Continuing Legal Education Seminars - Legalwise

Parramatta, March 2018

FAMILY LAW UPDATE

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BONDELMONTE V BONDELMONTE [2017] HCA 8

- Sons aged 17 and 15, daughter aged 12.

- January 2016, the boys went for a holiday in New York with their father. The mother consented to the holiday.

- The father decided to stay in the United States. The sons wanted to stay with him.

- They did. And the mother filed an urgent application which came on before Justice Watts in the Family Court.

- Watts J made interim orders that the sons be immediately returned to Australia, concluding it was in their best interests that they remain here pending determination of whether they should live in Australia or relocate to the US.

- The Court accepted the evidence of the father as to the views which had been expressed by the boys, namely that they wished to continue to live with him in New York. However his Honour considered that the actions of

* Barrister, Edmund Barton Chambers.

the father "*have significantly prejudiced and almost certainly coloured any statements the boys may make whilst they are in New York*".

- The father argued that a 'wishes report' should be obtained whilst the children were in New York. This was rejected, the Court preferring a family report upon their return to Australia to address wishes along with all other relevant factors.

- In the High Court, the father argued his Honour had failed to adequately take into account a material consideration, namely the views expressed by the children.

- Section 60CC(3)(a) requires that in deciding what is in a child's best interests, <u>one</u> of the considerations is:

> any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views

- The High Court (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) said:

> 34. The focus placed by the father upon the prescribed consideration stated in s 60CC(3)(a) tended to elevate the views expressed by a child to something approaching a decisive status. In some cases, it may be right, in the exercise of a primary judge's discretion, to accord the views expressed by a child such weight, but s 60CC(3)(a) does not require that course to be taken. They are but one consideration of a number to be taken into account in the overall assessment of a child's best interests.

> 35. The terms of s 60CC(3)(a) itself may be taken to recognise that, whilst a child's views ought to be given proper consideration, their importance in a given case may depend upon factors such as the child's age or maturity and level of understanding of what is involved in the choice they have expressed. Children may not, for example, appreciate the long term implications of separation from one parent or the child's siblings. Section 60CC requires that attention be given by the court to these matters.

- The High Court rejected the argument that a Court is obliged to seek a child's views in parenting proceedings before making a parenting order. The High Court said:

> 43. It [s60CC(3)(a)] requires that the views which have been "expressed" by a child be considered. The term "consider" imports an obligation to give proper, genuine and realistic consideration but this cannot affect or alter the terms of the provision so as to require a child's views to be ascertained.
>
> [footnote omitted]

- A further argument before the High Court related to adverse comments made by Justice Watts about the father's actions in retaining the children in the United States, contrary to earlier parenting orders, and whether his views about the father's conduct motivated the decision to order the return of the children. The High Court considered that his Honour was not motivated to give less weight to the children's views by reason of the father's actions. But if his Honour had done so, that would have been taking into account an irrelevant consideration.

- Finally, the interim orders made by Watts J included alternative orders for the children to live separately with family friends on a temporary basis upon their return to Australia. Those family friends were not applicants for parenting orders. Undertakings from them had been provided.

- However the High Court held they were persons in whose favour parenting orders could be made on the application of the mother. Section 64C provides that a parenting order may be made in favour of a parent of the child "or some other person".

Section 65DAA - *Court to consider child spending equal time or substantial and significant time with each parent in certain circumstances*

- Following *Bondelmonte*, what about on *Goode & Goode*?

- Consideration by Watts J in *Egan & Egan* [2017] FamCA 170 commencing at [14] in light of what the high Court said about what 'consider' means (*Bondelmonte* at [43], above).

- Watts J said at [28]:

> The Full Court in *Goode & Goode* at [64] said it was the juxtaposition of ss 65DAA(2)(c)(d) and (e) that "*suggests a consideration tending to a result, or the need to consider positively the making of an order* ...". I am unable to see how that reasoning survives the statement in *Bondelmonte v Bondelmonte* as to what the word "consider" imports.

THORNE V KENNEDY [2017] HCA 49

- Setting aside financial agreements under sections 90K and 90KA of the Family Law Act.

- Section 90K(1) provides that a court may make an order setting aside a financial agreement if the court is satisfied of matters including, in s 90K(1)(b), "the agreement is void, voidable or unenforceable" and, in s 90K(1)(e), "a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable". Section 90KA then provides, in part, that the question whether a financial agreement is valid, enforceable or effective "is to be determined by the court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts".

- Ms Thorne was 36 and living in the Middle East. She had no substantial assets.

- Mr Kennedy was 67 and living in Australia. He was a property developer with assets of at least $18 million.

- They met on the internet in 2006.

- She came to Australia in 2007 and the wedding was set for 30 September that year.

- On 19 September Mr Kennedy told Ms Thorne they were going to see a solicitor to sign an agreement. He said if she did not sign, the wedding would not proceed.

- As it was, Ms Thorne signed a ‘pre-nuptial agreement’ under s90B four days before the wedding. She did so against legal advice.

- Shortly after the wedding, a ‘post-nuptial agreement’ was signed under s90C in almost identical terms. Again, Ms Thorne signed against legal advice.

- The parties separated a little less than 4 years later, in 2011. There were no children of the relationship. Ms Thorne commenced proceedings to set aside the agreements, and for property settlement orders and maintenance. Mr Kennedy died during the trial and was substituted as a party by the executors and trustees of his estate.

- The central issues in the case were whether the agreements were liable to be set aside on the grounds of duress, undue influence, or unconscionable conduct.

- The accuracy of advice given to Ms Thorne by her solicitor, Ms Harrison, was not controversial. The key features were:

    (1) The agreement provided for Ms Thorne to receive maintenance during the marriage of the greater of (i) $4,000 per month or (ii) 25% of the net income from the management rights of a proposed development. Ms Harrison observed that the $4,000 per month contained no provision for increase and was a very poor provision from someone in Mr Kennedy's circumstances.

    (2) Ms Thorne would be permitted to live rent free in a penthouse located in the proposed development and her family would be permitted to live rent free in a unit located in that development. Ms Harrison noted, however, that Ms Thorne had

informed her that the local council had refused planning permission for the proposed development.

(3) If Ms Thorne and Mr Kennedy separated within the first three years of marriage, with or without children, then Ms Thorne would get nothing. The rights described above would also cease.

(4) If Ms Thorne and Mr Kennedy separated after three years, without children, Mr Kennedy would only have an obligation to pay a single lump sum of $50,000 to Ms Thorne. This payment was indexed to the Consumer Price Index if the separation occurred after 1 July 2011. Ms Harrison described this amount as "piteously small".

(5) If Mr Kennedy died while they were living together and while they had not separated then the agreement provided that Ms Thorne would be entitled to (i) a penthouse in the proposed development or, if that were not possible, a unit she chose in the same city not exceeding a market value of $1.5 million; (ii) 40% of the net income of the management rights of the proposed development or $5,000 per month, indexed annually, whichever was the greater; and (iii) the Mercedes Benz car that was presently in her possession or a replacement vehicle of the same or higher value.

- In setting aside the agreements, the primary judge relied on six matters which led to her Honour to conclude that Ms Thorne had “no choice” or was “powerless” in entering into the agreements:

  (i) her lack of financial equality with Mr Kennedy;
  (ii) her lack of permanent status in Australia at the time;

(iii) her reliance on Mr Kennedy for all things;

(iv) her emotional connectedness to their relationship and the prospect of motherhood;

(v) her emotional preparation for marriage; and

(vi) the "publicness" of her upcoming marriage.

- The primary judge described Ms Thorne's circumstances in these terms:

> "She was in Australia only in furtherance of their relationship. She had left behind her life and minimal possessions ... She brought no assets of substance to the relationship. If the relationship ended, she would have nothing. No job, no visa, no home, no place, no community. The consequences of the relationship being at an end would have significant and serious consequences to Ms Thorne. She would not be entitled to remain in Australia and she had nothing to return to anywhere else in the world.
>
> Every bargaining chip and every power was in Mr Kennedy's hands. Either the document, as it was, was signed, or the relationship was at an end. The husband made that clear."

- The Full Court allowed an appeal, in effect upholding the agreements. But Ms Thorne was successful in the High Court in restoring the first instance decision to set aside the agreements.

- Ultimately, the plurality determined that the primary judge's conclusions were open to her on the evidence, holding:

> 59. … Each of the factors which the primary judge considered was a relevant circumstance in the overall evaluation of whether Ms Thorne had been the subject of undue influence in her entry into

the agreements. In combination, it was open to the primary judge to conclude that Ms Thorne considered that she had no choice or was powerless other than to enter the agreements. In other words, the extent to which she was unable to make "clear, calm or rational decisions" was so significant that she could not aptly be described as a free agent.

[footnotes omitted]

- On the application of the vitiating factor of undue influence to financial agreements the plurality said at [60] these factors may have prominence:

  1. Whether the agreement was offered on a basis that it was not subject to negotiation;

  2. The emotional circumstances in which the agreement was entered, including any explicit or implicit threat to end a marriage or engagement;

  3. Whether there was any time for careful reflection;

  4. The nature of the parties' relationship;

  5. The relative financial positions of the parties; and

  6. The independent advice that was received and whether there was time to reflect on that advice.

- The plurality also said:

> 56. …Of course, the nature of agreements of this type means that their terms will usually be more favourable, and sometimes much more favourable, for one party. However, despite the usual financial imbalance in agreements of that nature, it can be an indicium of undue influence if a pre-nuptial or post-nuptial agreement is signed despite being known to be grossly unreasonable even for agreements of this nature.

- Further and more generally, the High Court's decision provides a useful roadmap on the doctrines of duress, undue influence and unconscionable conduct.

WALLIS & MANNING [2017] FAMCAFC 14 (10 February 2017) (per Thackray, Ainslie-Wallace & Murphy JJ)

ANSON & MEEK [2017] FAMCAFC 257 (7 December 2017) (per Murphy, Aldridge & Cleary JJ)

- These were property cases. They are interesting because they deal with how comparable cases are considered.

- In *Wallis & Manning* the wife submitted that the assessment of contributions was "*well outside the range reasonably available in the circumstances*". The Full Court said in relation to the assertion of a "range of outcomes" that "*[t]he assertion of a 'range', without more, cannot (and indeed should not) assist a trial court in the exercise of the relevant discretion"* (at [41]).

- The Full Court also had regard to the use of guidelines and comparable cases. In that context, it was submitted on behalf of the wife that the trial judge had not had regard to any authorities concerning contributions in long marriages. In relation to "guidelines", for example in relation to long marriages, the Full Court noted that the expression "long marriages" is not susceptible to precise definition and the factors that meet the description are so diverse that it would be elusive if not impossible. However, the Full Court noted that the use of comparable cases is a different matter.

- In considering previous authorities on the use of comparable cases, the Full Court said:

> 58. ...we are unable to agree that anything said by the Full Court in Fields & Smith 'decries' the use of comparable cases, although the Full Court there make it plain, and with respect we agree, that if

comparable cases are used to inform the discretion, some analysis of those vases so as to ascertain their comparability should be undertaken..."

...

67. While recognising the fact that no two cases are precisely the same, we are of the view that comparable cases can, and perhaps should far more often, be used so as to inform, relevantly, the assessment of contributions within s 79".

- The wife had sought at trial to rely upon four comparable cases. The Full Court noted that the submissions set out the facts of the cases, but in no way sought to compare the facts with the case under consideration and that:

    73. "[n]o argument was made to her Honour as to any consistency emerging from those authorities, nor is there any attempt to canvass a number of different authorities, particularly from the Full Court, so as to seek to establish any such comparability".

- However, in *Anson & Meek,* Aldridge and Cleary JJ said:

    126. We do not consider that the existing authorities obliged the primary judge to consider the comparable cases at all, let alone obliged her to conduct an analysis of the comparable cases so as to identify both the factors that indicate a lack of comparability and those that do not.

    …

158. In our opinion, the fact that two different judges acting upon the same evidence may properly reach different conclusions greatly diminishes the value of comparable cases. This is especially so in this jurisdiction where there is almost an infinite variation in the rich factual detail that attend both parenting and property cases. The concern is amplified when the Court is proffered just a selection of cases said to be comparable as opposed to an analysis of **all** cases that could be said to be comparable.

- See also [173]-[179]

HOLLAND & HOLLAND [2017] FAMCAFC 166

- A post-separation inheritance case.

- Short facts: a 17 year relationship with 2 children aged 14 and 17. Four years after separation the husband received an inheritance from his brother of $715,000.

- The orders made by the trial judge represented a 62:38 division of assets in the wife's favour, but in an asset pool which excluded the inheritance.

- The trial judge excluded the inheritance from the asset pool and instead treated it as a financial resource of the husband.

- The "exclusion" of the inherited property was a central issue in the appeal. The Full Court (Ainslie-Wallace, Murphy and Aldridge JJ) considered in detail the concepts of "after-acquired property", "exclusion" and "financial resource".

- The Full Court reiterated that the concepts of "after-acquired property" and "exclusion" involve the risk of error advanced by an argument in *Calvin & McTier* and "*firmly rejected by the Full Court in that case*", in that it is contrary to longstanding authority to suggest that post-separation property will only be included if there is a direct connection between the marriage and the property (at [17]).

- The Full Court also reiterated the well known passage from *Stanford* that it is:

> "*necessary to begin consideration of whether it is just and equitable to make a property settlement order by identifying, according to*

common law and equitable principles, the existing legal and equitable interests of the parties in the property..." (at [18]).

- The Full Court noted at [20] that the expression "financial resource" requires similar caution. A s79 order can alter the parties' interests in respect of property, but not in relation to financial resources. Financial resources are nonetheless important to s79 orders, by reference to s75(2) factors.

- Inherited property is sometimes labelled as a "financial resource" in circumstances where the Court is actually considering the property as part of an asset by asset approach. The Full Court cautioned against this, noting that the term "financial resource" should be confined to interests which do not fall within the definition of property.

- Thus the Full Court concluded that her Honour erred in referring to the husband's interest in the inherited property as a "financial resource". Instead, it was property of the husband.

- The Full Court said it is wrong as a matter of principle to refer to any existing legal or equitable interests in property to be "excluded" from consideration in s79 proceedings and that:

> 26. More often than not, the expression is used to indicate that particular property, or a particular category of property, or superannuation interests, are to be treated separately from other property for the purpose of a consideration of s 79(2) or for the purpose of assessing contributions

- Further, the Full Court in effect cautioned against the categorisation of property by reference to a characteristic, such as "inheritance" or "after-

acquired property", as to do so often leads to an erroneous argument that unless contributions to that property can be established the property ought be excluded.

- In the result, the Full Court concluded that her Honour erred in principle, in that the inherited property was excluded altogether from consideration.

- However, it was open to her Honour to conclude that the inherited property should be assessed separately from the other property (i.e. a "two pool approach"), and that by reference to contributions the wife should be assessed as having no entitlement in the property. However, to reach such a conclusion there would need to be findings which included the interest in the property and findings in relation to contributions of all types. However her Honour had not undertaken such an asset by asset assessment in relation to the inherited property.

- The key proposition from this appeal it that there is no basis for excluding from consideration any property in which the parties have an existing legal or equitable interest. However the nature of a particular interest or interests in property and when and how it was acquired, utilised, improved or preserved may be very relevant to each or all of three central questions:

    (i) should a s 79 order be made at all;

    (ii) whether contributions should be assessed "globally" or "asset by asset" or by reference to two or more "pools"; and

    (iii) what is the nature and extent of each party's contributions.

DREW & JENSEN [2017] FCCA 656

- Parenting case, 2 children aged 5 and 2.

- The father commenced recovery proceedings in a Magistrates Court which made the order ex parte on the basis of the evidence the father filed.

- The recovery order was executed by the Police, and the children placed in their father's care. The mother commenced proceedings in the FCCA.

- At the interim hearing both proposed that the children live with them, and spend time with the other parent.

- The Judge closely examined the evidence the father had put before the Magistrate at the recovery application, and observed:

> 45. It goes without saying that it is critically important for any party who brings parenting proceedings to present all relevant information to the Court. If it were possible to have an even higher duty of disclosure in these circumstances, it arises when ex parte Orders are sought. Thus, the evidence the Father gives at paragraphs 12-16 is relatively benign, and even if it did not provide assurance to a judicial officer making an urgent decision, at the very least it did not raise anything to be concerned about.
>
> 46. The difficulty for the Father, however, is that this particular evidence, on which he relied in order to gain the recovery order, was plainly misleading in what it does not tell the Court. Moreover, the matters about to be discussed were plainly known to the Father.

- The objective material before the court indicated that the father had been violent in a previous relationship and, indeed, that the nature of his violence was consistent with the allegations made by the mother in the present case. Furthermore, the father had been convicted in respect of that violence.

- The Court stated:

> 54. Let it be very clear – it is the opinion of this Court that any parent who has been violent to a former partner in the past, who has been convicted of the same, and who does not spend time or communicate with children from a previous relationship for reasons that include that violence, must put that material before the Court in all circumstances, let alone when ex parte Orders are sought.

- The Court referred to The Best Practice Guidelines for Lawyers Doing Family Law Work, which provides:

> 3.1 An application for an injunction may be made by one party without notice to the other (an 'ex parte' application). In such a case, the applicant's lawyer is under a duty to inform the court of any matters within the lawyer's knowledge which are not protected by legal professional privilege and which would support an argument against the granting of an injunction or limit the terms of the injunction adversely to his or her client.
>
> 3.2 If an injunction is appropriate, an ex parte application should be discussed. The issues to consider are:
>
> - whether the client may be in danger, whether valuable property is about to be dissipated, or whether vital evidence is about to be

destroyed or removed if proceedings are not instituted on an ex parte basis

- the seriousness of the threat to the client, property, or evidence, including whether it is urgent and imminent the likelihood of the court granting an ex parte order, which it will only do if there is a real and urgent need to protect a person or property

- whether proceedings ex parte may escalate the danger to the clients, and

- the court's preference for alternative measures, such as permission to bring the application on short notice.

[emphasis added]

- After reviewing several authorities on the principles of disclosure, as well as in relation to ex parte applications, the Court concluded:

> 32. Lest there be any doubt, this Court considers that the obligation of disclosure discussed in these authorities apply as much to parties as to their lawyers. When a party fails to disclose relevant information to the Court in a parenting case, this may reflect adversely on their capacity to provide for the emotional needs of the child [s60CC(3)(f)] (because of the emotional trauma associated with the recovery for example) and their attitude to the child and to the responsibility of parenthood [s60CC(3)(i)]. It is, in any event, certainly a fact or circumstance that a Court might consider relevant [s60CC(3)(m)].

- *The lawyer's reputation* – Remember the lawyer's duty to the Court is paramount. It includes not misleading the Court.

- For ex parte applications the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 provide:

19.4 A solicitor seeking any interlocutory relief in an ex parte application must disclose to the court all factual or legal matters which:

19.4.1 are within the solicitor's knowledge,

19.4.2 are not protected by legal professional privilege, and

19.4.3 the solicitor has reasonable grounds to believe would support an argument against granting the relief or limiting its terms adversely to the client.

19.5 A solicitor who has knowledge of matters which are within Rule 19.4:

19.5.1 must seek instructions for the waiver of legal professional privilege, if the matters are protected by that privilege, so as to permit the solicitor to disclose those matters under Rule 19.4, and

19.5.2 if the client does not waive the privilege as sought by the solicitor:

(i) must inform the client of the client's responsibility to authorise such disclosure and the possible consequences of not doing so, and

(ii) must inform the court that the solicitor cannot assure the court that all matters which should be disclosed have been disclosed to the court.

SIMIC & NORTON [2017] FamCA 1007

- A must read case.

- Property and parenting and child support departure proceedings in the Family Court at Sydney.

- The parenting case settled, and the property case settled on the 7th day of the trial.

- However – costs notices had been provided in accordance with the FLR and Benjamin J made a number of observations in relation to costs and other aspects of the matter.

- Together the parties had spent circa $860,000 in legal costs. The mother's were $352,000. The father's were $506,000.

- His Honour:

> 1. … I have become increasingly concerned about the high levels of costs charged by the legal profession in property and parenting proceedings and in previous judgments I have expressed these concerns in that regard. Such comments have seemingly gone unheeded.
>
> 2. In the Sydney Registry of the Family Court I have observed what seems to be a culture of bitter, adversarial and highly aggressive family law litigation. Whether this win at all costs, concede little or nothing, chase every rabbit down every hole and hang the consequences approach to family law litigation is a reflection of a Sydney-based culture by some or many litigants or whether it is an

approach by some legal practitioners or a combination of both, I do not know.

3. Whichever is the cause, the consequences of obscenely high legal costs are destructive of the emotional, social and financial wellbeing of the parties and their children. It must stop.

…

15. Attached to the affidavits of the parties were copies of correspondence between the solicitors. Some of this solicitor correspondence was included as part of the five hundred pages of exhibits to the father's affidavit. I have read each and every one of those letters.

…

17. Some of those letters were inflammatory and reflected the anger of the parties or one or other of them. The letters were at times accusatory. They were often verbose and at times involved unnecessary tit for tat commentary. Some of the letters served little or no forensic purposes.

18. The father conceded in cross-examination that on some days multiple letters were sent by his solicitor to the other party's solicitor.

19. Solicitors are not employed to act as 'postman' to vent the anger and vitriol of their clients.

20. The solicitors are professional legal practitioners and charge significant hourly rates for their time and skills. To that end, they must ensure that correspondence and communication is necessary, balanced, considered and relevant.

21. Parties to family law litigation can often be distressed, anxious, angry, upset and emotional. Many have little experience in court process and this may be their one, and hopefully only, interaction with the civil legal system. They are generally unsophisticated litigants in terms of costs and rely on the provision of fair, reasonable, competent and proportional professional services by their legal representatives.

…

26. For legal practitioners to be entitled to be paid costs in this Court, or any court for that matter, there is the following underlying criteria:-

(a) It needs to be reasonable to carry out the legal work to which the legal costs relate;
(b) The legal work must be carried out in a reasonable and professional manner;
(c) The quantum of legal costs and disbursements must be fair and reasonable, in all of the circumstances; and
(d) The legal costs and disbursements must be proportionate to the issues in dispute.

27. In this case the parties have spent an ‘eye watering’ total of about $860,000 in legal costs and disbursements.

28. Legal practitioners have a duty to minimise costs and to reduce conflict.

New Practice Direction – Federal Circuit Court

Practice Direction No 2 of 2017

Interim Family Law Proceedings

Part 1 Preliminary

1. This Practice Direction sets out arrangements for the management of interim proceedings in the family law jurisdiction in the Federal Circuit Court of Australia.

2. This Practice Direction commences **1 January 2018** and supersedes the following Information Notices:

   Notice to Litigants and Practitioners – Interim Proceedings-Adelaide Registry;
   Notice to Litigants and Practitioners – Interim Parenting Proceedings – Sydney, Newcastle and Canberra Registries.

3. The conduct of proceedings in the Court is governed by the *Federal Circuit Court of Australia Act 1999* and the *Federal Circuit Court Rules 2001.* Consistent with its legislative mandate, the Court applies the rules of court flexibly and with the objective of simplifying procedures to the greatest possible extent.

4. ***It is expected that parties and their representatives will assist the Court to ensure that proceedings are conducted expeditiously and consistently with the objectives of early identification of the issues in dispute requiring adjudication and the efficient use of judicial resources.***

Commencing proceedings

5. Proceedings in the Court are commenced by an Initiating Application supported by an affidavit. Interim orders may be sought at the time of filing an Initiating Application for final orders or during the proceedings by way of an Application in a Case. Applications for any interim orders must be supported by an affidavit. In financial matters they must also be supported by a financial statement or an affidavit of financial circumstances.

6. Pursuant to section 51 of the *Federal Circuit Court of Australia Act 1999* the Court directs that, unless express leave is granted by the Judge into whose docket the matter has been allocated, affidavit material in support of an interim application must not:
   - exceed 10 pages in length for each affidavit;
   - contain more than 5 annexures.

Interim hearing

7. The Judge determines whether to conduct an interim hearing on the first return date of an Initiating Application, or Application in a Case. The Judge will also determine whether to deal with all or part of the application and/or the Response as filed.

8. Any interim hearing will be conducted as an abridged process with a circumscribed scope of inquiry. Only those issues, specifically identified by the Judge as the subject matter of the interim hearing, will be dealt with.

9. The relevant facts to be relied on by a party at an interim hearing must be set out succinctly in their affidavit material complying with paragraph 6

above. Division 15.4 of the *Federal Circuit Court Rules 2001* sets out the rules in relation to affidavits.

10. Where the respondent seeks interim orders additional to those sought by the applicant, and the applicant opposes the orders sought, the applicant may file a second affidavit in answer, complying with paragraph 6 above, and setting out:
    a. any additional orders sought;
    b. any additional relevant facts relied on in opposition to the respondent's orders.

Failure to comply

11. Parties and practitioners should expect that failure to comply with any part of this Practice Note will result in loss of hearing priority, or adjournment of an interim hearing with costs orders.

12. In particular, if a party proposes to rely upon an affidavit which does not comply with paragraph 6 above, parties and practitioners should expect that:
    a. in the discretion of the Judge,
        i. non complying affidavits will not be read; or
        ii. the responsible party will be required to select 10 pages out of their non complying material that they seek to rely upon;
    b. Specific costs orders may be made.

13. Documents filed less than 48 hours prior to hearing (electronically or otherwise) ('a late document') cannot be relied upon at the hearing without leave of the Court. A party or practitioner seeking to rely upon a late document must seek leave to tender a copy of it at the commencement of the hearing.

14. This Notice can be found on the Court's website: www.federalcircuitcourt.gov.au

Amendments to the Family Law Rules – commencing 1 March 2018[1]

Family Court only (not Federal Circuit Court).

Noteworthy changes:

- Exhibits and annexures are no longer to be attached to affidavits (or otherwise filed). Documents that are to be relied on must be referred to in the body of the affidavit and tendered. Hard copies of any document intended to be used in conjunction with an affidavit and tendered, must be served on the other party contemporaneously with the affidavit.

- Two new 'Notice of Risk' forms have been approved - one for use in current cases and one to be used in conjunction with Applications for Consent Orders. The form 'Annexure to Proposed Consent Parenting Order' has been abolished.

- It is no longer necessary to file a Superannuation Information Form with an Application for Consent Orders, provided an alternative document is filed which allows the Court to determine the value of the superannuation interest, such as an up to date member statement.

- A new Submitting Notice has been created, to be used in situations where a party is served with an Initiating Application, Response, Reply or Notice of Appeal and they do not wish to contest the making of the orders sought. The party filing the notice must provide an address for service and state in the notice that they will submit to any order the Court may make. The notice must indicate if the party wants to be heard as to costs.

[1] Family Law Amendment (2018 Measures No. 1) Rules 2018 dated 9 February 2018

- A new Notice of Contention in appeals is to be used when the respondent to an appeal does not seek to cross-appeal, but seeks to have the Order affirmed on grounds other than those relied on by the first-instance Court.

- Copies of documents in answer to a subpoena and the documents can now be produced in any electronic form capable of being printed without loss of content.

- The addition of "safety concerns" as a factor for consideration in transfer of venue applications.

- A new rule governing undertakings to the Court, including that oral undertakings must be subsequently reduced to writing and filed, and providing that an undertaking to pay damages is to submit to any order the Court might consider just for the payment of compensation.

- Cost Assessment Orders now have the force and effect of an Order of the Court.

- Increasing Deputy Registrars' delegated powers to include *inter alia* the making of location orders; dismissing cases in certain circumstances; the appointment of a case guardian.

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