

To final orders and beyond! The problems with forecasting

FAMILY LAW CPD DAY

27 MARCH 2026

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orders, and
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The challenge

What capacity do the family courts have to make orders that allow for parents to improve, for situations to change, and for the needs of growing children to be met?

Case scenarios include challenges with:

- Parents with conditions that might improve with treatment
- Parents who have had restricted time because of allegations that turn out to be unfounded – but the other still believes
- Parents who separated when the child was very young, or unborn, and have no co-parenting relationship
- Children with complex needs that are not fully ascertainable because of their age

Legislative help

Provisions of the Act that support the Court's task

Section 11E – Courts to consider seeking advice from family consultants

If the Court has the power to order a person attend family counselling, FDR, participate in a course or program, or attend appointments with a family consultant;

Or the power to advise or inform about these;

It may seek the advice of a family consultant (or other appropriately-qualified person); and

It must consider seeking that advice.

Legislative help

Provisions of the Act that support the Court's task

Section 13C – Court may refer parties to family counselling, family dispute resolution and other family services

The Court may, at any stage, order parties to attend FDR, or one or more parties to attend family counselling, use children's contact services, or participate in a program or course – considering s11E use of family consultant.

The Court may suggest a purpose for this participation.

The Court may require parties to encourage the participation of other affected persons.

Orders may be made on application or on the Court's own initiative.

Legislative help

Provisions of the Act that support the Court's task

In relation to parenting orders:

Section 62B – Court's obligation to inform people to whom Part VII orders apply about family counselling, family dispute resolution and other family services

If a court makes an order in proceedings under this Part, the court must inform the parties to the proceedings about the family counselling services, family dispute resolution services and other courses, programs and services available to help the parties adjust to the consequences of that order.

Impact of recent cases

Impact of cases on the legislative framework

Part VII – Determining proceedings involving children

Lainhart & Ellinson [2023] FedCFamC1A 200

“The judicial function cannot be delegated to others.” [28]

“Courts must take the litigants as they find them when determining causes of action under Pt VII of the Act . Courts are not, and cannot operate like, therapeutic agencies, using litigation as the vehicle to meddle by making aspirational directions about how litigants should improve their parenting capacity in the hope of enhancing their children’s familial experiences.” [29]

Impact of cases on the legislative framework

Section 64B – Parenting orders

Oberlin & Infeld [2021] FamCAFC 66

A “self-standing order, untethered from any particular parenting order,” is not itself a parenting order under s64B(2). [51]

Impact of cases on the legislative framework

Section 67ZC – Orders relating to the welfare of children

AIF v AMS (1999) 199 CLR 160

“[A]uthorising any order that would promote the child's welfare [...] would be to convert a jurisdiction designed to protect against risk into a jurisdiction to supervise parents and guardians in the exercise of their rights and responsibilities.” [86]

Oberlin & Infeld [2021] FamCAFC 66

“[S]elf-standing orders directing a party to accept therapeutic treatment are not usually made conformably with s 67ZC” unless there exists “unique circumstances”. [52]

- Eg, the party accepting the fact under XX
 - Jacks & Samson [2008] FamCAFC 173; Zyma & Begum (No 2) [2025] FedCFamC1A 109

Legislative framework

Section 64B(2)(g) – Steps to be taken before variation application

- (2) A parenting order may deal with one or more of the following:
 - (g) the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of:
 - (i) a child to whom the order relates; or
 - (ii) the parties to the proceedings in which the order is made

Legislative framework

Section 64B(2)(g) – Steps to be taken before variation application

Oberlin & Infeld [2021] FamCAFC 66

Orders for steps that are “more expansive” than eg use of ADR “must still be prescriptive and enforceable, not aspirational and productive of further controversy.” [40]

“It is presently unnecessary to express concluded views on the breadth and complexity of orders which may be made in the form of parenting orders under s 64B(2)(g) of the Act [...]” [41]

And then there's
s65DAAA

The tension that exists

On the one hand:

authority that we ought not be too aspirational or try to accommodate for an unknown future

Versus, on the other:

the hurdles that exist in coming back to Court, and the presumption that continuing litigation is not in the child's best interests

Re-open if circumstances change

Gillies & Batt [2025] FedCFamC2F 1130

Father had a history of marijuana and alcohol use, and FV towards Mother and other family members. Child expressed clear wish to see Father more.

Evidence that Father needed intensive therapy, and Father showed little to no willingness or insight. Commenced therapy immediately before trial and expressed intention to progress that. Court ordered no time or communication. Father can relitigate if circumstances change.

“Whether [he] can or will undertake recommended psychological intervention or cease using cannabis in the future is a matter for him. I am to take him as I now find him. It is not my task to make aspirational directions about how he might improve his parenting capacity in the hope of enhancing X’s familial experience.” [123]

Re-open if circumstances change

Shinohara & Shinohara - [2025] FedCFamC1A 126

The trial judge raised the question of delaying final orders until the progress of therapy was known, and flagged the issue of 65DAAA, but parties and ICL rejected this slow-down and sought final orders.

(Final spend-time stages contingent on attendance at therapy, and upheld on appeal.)

Threshold for circumstances

Isakson & Isakson [2025] FedCFamC1A 65

Determined on appeal (from WA magistrate) that improvement in the Father's mental health, a new desire by the Child to see the Father, and a change in the Father's living arrangements (own house versus living with PGPs) were *not* enough for 65DAAA.

Legislative framework

Section 65DAAA – Reconsideration of final parenting orders

Is authority on the meaning of s65DAAA both comprehensive and settled?

- Rasheem & Rasheem [2024] FedCFamC1F 595
- Radecki & Radecki [2024] FedCFamC1A 246
- (cf Stanford & Stanford [2012] FamCAFC 1 versus Stanford & Stanford (2012) 247 CLR 108)

Creative solutions

Thoughts on approaches to take when faced with these issues:

- Splitting hearings
- Final hearing... but interim orders
- Orders staged by anticipated timeline
- Orders staged by conditional acts
- Creative use of s64B(2)(g) to revisit
- Alteration by parenting plan
- Pre-agreement to re-open

Splitting hearings

Section 102NJ – Power to make findings and orders at any stage of proceedings

Mihova & Mihova (No 2) [2025] FedCFamC1F 284

With reference to Rules 10.10 and 10.11:

“Generally, all questions of fact and law should be determined at the one time.” Quoted at [18]

“It may be appropriate to determine a separate question, even if it will not resolve all the issues, provided that there is a strong prospect that the parties will agree upon the result when the core of the dispute has been decided, or if the decision will obviate unnecessary and expensive hearings of other questions.” Quoted at [18]

There is a duty to end proceedings ASAP, but could a split in the short term prevent unnecessary hearings in the long term?

Splitting hearings

Tatari & Tatari (No 3) - [2024] FedCFamC1F 445

Final orders made on change of residence to the Father, and the commencement of staged supervised time with the Mother and family therapy for the children.

Interim orders made (at the same time) for the children to live with the PGM, and have staged reintroduction to the Father before change of residence.

Matter kept on foot, and return date scheduled for after the transition to the Father's care and commencement of therapy - final orders on spend-time with Mother adjourned until that date.

Making final spend-time orders was premature, as the Court did not know how the Mother would respond, and whether she would gain insight. [424]

Staged orders

Final hearing, but effectively interim orders:

- Staged by anticipated timeline
- Staged by conditional acts
- Carrot and stick approach

Staged orders

Arendse & Pilkvist - [2025] FedCFamC1A 153

Champion J allowed written communication from the Father after a period of 12 months - hoping that this would allow the Mother enough time, with therapy, to cope better with the thought of the Child being in contact with him.

No spend-time unless the Mother agrees.

“All parties agreed that I should make final orders, not interim orders, because of the stress that ongoing litigation was imposing on the parties. I must make prescriptive and enforceable orders. A court is not a therapeutic agency.” [208]

Staged orders

Melson & Divjak - [2022] FedCFamC1F 945

Mother presented a risk of emotional harm because of her extreme hostility to Father.

Supervised time allowed with Mother initially; once the Mother had engaged a psychologist and completed a Post-Separation Parenting course, she progressed to unsupervised time without a qualitative assessment of the effectiveness.

“I understand her views may remain entrenched despite the opportunity to carefully reflect. However, after the expiration of the supervised visits, time should progress to unsupervised, regardless.” [253]

Staged orders

Shalhoub & Morcos - [2023] FedCFamC1F 419

Mother posed unacceptable risk of emotional harm (largely from mental health that suggests bipolar, and unfounded allegations re sexual abuse of her and child by Father).

Father showed entrenched bias against Mother.

Orders made for the Child to live with the Father, and the Father to share parental responsibility with the Minister for Families and Communities *only* in relation to the Mother and maternal family's spend-time with the child, decreasing over time: until 12yo, Minister sole responsibility regarding that issue; 12-16yo, shared; 16-18yo, Father sole responsibility.

Staged orders

Reynolds & Reynolds [2025] FedCFamC2F 85

The Court took a carrot-and-stick approach

The Mother was found to have drug dependency and mental health issues, and present risks to the children. A history of non-compliance with orders.

The Court ordered that the children live with the Father.

Mother initially given supervised time.

Staged orders

Reynolds & Reynolds [2025] FedCFamC2F 85

- ✓ Mother to progress to unsupervised daytime with completion of a drug recovery program and provision of a clean HFT
- ✓ Mother to transition to overnight time only if she provides further clean HFTs, and completes a 'graduate' program subsequent to the drug recovery program, and attends at least four sessions each of CBT/EMDR and DBT.
- ✗ If the Mother engages in any listed behaviours (no nominated supervisor present, withholding children from Father, significant lateness), then her time is to be suspended on the next occasion.

Staged orders

Stephanidi & Lawrence (No 2) - [2025] FedCFamC1F 834

Court asked to determine interim arrangements and final orders on the same evidence.

Both parents presented risk, and Court had to decide the “least-worst” outcome.

Children live with the Mother.

Therapy was ordered on an interim basis, as a pre-condition for *both* parents.

How?

Staged orders

Stephanidi & Lawrence (No 2) - [2025] FedCFamC1F 834

Father must engage in therapy for 2 years, and provide reports to Mother and ICL every six months: if he does not, time is suspended and the parties have leave to re-list on 14 days' notice.

Mother must also attend on a therapist, at least twice, for the purposes of helping her accept the Court's finding that the Father does not present unacceptable risk, and must provide a report to Father and ICL every six months for 2 years: if she does not, the Children change to live with the Father, and the parents have leave to re-list for 14 days' notice.

Orders also made for both parents to attend parenting courses prior to the commencement of the Father's spend-time.

Staged orders

Stephanidi & Lawrence (No 2) - [2025] FedCFamC1F 834

Questions:

- What if neither parent complies?
- The Mother is only ordered to attend "across no less than two sessions" – but must also provide a report every 6 months for 2 years, or else she loses residence?
- The Mother is ordered to attend a parenting course, although no time or residence is contingent on her attending one, and she could frustrate the Father's time by not doing it?

Staged orders warning!

Stages must be within power:

- ☑ Must be tethered to parenting orders
- ☑ Must be capable of being implemented and enforced
- ☑ Must not improperly devolve responsibility for judicial decision-making

Staged orders

Miyajima & Mikkelsen - [2024] FedCFamC1A 208

The Father's time with the children was conditional on his "engagement" in psychological therapy and the completion of courses, and his therapist was required to provide a report to the Mother that he no longer required therapy for the time to commence.

Appeal allowed. The Order was an improper divestiture of judicial power because:

- (a) what does "engaged" mean
- (b) it executes even if engagement is terminated with an unsuccessful outcome
- (c) if intended to ameliorate the risk of harm it devolves power to the psychiatrist to determine risk

Staged orders

Miyajima & Mikkelsen - [2024] FedCFamC1A 208

“If, indeed, the father needed to demonstrate change before he should see the children, as seems to be the clear finding reading the judgment as a whole, then the father was faced with either orders for supervised time until he could show that his behaviour had changed or the primary judge could have adjourned the proceedings part-heard to enable the father to call appropriate evidence of that change. Whilst both may be unpalatable options, they are preferable to making an order that, respectfully, is not enforceable.” [22]

- Section 65DAAA
- Section 102NJ

Staged orders

Tips for proposing stages!

- Case Outline
- Affidavit reasoning
- Your future scenario is more likely than not the 'best interests' position – s60CA
- Have the logistics worked out
- Spell out the consequences of compliance with the stages *and* not

Creative use of s64B(2)(g)

Section 64B(2)(g) – Steps to be taken before variation application

Make provisions for revisiting an order without having to come back under s65DAAA

Alteration by agreement

Section 64D – Parenting orders subject to later parenting plans

Advancing stages through co-operation

If the Orders need to be re-opened under s65DAAA, subsequent plans can provide evidence of a significant change in circumstances and the child's best interests

Alteration by agreement

Section 65DAAA(3) - The court may reconsider a final parenting order with the agreement or consent of all the parties to that order

Can this be agreed to in advance, and included in final orders?

- Expiry date
- Conditional acts or events

Final thoughts

Know your judge

Stress-test against existing authorities and previous test cases

Develop the case theory

Timeline stages and assess feasibility



