0.1. Having Fun with Division 12A [Sealey & Archer]

0.1.1. It is now January 2008 and early days since the removal of the Dark Shadow of Howard over family law jurisprudence. But it may be late in the day for Ruddock's cash for comment [CFC] "mens groups" as the new AG decides if the taxpayer might continue to fund what is essentially a propaganda mouthpiece for a loose conglomerate of FLIndustry and "Government interests", all via glove puppets of the various mens group self appointed "peak bodies", albeit that the instigator of the plan is now out of power [but the FLIndustry are gung ho to keep it going].

0.1.2. An interesting conspiracy theory might be expounded as to whether the plan actually **did** work for Howard in light of the fact that by losing his own seat he retired on $230,000 per annum **more** superannuation than had he won his seat and retired as an Opposition backbencher. Of course other parts of his suicide package in I.R. law are to be "rolled back", so any family law roll back is an unknown unknown at present.

0.1.3. Whatever the answer might be to Howard's own position and my prior prediction we would see him back as a family lawyer, COAT or SSAT, the situation Kevin '07 has been left with is a goldmine for lawyers and a disaster for blokes, both in family law and child support. As I write this, jobs are being advertised around Australia at $140,000 pa for SSATs, while FMS judgments are flooding out to prove the SSAT always "gets it wrong", albeit that is the fault of the "reform" and not of the Office itself. After all, how can it be possible to "review the merits" of the facts in a Part 6A hearing when Part 6A itself has **no rules of evidence**.

0.1.4. And so we come to just one of these "reforms for lawyers", being the Division 12A of Part VII. The cash for comment boys are pushing this hard [still seemingly under Ruddock

instructions] at their web sites, but as they don't understand what it is, they simply refer blokes to a Practice Direction of Bryant CJ, which I refer to below.

0.1.5. But in an amusing twist they point blokes [for other reasons] straight to a recent example of Judge & Co making hay while the sun shines by **not** using Div 12A, and I will return to the case of Sealey & Archer [2007] FamCA 432 (15 May 2007). But first we need to check the history of Div 12A, per:

> *Division 12A*
> *Div. 12A of Part VII ..... ad. No. 37, 1991*
> *rep. No. 167, 1995*
> *ad. No. 46, 2006*

0.1.6. So we see the Ruddock ad. [ad. = added] in 2006 but we see that "it" has been and gone before. We all know that the FLRules created a Form 12A in 1991 following the lathering of the FCA by the High Court in Harris & Caladine, but I was not aware that the FLAct was amended [or why it would need to be]. However it was ad. in 1991 after Harris & Caladine, and maybe Keating agreed with me as he axed [rep. = repealed] it in 1995.

0.1.7. Now apart from a whole new can of worms via AIAct s 8 regarding such repeals [which I won't explore here, but you may], we know that Harris & Caladine and the Form 12A had nothing to do with Part VII, so why was it put in Part VII? Perhaps it may explain why it was taken **out** by Keating, but why then put it back there, rather than in a more global Part, dealing with all Parts of the FLAct.

0.1.8. For example, s 85 Transactions to Defeat Claims in Part VIII was seen as being capable of doing "more things" than just in property cases, so it became s 106B, up in Part XIII where its powers increased to "In proceedings under this **Act**". Surely Div

12A's home should be at "Part XI—Procedure and evidence" as say s 98B, or s 99 has been vacated since 1987 and is looking very lonely.

0.1.9. But, even if in the wrong Part, we do get the reference to the Harris & Caladine Registrar in Chambers in s 67ZO [see below], so in essence this is a new look Div 12A that goes way beyond setting the order [no pun intended] for consent orders, but allowing a wholesale departure from adversarial to inquisitorial process but, as seen in Sealey, only if it will **not upset the cashflow** of the FLIndustry.

0.1.10. So there are some huge imponderables for those that might be entrusted by Kevin '07 to "un-reform" the CSAAct and FLAct back to sensibility and justice. But here is the new Div 12A, per:

Division 12A—Principles for conducting child-related proceedings
Subdivision A—Proceedings to which this Division applies

69ZM Proceedings to which this Division applies

*(1) This Division applies to proceedings that are **wholly** under this Part.*
*(2) This Division also applies to proceedings that are **partly** under this Part:*
(a) to the extent that they are proceedings under this Part; and
*(b) if the parties to the proceedings **consent**—to the extent that they are **not** proceedings under this Part.*
*(3) This Division also applies to any other proceedings between the parties that involve the court exercising jurisdiction under this **Act** and that arise from the breakdown of the parties' marital relationship, if the parties to the proceedings **consent**.*

(4) Proceedings to which this Division applies are child-related proceedings.
(5) Consent given for the purposes of paragraph (2)(b) or subsection (3) must be:
(a) free from coercion; and
(b) given in the form prescribed by the applicable Rules of Court.
(6) A party to proceedings may, with the leave of the court, revoke a consent given for the purposes of paragraph (2)(b) or subsection (3).

0.1.11. So if you are following that, a separated couple with no issues [kids] can still use Div 12A in a property hearing [like Harris & Caladine] to get a hearing of the inquisitorial type, just like Princess Di [for her "death" hearing, not her divorce], but it will be termed a "child-related proceeding". Go figure that one!

Subdivision B—Principles for conducting child-related proceedings

69ZN Principles for conducting child-related proceedings

Application of the principles
(1) The court must give effect to the principles in this section:
(a) in performing duties and exercising powers (whether under this Division or otherwise) in relation to child-related proceedings; and
(b) in making other decisions about the conduct of child-related proceedings.
Failure to do so does not invalidate the proceedings or any order made in them.
(2) Regard is to be had to the principles in interpreting this Division.

Principle 1

*(3) The first principle is that the court is to consider the needs of the child concerned and the **impact** that the conduct of the proceedings may have on the child in determining the conduct of the proceedings.*

Principle 2
*(4) The second principle is that the court is to **actively direct, control and manage the conduct** of the proceedings.*

Principle 3
(5) The third principle is that the proceedings are to be conducted in a way that will safeguard:

(a) the child concerned against family violence, child abuse and child neglect; and

(b) the parties to the proceedings against family violence.

Principle 4
(6) The fourth principle is that the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties.

Principle 5
*(7) The fifth principle is that the proceedings are to be conducted without undue delay and with as little formality, and **legal technicality and form**, as possible.*

69ZO This Division also applies to proceedings in Chambers

*A judge, Judicial Registrar, Registrar, Federal Magistrate or magistrate, who is hearing child-related proceedings **in Chambers**, has all of the duties and powers that a court has under this Division.*

Note: An order made in Chambers has the same effect as an order made in open court.

69ZP Powers under this Division may be exercised on court's own initiative

*The court **may** exercise a power under this Division:*
*(a) **on the court's own initiative**; or*
(b) at the request of one or more of the parties to the proceedings.

0.1.12. Then our own Di, the CJ, makes some practice directions [PD] that, on the surface, appear to add little to the legislation itself [because what "other matters" would one expect except s79 and s79A?]. But remember this PD was made under the influence of the Howard Dark Cloud, whereby Bryant was promoted [North by North-West] from CFM to CJ on the understanding that she would not reverse the PD of Nicholson CJ to **not** hear any child support cases in the FCA.

0.1.13. Now it would be easy to argue via s 100 of the CSAAct that Div 12A should apply to a child support departure under Div 4 of Part 7 of the CSAAct, but now with Bryant CJ herself supporting the remaining child support expert, Kay J. Would that not present a most interesting situation where, with the Howard Dark Shadow removed, those forced into silence might once again stand up for justice in child support, and Kay J's Humpty Dumpty [from McGuiness & Cowie, but now further shattered by the SSAT involvement] might be restored to "wellness".

0.1.14. So with all that in mind it is heartening to see the words "for the time being" in this PD. Could it be that that was Bryant CJ's "little clue" that she would play the Howard game as long as he was the boss, but if he wasn't, then "things might change" back to justice. So here is the PD:

1 Application of Practice Direction

*This Practice Direction **applies** to cases involving child-related proceedings to which **Division 12A** of Part VII of the Family Law Act 1975 ('the Act') applies.*

The following cases involve 'child-related proceedings' for the purposes of Division 12A of the Act and this Practice Direction:

- *Proceedings under Part VII of the Act (for example, **children's cases**) commenced by an application filed from 1 July 2006*

- *Any **other** proceedings under the Act (for example, property settlement cases) commenced by an application filed from 1 July 2006 if the parties to the proceedings consent*

- *Any proceedings under the Act commenced by an application filed **before** 1 July 2006 if the parties to the proceedings **consent** and the court gives leave.*

*In so far as Division 12A applies to any **other** proceedings under the Act, **for the time being** it is intended that this Practice Direction will only apply to proceedings under **s 79 or s 79A** of the Act.*

2 Introduction

*2.1 Division 12A applies to cases after completion of the Resolution (Pre-trial) Phase of the Court's case management system. Most cases are resolved during this phase. Agreed or mediated solutions are considered to be the most desirable outcome in most cases. Division 12A is **not intended to be a substitute for agreed or mediated solutions**. It is therefore only when that process has been unsuccessful or is inappropriate that cases will be **listed before a judge** for trial.*

*2.2 It is an essential feature of Division 12A that the **Judge is in charge of the case** and will play the leading role in relation to the conduct of the trial, including deciding the issues to be determined, the **evidence that is called**, the way the evidence is received and the manner in which the **trial is conducted**.*

0.1.15. But hey, I was offering you some "fun fun fun" and all we have so far is more and more dreary "reform legislation". Besides, those cash for comment guys get to have lots of fun, for example this one:

The new Formula and Formula Fun

Grant Reithmuller [sic], Federal Magistrate, looks at Stage 3 of the planned amendments arising from the Child Support Legislation Amendment (Reform of the Child Support Scheme — New Formula and Other Measures) Act 2006 expected to commence on 1 July 2008

0.1.16. Now Ruddock did not give a cods about any separation of powers under the Constitution. He was so impressed with the performance of Mr Riethmuller in Perryman and his COAT Empire that [as seen in Child Support Chapter] he made him a FM, hoping he might be able to use his magic to make a similar Empire in the FMS. Well, as seen, that went pear shaped and Howard stepped in to get **rid** of the courts in child support.

0.1.17. So Mr Riethmuller was left twiddling his thumbs doing boat people cases, so Ruddock decided to "loan" him to the cash for comment freaks to cement the task given to silly old Bazza that also went pear shaped in front of the Senate Committee, as seen. Essentially that ongoing job was to try to explain to blokes why

they would need to wait three years for their new formula, given that Divorce Doctor had done the job in one week at csacalc.com.

0.1.18. As we see the cash for comment site could not even spell his name correctly [or perhaps that was part of their s 121 paranoia of "that is not his real name"]. Anyway I will continue the fun, fun, fun with Div 12A and the Sealey case.

0.1.19. The first warning bells are that the link to the case at the FCA site no longer works, that being because the judgment is **not there** [but seems that it **was** there in the past]. Instead, Ruddock had given them a pdf version to distribute, but with the copy facility **removed**. But they were not able to get AustLii to drop it so I simply downloaded their version.

0.1.20. Now Sealey is a judgment by the new charismatic judge Toulouse-Lautrec [not his real name of course] who was being floated by Ruddock to the CFC boys for them to push as a fine upholder of justice. But hey, what is really being floated here, **in their Self Represented Litigants** part of the forum, is the message that only if bloke goes The Full Monty [using **lawyers** and **forgetting** Div 12A and SRL] will they too get their dream of "joint parenting responsibility" [which of course they already had before the "reform", as you can read in the Child Matters chapter].

0.1.21. So I talk a lot in this book to Barbara Cartland affidavits, but this was **Barbara on Steroids**, both parents having spent huge sums, as detailed by Toulouse-Lautrec J, per:

> *The affidavit material was voluminous. The mother's principal affidavit is 60 pages with 304 paragraphs. There is a volume of exhibits to the affidavit. That volume is about 35mm thick. Her update affidavit is 10 pages with 46 pages of annexure. The father's affidavit is 57 pages long with 124 paragraphs. There are 155 pages of annexures to that affidavit. His update*

*affidavit is 13 pages with about 40 to 60 pages of exhibits. Many parts of the affidavit material were objected to and either not read or alternatively were struck out. The cost to the parties has been immense. Since the commencement of these proceedings in December 2005 the **mother** has incurred and partly paid costs of **$123,000**. The **father** has incurred and partly paid costs of **$96,550**.*

0.1.22. And that was only the warm up, with 4 days of trial about to be waged at the expensive **non** Div 12A rate. And so it was that Plain Brown Paper Envelopes took over all other considerations in the case. On those days in May 2007, huge squadrons of PBPEs took to the air. Office workers in Haymarket went to their lunch break as if it were night. Some said it was a total eclipse of the sun, while others said it was a remake of The Birds by Alfred Hitchcock, given the ominous massed fluttering noise of the PBPEs.

0.1.23. Of course Toulouse-Lautrec J was aware of such matters from the start, so blamed it on the parents [as normal], per:

*1. This case illustrates to me the **very worst of impacts on a family of the adversarial system**. This case has been fought hard and focused very much on the emotional battle between the parents rather than dealing with the best interests of the children. This hearing may well have served the needs of the parents to attack each other over the breakdown of their marriage but it could not in any fashion be said to have been in the children's best interests. The **parents have determined the manner in which the case has been heard** (as is their right under the adversarial system) notwithstanding my requests for a different approach.*

*3. Because the parties [sic] lawyers have a **responsibility** and obligation to explain to their respective clients that there is and was the **opportunity to consent to the case being heard under Division 12A** of the amended Act or, prior to 1 July 2006, in Sydney, the ability to consent to participate in the Children's Cases Program, and to have advised their clients that such a process would be quicker and cheaper for their clients, I **must assume** that one or both of the parties rejected that option.*

0.1.24. Toulouse-Lautrec J then covered the tracks of the "envelope lickers" by the most unusual ploy of **not** identifying the instructing solicitors, only the barristers, per:

REPRESENTATION

COUNSEL FOR THE APPLICANT: Mr Schonell

COUNSEL FOR THE RESPONDENT: Mr Campton

0.1.25. Now if you have been following all this you will have noticed a conflict between the legislation and the PD, and of course in such a case the legislation must win, particularly where the legislation results in **less** workload for the court. The conflict is that the legislation applies to all cases whereas the PD requires consent for applications filed prior to 1 July 2006 [as was this one].

0.1.26. The legislation firmly establishes [s 69ZP above] that the court "may exercise the Div 12A power on its own initiative", so it is hardly acceptable for the judge to do a softcock "assume" the lawyers took care of "that" [consent] when in fact s 69ZP is expressed in the disjunctive, meaning it did not matter how the parents [or their lawyers] wished to proceed.

0.1.27. So who won? Well because the whole Dog & Pony show was to impress the CFC SPC freaks that "this is the **only** way to get your precious shared parenting responsibility", the last word was left to the freaks, who said:

> *"Basically, the 3 children live with Dad, and Mum has the right to exercise what **is effectively 50/50** if she choose to fly in from her new home interstate."*

0.1.28. So "the winner is ..." - shared parenting [or is that shared parenting responsibility?]. The actual orders drafted by the lawyers and accepted by the judge are almost as voluminous as the Barbara Cartland affidavits and are nothing more and nothing less than classic "boomerang orders", the like of which has not been evidenced since the famous warm & cuddly Parenting Plans templates drawn up by Ms Pagani in 1996 [see the Child Matters chapter].

0.1.29. But the real answer to the question about who is the winner is that this is surely a potentially positive move for SRL blokes who can now rely heavily on a written submission [and the Band Aid on their mouth] and the lawyers for Buttercup are basically "de-powered" as far as ambushing him in witness box "like a rabbit caught in headlights", as Geoffrey Robinson describes it.

0.1.30. On the other hand it would appear the courts will give great weight to the Family Report [if any], and as we know these are something akin to a COAT Report from a similar "nobody" employed by the CSA. The main example was the one prepared by a social worker in the Parsons case that got it all so wrong that after the mother was killed outside the FCA building, Nicholson CJ [as he then was] ordered that the Report be "locked away".

0.1.31. I was totally gobsmacked to see that the Report writer decided custody based upon a kiddies game called the Island Game, invented of course by a HLL thinktank at the AIFS. She drew two circles on the floor and put dad in one and mum in the other and 2 kids in between. She then cried out "tsunami" and based upon kids jumped into mum's circle, mum was to get custody. Not a lot of social science in that folks!

0.1.32. But putting such matters aside for now, here is my slant on the devious way the FLIndustry is using/abusing this new [or actually amended] legislation. Since Harris & Caladine case in 1991 there has always **been** a Form in the List of Forms provided by the courts under s 123 of the FLAct [ie via the FLRules] which said "**this** is the Form to use if you want to avoid House & Garden and just want to **consent** to the orders you [plural, or some might say "yous"] have drafted as Exhibit 1. And for 7 years or more this **was** Form 12A. It was then rebadged as Form 11 [for no particular reason?] until 2007, but in either case there **was** a form in the List of Forms.

0.1.33. In October 2007 I prepared a "consent package" for a couple as the normal Form 11 plus Exhibit 1 and they filed it in the FCA for the Registrar to "rubber stamp", ie use his Harris & Caladine majority approved powers to make the orders sought. Well they were told in no uncertain terms there was no such thing as a Form 11 [so here is a business card of a lawyer to get you straightened out]. They declined the offer and came back to me, and after a visit to the FCA web site it became clear that all I needed to do was remove the words "Form 11" from page 1, re-print the page and all was hunkie dory with the FCA.

0.1.34. There is a note at FCA site to say that forms are no longer [except for Form 4, God knows why] to be referred to by number. The FMS of course never had consent forms and neither does the new "Family Law Courts" entity. Of course [in a separate

list] you can find a "consent kit" with the now de-numbered Form 11, but no such Form remains in the normal alphabetical List of Forms. And here is the catch. As you go down the list, the first mention of "consent" is **Consent - Division 12A of the Family Law Act**.

0.1.35. I sort of did a double take, thinking OK so there must be "legal reasons" why Form 11 is reverting back to Form 12A, but immediately it became obvious that this was just another HPR [Howard Parkinson Ruddock] dirty trick. Now first of all, as the form continues to assert, there is no such thing as "Division 12A of the Family Law Act". It is Division 12A **of Part VII** of the FLAct. That is not semantics as any of the XV [I think that is 15?] Parts could have a Div 12A. It is predicable however as one could be forgiven by reading the HPR CFC mens site in thinking that the FLAct **was** just Part VII.

0.1.36. And one instance of proof of how well HPR has "done the job" on the CFC boys is that the web site forum is full of blokes quoting "my final orders", which are not property orders under Part VIII [which essentially **are** final orders] but child orders under Part VII [which are never final], and I will talk to Rice & Asplund herebelow. They talk to their property orders as being "a settlement" [ie House & Garden] as if they were not permitted to come to consent with their former spouse [sorry, the FLAct at Part VIII has yet to catch up with the current term of "partner", so you must be a good old fashioned married, or formerly married, type].

0.1.37. Yes indeed, the whole HPR marketing behind the "new Div 12A" was simply to revert the playing field back to 1990 whereby, for all intents and purposes, there is no escape from using blood sucking lawyers. That is to say, a reversal of all the good work of the Divorce Doctor, forcing the court [via Faulkes J, and now DCJ] to do the SRL Pilot Program/Farce in 1999 or so, and

who knows what ever happened to their **then** Pin Up Boy Ray "Everybody Loves Raymond" Lentin.

0.1.38. Possibly Raymond has in fact got so disenchanted at being taken for an idiot by the Faulkes Pilot Program that he is actually Conan at the CFC site, where Conan threatens "Remember my name, you will soon be shouting it". It seems that we have a return to the failed MensLine with the deposed Ms Patterson expression "toxic masculinity".

0.1.39. But to return to this new Div 12A Form, it becomes immediately obvious that the form will virtually **never be used** [thus proving my assertions regarding the HPR marketing reason for the form] by the words:

> *"Cases which involve an application filed **after 1 July 2006** asking the Court to make orders about children **do not require consent** as the less adversarial trial apply automatically."*

0.1.40. So given that 99.9% [and increasing] of cases will be filed after 1 July 2006, then why have a form at all? And even so, why confuse the issue by calling it consent rather than such words as election, nomination or whatever? So I can confidently say that this whole HPR device, supported by the FLIndustry even after the HPR departure, is purely and simply to give the illusion that parents can no longer totally avoid blood sucking lawyers and simply consent to Short Minutes [Exhibit 1, with whatever Consent Form may be flavour of the month]. What is certain is that the one listed as "Consent - Division 12A of the Family Law Act" is **not** it.

0.1.41. Also I spoke to a new "victim" in January 2008 who has his "final hearing" [as he is induced to call it] in September 2008. He informed me that Buttercup has already done a Barbara Cartland affidavit and that, prior to bloke sacking his own blood sucking lawyer, he was being asked to also pay $10,000 for his

own BC. Also his lawyer had made no mention of Div 12A or especially that it would be "automatic", in which case affidavits may not even be required by the judge. Yes indeed there is no doubt that HPR have left their designed legacy of total confusion about "the family law system", and the FLIndustry is holding on with both hands, waiting to see what Kevin '07 might do to "restore access to justice".

0.1.42. So to finalise this case, as hinted, Toulouse-Lautrec J throws in good old Rice & Asplund, per:

> *14. In the hearing of the case I was not asked to determine the Rice and Asplund (see the decision in Rice and Asplund (1979) FLC 90-725) issue. That is, given the orders made on 6 July 2005 were final orders, is there a change of circumstance which would warrant the Court rehearing the question of the children's residence. Where an application to radically change the circumstance of the children's residence and care within six months of final orders being made is instituted in the Court it is a common feature to see a challenge to the application being heard at all.*
>
> *15. The approach of the father in this case in not pursuing such an application I commend and for his comfort say that in my opinion there is sufficient change of circumstances in the mother's case to warrant the Court further hearing and determining the residence of the children.*

0.1.43. Well if he was not asked, then why would he even **mention** it? The answer lies in another HPR device [which I might well document separately] which is being pushed at the CFC sites which says [in code] that any bloke who tries to act as a SRL will get gonged by Rice & Asplund, when nothing could be further from the truth, especially as 12 years ago there was no mention of it at all in the much celebrated B & B Family Law Reform case, which

must surely put to bed a 1979 case prior to the Object "the best interests of the children" being written into Part VII.