

Family Law Amendment Regulations 1999 (No. 1) 1999 No. 39

EXPLANATORY STATEMENT

Statutory Rules 1999 No. 39

Issued by the Authority of the Attorney-General

Family Law Act 1975

Family Law Amendment Regulations 1999 (No. 1)

Subsection 125(1) of the *Family Law Act 1975* (the Act) empowers the Governor-General to make Regulations prescribing all matters necessary to be prescribed for the purposes of the Act.

Sub-section 110(2) of the Act provides that the Regulations may make provision for the enforcement in Australia of overseas child maintenance orders and for the enforcement overseas of Australian child maintenance orders. Section 111 provides that the Regulations may make provision for the implementation of the Convention on the Recovery Abroad of Maintenance. Section 44A provides that the Regulations may prescribe courts of summary jurisdiction in which proceedings for dissolution of marriage may be instituted.

The purpose of the Regulations is to replace outdated references in the Regulations to provisions of the Family Law Act and other legislation, to prescribe overseas countries as reciprocating jurisdictions for the purpose of Australia's overseas maintenance arrangements and to make other amendments to clarify and improve the operation of the Regulations.

Details of the Regulations are as follows:

Regulation 1 is formal.

Regulation 2 provides that the Regulations commence on gazettal.

Regulation 3 provides that Schedule 1 in the Regulations amends the Family Law Regulations.

Item 1 of Schedule 1 amends regulation 3 of the Family Law Regulations. Regulation 3 defines the word 'filed' in the Regulations by reference to its meaning in rule 2 of Order 4 in the Rules of Court made by the Family Court under section 123 of the Family Law Act 1975. References in the Regulations to specific Rules of Court can become outdated over time as a consequence of changes in the Rules. To avoid this, item 1 of Schedule 1 omits the specific reference to rule 2 of Order 4 of the Rules of Court and instead provides that the word 'filed' in the Regulations has the same meaning as in the Family Law Rules.

Item 2 of Schedule 1 amends paragraph 10A(2)(b) of the Family Law Regulations. Regulation 10A prescribes courts of summary jurisdiction for the purpose of section 44A of the Family Law Act 1975 (proceedings for a decree of dissolution of marriage may be instituted in certain courts of summary jurisdiction) to include the Magistrates Court established under the A.C.T. Magistrates Court Ordinance 1930. A.C.T. Ordinances are now referred to as Acts. Item 2 therefore replaces the word Ordinance with the word Act.

Item 3 of Schedule 1 amends sub-regulation 12(7) of the Family Law Regulations. Subregulation 12(7) refers to the service of documents on a person in accordance with rule 5(1)(a) of Order 18 in the Rules of Court made by the Family Court. When the Regulations were made in 1984, Rule 5(1)(a) of Order 18 of the Rules of Court referred to service by delivering a document to a person personally. However Rule 5(1)(a) of Order 18 has since been replaced and the reference

to it in Regulation 12(7) has become outdated. To correct this, and to avoid references in the Regulations becoming outdated over time as a consequence of changes in the Rules, item 3 replaces the specific reference to rule 5(1)(a) of Order 18 of the Rules of Court with a reference to service by delivering a document to a person personally.

Item 4 of Schedule 1 substitutes sub-regulation 18(8) of the Family Law Regulations. Subregulation 18(8) refers to the service of notice of registration of an interstate maintenance order on a person in accordance with rule 5(1)(a)(b) or (c) of Order 18 in the Rules of Court. When the Regulations were made in 1984, Rule 5(1)(a) (b) and (c) of Order 18 of the Rules of Court referred to service by delivering a document to a person personally, sending the document to a person by prepaid post and posting, faxing or delivering the document to a person's official address for service. However Rule 5(1)(a) (b) and (c) of Order 18 has since been replaced and the reference to it in Regulation 18(8) has become outdated. To correct this, and to avoid references in the Regulations becoming outdated over time as a consequence of changes in the Rules, item 4 replaces the specific reference to rule 5(1)(a)(b) or (c) of Order 18 of the Rules of Court with a reference to service by delivering a document to a person personally, sending the document to a person by prepaid post or posting, faxing or delivering the document to a person's official address for service.

Item 5 of Schedule 1 inserts a new sub-regulation 18(8A) in the Regulations as a consequence of the amendment made by item 4 of Schedule 1. When the Regulations were made in 1984, Rule 5(1)(b) of Order 18 of the Rules of Court referred to service by delivering a document to a person by prepaid post with an acknowledgment of service for completion by the person. New sub-regulation 18(8A) makes clear that the reference to service by prepaid post in the amendment made by item 4 includes a requirement that the document be accompanied by an acknowledgment of service.

Item 6 of Schedule 1 substitutes regulation 22 in the Regulations. Regulation 22, which defines "maintenance order" for the purpose of Part III of the regulations, refers to an order of a kind referred to in section 109 of the Act. When regulation 22 was made in 1984, section 109 referred only to orders relating to child bearing expenses. Amendments to section 109 since 1984 have altered its meaning. Item 6 therefore substitutes regulation 22 to replace the reference to section 109 with a reference to sections 67D and 67E of the Act (which deal with orders for child bearing expenses). New regulation 22 also defines reciprocating jurisdiction for the purposes of Part III of the Regulations (which deals with registration and enforcement of maintenance orders from reciprocating jurisdictions).

Item 7 of Schedule 1 amends sub-regulation 23(7) in the Regulations. Sub-regulation 23 (7) provides that a court exercising jurisdiction under sub-section 68(3) and 68(4) of the Act to vary an overseas custody order must send a copy of the variation order to the overseas court. The Family Law Reform Act 1995 replaced section 68 with a new section 70J. Item 7 therefore replaces the references in sub-regulation 23(7) to section 68(3) and 68(4) with a reference to section 70J.

Item 8 of Schedule 1 amends sub-regulation 26(2) in the Regulations. Regulation 26(2) provides that an overseas maintenance order shall not be sent to a court for registration and enforcement if it is an order of a kind referred to in section 109 of the Act. When subregulation 26(2) was made in 1984, section 109 referred only to orders relating to child bearing expenses. Amendments to section 109 since 1984 have altered its meaning. Item 8 therefore amends sub-regulation 26(2) to replace the reference to section 109 with a reference to Subdivision B of Division 8 of Part VII of the Act (which deals with orders for child bearing expenses).

Item 9 of Schedule 1 amends paragraph 26(3)(b) in the Regulations for the same reasons that Item 4 amends sub-regulation 18(8).

Item 10 of Schedule 1 inserts a new sub-regulation 26(3A) in the Regulations for the same reason that item 5 inserts a new sub-regulation 18(8A).

Item 11 of Schedule 1 amends paragraph 26(7) in the Regulations for the same reasons that item 4 amends sub-regulation 18(8).

Item 12 of Schedule 1 inserts a new sub-regulation 26(7A) in the Regulations for the same reason that item 5 inserts a new sub-regulation 18(8A).

Item 13 of Schedule 1 amends sub-regulation 27(2) in the Regulations. Regulation 27(2) provides that an Australian maintenance order shall not be sent to an overseas court for registration and enforcement if it is an order of a kind referred to in section 109 of the Act. When sub-regulation 27(2) was made in 1984, section 109 referred only to orders relating to child bearing expenses. Amendments to section 109 since 1984 have altered its meaning. Item 13 therefore amends sub-regulation 27(2) to replace the reference to section 109 with a reference to Subdivision B of Division 8 of Part VII of the Act (which deals with orders for child bearing expenses).

Item 14 of Schedule 1 amends paragraph 28(3) in the Regulations for the same reasons that item 4 amends sub-regulation 18(8).

Item 15 of Schedule 1 inserts a new sub-regulation 28(3A) in the Regulations for the same reason that item 5 inserts a new sub-regulation 18(8A).

Item 16 of Schedule 1 amends paragraph 28A(3) in the Regulations for the same reasons that item 4 amends sub-regulation 18(8).

Item 17 of Schedule 1 inserts a new sub-regulation 28A(3A) in the Regulations for the same reason that item 5 inserts a new sub-regulation 18(8A).

Item 18 of Schedule 1 amends sub-regulation 29(1) of the Regulations. Sub-regulation 29(1) provides that a court in Australia may make a maintenance order against a person in an overseas jurisdiction. Item 18 amends sub-regulation 29(1) to make clear that the order made by the court may only be made provisionally.

Item 19 of Schedule 1 amends sub-regulation 29(2) of the Regulations. Sub-regulation 29(2) provides that an order made under regulation 29(1) is provisional and must be sent to an overseas jurisdiction for confirmation. Item 19 substitutes sub-regulation 29(2) to make clear that an order made under sub-regulation 29(1) is of no effect unless it is expressed to be provisional and it is confirmed by a court in an overseas jurisdiction.

Item 20 of Schedule 1 amends regulation 30 in the Regulations. Regulation 30 provides that, where an overseas maintenance order is registered in an Australian court under the Regulations, enforcement proceedings may be taken as if the order was an order made by the court under Part VIII of the Act. When regulation 30 was made in 1984, Part VIII of the Act dealt with child and spousal maintenance orders. Amendments to the Act since 1984 have moved provisions relating to child maintenance orders to Part VII of the Act meaning. Item 20 therefore amends regulation 30 to replace the reference to Part VIII with a reference to Part VII or Part VIII of the Act.

Item 21 of Schedule 1 amends sub-regulation 33(6) in the Regulations for the same reasons that item 4 amends sub-regulation 18(8).

Item 22 of Schedule 1 inserts a new sub-regulation 33(6A) in the Regulations for the same reason that item 5 inserts a new sub-regulation 18(8A).

Item 23 of Schedule 1 inserts a note following regulation 36 in the Regulations. Regulation 36 provides that a person, against whom a maintenance order has been made by an overseas court, may apply to an Australian court for a variation of the order. However regulation 38 provides that in some cases such a variation is provisional unless and until it is confirmed by the overseas court. Item 23 inserts a note after regulation 36 to draw attention to regulation 38.

Item 24 of Schedule 1 amends regulation 37 in the Regulations. Regulation 37 provides that where an overseas maintenance order is registered in an Australian court under the Regulations, the person against whom the order was made may seek a variation of the order and may raise any matter that could have been raised in proceedings under Part VIII of the Act. When regulation 37 was made in 1984, Part VIII of the Act dealt with child and spousal maintenance orders. Amendments to the Act since 1984 have moved provisions relating to child maintenance orders to Part VII of the Act meaning. Item 24 therefore amends regulation 37 to replace the reference to Part VIII with a reference to Part VII or Part VIII of the Act.

Item 25 of Schedule 1 amends regulation 38 in the Regulations. Regulation 38 provides that a variation of an overseas maintenance order or agreement by an Australian court is only provisional if the order or agreement was made in an overseas jurisdiction whose law provides for the confirmation of provisional orders. The provisional order must be sent by the Australian court to a court in the overseas jurisdiction for confirmation. In practice it is difficult for Australian courts to ascertain which overseas jurisdictions have laws providing for the confirmation of provisional variations. Item 25 therefore replaces sub-regulation 38(1) with new sub-regulations 38(1) and 38(1A) to list the jurisdictions whose laws do not provide for the confirmation of provisional variations (Austria, Czech Republic, Republic of Ireland, Slovak Republic, Sweden, Switzerland and the USA).

Item 26 of Schedule 1 amends sub-regulation 39(2) of the Family Law Regulations for the same reasons that item 4 amends sub-regulation 18(8).

Item 27 of Schedule 1 inserts a new sub-regulation 39(2A) in the Regulations for the same reason that item 5 inserts a new sub-regulation 18(8A).

Item 28 of Schedule 1 inserts a new sub-regulation 49(5) in the Regulations. Subregulation 49(4) provides that a person, against whom a maintenance order has been made under the Convention on the Recovery Abroad of Maintenance, may apply for a variation of the order. Item 28 therefore inserts regulation 49(5) to make clear that an Australian court considering an application for a variation order under sub-regulation 49(4) must apply the Family Law Act 1975 in determining the application.

Item 29 of Schedule 1 inserts new sub-regulations 50(1A), (1B) and (1C). Regulation 50 in Part IV of the Regulations provides for a person in another country to apply under the Convention on the Recovery Abroad of Maintenance for action to be taken to recover maintenance in Australia. Part IV of the Regulations provides for legal proceedings to be commenced in Australia to obtain a new maintenance order under Australian law for an overseas claimant. Part IV of the Regulations does not provide for maintenance orders made by overseas courts to be registered and enforced in Australia. However the order may be registered and enforced under Part III of the Regulations if the Convention country is also a reciprocating jurisdiction under that Part. Doubts have arisen about whether the Convention and Part IV of the Regulations permit the registration and enforcement of orders from Convention countries. To resolve any doubt new sub-regulation 50(1A) is inserted to provide that the action which may be taken in response to a Convention application does not include registration and enforcement of the order in Australia. New sub-regulation 50(1B) is inserted to make clear that an Australian court may, in dealing with an application under regulation 50, have regard to the decision and record of proceedings of the overseas court. New sub-regulation 50(1C) is inserted to make clear that new subregulations 50(1A) and (1B) do not affect Part III of the Regulations (which provide for the registration and enforcement of overseas maintenance orders from reciprocating jurisdictions).

Item 30 of Schedule 1 amends regulation 51 of the Regulations. Regulation 51 provides that in overseas maintenance proceedings, applications under specified Rules of Court should not be made without leave of the Court. The Rules of Court specified are rule 1 of order 19 (request for answers to specific questions), rules 2 and 6 of Order 20 (requests to make discovery of documents or produce documents) and rule 2 of Order 22 (requests to admit facts or documents). References in the Regulations to specific Rules of Court can become outdated over time as a consequence of changes in the Rules. To avoid this, item 30 omits the references to specific Rules of Court and instead provides that without leave of the court applications may not be made to request for answers to specific questions, requests to make discovery of documents or produce documents, and requests to admit facts or documents.

Item 31 of Schedule 1 amends sub-regulation 54(4) of the Regulations. Regulation 54 provides for the taking of evidence interstate or overseas for the purpose of maintenance proceedings in an Australian court. Sub-regulation 54(4) provides that nothing in regulation 54 affects rules 6 and 7 of Order 30 of the Rules of Court (which relate to orders and requests by a court for the taking of evidence within or outside Australia). References in the Regulations to specific Rules of Court can become outdated over time as a consequence of changes in the Rules. To avoid this, item 31 omits the references to specific Rules of Court in sub-regulation 54(4) and instead provides that nothing in regulation 54 affects the power of a court to order or request the taking of evidence within or outside Australia.

Item 32 of Schedule 1 amends Form 1 in Schedule 1 of the Regulations. Form 1 is a request to have notice of proceedings served on a person overseas. Form 1 refers to a cover sheet for the request in accordance with Rule 3 of Order 7 of the Rules of Court. References in the Regulations to specific Rules of Court can become outdated over time as a consequence of changes in the Rules. To avoid this, item 32 omits the specific reference to Rule 3 of Order 7 of the Rules of Court and instead refers to a heading of Forms as provided for in the Rules of Court.

Item 33 of Schedule 1 amends Schedule 2 to the Regulations. Schedule 2 prescribes overseas jurisdictions as reciprocating jurisdictions for the purposes of the overseas maintenance provisions in Part III of the Regulations. Item 33 adds Poland and the Canadian province of Nunavut to the list of reciprocating jurisdictions in Schedule 2.

Item 34 of schedule 1 amends schedule 4 to the Regulations. Schedule 4 prescribes countries as Convention countries for the purposes of Part IV of the Regulations relating to the Convention on the Recovery Abroad of Maintenance. Item 34 adds Belarus and Estonia to the list of Convention countries in Schedule 4.