to in section 4 or in a different way,

section 4 is to be regarded as having ceased to have effect in respect of the ineffective order when the subsequent order took effect.

Where a subsequent order of a court (ie not an ineffective order but a proper order) has taken effect that order, not a right or liability under clause 4, will determine the status of the parties from the time of the order. The Bill does not affect orders properly made.

Powers of courts in relation to declared rights and liabilities

9. (1) A court may vary, revoke, revive or suspend a right or liability conferred, imposed or affected by section 4 as if it were a right or liability conferred, imposed or affected by an order made by a court.

(2) In this section —

“**court**” includes a court having jurisdiction under an Act that repeals the *Family Court Act 1975*.

The Bill, having given substantive rights and liabilities to persons, under clause 4, also, by this clause, gives courts power to deal with those rights and liabilities by way of varying, revoking etc those rights or liabilities.

See proposed Committee stage amendment:

Page 5 after line 20 - to insert the following subclause -

" (2) If, immediately before the commencement of this Act, a court had power under section 28(3)(c), 31(1) or 69 ("**the relevant provision**") of the *Family Court Act 1975* to set aside, vary, discharge, revive or suspend an order or part of an order then a court may, in accordance with the relevant provision, set aside, vary, discharge, revive or suspend a right or liability that -

(a) is in respect of a matter to which the relevant provision applies; and

(b) is conferred, imposed or affected by section 4.

RENUMBERING OF SUBSEQUENT CLAUSES WILL BE REQUIRED - A CLERICAL AMENDMENT - NOT TO BE FORMALLY MOVED.

Family Court Act 1975 section 28(3) provides in part as follows:

(3) Subject to this Act, in exercising its non-federal jurisdictions **with respect to a child** the Court may -

(a).....

(b).....

(c) discharge or vary an order or suspend any part of an order and may revive the operation of any part of an order so suspended.

emphasis added

Family Court Act 1975 section 31(1) provides in part as follows:

31. (1) Where, on application by a person affected by **an order made by the Court under section 30**, the Court is satisfied that there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence, or any other circumstance, the Court may, in its discretion, set aside the order and, if it thinks fit, but subject to section 30 (2) and (3), make another order under section 30 in substitution for the order so set aside.

emphasis

added - clause 30 relates to the alteration of property interests

The matter relates to comment provided by an eminent family lawyer after the introduction of the Bill, prompting further research which indicated that the concern identified may also be relevant to sections 28 (3)(c) and 69.

	<p><i>Family Court Act 1975</i> section 69 provides in part as follows:</p> <p>69. (1) Where there is in force an order under Division 4 with respect to the maintenance of a child or under Division 5 with respect to preliminary expenses or other expenses (whether made before or after the commencement of this subsection) the Court may-</p> <p>(a) discharge the order if there is any cause for so doing; (b)..... (c) etc</p> <p style="text-align: right;">emphasis added</p> <p>Clause 9(2) would give the courts powers that are analogous to the courts' powers to deal with certain orders. A court could set aside etc a right or liability in the circumstances specified in the relevant provision.</p>
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<p>Evidentiary</p> <p>10. The court record, or a copy of the court record, of an extracted ineffective order may be adduced in evidence to show the existence, nature and extent of each right and liability conferred, imposed or affected by section 4</p>	
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<p>Act does not apply to certain orders</p> <p>11. Nothing in this Act applies to an order declared to be invalid by the Full Court of the Family Court of Australia before the commencement of this Act.</p>	<p>This Bill does not in any way affect any order declared to be invalid by the Full Court prior to the commencement of this Act. eg in the case of <i>Horne v Horne</i>.</p>
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