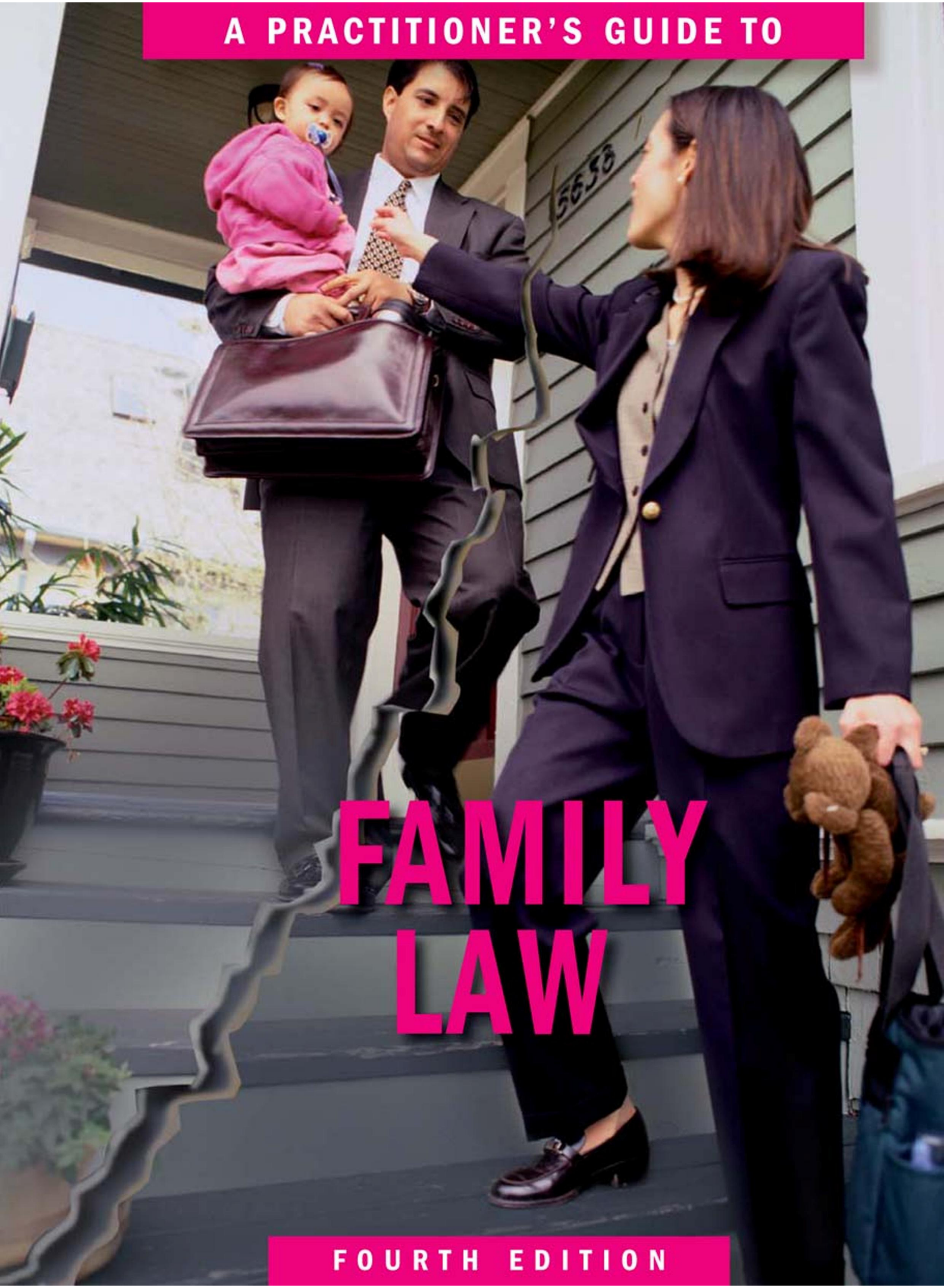
A PRACTITIONER'S GUIDE TO



FAMILY LAW

FOURTH EDITION

A PRACTITIONER'S GUIDE TO FAMILY LAW

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ABOUT THIS HANDBOOK

A Practitioner's Guide to Family Law is aimed at junior members of the profession and practitioners who do not regularly practice in family law.

The focus of the Handbook is on the practical aspects of family law procedure. This Handbook is not intended to be a comprehensive guide on any topic covered.

The law is stated as at June 2008.

Sasha More
Chair
NSW Young Lawyers Family Law Committee

ABOUT NSW YOUNG LAWYERS AND THE NSW YOUNG LAWYERS FAMILY LAW COMMITTEE

NSW Young Lawyers ("NSWYL"), a division of the Law Society of New South Wales, is a forum for young lawyers in NSW to initiate and express fresh ideas and directions on legal and social issues for the benefit of the profession and the community. It represents lawyers who are under 36 years of age or who have been admitted to practise for less than five years, and law students.

The objects and purposes of NSWYL include:

- to further the interests and objectives of lawyers in New South Wales;
- to challenge the views of the day having regard to the interests and rights of young people; and
- to promote the benefit of the community and disadvantaged groups.

NSW Young Lawyers Family Law Committee:

This book has been written by members of the NSWYL Family Law Committee ("the Committee"). The Committee is made up of lawyers and law students who have an interest in family law.

The aims of the Committee are:

- to provide professional education in family law for the whole profession by organising CLE seminars as part of the NSWYL's CLE program;
- to proactively monitor and have input into changes in family law including commenting on proposed legislation, making submissions to governments, courts and other organisations on various issues relevant to family law as they arise;
- to organise meetings, seminars, publications and public forums on issues relating to family law;
- to provide a forum for young practitioners to discuss issues of concern to them;

- to provide a peer support network for young practitioners and practitioners in the first 5 years of practice involved in family law;
- to promote issues which are of relevance and concern to young lawyers; and
- to promote NSWYL's activities and enhance the image of NSWYL.

If you are interested in joining our committee or have any questions please contact our Committee chair, Sasha More at flaw.chair@younglawyers.com.au, or the NSWYL office on (02) 9926 0268.

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PART A – GENERAL PRINCIPLES OF FAMILY LAW

CHAPTER 1 – PROPERTY

1.1 PROPERTY BASICS

The main objectives of the court in determining a property settlement under the *Family Law Act 1975* (Cth) ("FLA") are to: "finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them" (s 81 FLA).

The approach currently taken by the court in property applications is commonly referred to as the "four-step process":

1. identifying the assets, liabilities and financial resources of the parties;

2. assessing the contributions made by the parties (as defined in s 79(4)(a) to (c) FLA);

3. evaluating each party's future needs as set out in ss 75(2), 79(4)(d), (f) and (g) FLA, so far as they are relevant;

4. the court be satisfied that, in all the circumstances of the case, it is just and equitable to make the orders (s 79(2) FLA).

1.1.1 What is property?

Property is broadly defined by s 4(1) of the FLA. It includes assets that have been acquired by either or both parties during the marriage. Sometimes marital assets include assets which were owned by either party prior to the marriage and which have been used for family purposes during the marriage. There are also financial resources that need to be taken into account such entitlements to benefits from a family trust. Superannuation entitlements are now included as "property".

Each party has a duty to the court and to the other party to give "full and frank" disclosure of all information relevant to the case (*Family Law Rules 2004* (Cth) ("FLR") r 13.04).

Division 13.1.2 of the FLR sets out the duty of disclosure in financial cases. A Form 13 (Financial Statement) must accompany an Application for Final Orders if property orders are sought.

Below is a list of the basic information you will need from your client in order to identify the property, liabilities and financial resources of the parties.

- any current cases or existing orders about family law / child support / domestic violence / child welfare;
- any financial agreement made between the parties;
- any bankruptcy proceedings;
- any proceeds of crime order or forfeiture application; and
- whether any third parties should be joined.

In relation to children:

- names;
- dates of birth;
- who they live with;
- education; and
- health.

In relation to income and assets:

- gross weekly income;
- child support payments (paid or received);
- real estate (address/es), percentage of share and value of share);
- motor vehicles (make, model, value of share);
- furniture and effects (value of share);
- funds in banks, building societies, credit unions or other financial institutions;
- interest in any business (estimated gross market value of share);
- investments (shares etc);
- life insurance policies;
- interest in any other property;
- interest in any trust fund;

- any significant disposal of property in the last 12 months or the 12 months prior to separation; and
- superannuation: name(s) and type of plan, gross value of each interest.

In relation to liabilities:

- mortgages;
- credit / charge cards;
- loans (including personal loans or other loans from financial institutions as well as any loans from family members and friends);
- hire purchase / lease; and
- income tax.

If there is no agreement as to the values assigned to the assets and financial resources, it may be necessary to use an expert valuer: see Pt B, Ch 7.6 of this Handbook.

1.1.2 Types of contribution

Section 79(4)(a) – (c) sets out the matters to be considered with respect to the parties' contributions. The main types of contributions that are taken into account are:

- direct financial contributions to the acquisition of any property of the parties or either or them (for example, paying part of the deposit on a house);
- direct financial contributions to the conservation or improvement of any property of the parties or either of them (for example, repairs and renovations to the structure of the house);
- indirect financial contribution to acquisition, conservation or improvement of any property of the parties or either of them (for example, one party pays the bills which enables the other to pay the mortgage);
- non-financial contributions (for example, wife carries out homemaker duties which enables the husband to concentrate on business activities); and
- contributions made to the welfare of the family (for example, homemaking and parenting).

The court exercises its discretion as to the weight that is to be given to the various contributions of the parties, in determining an adjustment, if any in the property settlement.

The following may also be relevant to the consideration of contributions:

- short marriages;
- gifts;
- lottery winnings;
- contributions after separation;
- special skills;
- waste;
- significant pre-marriage or post-separation contributions; and
- small asset pool.

1.1.3 "Future needs"

Section 75(2) requires that the future needs of the parties also be considered, including:

- age and state of health of each party;
- income, property and financial resources of each party;
- whether a party has the care of a child under 18;
- commitment necessary for a party to support himself or herself;
- responsibility to care for another person;
- eligibility of a party to receive a pension or allowance form the government or from a superannuation fund inside or outside of Australia;
- a standard of living that is reasonable in all the circumstances;
- extent to which maintenance will increase a party's earning capacity by enabling a person to undertake a course of training;
- extent to which a party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;
- duration of the marriage and the extent to which it has affected the earning capacity of the party who seeks maintenance;
- the need to protect a party who wants to continue his or her role as parent;
- financial circumstances relating to the cohabitation with another person;
- any child support payable;
- the terms of any financial agreement binding on the parties;
- any other fact or circumstance.

The court has discretion as to how much weight is placed on each relevant factor.

1.1.4 Just and Equitable

Finally, once steps 1 to 3 have been completed, s 79(2) requires the court to be satisfied that, in all the circumstances of the case, it is just and equitable to make the order.

1.2 TAXATION IMPLICATIONS

1.2.1 Capital Gains Tax

Capital gains tax ("CGT") is a tax on the gains (or loss) of an investment, payable only when the investment is sold or disposed of.

Your clients need to be aware of the value of their assets, especially during negotiations in property settlements. It is critically important that the status of an asset initially acquired on or before 19 September 1985 (a pre-CGT asset) or an asset acquired on or after 20 September 1985 (a post-CGT asset) be established and taken into account.

In assessing the valuation of assets subject to CGT that must be disposed of to comply with a court order, any CGT liability and other realisation costs should be taken into account: *In the Marriage of Kelly (No. 2)* [1981] FLC 91-108. If a disposal is required in the future, but the actual asset to be disposed of cannot be specified, then the relevance of CGT is uncertain. It is advisable to obtain clear evidence that certain assets must be sold, to ensure that any CGT liability is taken into account: *Noetel and Quealey* [2005] FamCA 677.

A roll-over allows you to defer a capital gain or loss from a CGT event and applies only in specific situations. A roll-over occurs automatically where an asset is transferred due to a marriage breakdown and all the pre-conditions have been satisfied. See Chapter 3, Part 3-1 of the *Income Tax Assessment Act 1997* (Cth) ("ITAA") for the pre-conditions.

If an asset is transferred to a spouse or former spouse (including de-facto spouse) pursuant to a court order or a maintenance agreement, the roll-over provisions of the ITAA allows the transferee to obtain the asset with

virtually all of the CGT characteristics which it had before the transfer. Hence a pre-CGT asset retains its pre-CGT status after transfer. Therefore, a property purchased prior to 19 September 1985 can be transferred to a spouse free of any CGT. It retains its exempt status in the hands of the spouse if the requirements for roll-over relief are satisfied.

A capital gain or loss generated from a CGT asset acquired after 20 September 1985 and transferred under a court order or a financial agreement is usually rolled over. For example, if the real property being transferred has a cost base of $100,000, the first element of the land's cost base after the transfer is $100,000. Hence, with a post-CGT asset, the transferee inherits the cost base of the transferor retaining any applicable indexation allowances. The transferee will eventually bear any CGT liability. This liability should be factored into any consent orders or settlement agreement reached by your client and their former spouse or de facto spouse. Your client will effectively inherit any pending capital gain: see s 126.5(5)(a) of the ITAA. For example, if the asset is valued at $400,000 but the cost base to the transferor spouse or former spouse at the relevant time is only $100,000, then a considerable capital gain would be provoked if the asset was to be sold and the transferee will have to bear the liability. For the definition of “cost base”, see s 110.25 of the ITAA.

So, if your client is to receive a pre-CGT asset from their present or former spouse in such circumstances, the true worth or value of that asset to your client may well be current market value, less costs of realisation. In high contrast, if the asset proposed to be transferred was acquired on or after 20 September 1985 by your client’s present or former spouse, the true worth or value of that asset to your client will be much less.

However, the roll-over provisions give an advantage to the transferor who does not incur a CGT liability at the time of transfer. Rather, the transferee spouse takes over the CGT cost base from the transferor. CGT is incurred as and when the asset is realised. When calculating the net worth of a settlement to a client (particularly a transferee), this effect should be kept in mind.

In the past, roll-over provisions did not apply to financial agreements. Recently, the government has decided to extend the scope of the CGT marriage breakdown roll-over provisions to assets transferred to a spouse or former spouse under a binding financial agreement or a similar agreement under a corresponding foreign law. The roll-over will also apply to assets transferred under a written agreement under a state, territory or

foreign law relating to de facto marriage breakdowns where the agreement is similar to a binding financial agreement. Transfers under a financial agreement will in future be treated in the same way as court-ordered transfers once the legislation receives Royal Assent. Any transfers under a financial agreement dated between 28 December 2000 and 1 July 2005 will be subject to CGT.

There may be some instances where roll-over relief is deliberately avoided so that a capital gain is realised. This would be in cases designed to offset existing losses in appropriate instances, for example, where a main residence which is exempt from CGT will later be used for income-earning purposes. In that case, a high cost base may be desirable. In these cases, you should carefully check the particular circumstances to factor the relief into settlement negotiations.

In the negotiation of a family law property settlement, the only way for your client's interests to be protected is for the tax status of relevant assets (and thus their true worth) to be established and taken into account. Further, your client should obtain details of the cost base of any assets being transferred to them (with roll-over relief) that may be subject to CGT in the future. Such details should include not only the original purchase price and incidental costs at the time of acquisition, but also the dates and costs of capital improvements. This will avoid a party paying more CGT than they need to on the disposal of the asset in later years.

For CGT involving a company or trustee, see s 126.15 of the ITAA. For further information, see subdiv 126-A.

1.2.2 Good & Services tax

There is usually no liability for Goods and Services Tax ("GST") upon the transfer of real estate and other assets between spouses, unless the asset in question satisfies the elements of GST, for example, the real estate is seen to be an enterprise or business assets are involved. In those cases, the spouse leaving the assets to the other spouse should obtain an indemnity just in case there are outstanding GST liabilities. See *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

1.2.3 Income tax

Spousal maintenance is not taxable in the hands of the recipient.

Child support is tax-exempt in the hands of the recipient.

1.2.4 Duty

Duty is a type of state tax imposed on various types of instruments such as transfers and agreements for the sale of real estate, documented gifts, policies of insurance, mortgages, transfers and the issue of motor vehicle licences.

A financial agreement, a termination agreement and a deed or other instrument executed by a person for the purposes of, or in accordance with, an order or financial agreement is not subject to any duty or charge under any law in New South Wales or any law of the Commonwealth that applies.

No duty is chargeable when property is transferred to one of the parties to a dissolved or irretrievably broken-down marriage or irretrievably broken-down domestic relationship (presumably, both de facto and close personal relationships) under the *Property (Relationships) Act 1984* (NSW), or to either of the parties to the relationship, or to a child or children of either of them: see s 68 of the *Duties Act 1997* (NSW).

To claim an exemption from payment of stamp duty, you should provide a certified copy of the orders or agreement to the NSW Office of State Revenue and request that the transfer be stamped with an exemption. Your client should present a certified copy of the orders of agreement to the NSW Roads and Transport Authority when registering the transfer of a motor vehicle.

1.2.5 Land tax

Land tax is an annual tax based on land ownership and is not exempt. Revenue from land tax is paid to the government, and assists in the provision of public services such as education, health and public safety.

1.2.6 Tax debt

One of the major downsides of a marriage breakdown is when one spouse is exposed to an unanticipated debt. This debt will become a liability of the relationship as a consequence of being either married to or in a de facto relationship with another person.

These circumstances are common in most marriage breakdowns and result in severe financial and emotional consequences. The tax debt issue arises when parties try to ascertain the assets and liabilities of the marriage in order to determine who gets what. It can also be a debt accumulated during the marriage.

Tax debts should be taken into account in a property settlement if they are presently owing.

1.2.7 Loss of tax benefits

Certain other transactions can also have unintended consequences – not by causing a tax expense, but by precluding a tax saving. For example, where a company which is jointly owned by a husband and wife has substantial income tax losses, and if the wife were to transfer her interest in the company prior to those losses being recouped, the company may fail the "continuing ownership test" and lose the benefit of being able to earn income tax-free in the future.

1.2.8 Tax liabilities of business & partnerships

When certain assets must be sold (or companies liquidated) as a result of family law proceedings, it is important to quantify the amount of tax (be it CGT, income tax or GST) payable (and by whom) prior to the property settlement being finalised, otherwise, tax debts may be transmitted inequitably to one party.

Similarly, it is important that you understand the financial circumstances of the case and seek advice from tax specialists where necessary on the proposed orders for property settlement.

A party exiting from a trading entity is normally freed from any existing liabilities as part of the property settlement. The exiting party should consider seeking indemnities from the remaining party for all potential tax liabilities that may arise in the present and future.

Where the trading entity is a partnership, it is particularly important to set out who is going to pay any future tax liabilities. In addition, any tax refunds that are due should be taken into account in determining the allocation of the net asset pool.

It is in both parties' interests for the division of the pool of assets to be done in a tax-effective way. Given that the level of complexity and circumstances of each case will vary significantly, it is often sensible to ensure that there are no tax liabilities that will flow unexpectedly to one party.

1.3 BIG & SMALL MONEY CASES

1.3.1 "Big money" cases

It is unlikely that as a young lawyer, you will be handling a "big money" matter without assistance. It is important to be aware of the issues in large matrimonial estates, as the law being debated in this area has the potential to influence the law more generally.

Large matrimonial estates can raise a number of legal issues such as taxation, valuation and control of companies and trusts. A comprehensive discussion of all the issues raised by large matrimonial estates is beyond the scope of this section, which focuses on the debate about contributions in the context of large estates.

Perhaps the first practical issue to consider is: how much money is involved in a big money case? In *Stay & Stay* (1997) FLC 92-751, a pool of $4.3 million was determined to be in the "medium range". There has been some debate as to whether this authority has been overruled and whether the quantum of the assets alone, irrespective of how the pool was created, qualifies a case for the application of the big money principles. Suffice to say, big money cases involve many millions.

In big money cases, there is debate as to whether the assessment of contributions should be assessed by reference to the special skills involved or by reference to equality.

Special skills is an approach to the assessment of contributions which states that as one party to a marriage has displayed exceptional skills in the creation of a business or assets, that party ought to be rewarded for this when assessing contributions.

Ferraro and Ferraro (1993) FLC 92-335

Although touched on in cases prior to it, *Ferraro and Ferraro* was the first case to reward the special skill of a party. Briefly stated, at the date of cohabitation, the parties had no substantial assets but by the time of the hearing, after a 27-year marriage, the asset pool stood at $12 million. The husband conducted a property development business. In this case, the court said that although the application of skill by a professional person and successful business person was relatively the same, the difference in the application of the skill in the latter case produces assets in a high range. Here, the husband's "business acumen" or "entrepreneurial skill" was such that his "special skill" ought to be rewarded with an "extra contribution".

This case has provoked a healthy debate.

JEL v DDF (2001) FLC 93-075

In this case, the trial judge gave the wife 35% of a $42 million dollar pool and on appeal, the Full Court reduced this to 27.5%. The husband was a mining entrepreneur and the wife the primary homemaker. In reducing the award to the wife, the Full Court laid out the applicable principles as follows:

- there is no presumption of equality of contribution or of partnership;
- a court must undertake an assessment of the respective contributions of the parties to the marriage;
- although in many cases, the direct financial contributions of one party will equal the indirect contributions of the other as a homemaker and parent, that is not necessarily so in every case;
- when evaluating the roles performed by parties to a marriage there may arise special factors attaching to the performance of the particular role of one party to a marriage;
- the court will recognise special factors as taking the contribution outside the "normal" range;
- the size of the pool is not determinative of the issue as to whether or not a party has exercised special skills, and care must be taken to recognise a distinguishable "windfall" gain;
- decisions in previous cases where special factors were found may provide some guidance but they are not prescriptive;
- ultimately, it is the trial judge's exercise of discretion on the facts of the case that will regulate the outcome; and
- in the exercise of that discretion, the trial judge must be satisfied that the actual orders are just and equitable and not just the underlying percentage division.

The Full Court also acknowledged the following propositions:

- particularly in "big money" cases, the use of percentages may overvalue the contribution of a homemaker and parent; and
- the finding of a "special contribution" is not dependent on the size of the asset pool.

In opposition to the special skills approach set out above is the equality approach to the assessment of contributions. The equality approach is not that there is a presumption of equality, but that it is equality in the assessment of contributions which ought to be the general guide.

Figgins and Figgins (2002) FLC 93-122

At the date of hearing, the wife was 38, the husband, 40, and they had one child aged 6. The parties' marriage and cohabitation totalled 5 years. At the commencement of the marriage, the parties had no property of significance and they jointly acquired an investment property that they sold post-separation for a profit of $100,000 that was split equally.

Two weeks after the marriage, the husband's father and step-mother were killed and the husband inherited one half of their estate. The estate was valued for probate at $28 million. At trial, the husband's assets were $22.5 million.

Carter J at first instance awarded the wife $1.1 million plus the $50,000 already received by her ($600,000 for contributions).

On appeal, the majority of the Full Court awarded the wife $2.5 million plus the $50,000 already received and indicated that the wife would have been entitled to even more than this sum had she sought it.

The case did not deal with special skills as the husband's inheritance was a sole contribution as distinct from a special contribution through running a business. Although the court acknowledged that there was no guideline that adopted equality as a starting point, the majority stated: "we think that this doctrine of "special contributions" should, in an appropriate case, be reconsidered. We think that the decision of the House of Lords in *White v White* [2001] 1 ALL ER 1 gives force to these concerns."

1.3.2 "Small money" cases

Small money cases need to be dealt with efficiently and economically for clients. After reviewing the case from a legal point of view, a budget for negotiation and litigation should be set for the client. For clients with a smaller asset pool, it may be appropriate to refer them to low cost or no-cost community mediation services such as Centacare, Unifam or Relationships Australia. Applications involving a small asset pool should be filed in the Federal Magistrates Court or the local court. These courts are less formal and are cheaper and generally quicker. In preparing documentation for filing, it is important to keep the documents succinct but make sure they cover the basics such as the pool of assets and any positive s 79(4)(c) or s 75(2) FLA factors.

Full and frank disclosure is still required.

Small money property cases are dealt with in accordance with the same basic principles as any other property case: see Pt A, Ch 1.1 of this Handbook.

Small money cases push judicial officers to recognise the significance of s 79(4)(c) contributions in a way which probably exceeds the custom and requires them to give larger adjustments under s 75(2) FLA proportionally due to the dollar amount involved.

In small money cases, it is the real impact in dollar terms which is ultimately the critical issue. Section 75(2) factors need to be given significant weight in dollar terms. The usual 5% to 15% adjustment that is usually seen in matters with a larger pool of assets will not be relevant in assessing how the court exercises its discretion. The court will look at the real dollar adjustment even in the face of overwhelming contributions by one party.

1.4 SUPERANNUATION

Superannuation is treated as property under the *Family Law Legislation Amendment (Superannuation) Act 2001* (Cth), which amends the definition of "matrimonial cause" under s 4(ca) of the FLA to include reference to superannuation.

Consequently, the four-step process usually undertaken in Family Court proceedings of identifying the type of property to be split and then valuing the property, now applies to superannuation: s 79 FLA.

1.4.1 Identify the type of interest

There are seven types of superannuation interests, which can be divided up as:

- accumulated interest – the most common type of fund;
- defined benefit interest;
- self-managed funds;
- partially vested accumulation interest;
- percentage-only interests;
- Retirement Savings Accounts ("RSA");
- Approved deposits;
- Superannuation annuities; and
- small superannuation investments.

1.4.2 Valuation

The valuation of a superannuation interest will depend on the type of interest and whether it is in the growth phase or the payment phase.

In most cases, where the court is making an order to split a superannuation interest, the FLA requires the court to determine the value of the interest according to the "mandatory" methods prescribed by the *Family Law (Superannuation) Regulations 2001* (Cth) ("FLSR").

In practice, an "eligible person" (which includes a member and the spouse of a member) will obtain information about the value of a superannuation interest held by them or their spouse by submitting to the trustee of the superannuation fund:

- a Form 6 "Declaration by Applicant for Information about a Superannuation Interest"; and
- a Superannuation Information Form.

Such forms are available from the Family Court's web site at (http://www.familycourt.gov.au). You are not an "eligible person" and

therefore cannot sign the superannuation forms on behalf of your client although you can provide your details as the address for service.

Once the trustee receives the signed forms, it will be able to provide information to either your client or to you about the value of the superannuation entitlements held by the member. Some trustees charge a fee, The trustee is prohibited from disclosing to anyone other than to the applicant (or you) that the application has been made.

1.4.3 Superannuation splitting & flagging

Superannuation entitlements can be divided between separating or divorcing couples by either:

- court order; or
- written agreement.

I. Court order

The FLA enables the court to “split" or “flag” superannuation interests.

Trustees must comply with the orders provided they have been afforded procedural fairness.

There are a number of different Splitting orders:

"type (a) orders": where the non-member spouse is entitled to be paid a base amount. Type (a) orders will be the most common type of order sought and should be used when superannuation is in the growth phase. If the amount is not to be received immediately, the FLSR sets out how the trustee will adjust for growth in the base amount over the years until the non-member receives the superannuation interest. This is known as the "adjusted base amount".

"type (b) orders": where the non-member spouse is entitled to be paid a specified percentage of the splittable payment. A type (b) order should be used when the superannuation is in the payment phase.

"type (c) orders": which are relevant to “percentage only interests” and therefore are currently only applicable for recipients of Commonwealth judicial pensions.

When the court makes a splitting order, it exercises its powers under s 79(2) of the FLA and accordingly, the order must be just and equitable. Further, the provisions of s 79A of the FLA apply to the splitting order such that the order may be able to be set aside or varied if it becomes impracticable to carry it out, or the order is unjust in changed circumstances.

Once a splitting order is made, the non-member has three options (subject to individual requirements of each superannuation fund) with respect to the superannuation entitlement:

- the creation of a new interest in the member's superannuation interest; or
- the roll-over or transfer of moneys to an existing fund that the non-member may have; or
- a lump sum payment (only available where a condition of release, for example retirement or permanent incapacity, is satisfied).

A flagging order prevents the trustee of a superannuation fund from dealing with the interest until the flag is lifted. Flagging orders are useful when the value of the superannuation interests is uncertain at the date of the hearing but will be determinable in a short period of time. A flagging order will:

- restrict the trustee from paying any superannuation entitlements held in the fund;
- require the trustee to notify the court when the flagged superannuation interest becomes payable; and
- enable the court to make an order that the flag be lifted and a splitting order made.

The court cannot make a splitting or flagging order unless the trustee of the fund has been accorded “procedural fairness”, in relation to the making of the order. That is, the trustee must be given:

- notice that the order is being considered; and
- an opportunity to be heard.

The giving of notice can be satisfied by a letter which:

- advises that proceedings have been commenced, the return date and the terms of any order sought;
- encloses a copy of any form which has been filed in the court; and
- invites the trustee to indicate if it has any objection to the order being sought.

II. Written Agreement

Under the FLA, parties can enter into a superannuation agreement to divide any superannuation entitlements arising in respect of their relationship. Such agreements can be made before, during or after marriage and are operative when served on the trustee of the superannuation fund.

When a superannuation agreement is served on a trustee it must be accompanied by a copy of the decree absolute or a "separation declaration." A separation declaration is a declaration that the parties to the marriage have separated and such declaration must comply with s 90MP of the FLA. A superannuation agreement must also meet the requirements of s 90G of the FLA.

As soon as possible after an order or agreement is made, a copy of the order or agreement must be served on the trustee together with a Regulation 72 notice.

A Regulation 72 Notice must specify the following:

- name of the non-member spouse;
- postal address of the non-member spouse;
- date of birth; and
- whether the member's spouse has an interest in the same plan.

Superannuation agreements can allow for the “flagging” of superannuation interests also. The operative time for flagging depends on the nominated superannuation fund. A superannuation that would be flagged immediately would be a self-managed fund. For other funds, it can take up four business days after service.

Flag-lifting agreements can lift a flag in most situations and will split superannuation interest if needed. A flag can only be released by a court

order and the reason to lift a flagging agreement would be to allow the parties to split the superannuation.

If the interest is an accumulation type interest in the growth phase, the non-member is only entitled to a lump sum payment when they satisfy a condition of release. If the interest is a non-accumulation type of interest, for example, a defined benefit interest, the non-member spouse may not be permitted to roll-out or transfer funds from the existing fund, unless the trust deed allows for such transfer. Further, a non-member spouse may only be entitled to a lump sum payment if the member satisfies a condition of release.

Regardless of whether splitting orders are made by agreement or after a contested hearing, the superannuation trustee must be afforded procedural fairness. This means that when filing consent orders, you must also file evidence that the superannuation trustee is on notice of the proposed orders and has had an opportunity to object. The trustee must be given at least 28 days notice to object to the proposed orders.

1.5 BANKRUPTCY

The *Bankruptcy and Family Law Legislation Amendment Act 2005* (Cth) ("BFLLAA") received Royal Assent on 18 March 2005. Some of its provisions came into effect immediately, some on 15 April 2005 and the balance by 19 September 2005. Refer to the "Commencement" table in the BFLLAA for guidance on the commencement dates of the various sections.

1.5.1 Changes to the power of the Family Court of Australia

The amendments enable concurrent family law and bankruptcy proceedings to be brought together to ensure that all relevant issues including the interests of competing parties (for example, creditors and non-bankrupt spouses) are determined at the same time.

The Family Court has the power to hear matters regarding property settlement, spousal maintenance or s 79A applications where there is a bankruptcy trustee involved. The Federal Magistrates Court will also continue to have jurisdiction in such matters.

The Family Court also has the power under s 79 FLA to make orders in relation to vested bankruptcy property, that is, property that has vested in

the bankruptcy trustee by reason of the bankruptcy. Note that not all property will vest in the bankruptcy trustee, for example, the bankrupt's superannuation benefits will not vest.

Under s 79(1) FLA, the Family Court also has the power to order a bankruptcy trustee to settle or transfer property to a non-bankrupt spouse or child.

The bankruptcy trustee will be able to defend claims to vested bankruptcy property made by spouses, however, they will not be able to start proceedings in the Family Court.

Amendments made to the non-avoidance section of the FLA (that is, s 106B) give creditors standing to apply.

I. If bankruptcy occurs prior to separation

The non-bankrupt spouse may seek to have his or her interest in the vested bankruptcy property recognised and seek a distribution from that part of the property that has not already been distributed by the bankruptcy trustee.

II. If bankruptcy occurs after separation but prior to the making of final property orders

A non-bankrupt spouse has the right to claim spousal maintenance and/or property settlement against the bankrupt spouse's bankruptcy trustee.

A non-bankrupt spouse can give notice of a claim against the assets or property collected by the bankruptcy trustee and can bring a s 114(4) FLA injunction against the trustee to prevent, for example, the trustee from distributing the property. The court will have the power to grant an injunction against a bankruptcy trustee distributing dividends to the creditors of a bankrupt spouse.

A trustee must be joined in property or spousal maintenance proceedings if:

- the trustee has applied to be joined; and
- the court is satisfied that the interests of a bankrupt's creditors may be prejudiced by the making of an order: s 79(11) FLA.

If a trustee is a party to proceedings, the bankrupt spouse will not have the right to make submissions regarding the vested bankruptcy property, except in exceptional circumstances: s 79 (12) and (13) FLA.

Section 75(2)(ha) of the FLA requires the court to consider the effect of a proposed order on the ability of a creditor to recover a debt, alongside the interests of the non-bankrupt spouse and any child of the marriage.

Pursuant to s 72(2) of the FLA, the court has the ability to satisfy a spousal maintenance claim by way of transfer to the non-bankrupt spouse of vested bankruptcy property.

II. If bankruptcy occurs after separation and after the making of final property orders

Trustees have standing under s 79A FLA to apply to set aside orders and can also apply to have maintenance orders varied under s 83(1A) FLA.

If the orders have not yet been implemented, the "relation back" principle of the *Bankruptcy Act 1966* (Cth) ("BA") may continue to apply.

1.5.2 Financial agreements

The definition of a "maintenance agreement" in the BA has been narrowed to exclude financial agreements entered into under Pt VIIIA of the FLA. Maintenance agreements enjoy the privilege of being exempt from the application of the "relation back" or "clawback" provisions of the BA, that is, where the Trustee can recover certain property transferred by a bankrupt to another person prior to bankruptcy. The new amendments "strip" financial agreements of that privilege and Trustees can now use the "clawback" provisions of the BA to recover property transferred pursuant to a financial agreement prior to bankruptcy: Sch 3 BFLLAA.

A new "act of bankruptcy" has been created to apply where a person is rendered insolvent as a result of transferring assets pursuant to a financial agreement under Pt VIIIA: Sch 4 BFLLAA.

Parties entering into a financial agreement pursuant to Pt VIIIA of the FLA must sign a separation declaration in order for certain provisions of a financial agreement to be binding: Sch 5 BFLLAA.

CHAPTER 2 – MAINTENANCE

2.1 SPOUSAL MAINTENANCE

The court has power to make an order that one spouse maintain the other in circumstances where the first spouse has the capacity to pay spousal maintenance and the second spouse is unable to support herself or himself adequately.

This ability to be self-supporting is determined having regard to:

- the need to care for a child of the marriage who has not attained the age of 18 years or is physically or mentally handicapped;
- age;
- physical or mental incapacity for employment; and
- any other adequate reason.

When deciding whether a spouse is entitled to maintenance, and the amount of maintenance required, the court will take into account the same factors as are considered under s 75(2) of the *Family Law Act 1975* (Cth) ("FLA"): see also Part A Chapter 1.1 of this Handbook.

Maintenance payments for a spouse will usually cease upon their remarriage, forming a de facto relationship, obtaining employment, death, or upon the death of the person making maintenance payments.

Spousal maintenance orders can be made on an urgent or interim basis pending final division of property if one spouse is unable to adequately support himself or herself and the other spouse has the capacity to pay.

Due to the court's "clean break principle" (s 81 FLA), the court is reluctant to make long term final spouse maintenance orders.

Often, a spousal maintenance order will be made to cover a period to enable the spouse to complete a course of study or training to enable him or her to re-enter the workforce. A final spousal maintenance order is considered after the four steps of the property case have been considered: see Pt A, Ch 1.1 of this Handbook. Often, as a result of the property case, there is no longer a need for spousal maintenance.

2.2 CHILD SUPPORT

Since 1 July 2006 there have been significant changes to the Child Support Legislation. From 1 July 2008 the most significant child support changes effecting legal practitioners came into effect.

From 1 July 2008 a new child support formula was implemented. The new formula is based on the "costs of children". The new formula is based on the principle that each parent between them should meet the total costs of the children. The portion of the costs each parent meets is worked out on the basis on the parent's relative income and the time each parent spends with the children. In accordance with the old formula adjustments are made for each parent having other dependent children to support.

2.2.1 The costs of children

The costs of children table is a major reform of the child support regulations. The costs of children table can be obtained from the Child Support (Assessment) Regulations or on the Child Support Agency's website. The costs of children table differentiates between the costs of children under 13 years of age and the costs of children over the age of 13. The table also provides for different numbers of children (to a maximum of three children) and different combinations of ages.

2.2.2 Income percentage

The new legislation deals with parent's income in a similar way to the old child support formula. Parent's income is calculated by taking a parent's taxable income for the last relevant taxation year with certain add backs (i.e. rental property losses, reportable fringe benefits, certain foreign income, tax free pensions and benefits).

Prior to a parent's child support income being calculated, a self supported amount is deducted from each parent's income. The new self support amount is calculated each year as a third of male total average weekly earnings. As at 1 July 2008 this figure is $18252, but the figure will be updated each year in accordance with the changes to the male total average weekly earnings. The self support amount is deducted from a parent's adjusted taxable income to give each parent the child support income. Once both parents' child support income is determined it is converted to a percentage of the total child support income of both parents for the purpose of calculating child support.

2.2.3 Levels of care and the cost percentage

Under the new formula the level of care each parent has is considered when determining the amount of child support payable. A parent's percentage of care (i.e. number of nights per year as a percentage) is translated into a cost percentage in accordance with the cost percentage table. A copy of the cost percentage table can be obtained from the Child Support (Assessment) Regulations or the Child Support Agency's website.

2.2.4 The new child support formula

Once the costs of children, the percentage of each parent's child support income and cost percentage are determined the administrative assessment of child support can be calculated. By way of example the new child support formula works as follows;

> Jack's child support income is $70,000.00 and Jill's is $30,000.00. Jack's income percentage will be 70% (he will be expected to meet 70% of the costs of child and Jill's income percentage will be 30% and she will be expected to meet 30% of the costs of the child). Jack has the care of the child one night a week or 14% of the time. In accordance with the table Jack is allowed a cost percentage of 24% (see cost percentage table). As Jack's child support income is 70%, and he meets 24% of the costs of the child through direct care he must therefore transfer 46% of the total costs of the child to Jill by way of child support payments.

A parent entitled to receive child support can elect for the Child Support Agency to collect child support from the other parent. Alternatively, he or she can elect to collect child support from the other party privately. Practitioners should note that the amount of child support assessed affects the payee's entitlement to Family Tax Benefit from Centrelink.

The new legislation also deals with the types of Child Support Agreements. From 1 July 2008 there are two types of agreement, Binding Child Support Agreements and Limited Child Support Agreements.

2.2.5 Binding child support agreements

Parties entering into Binding Child Support Agreements are required to each obtain independent legal advice with each party's legal representative executing a certificate similar to the certificate required in Binding Financial Agreements. With Binding Child Support Agreements there is no minimum amount of child support payable. The amount of child support payable in a

Binding Child Support Agreement may be less than the administrative assessment issued.

It is important to note however, that a parent's Family Tax Benefit will be calculated on the basis of what the child assessment would have been had the agreement not applied. This is of particular importance when advising a parent entitled to receive child support.

Parties are able to terminate a Binding Child Support Agreement by a written agreement (entering into a new Binding Child Support Agreement) with each party obtaining and executing a Certificate of Independent Legal Advice or by way of application to a court pursuant to section 136 of the Child Support (Assessment) Act 1989.

2.2.6 Limited child support agreements

With Limited Child Support Agreements parties are not required to obtain legal advice or execute a Certificate of Independent Legal Advice. Limited Child Support Agreements can only be in place once an administrative assessment has been determined. They will only be accepted if the amount payable pursuant to the Limited Child Support Agreement is equal to or greater then the amount of the administrative assessment. Limited Child Support Agreements are able to be varied or terminated by the parties entering into a new Limited Child Support Agreement or a Binding Child Support Agreement.

Either parent is able to terminate a Limited Child Support Agreement if the amount payable pursuant to the Limited Child Support Agreement is more than 15% different to the administrative assessment issued.

Limited Child Support Agreements can be terminated by either party after three years or at any time by order of the court.

It is fair to say that the law relating to Child Support Agreements has become somewhat more complex since 1 July 2008. Practitioners need to exercise great caution when advising clients, and should thoroughly check the current legislation and resources on the Child Support Agency's website before proceeding.

2.2.7 Dealing with disputes

Once an administrative assessment of child support has been issued either parent may, by written application, ask the Registrar of Child Support to make a departure from the administrative assessment because of the

special circumstances that exist. These special circumstances are listed in section 117(2) of the Child Support (Assessment) Act 1989. This process is also called "Change of Assessment" by the Child Support Agency.

Parents may also ask the Child Support Agency to make changes to the assessment where (for example):

- The care arrangements for the children change
- A parent's income changes (a parent can then "estimate" their income
- A "terminating event" occurs

Once the Child Support Agency makes a decision, each parent has the right to object to this decision.

2.2.8 Objection process

An objection must be lodged with the Child Support Agency within 28 days of the original decision (unless an extension of time is granted). It must be in writing and state fully the grounds relied on. The other party is given the opportunity to respond.

The Registrar is required to consider the objection and any response within 60 days after the objection is lodged and either disallow the objection or allow it in whole or in part. Pursuant to Section 87B the parties will receive a written notice in relation to the Registrar's decision.

2.2.9 Social Securities Appeals Tribunal Review (SSAT)

Once an objection decision has been made, either party can appeal to the Social Security Appeals Tribunal (SSAT). The SSAT obtained jurisdiction to deal with child support disputes on 1 January 2007. Any application to the SSAT is to be made within 28 days after receipt of the Registrars Notice of Objection. Parties are able to appeal to the SSAT by way of an appeal form (available on their website) or by initiating the appeal over the telephone. Once the review has been determined the SSAT will provide the decision and the reasons for the decision.

Parties can appeal the SSAT decision in court, but only on a question of law.

2.2.10 Courts

The role of the courts in child support matters has been further restricted with the introduction legislative reforms in 2006-2008.

The Family Court of Australia and Federal Magistrates Court of Australia have jurisdiction to hear the following child support matters;

An appeal of a decision of the SSAT in relation to the matter of law

Where parties are making an application for lump sum child support under Section 124 of the Assessment Act.

Where the parties are both involved in other proceedings pending before the Court, and the court considers it convenient to deal with a child support departure matter at the same time (section 116(1)(b).

Where a party is seeking leave under section 111 to depart from assessments that are older than 18 months (to a maximum of 7 years)

An application under section 106A or section 107 of the Child Support (Assessment) Act (paternity matters).

Child support is a complicated area of the law, and one that has been subject to significant change in recent times. There are a number of potential pitfalls and traps for clients and practitioners alike. Practitioners are strongly advised to carefully research the current legislation when confronting child support issues. There are also a number of resources available on the Child Support Agency's website www.csa.gov.au, including a "Legal Practitioners Guide". Legal Practitioners can speak directly with a technical officer from the Child Support Agency by calling the Solicitors Hotline on 1800 004 351. Practitioners can also make contact with the Child Support Service of Legal Aid NSW on (02) 9633 9916.

CHAPTER 3 – PARENTING

This chapter aims to provide an outline of the recent amendments to the *Family Law Act 1975* (Cth) ("the Family Law Act") in relation to parenting applications and to provide a practical guide for family law practitioners in approaching various types of parenting applications.

3.1 WHO CAN APPLY FOR A PARENTING ORDERS?

Part VII of the Family Law Act deals with children. Applications for parenting orders can be brought by either or both of the child's parents, the child, a grandparent of the child; or any other person concerned with the care, welfare or development of the child (*section 65C*).

The *Family Law (Shared Parental Responsibility) Act 2006* commenced on 1 July 2006 and introduced significant amendments to the Family Law Act. One of the aims of the changes to the Act is to ensure that courts are used as a last resort in resolving parenting disputes, which means there is a significant focus on resolving disputes using alternative dispute resolution methods.

A person is not able to apply for a Part VII parenting order without first obtaining a certificate from a registered family dispute resolution practitioner. Such a certificate indicates the parties have attempted to resolve their dispute through less adversarial means. There are certain exceptions to filing a certificate: see sections 60I (7) and (9).

3.2 PROCEDURAL MATTERS

3.2.1 Pre-action procedures

Pursuant to Rule 1.05 of the Family Law Rules, prior to commencing proceedings each party must comply with the pre-action procedures as found in Schedule One to the Rules. Briefly, a party is required to make a genuine effort to resolve the dispute before starting a case by:

(a) Participating in primary dispute resolution such as negotiation, conciliation, mediation, arbitration and counselling;

(b) Exchanging a notice of intention to claim and exploring options for settlement by correspondence; and

(c) Complying, as far as practicable, with the duty for disclosure.

There are circumstances in which the Court may accept it not possible or appropriate to comply with Rule 1.05 including matters involving urgency and/or family violence.

3.2.2 Which court?

The Family Court of Australia and the Federal Magistrates Court of Australia together with all New South Wales Local Courts have jurisdiction to deal with matters that fall under the Family Law Act.

Whilst a Local Court has jurisdiction to deal with a matter it only has jurisdiction to make Orders pending the transfer of the matter to a Family Court or Federal Magistrate Court unless the parties consent to the jurisdiction (*s69N(4)*). Any Order made by a Local Court Magistrate can of course be appealed which results in a *Hearing de Novo*. Whilst in some cases a great deal can be achieved at a Local Court, in most contentious and complex matters, it is advisable to commence proceedings at either the Family Court or the Federal Magistrates Court.

The Federal Magistrates Court has been set up to deal with the less complex matters which are not likely to be longer than two (2) full days Final Hearing in length. Accordingly, whilst as at the time of writing, there is no rule forcing the commencement of less complex proceedings in the Federal Magistrates Court, practitioners should exercise some degree of discretion.

If you have a matter involving allegations of sexual assault, it advisable to file in the Family Court and request the matter be referred to the Magellan Judge.

3.2.3 Procedure generally

Both the Federal Magistrates Court and Family Court are undertaking significant procedural changes on a regular basis primarily in relation to the recent amendments to the *Family Law Act*. Accordingly, whilst accurate at the time of writing, further changes are likely.

3.2.4 Federal Magistrates Court of Australia procedure

The Rules for commencing proceedings in the Federal Magistrates Court are set out in Part 4 of the *Federal Magistrates Court Rules 2001.*

To commence proceedings the Applicant must:

- File an Initiating Application. This Application may include final and interim orders sought;
- File an Affidavit setting out the fact relied on;
- Pay the Application fee. For current fees see www.fmc.gov.au;
- File a s 60I certificate or seek the necessary exemption.

The matter will then be allocated a first return date, which is approximately 6-8 weeks after the date of filing. The Application and Affidavit must be served on the Respondent in accordance with Part 6 of the Rules. All parties and their legal representatives should attend Court on the first return date. On that date, a number of things may happen: the parties may be directed to attend further dispute resolution, an interim hearing may be held (if time permits), procedural directions may be made and/or the matter may be allocated future dates for the hearing of any interim or final parenting Applications.

3.2.5 Family Court of Australia procedure

Practitioners should refer to Chapter two (2) of the *Family Law Rules 2004* with respect to commencing proceedings. A Form 1 Application needs to be filed seeking Final Orders. If you are instructed to obtain Interim Orders then a Form 2 Application in a Case with supporting Affidavit will also need to be filed. See www.familycourt.gov.au for current filing fees.

The procedure in the Family Court is split into two phases, the Resolution phase and the Determination phase. Initial Court events fall into the Resolution phase category. Once this phase is completed and if the matter is not resolved, the matter proceeds to the Determination phase.

I. Resolution phase:

Unless an urgent hearing is sought the first event at the Family Court for a parenting application will usually be a procedural hearing before a Registrar.

If the matter involves both parenting and property issues then a Case Assessment Conference will be conducted by both a Family Consultant and a Registrar. Practitioners should have a full knowledge of the issues in dispute and in particular should be ready to advise the Court of the reasoning behind the Orders sought in the client's Application and justification for the level of time a child is to spend with the other party. The Registrar will then usually refer the matter to a family consultant (if by consent), list the matter for a Directions Hearing and/or possible Interim Hearing (if an Interim Hearing is sought by either party).

At the Case Assessment Conference or Directions Hearing, the matter should be referred to the Child Responsive Program, if both parties consent. Interviews involve the child/ren and result in an "issues" report being prepared for the first day of the Less Adversarial Trial program.

The Family Consultant will give parents feedback on age appropriate orders, the impact of conflict on children and make recommendations on the future conduct of the matter.

II. Determination phase

Although it is becoming increasingly unlikely, there still exist parenting matters which are in the 'old' system as to Case Determination having been filed prior to 1 July 2006. All parenting matters filed post 1 July 2006 are dealt with pursuant to Division 12A.

Determination Phase under Division 12A: All parenting matters filed post 1 July 2006 are to be dealt with pursuant to Division 12A. Practitioners should obviously be familiar with Division 12A of the *Family Law Act*

(sections 69ZM through Sections 69ZX) but also *Practice Note 2 of 2006 – Child – related proceedings (Division 12A)*.

The five (5) principles that relate to proceedings to be dealt with pursuant to Division 12A provide some insight into the way in which the determination phase of the proceedings will be conducted (*See Section 69ZN)*:

1: 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.

2: The second principle is that the Court is to actively direct, control and manage the conduct of the proceedings.

3: 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.

4: 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.

5: 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.

3.3 DURING THE PROCEEDINGS

3.3.1 Family consultants

Practitioners should refer to Part 3 of the Act (Sections 11A to 11G). The function of a Family Consultant in proceedings is found in Section 11A. Some of these include assisting and advising the parties to proceedings so as to help resolve disputes that are the subject of the proceedings along

with assisting, advising and reporting to the Court and if necessary giving evidence in the proceedings.

On a practical level, a Family Consultant will generally be assigned to your client's case from the start of proceedings right throughout the matter. The Family Consultant will be present in Court throughout the LAT hearings. Everything said in the sessions with the Family Consultant are 'reportable' to the Court and clients should be advised accordingly.

3.3.2 Referral to dispute resolution during proceedings in the Federal Magistrates Court of Australia

Pursuant to section 13C the Court may order the parties to attend a dispute resolution session with either a Family Consultant at the court or through a body such as Relationships Australia, Centacare or Unifam. Depending on the financial circumstances of the parties, orders for external dispute resolution may be funded by the Federal Magistrates Court, or the parties may have to pay for the service. The rate payable is means-tested.

It is also common for some Federal Magistrates to order the parties attend a course, program or other service during the period between the first return date and final hearing, or after the final hearing. Courses include "Parenting After Separation" and "Keeping Contact", which are also run by Relationships Australia, Unifam and Centacare.

3.3.3 Family reports

Pursuant to section 62G the court may direct that a Family Report be prepared by a Family Consultant. The Court may make this order pursuant to an application, or of its own motion.

The matters which the court may take into account in considering whether a report is appropriate are set out in rules 23.01A(2) of the *Federal Magistrates Court Rules* and rule 15.03(2) of the *Family Law Rules* and include whether the case involves:

- An intractable or complex parenting case;
- If a child is mature enough for the child's wishes to be given significant weight in determining a case — a dispute about the child's wishes;

- A dispute about the existence or quality of the relationship between a parent, or other significant person, and a child;
- Allegations that a child is at risk of abuse;
- Family violence; or
- Whether there is any other relevant independent expert evidence available.

Where a family report is ordered the parties to the proceedings, the children and sometimes other significant persons in the children's lives are required to attend upon a Family Consultant for the purpose of preparing the report. The Court makes directions about matters which the Family Report is to address and commonly includes issues relevant to the parties and the views of the children.

The family report is received by the parties prior to the hearing and usually includes recommendations made by the family consultant. Family reports provide significant guidance to the Judicial Officer as an independent piece of evidence and are a useful tool in assisting matters to resolve. If the matter proceeds to a final hearing, the Family Consultant can be called to give evidence in relation to their report. If a party seeks to do so, the Court should be given as much notice as possible and not less than one week's notice.

3.3.4 Independent children's lawyer

Pursuant to section 68L the Court may make an order that the child be independently represented by a lawyer. The Court may make this order in response to an application, or on its own motion. If the Court makes an order for the appointment of an independent children's lawyer, in most cases, the Court notifies the Legal Aid Commission who arranges for representation by a Legal Aid Solicitor or a private practitioner, accredited through the National Independent Children's Lawyer Training scheme.

The case of *Re K* (1994) FLC 92-461 sets out a non-exhaustive list of matters to be considered in relation to the appointment of an Independent Children's Lawyer. Parties seeking to have an Independent Children's Lawyer appointed must be prepared to make submissions in relation to these points:

- Where there are allegations of child abuse, be it physical, sexual or psychological.
- Where there is an apparently intractable conflict between the parents.
- Where the child is apparently alienated from one or both parents.
- Where there are real issues of cultural or religious differences affecting the child.
- Where the sexual preference of either the parents or another significant person are likely to impinge upon the child's welfare.
- Where the conduct of either of the parents or another significant person is alleged to be anti-social to the extent that it significantly impinges upon the child's welfare.
- Where there are issues of significant medical, psychiatric or psychological illness or personality disorder relating to either a party, another significant person or a child.
- Where neither party may be a suitable parent.
- Where a mature child is expressing strong views which could result in the change of a long standing arrangement.
- One of the parties proposes the child will be permanently removed from the jurisdiction.
- Where it is proposed to separate siblings.
- Where none of the parties are legally represented.
- Where the child's interests are not adequately represented by one of the parties, particularly in relation to medical treatment of children.

The role of an Independent Children's Lawyer is set out at section 68LA of the Family Law Act. The Independent Children's Lawyer's role includes matters such as forming an independent view of what it in the best interest of the child, making submissions to the court suggesting what they consider to be the best course of action, acting impartially, and facilitating settlement negotiations.

3.4 DETERMINING A CHILD'S BEST INTEREST AND THE PRESUMPTION OF EQUAL SHARED PARENTAL RESPONSIBILITY

3.4.1. Best interest of the child – paramount consideration

Despite the recent amendments to the Act the Court must still regard the best interests of the child as the paramount consideration (section 60CA). The phrase, 'best interests of the child' is certainly not a new concept and is perhaps one of the most essential, critical and necessary phrases in family law matter involving children. The question of course is, how does the Court determine what is the best interests of the child?

Practitioners should refer in particular to Section 60B, Section 60CC and Section 61DA when formulating advice to a client.

I. Section 60B: Objects of part and principles underlying it:

(1) The objects of this Part are to ensure that the best interests of children are met by:

(a) Ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and

(b) Protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

(c) Ensuring that the child receives adequate and proper parenting to help them achieve their full potential; and

(d) Ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

(2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):

(a) Children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

(b) Children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and

(c) Parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and

(d) Parents should agree about the future parenting of their children; and

(e) Children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

(3) For the purposes of subparagraph (2)(e), an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:

(a) To maintain a connection with that culture; and

(b) To have the support, opportunity and encouragement necessary:

(i) To explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and

(ii) To develop a positive appreciation of that culture.

II. Section 60CC: How a court determines what is in a child's best interest:

The two primary considerations under this Section are:

(I) The benefit to the child of having a meaningful relationship with both of the child's parents; and

(II) The need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

The additional factors or considerations the Court must consider include (and practitioners will note the obvious comparisons with former section 68F(2) of the Family Law Act):

- Any views expressed by the child.
- The nature of the child's relationship with each parent and other persons.
- The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the child and the other parent.
- The likely effect of any change in the child's circumstances.
- The practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain direct contact with both parents and other significant persons on a regular basis.
- The capacity of each parent to provide for the needs of the child.
- The maturity, sex, lifestyle, background and culture of the child.
- If a child is of Aboriginal or Torres Straight Islander background the right to know and be involved in that culture and the likely impact any parenting Order will have on that right.
- The attitude to the child and to the responsibilities of parenthood.
- Any family violence and/or any family violence Order that applies (if the Order was a final Order or it was contested by a person).
- Whether a parent has fulfilled or failed to fulfil his or her responsibilities as a parent and in particular the extent to which a parent has taken or failed to take the opportunity to participate in making decisions about major long term issues in relation to the child, to spend time with the child and to communicate with the child.

- Any other fact or circumstance that the Court thinks relevant.

III. Section 61DA: Presumption of equal shared responsibility

When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

Note: The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each of the parents (this issue is dealt with in section 65DAA).

The presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:

- abuse of the child or another child who, at the time, was a member of the parent's family (or that other person's family); or
- family violence.

When the court is making an interim order, the presumption applies unless the court considers that it would not be appropriate in the circumstances for the presumption to be applied when making that order.

The presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

3.5 ON A PRACTICAL LEVEL – HOW DOES THE COURT DEAL WITH THE APPLICABLE LAW

The best guidance can be obtained from the Full Court's decision in *Goode & Goode* (2006) FamCA 1346. At the time of publication this decision is the authoritative decision on the interpretation of the amendments. The decision in Goode dealt with an interim parenting application, however paragraphs 10 and 82 of the Judgment provide guidance for practitioners in

relation to the application of the amendments to the Act generally. Paragraph 10 states:

"Thus, in deciding to make a particular parenting order, including an order for parental responsibility, the individual child's best interests remain the paramount consideration (as they did prior to the amending Act – see B v B: Family Law Reform Act 1995 (1997) FLC ¶92-755 at paragraph 9.51) and the framework in which best interests are to be determined are the factors in ss 60CC(1), (2), (3), (4) and (4A). The objects and principles contained in s 60B provide the context in which the factors in s 60CC are to be examined, weighed and applied in the individual case."

Paragraph 82 provides:

> In an interim case that would involve the following:
>
> (a) identifying the competing proposals of the parties;
>
> (b) identifying the issues in dispute in the interim hearing;
>
> (c) identifying any agreed or uncontested relevant facts;
>
> (d) considering the matters in s 60CC that are relevant and, if possible, making findings about them (in interim proceedings there may be little uncontested evidence to enable more than a limited consideration of these matters to take place);
>
> (e) deciding whether the presumption in s 61DA that equal shared parental responsibility is in the best interests of the child applies or does not apply because there are reasonable grounds to believe there has been abuse of the child or family violence or, in an interim matter, the Court does not consider it appropriate to apply the presumption;
>
> (f) if the presumption does apply, deciding whether it is rebutted because application of it would not be in the child's best interests;

(g) if the presumption applies and is not rebutted, considering making an order that the child spend equal time with the parents unless it is contrary to the child's best interests as a result of consideration of one or more of the matters in s 60CC, or impracticable;

(h) if equal time is found not to be in the child's best interests, considering making an order that the child spend substantial and significant time as defined in s 65DAA(3) with the parents, unless contrary to the child's best interests as a result of consideration of one or more of the matters in s 60CC, or impracticable;

(i) if neither equal time nor substantial and significant time is considered to be in the best interests of the child, then making such orders in the discretion of the Court that are in the best interests of the child, as a result of consideration of one or more of the matters in s 60CC;

(j) if the presumption is not applied or is rebutted, then making such order as is in the best interests of the child, as a result of consideration of one or more of the matters in s 60CC; and

(k) even then the Court may need to consider equal time or substantial and significant time, especially if one of the parties has sought it or, even if neither has sought it, if the Court considers after affording procedural fairness to the parties it to be in the best interests of the child.

3.5.1 Interim application after *Goode and Goode*

Prior to the amendments to Part VII of the Act the decision in *Cowling v Cowling* (1998) FLC-801 guided the Court's determination of interim parenting application. As set out above, the Full Court in Goode provided guidance for the determination of interim proceedings under the current Part VII of the Act. The Full Court also considered the continued relevance of Cowling:

"71. The reasoning in Cowling, particularly in paragraph 22 of the reasons for decision to the effect that the best interests of the child are met by stability when the child is considered to be living in well-settled circumstances, must now be reconsidered in light of the changes to the Act, particularly changes to the objects (s 60B), the inclusion of the presumption of equal shared parental responsibility (s 61DA), and the necessity if the presumption is not rebutted to consider the outcomes of equal time and substantial and significant time.

In our view, it can be fairly said there is a legislative intent evinced in favour of substantial involvement of both parents in their children's lives, both as to parental responsibility and as to time spent with children, subject to the need to protect children from harm, from abuse and family violence and provided it is in their best interests and reasonably practicable. This means where there is a status quo or well settled environment, instead of simply preserving it, unless there are protective or other significant best interests concerns for the child, the Court must follow the structure of the Act and consider accepting, where applicable, equal or significant involvement by both parents in the care arrangements for the child.

Please note that "*the court must, in making a final parenting order in relation to the child, disregard the allocation of parental responsibility made in the interim order"* (section 61DB).

3.6 PARENTING ORDERS GENERALLY

As stated above, if a court makes an order that parents are to have equal shared parental responsibility, parents are required to make joint decisions about major long term issues. "Major long term issues" include but are not limited to education, religion and cultural upbringing, health, name and living arrangements so far as changes to those issues may impact on the time the child spends with a parent (section 4). Parents are not required to consult on matters that are not long term issues, such as what a child eats or wears (section 65DAE). In making an application for interim or final parenting orders, practitioners should discuss with their clients other matters which may require an order or matters which the court may make an order in relation to. Examples include:

- Time Spent and facilitation;
- Weekend time – commencement, conclusion and when such time should recommence following school holiday time;
- School holiday time – period and facilitation;
- Time spent on other special days and holidays such as Mother's Day, Father's Day, Birthdays, Easter and Christmas;
- Telephone communication – for example, at a reasonable hour on weekdays and for a reasonable duration; between certain or specified hours on a specific day of the week having regard to the child's accustomed routine;
- Restraints on bringing the child into the presence of a particular person;
- Restraints on denigrating the other parent in the presence of the child;
- Restraints on discussing the proceedings in front of the child;
- Restraints on consuming drugs or alcohol prior to or during time spent with the child;
- Restraints on relocating a specified distance from current address.

3.7 OTHER TYPES OF PARENTING ORDERS

Clients will often approach practitioners to obtain Orders from the Court concerning specific issues or events relating to a child. Some examples of the more common Orders sought are set out below:

3.7.1 Relocation

The Family Law Act does not expressly address the issue of relocation. Relocation matters are parenting matters where the proposal of one party involves an application to relocate permanently with a child, be it intrastate, interstate or internationally. Relocation cases will continue to be vexed applications, which may be even more onerous on the party seeking to relocate given that if the Court decides the parents are to have equal shared parental responsibility an order for equal time must be considered. A full ventilation of this complex area is outside the scope of this Handbook and practitioners should refer to Full Court authority following the 2006

amendments (and the subsequent commentary on those cases) for guidance.

3.7.2 Change of name

To change the name of a child under 18, the consent of both parents is required, except in situations where:

- The child does not understand the meaning and implication of the change of name;
- Both parents are deceased or cannot be found, or for some reason cannot carry out their parental responsibilities, in which case, the child's guardian may apply; or
- Only one of the parent's details are recorded on the child's birth certificate, in which case, that parent can apply; or
- There is no other surviving parent, in which case, the surviving parent can apply; or
- A court orders the change of name.

I. Where both parents consent

Where both parents agree and consent to changing the child's name, they can apply to the Registrar of Births, Deaths & Marriages for registration of a change of name by completing the Application for Change of Name of the Child, available on the NSW Registry of Births, Deaths and Marriages website: http://www.bdm.nsw.gov.au ("the BDM website"). The application must include:

- Statutory Declaration;
- Payment Details;
- At least three forms of identification from both parents and the child; and
- A NSW Birth Certificate or a NSW Change of Name Certificate (if available).

For more information on proof of identification, go to the BDM website. Note that a father not listed on the birth certificate will not be able to apply for a copy of the child's birth certificate from the Registry. In such cases, the Father will need to ask the Mother to provide a copy of the child's birth certificate. Photocopies of documents must be certified by qualified witnesses.

For current fees and processing times, check the BDM website.

II. Where one parent refuses consent

Where one parent refuses to consent to changing the child's name, or the parent's whereabouts are unknown, a court order approving the change of name is required. The other parent can apply to a court having jurisdiction under the Family Law Act to approve the change of name.

If changing a child's name by Court order in the Federal Magistrates Court, the Applicant will need to file an Initiating Application and an Affidavit setting out the reasons why the Applicant wants the child's name to be changed. The Applicant should also address the factors which the Federal Magistrate will consider, such as:

- The short and long-term effects of any change to the child's name;
- Any embarrassment likely to be suffered by the child if his or her name is different from that of the parent with whom the child lives or who has care and control of the child;
- Any confusion of identify which may arise for the child if his or her name is or is not changed;
- The effect which any change of name may have on the relationship between the child and the parent whose name the child bore during the marriage or period of cohabitation;
- The effect of frequent or random changes of the child's name; and
- The child's wishes; and
- The degree of maturity of the child.

The Applicant must cause the other parent (the Respondent) to be served in accordance with the Rules as soon as practicable after filing. In the event

the Applicant cannot serve the documents on the Respondent, the Applicant should apply for an interim order seeking substituted service or to dispense with service.

If the Respondent opposes the Application or proposes different orders, they should file a Response and an Affidavit, and serve the documents on the Applicant within 14 days of being served with the Application.

If the other parent refuses to complete the appropriate documents after the Court Order to change the name of the child has been made, a warrant for arrest can be sought to compel the parent to fulfil his or her parental responsibilities. Alternatively, that parent can seek an order that a Registrar be authorised to sign the necessary paperwork if the other party refuses to sign, pursuant to section 106A of the Act. The Applicant can avoid having to bring enforcement proceedings by seeking the s 106A Order in the first instance.

3.7.3 Passports

To obtain a passport for a child under 18 years, the written consent of all persons with a caring responsibility for the child (that is a parent, or a parent who has a parenting order or has parental responsibility for the child, or a guardian of the child) is needed. Each child must be issued with his or her own passport.

I. Where both parents consent

To apply for an Australian passport for a child under 18 years, the parent should complete the Australian Passport Child Application Form in black ink (a copy of which can be obtained from an Australia Post Office, or mailed, if requested), or complete and print an application online: http://www.passports.gov.au ("the Passports' website").

The following documents must also be provided with the application:

- The child's full birth certificate as well as any previous Australian passport that they may have had;

- If the child was born in Australia, you will need to provide an original document that confirms one parent's Australian citizenship or permanent residency at the time of the child's birth;
- If the child does not have an Australian birth certificate, you will need to provide the child's full overseas birth certificate (with an English translation if necessary) and proof of the child's Australian citizenship;
- If the child was born overseas and has no birth certificate, complete Form B6 (Child Born Overseas and No Birth Certificate) (which can be downloaded from the Passports' website);
- If you are presenting court orders with the application, you must complete Form B7 (No Further Court Orders) (which can be downloaded from the Passports' website); and
- You may also be required to complete a Form B11 (General Declaration) in order to provide additional information on a particular issue (which can be downloaded from the Passports' website).

Applications should be personally lodged at an Australian post office.

II. Where one parent refuses consent

If one parent refuses to give their consent for a passport to be issued to their child, the other parent can make an application to the Court for an order that a passport be issued despite the other parent's refusal to consent and sign. The Affidavit accompanying the Application should address the reasons for seeking the passport, including the details of any proposed trip.

If the whereabouts of the non-consenting parent are unknown, the Applicant should also seek an order dispensing with service.

The court's power to permit a child's passport to issue, under the Family Law Act, either as an injunction or a parenting order (or an order about the welfare of a child).

A passport can still be issued to a child in certain "special circumstances", even when full consent has not been obtained. Special circumstances include:

- When one parent is deceased (a death certificate would have to be lodged);
- When one parent cannot be contacted; or
- Only the mother is named on the birth certificate.

An application can be made to the Approved Senior Officer for a Waiver of Consent by completing Form B9 (Child Without Full Parental Consent) (which can be downloaded from the Passports' website).

Where the father is not named on the birth certificate, a Form B8 (Mother's Name Only on Child's Birth Certificate) (which can be downloaded from the Passports' website) should be completed.

III. Surrender of passport

If there is a possibility that a child will be removed from Australia, an application can be made to the court to make an order for the surrender of the child's existing passport. An Affidavit stating the facts relied on must also be filed. The Orders may be made alone, or together with interim or final parenting orders (for example, an order restraining the removal of a child from the country, or seeking orders for approval to take the child overseas).

When there are no other orders sought in the Application, it will be listed for hearing before a Federal Magistrate.

3.7.4 Overseas travel

A party wishing to travel overseas with a child must make a reasonable attempt to resolve a dispute and comply with pre action proceedings before commencing proceedings (R 1.05).

Sections 65Y and 65Z provide that if there is a parenting order in place or if there are proceedings regarding which parent a child should live with, the child must not be taken outside Australia without the written consent of each party.

Parties seeking to travel must file an Initiating Application and supporting affidavit.

Prior to the parent taking the child away on holidays, and where there is the slightest fear that the child may not be returned, the parties should enter into an agreement which covers the following:

- The purpose of the holiday;
- The provision of itinerary, details of travel, accommodation and tickets;
- Requirement that the child travel only on Australian passports; and
- Provision of proper security for the return of the child and that security be in a realistic amount making provision for costs, expenses etc of the other party travelling overseas to obtain return of the child.

Alternatively, Court Orders can be made proposing that prior to the parent taking the child on an overseas trip, written notice is provided to the other parent detailing:

- The country to which the child is travelling;
- The name of the person who will accompany the child (if applicable);
- The dates upon which the child will depart from and return to Australia;
- The airline with whom the child will travel; and
- The addresses and telephone numbers at which the child will stay.

Court Orders can also be made imposing other conditions prior to overseas travel, including arrangements for vaccination, travel visas, telephone communication with the parent still in Australia and financial security. Where there is an appreciable or high risk that the child will not be returned, a Court Order can be sought to restrain the parent from leaving Australia with the child.

3.7.5 Medical procedures

The Family Court has the jurisdiction to approve or refuse permission for special medical procedures under the section dealing with the power to make orders for the welfare of children (i.e.: section 67ZC of the Family Law

Act). The most common application is for an order which has the effect of authorising a procedure on a child rendering that child permanently sterilised. However, in *Re Alex: Hormonal Treatment For Gender Identity Dysphoria* [2004] FamCA 297, authorisation was given by the court for the administration of hormonal therapies that would commence the "sex change" process.

Such decisions are beyond the ordinary ambit of parental power and must be the subject of court sanction.

The Gillick principle establishes as a threshold question of consent, whether a child is capable in law or in fact, of consenting to medical treatment on his or her own behalf. The High Court has endorsed and followed the decision of the House of Lords in *Gillick v West Norfold AHA* [1986] AC 112, which held that the parental power to consent to medical treatment on behalf of a child diminishes gradually as the child's capacities and maturity grow, and that this rate of advancing capacity in the child depends on the child.

According to this principle, a child is capable of giving informed consent when "he or she achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed".

P & P (1995) FLC 92-615 expanded on the guidelines set out in Marion's Case Secretary, Department of Health and Community Services v JWB and SMB (1992) FLC 92-293.

The *Family Law Rules 2004* contain special rules for special medical procedure applications in Div 4.2.3.

If a "medical procedure application" is filed, evidence must be provided to satisfy the Court that the proposed medical procedure is in the best interests of the child. Rule 4.09 sets out the issues the evidence must address, including evidence from medical, psychological or other relevant expert witnesses.

The Rules provide for a medical procedure application to be listed before a Judge as soon as possible after the date of filing. It is common for an Independent Children's Lawyer to be appointed in medical procedure applications.

3.7.6 Paternity issues

Paternity disputes, particularly in the context of child support, are common.

I. Presumption of paternity

A child conceived or born during a marriage is presumed to be the husband's child.

The Family Law Act also establishes rebuttable presumptions of parentage for couples who are married, cohabited at certain times relevant to conception, are named as a parent in an official document (such as the register of births) or if another court has made a finding of parentage. See subdivision D of Division 12 of the Act.

The Act sets out presumptions of parentage for a child born as a result of artificial conception, so that if a couple has a child through artificial conception procedures, it is presumed they are the parents, regardless of whether they have a biological connection: s 60H of the Act.

II. Declaration of parentage

If the court has decided an issue of parentage, it may make a declaration that is conclusive evidence of parentage for all purposes of Commonwealth law.

III. Evidence of parentage

Evidence such as physical characteristics and blood group types can be admitted to assist in establishing parentage. The most reliable and conclusive method, however, is DNA based testing carried out on bodily samples (usually a finger prick or mouth swab).

IV. Parentage testing

The court may order a "parentage testing procedure" to be carried out if an issue about parentage arises: section 69W of the Family Law Act.

Who can apply?

An application can be made by a party or an Independent Children's Lawyer, and the Court may make an order of its own motion.

What can the court order do?

A parentage testing order may be made in relation to the child, the mother and any other person about whom parentage testing information might assist in determining the parentage of the child (section 69W(3) of the Family Law Act) and consequential orders may be made, for example, in relation to costs.

Consent

Parentage testing can only be carried out if a parent or guardian of a child under 18 years old consents.

What if a person refuses?

If a person who is ordered to undergo parentage testing fails to comply, the court "may draw such inferences as appear just in the circumstances": section 69Y(3) of the Family Law Act.

Procedure

Application should be made to the Federal Magistrates Court by filing an Initiating Application seeking interim orders with an affidavit in support.

The laboratory which carries out the testing must be accredited by the National Association of Testing Authorities (NATA).

The laboratory will produce a report showing the results of the tests in accordance with Form 5 in Schedule 1 of the *Family Law Regulations 1984* (Cth).

Standard of proof

The standard of proof in parentage proceedings is the civil standard that is the balance of probabilities. The results of the test will normally show that the supposed father is more than 99% likely to be, or not to be, the father of the child (this can vary if, for example, putative fathers are closely related).

3.7.7 Location orders/Commonwealth information orders

Practitioners may be faced with the task of locating a child in circumstances where there is little or no information known about the child's whereabouts. Sections 67J through to 67P of the Family Law Act deal with Applications that can be made to obtain information as to the location of a child from a Government department (Commonwealth Information Orders), private Company or natural person (Location Orders).

Any information that is provided by a Commonwealth Information Order or Location Order is to be disclosed only to the Registry Manager of the Court that made the Order. The Registry Manager then has various powers with respect to the provision of the information so as to (as is required in most cases) ensure service of documents on a person (usually the other parent) who has the care and control of the child.

Before seeking a location order, your client will need to file evidence setting out the attempts and steps taken to locate the other person.

3.7.8 Recover orders

Some circumstances will arise whereby practitioners will need to act very swiftly to obtain a Recovery Order in relation to a child. Generally speaking, a Recovery Order may be necessary in circumstances where a person has failed to return a child in accordance with Orders of the Court. In circumstances where there are no Parenting Orders in place, a Recovery Order may be applied for if a child has been taken from the primary care giver without consent. The primary caregiver should apply for a "live with" order as well as a recovery order.

Practitioners should refer generally to sections 67Q through 67Y of the Family Law Act.

It is not a simple formality that a Recovery Order will be granted even in circumstances where one party may have refused to return the child in direct breach of Orders. The child's best interests are the paramount consideration when the Court is faced with an Application to make a Recovery Order (section 67V).

It is usual that a Recovery Order is addressed to all officers of the Australian Federal Police and all Police officers of the various states and territories of Australia. The Family Law Act at section 67Q dictates the powers that are authorised to be used when acting in compliance with a Recovery Order made by the Court.

3.7.9 Orders for time spent to be supervised & Orders for no time

In the more extreme cases, Practitioners may be faced with having to seek Orders on behalf of a client to severely limit the amount of time a child spends with a parent or to seek Orders that the child spend no time at all with a parent. The circumstances that can give rise to these types of Orders can include:

- Domestic/Family Violence.
- Allegations of sexual abuse.
- A parent with psychiatric problems.
- Re-introduction for child to parent after an extended break in the relationship.
- A demonstrable undermining of the relationship between the child and the other parent.
- A demonstrable risk of the child being 'abducted' by the parent

If the allegations by your client are serious, a Notice of Risk of Abuse (section 67Z) should be filed. Similarly an Order for the appointment of an Independent Children's Lawyer should be sought at an early stage of the proceedings. Thought should be given to the early issue of Subpoena (ensure you comply however with the Rules of the Court in this regard) for medical records, police records, counselling records, records of the Department of Community Services (DOCS), the Joint Investigative

Response Team (JIRT) or any other records that may substantiate the allegations made.

Thought should also be given to whether an Application should be made to the Court for the appointment of an Expert to prepare a report rather than the usual Family Report. This is particularly relevant in cases which may require a report addressing issues such as the psychological impact on the child, any psychiatric illness of a parent and any allegations of sexual abuse.

There are organisations that provide 'contact centres' to allow for supervised visits to take place between a child and parent (or other significant person). Your client should however propose other suitable supervisors (if possible) as there are usually lengthy waiting lists for 'contact centres'. If nominating an individual to act as a supervisor, you should file an Affidavit by that person, setting out their consent to act as supervisor and demonstrating an understanding of the role and responsibilities of a supervisor.

Finally, it is of the utmost importance that prior to confirming your instructions to file an Application for supervision of the time spent by a child with a parent or an Application that no time be spent by a child with a parent; you carefully explain the seriousness of making such an Application. If the allegations are ultimately found to be without substance, then the Court can make an Order that the person making the allegations is no longer fit to have the primary care of a child. It is also important to advise your client that Orders as to supervision are very rarely long-term measures adopted by the Court.

3.8 WHAT TO DO IF A CHILD IS REMOVED (OR SOON TO BE REMOVED) FROM THE COUNTRY ILLEGALLY

3.8.1 Airport watch list

The purpose of the Airport Watch List is to prevent children being removed from Australia without either the consent of both parents or an Order of the Court. This is done by placing the child's name on the Australian Federal Police's ("AFP") Airport Watch List.

To place a child on the Watchlist, a Court order specifically directing the AFP to place the child's name on the list has to be obtained. The AFP Family Law Team prefers the following wording for the order (as family law can and does frequently change, you should check the AFP website for correct wording):

> *"That until further order, each party (First Name, Second Name, SURNAME And Date Of Birth Of Each Party) their servants and/or agents be and are hereby restrained from removing or attempting to remove or causing or permitting the removal of the said child/children (First Name, Second Name, SURNAME And Date Of Birth Of Each Party) from the Commonwealth of Australia AND IT IS REQUESTED that the Australian Federal Police give effect to this order by placing the name/names of the said child/children on the Airport Watch List in force at all points of arrival and departure in the Commonwealth of Australia and maintain the child's/children's name/names on the Watch List until the Court orders its removal."*

The child's name may be placed on the Watchlist once an Initiating Application, an Application for Final Orders, an Application in a Case or a Response to those Applications are filed with a court that exercises the family law jurisdiction under the Act.

You must provide the AFP with a certified copy of the Court order once it is made.

To remove the child from the Watchlist, an order must be obtained directing the removal of the child's name from the Watchlist, and a discharge or vacation of the original Court order placing the child on the Watchlist. Once that order has been obtained, an original sealed order should be provided to the AFP. Otherwise, a child's name will automatically be removed from the Watchlist when he or she turns 18 years.

For further information, see the Australian Federal Police's *Family Law Kit* available at http://www.afp.gov.au/national/family_law/familylaw_kit.html

3.8.2 Hague Convention

Australia is a party to the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention").

The Convention entered into force in Australia on 1 January 1987. It has been adopted into Australian law by means of the *Family Law (Child Abduction Convention) Regulations 1986* (Cth) ("FLCACR"). The FLCACR and not the Convention itself constitutes the Australian law.

The Convention provides for the return of child to his or her country of habitual residence so that the courts in that country can determine issues of parental responsibility and with whom a child should live and spend time. The court's function in Convention cases is not to determine what is in the child's best interests. The Convention is primarily concerned with questions of jurisdiction.

The court's function is to return the child to the country of their habitual residence in order for the appropriate authorities in that country to determine what is in the child's best interests: see *Re HB (Abduction: Children's Objections)* [1997] 1 FLR 392 at 395 per Hale J. The basis for this is so that the abducting parent does not gain any tactical advantage through his or her actions.

Article 16 of the Convention provides that, after receiving notice of a wrongful retention or removal of a child, a court shall not decide on the merits or rights of custody until it has been determined that the child is not to be returned under the Convention or unless an application under the Convention is not lodged within a reasonable time after receiving notice. Article 19 provides that a decision under the Convention concerning the return of a child shall not be taken to be a determination on the merits of any custody issue.

The countries that are a party to the Convention are listed in Schedule 2 of the FLCACR. The countries are also listed on the official Australian website regarding child abduction maintained by the Commonwealth Attorney-General's Department (http://www.ag.gov.au/childabduction). However, the website directs those looking for the most current listing of countries to contact the Commonwealth Attorney-General's Department on 1800 100 480.

Each country that is a party to the Convention has a central authority that it is responsible for discharging the duties which are imposed on parties to the Convention. In Australia, the central authority is the Commonwealth Attorney-General's Department. All incoming and outgoing applications

pursuant to the Convention are assessed by the Commonwealth Attorney-General's Department. All incoming applications for the child to be returned overseas are then sent to the relevant state or territory central authority. State and territory central authorities can also assist parents of child removed from Australia with outgoing applications. In New South Wales, the Department of Community Services ("DoCS") is the relevant central authority.

I. Objections of the Convention

Article 1 of the Convention provides that the objects of the Convention are:

- To secure the prompt return of child wrongfully removed to or retained in any state that is a party to the Convention; and
- To ensure that rights of custody and of access under the law of a state that is a party to the Convention are effectively respected in the other states that are parties to the Convention.

II. Wrongful removal or retention

Article 3 of the Convention provides that the removal or retention is considered to be wrongful where:

- It is in breach of rights of custody under the law of the state in which the child was habitually resident immediately before the removal or retention; and
- At the time of the removal or retention those rights were actually exercised or would have been exercised but for the removal or retention.

III. Who can make an application?

Article 8 of the Convention provides that any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply to either the central authority in the child's habitual residence or the central authority in any other state which is a party to the Convention for assistance in securing the return of the child.

IV. Which children does the Convention apply to?

Article 4 provides that the Convention applies to any child who is habitually resident in a country that is a party to the Convention immediately before any breach of custody or access rights; and is under 16.

V. Voluntary return encouraged

Article 10 provides that the central authority of the state where the child is must take appropriate measures in order to obtain the voluntary return of the child.

VI. Authorities must act quickly

Article 11 provides that the judicial or administrative authorities of the countries that are parties to the Convention must act expeditiously in proceedings for the return of children. Further, if the authority has not reached a decision within six weeks from the date of the commencement of proceedings, the central authority of the other country involved in the proceedings has the right to request a statement of the reasons for the delay.

VII. The general rule

Article 12 provides that where a child has been wrongfully removed or retained in the terms of Article 3 and at the date of the commencement of proceedings before the judicial or administrative authority ("the authority") in the state where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. Further, this Article provides that even if one year has expired, the authority shall return the child, unless it is demonstrated that the child is now settled in his or her new environment.

VIII. Exceptions to the general rule

Article 13 provides that the authority is not bound to return the child if the person, institution or other body that opposes its return establishes that:

- The person, institution or body having the care of the child at the time of the removal or retention was not actually exercising rights of custody (which is referable to the local law of that person's country) at the time or removal or retention, or had consented or subsequently acquiesced in the removal or retention; or
- There is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Further, this Article provides that the authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of their views. In considering the circumstances referred to in this Article, the authority must take into account the information relating to the social background of the child provided by the central authority or other competent authority of the child's habitual residence.

Article 20 provides that the return of a child under Article 12 may be refused if this would not be permitted by the fundamental principles relating to the protection of human rights and fundamental freedoms in the state which is being asked to return the child.

IX. Abduction from Australia

When the Commonwealth Attorney-General's Department receives an application from a parent in Australia for the return of a child taken overseas it takes the following steps:

- Assesses whether the application satisfies Convention requirements and that the correct information and documents have been supplied;
- Faxes the application to the central authority in the overseas country;
- Is informed by the overseas central authority of the steps it has taken;
- If the application proceeds to court, the overseas central authority liaises with the Commonwealth Attorney-General's Department throughout the proceedings and provides it with any documents required by the overseas court;

- Keeps the parent left behind in Australia informed about developments in the other country; and
- If the Australian parent has been provided with financial assistance from the Australian government to go to the overseas country to collect the child, the Commonwealth Attorney-General's Department sometimes makes the travel arrangements.

In practice, it is the state and territory central authorities which deal directly with the parent who has been left behind in Australia. In New South Wales, when a parent approaches DoCS claiming that their child has been abducted to a Convention country, the parent is invited to an interview with a legal officer of the DoCS International Kidnapping Team and the following steps are taken:

(a) A preliminary assessment is made as to whether the parent can satisfy Convention requirements by proving:

- That the child is under 16 years of age;
- That the child's habitual residence at the time of the wrongful removal or retention was Australia;
- That he or she was exercising rights of custody (parental responsibility) at the time of the wrongful removal or retention or would have but for the wrongful removal or retention; and
- That he or she did not consent or subsequently acquiesce to the removal or retention; and

(b) A Form 1 Request for Return of Child Abducted from Australia (see Schedule 3 to the FLCACR) is completed together with any affidavits in support. If there are no Australian parenting orders in place the legal officer prepares a standard affidavit setting out the provisions of the Family Law Act and explaining the concept of "joint parental responsibility". The overseas court relies on that affidavit in deciding whether the applicant in Australia had "rights of custody". You can prepare the Form 1 application. However, you should tell the client that DoCS will provide them with this service free of charge. Legal Aid is not available for the provision of this service.

X. Abduction to Australia

When a child is removed from an overseas country to Australia, the overseas central authority sends the application to the Commonwealth Attorney-General's Department. After the Commonwealth Attorney-General's Department has assessed the Application to ensure that it satisfies Convention requirements it forwards it to the relevant state or territory central authority. The state or territory central authority then attempts to negotiate a voluntary return of the child and brings any necessary court proceedings. The Commonwealth Attorney-General's Department can instruct the state or territory central authority about how to deal with the case. The Commonwealth funds the court proceedings for the applicant in their entirety.

When the state or territory central authority receives the application from an overseas country that has been forwarded to it by the Commonwealth Attorney-General's Department it:

- Makes a preliminary decision about whether it is matter suitable for negotiating a voluntary return of the child;
- Seeks any urgent, ex parte restraining orders that it considers appropriate due to:

    (a) The abducting parent's history of fleeing;

    (b) A risk that the child may be harmed; or

    (c) There being evidence to suggest that the abducting parent may flee to a non-convention country.

The interim orders sought may include:

- Requiring the surrender of passports;
- Preventing children from being removed from Australia;
- Placing children on the Airport Watch List;
- For residence of the child;
- For the issuing of warrants to apprehend children; and

- For removal of a child from the abducting parent (as a last resort only).

If the Application seems to meet all the requirements of the Convention, it is filed in the Family Court. The Applicant in these proceedings is the state or territory central authority. The Commonwealth central authority is their client, not the parent seeking the child's return.

The FLCACR require the Family Court to hear the application within 42 days. The application is usually held before a judge or judicial registrar and heard on the papers. Special evidentiary provisions apply to documents received from overseas witnesses: see regulation 29 FLCACR.

XI Applications for access

A parent or other person having a right of access to a child under the law of a Convention country may apply under the Convention to have access enforced.

In Australia, the state or territory central authority will prepare the application using Form 3 Request for Access to a Child in a Convention Country in Schedule 3 of the FLCACR. The application is forwarded to the central authority in the overseas country.

When an application for access is received by a state or territory central authority in Australia, it attempts to reach a negotiated agreement. If an agreement is reached, consent orders are made by the Family Court. In order to allay the other parent's fear that the child will not be returned to Australia following the access period, Orders can be made for the child's passport to be held by the overseas central authority or for access to take place in a country that is a party to the Convention.

XII Abduction to non-convention countries

If a child is abducted to a non-Convention country, before any action is taken to recover the child, the central authority in the Australian state or territory the child was taken from should be contacted for country-specific advice. The Commonwealth Attorney-General or the Department of Foreign Affairs and Trade may be able to supply a list of lawyers in an overseas country who are familiar with international child abduction matters. The

parent may qualify for limited financial assistance from the Commonwealth to bring domestic proceedings overseas.

3.9 VARYING PARENTING ORDERS

Section 60CC(3) (l) requires the court to consider whether it would be preferable to make an order that would be least likely to lead to the institution of further proceedings when determining the best interests of a child. This is to avoid parties being involved in repeated litigation. Parties who have been involved in prior proceedings, who are seeking to effectively re-open a matter through a fresh application for final orders must demonstrate a material change in circumstances. This is known as the test in *Rice and Asplund* (1979) FLC 90-725. When a party is making such an application, the *Rice and Asplund* issue must be determined as a preliminary issue.

Relevant cases include:

- *Burton and Burton* (1979) FLC ¶90-622
- *Houston and Sedorkin* (1979) FLC ¶90-699
- *Rice and Asplund* (1979) FLC 90-725
- *F and N* (1987) FLC ¶91-813
- King and Finneran [2001] FamCA 344
- *F and C* [2004] FamCA 568
- *SPS and PLS* [2008] FamCAFC 16

A non-exhaustive list of the types of factual issues which parties may assert constitute a material change in circumstances include re-partnering or re-marriage, improved financial circumstances, strong wishes expressed by a child, recovery from mental illness etc. The introduction of the *Family Law (Shared Parental Responsibility) Act 2006* does not constitute a sufficient change in circumstances to revisit previous parenting orders.

CHAPTER 4 – COSTS

4.1 COSTS – FAMILY COURT OF AUSTRALIA

4.1.1 Costs notice

Lawyers have a duty to keep clients informed about costs at each stage of the matter.

You must provide your client with a written advice about the basis on which costs will be calculated, an estimate of costs, how party/party costs may apply and whether any other lawyer or expert witness will be retained and if so the estimated cost.

There is currently a Family Court Scale of Costs which sets out an itemised scale of costs that a lawyer can charge. If you wish to charge fees over and above the Family Court's Scale of Costs you need to have a Costs Agreement with your client.

Together with your Costs Agreement, you must ensure that you give to your client the Family Court's prescribed Brochure titled "Costs Notice".

The "Costs Notice" sets out information about:

- lawyer and client costs - rights, duties and responsibilities;
- party and party costs - what a lawyer may charge; and
- disputing an account - the process.

If an offer to settle is received during a property case, you must inform your client of their actual costs (both paid and owing) up to the date of the offer to settle and estimated future costs to complete the case in order for the client to properly consider the offer to settle.

Leading up to each court event, the client has to be provided with written notice of their actual costs (both paid and owing up to and including the court event), the estimated future costs up to and including each future court event and the source of payment of costs. This notice should also be exchanged with the representatives for the other party.

4.1.2 Costs orders

The general principle under section 117(1) of the Act is that each party shall bear their own costs. This is subject to section 117(2) and 117(AA) which gives the Court discretion to make a costs order where it considers that the order as to costs is just and there are circumstances that justify it making the order.

Section 118 of the Act also provides for the making of an order for costs against a party to proceedings upon a finding that the proceedings are frivolous or vexatious.

The Court may exercise its discretion to make a costs order in a matter for various reasons including:

- failure to comply with the Rules or an Order;
- failure to comply with a pre-action procedure;
- improper or unreasonable conduct; and
- undue delay or default by you.

Costs orders may be made in favour of or against:

- a party to the proceedings;
- an Independent Children's Lawyer - see section 117(2);
- a non-party (in exceptional circumstances); and/or

- a lawyer (in exceptional circumstances).

In considering its discretion to make an order for costs the Court shall have regard to each of the matters set out in section 117(2A).

A party seeking costs must give notice to the other person from whom costs are sought and the Court must give each person a reasonable opportunity to be heard in relation to the costs application.

Costs orders may be made at any stage of the proceedings.

4.1.3 Solicitor/client costs

The Family Court will no longer regulate solicitor/ client costs, for any fresh application commenced after 1 July 2008. For those matters, entering into a Costs Agreement and any issues about payment of solicitor/client costs will be regulated by the state/ territory regulatory body.

For those cases filed prior to 1 July 2008, the Family Court will continue to regulate solicitor/ client costs, except if the client retains a new solicitor post-1 July 2008 or in circumstances where the solicitor and client agree that the provisions of the Rules dealing with the regulation of costs should no longer apply to their financial relationship. The provisions which govern the assessment and calculation of costs for pre-1 July 2008 cases are now set out in Schedule 6 of the *Family Law Rules* 2004. The Family Court's procedure for dealing with a Solicitor/ client costs dispute is as follows:

The client requests and the solicitor provides an itemised bill of costs;

- The client files the Family Court form "Notice Disputing Itemised Costs Account";
- A Settlement Conference takes place; and
- An Assessment hearing takes place, if necessary.

4.2 COSTS – FEDERAL MAGISTRATES COURT OF AUSTRALIA

Part 21 of the *Federal Magistrates Court Rules 2001* (Cth) ("FMCR") deals with the issue of costs in the Federal Magistrates Court. The Federal Magistrates Court has its own scale of costs, set out in Schedule 1 of the Rules.

The most salient aspects of the costs provisions of the Federal Magistrates Court Rules are as follows:

- On application by a respondent, the court may order the applicant to give security that the court considers appropriate for the respondent's costs of the proceedings: r 21.01(1) FMCR;
- A party may make an Application for an Order for Costs at any stage in a proceeding or within 28 days after a final order is made, or within any further time allowed by the court: r 21.02)(1) FMCR;
- The court may specify the maximum costs that may be recovered on a party/party basis either by order at the first court date or of its own motion, or on the application of a party: r 21.03(1) FMCR.
- The court may vary the maximum costs specified if, in the court's opinion, there are special reasons and it is in the interests of justice to do so: r 21.03(3) FMCR;
- If the costs of a motion, application or other proceeding are reserved, the costs reserved follow the event unless the court otherwise orders: r 21.04 FMCR;
- If proceedings are transferred to the Federal Magistrates Court from the Family Court or from the Federal Court and the court from which the proceeding is transferred has not made an order for costs, then the court may make an order for costs including costs before the transfer: r 21.05(2) FMCR;
- The court or a registrar may make an order for costs against you if you, or your employee or agent, have either caused costs to be incurred by a party or another person, or to be thrown away, because of undue

delay, negligence, improper conduct or other misconduct or default: r 21.07(1) FMCR;

- You may be in default if a hearing may not proceed conveniently because you have unreasonably failed to attend, or to send another person to attend the hearing, or to file, lodge or deliver a document as required, or to prepare any proper evidence or information, or to do any other act necessary for the hearing to proceed: r 21.07(2) FMCR. Before making an order for costs, the court or registrar must give you a reasonable opportunity to be heard: r 21.07(5) FMCR;
- Unless the court otherwise orders, interest is payable on outstanding costs: r 21.08 FMCR;
- Unless otherwise provided, the FMCR do not regulate the fees to be charged by lawyers as between lawyer and client in relation to proceedings in the court: r 21.09(3) FMCR;
- Unless the court otherwise orders, a party entitled to costs in a proceeding (other than a proceeding to which the *Bankruptcy Act 1966* (Cth) applies) is entitled to costs in accordance with Sch 1 of the FMCR and disbursements properly incurred: r 21.10 FMCR;
- Expenses for attendance by a witness at a hearing is a disbursement properly incurred for a proceeding if the attendance is reasonably required and the amount is reasonable or is authorised, or approved, by the court: r 21.12 FMCR;
- Likewise, expenses for the preparation of a report by an expert is a disbursement properly incurred for a proceeding if the report is reasonably required and the amount is reasonable or is authorised, or approved, by the court: r 21.13 FMCR.

4.2.1 Solicitor/client costs

The Federal Magistrates Court does not regulate costs arrangements between solicitors and clients. Clients have to rely on the particular State's costs assessment system to resolve cost disputes.

PART B – GOING TO COURT

CHAPTER 5 – BEFORE YOU FILE

5.1 LIST OF FORMS

The Family Court website contains prescribed forms organised alphabetically and by number, “Do-It-Yourself” kits, fee exemption, waiver and refund forms, and non-prescribed forms: http://www.familycourt.gov.au. The Federal Magistrates Court website contains downloadable and interactive copies of the most common forms used by that Court: http://www.fmc.gov.au

5.2 JURISDICTION – WHERE TO FILE

The Commonwealth and the states each have power to legislate in respect of certain areas of family law. In relation to the Commonwealth, s 51 of the Constitution provides:

> "The Parliament shall, subject to the Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> - marriage;
> - divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants."

Any Commonwealth law which is enacted pursuant to a head of power under the Constitution supersedes any inconsistent state law pursuant to the inconsistency of laws provision (contained/provided for) in s 109 of the Constitution.

New South Wales and four other states have handed over to the Commonwealth their power to legislate with respect to children. The specific referral of power in relation to children includes the power to make laws regarding maintenance of children, guardianship, residence, contact and parentage issues.

The following courts exercise jurisdiction under the Family Law Act 1975 (Cth) ("FLA") in New South Wales:

- Family Court of Australia;
- Federal Magistrates Court; and
- Courts of summary jurisdiction.

5.2.1 Family Court of Australia

The Family Court is a superior court of record. The jurisdiction of the Family Court is principally outlined in the following sections of the FLA:

- original jurisdiction – ss 31(1) and 69H;
- appellate jurisdiction – s 93A(1);
- hearing of case stated – s 94A(1);
- associated matters – s 33;
- miscellaneous matters – s 39(5); and
- by proclamations – s 40.

The Family Court also exercises jurisdiction under the following Acts:

Marriage Act 1961 (Cth)

- s 12 ("Authorisation of marriage of person under age of 18 or 16 years in exceptional circumstances");
- s 16 ("Consent by Magistrate where parent etc refuses to consent etc");
- s 17 ("Re-hearing of applications by a Judge"); and
- s 92 ("Declaration of legitimacy, etc").

Child Support (Registration and Collection) Act 1988 (Cth) and Child Support (Assessment) Act 1989 (Cth)

- The Child Support (Registration and Collection) Act 1988 (Cth) ("CSRCA") and the Child Support (Assessment) Act 1989 (Cth) ("CSAA") both confer original and appellate jurisdiction on the Family Court in respect of matters arising under these Acts: see ss 104(1) and 106(1) of the CSRCA and ss 99(1) and 101(1) of the CSAA.

The applicant must establish that the Family Court has jurisdiction to determine the application (FLA):

Section 39(3) FLA – at the date on which the application for the decree of dissolution of marriage is filed in a court, either party to the marriage must be:

- an Australian citizen;
- domiciled in Australia; or
- ordinarily resident in Australia and have been so resident for one year immediately preceding that date.

Section 39(4)(a) – when seeking a declaration as to the validity of a marriage or of the dissolution or annulment of a marriage, or for the institution of proceedings of any "matrimonial cause", either party to the marriage must be:

- an Australian citizen;
- ordinarily resident in Australia; or
- present in Australia at the relevant date.

Section 39(4)(b) – in any other case (that is, in any case where the proceedings are not between the parties to a marriage) at the relevant date, either party to the proceedings must be:

- an Australian citizen;
- ordinarily resident in Australia; or
- present in Australia.

Section 69E – in proceedings relating to a child:

- the child must be present in Australia on the relevant day or is an Australian citizen;
- the child must be is ordinarily resident in Australia on the relevant day;
- a parent of the child is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, on the relevant day;
- a party to the proceedings is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, on the relevant day; or

- it would be in accordance with a treaty or arrangement in force between Australia and an overseas jurisdiction, or the common law rules of private international law, for the court to exercise jurisdiction in the proceedings.
- The "relevant date" is the date on which the application instituting the proceedings is filed in the court.

The Family Court also has other forms of jurisdiction:

- Implied Jurisdiction: all courts of limited jurisdiction have implied jurisdiction, which is incidental to their statutory jurisdiction. The Family Court has implied power to make orders as are necessary for it to exercise its statutory jurisdiction with justice and efficiency;
- Incorporated Jurisdiction: the Rules of the High Court apply to the Family Court, so far as they are capable of application and subject to any directions of the Family Court concerning practice and procedure. Further, the Judiciary Act 1903 (Cth) provides that state law, and the Australian common law to a limited extent, apply to courts exercising federal jurisdiction;
- Associated Jurisdiction: s 33 of the FLA gives the Family Court (but no other court) a broad jurisdiction in respect of matters which are associated with other matters within the express jurisdiction of the Family Court;
- Accrued Jurisdiction: non-federal jurisdiction accrues to a court exercising federal jurisdiction so that the court may determine the entire matter before it and not simply the federal aspects of the matter. Cross-vested jurisdictional issues arise under this form of jurisdiction.

5.2.2 Federal Magistrates Court of Australia

The Federal Magistrates Court (formerly known as the Federal Magistrates Service) was established in July 2000 to deal with a range of less complex federal disputes, including matters arising for determination pursuant to the FLA. The Federal Magistrates Court was established by the Federal Magistrates Act 1999 (Cth) (“FMA”) and its jurisdiction is found in the Federal Magistrates (Consequential Amendments) Act 1999 (Cth).

It is intended to provide a quicker, cheaper option for litigants and to ease the workload of both the Family Court and the Federal Court. The Federal Magistrates Court has power to develop procedures which are as

streamlined and user-friendly as possible, with the intention of reducing delay and cost to litigants.

The Federal Magistrates Court is a court of record and a court of law and equity and, accordingly, it has the power to apply both the rules of law and the rules of equity. It is not a superior court.

The Federal Magistrates Court has jurisdiction to deal with the following:

- dissolution of marriages (but not declarations as to validity of a marriage or of dissolution or annulment of a marriage);
- parenting of children and adoption orders;
- declaration and adjustment of property interests, irrespective of value;
- maintenance for children not covered by the CSAA, and maintenance for spouses; and
- enforcement and contravention of court orders. (Note the two day rule and it is now run on a 'docket system')

The Federal Magistrates Court did not adopt the Family Law Rules 2004 (Cth). It has its own rules and forms.

5.2.3 Courts of summary jurisdiction

Jurisdiction is also vested by the FLA in courts of summary jurisdiction, such as Local Courts in New South Wales, by the following sections:

- s 39(6) FLA: jurisdiction in respect of all matrimonial causes except proceedings for a decree of nullity of marriage, or for a declaration as to the validity of a marriage or for the dissolution or annulment of a marriage by decree or otherwise;
- s 46(1) FLA: limits jurisdiction in respect of property proceedings. A property matter can only be determined if its value does not exceed $20,000. If there is no consent to the matter proceeding in a court of summary jurisdiction that court must transfer the proceedings to the Family Court or another court which has jurisdiction to hear the matter; and
- s 69J: jurisdiction to deal with proceedings under Pt VII FLA (children). The court of summary jurisdiction cannot determine contested proceedings for parenting orders without the consent of the parties.

- It may be more convenient and effective to proceed in a court of summary jurisdiction if there are family violence proceedings (state jurisdiction) on foot.
- Section 69N of the FLA provides that the court of summary jurisdiction cannot hear or determine contested parenting orders (excluding child maintenance) without the consent of both parties. The court must transfer the proceedings to a higher court such as the Federal Magistrates Court or the Family Court: s 69N(3) FLA.
- Section 96(1) of the FLA provides that a decision of a court of summary jurisdiction exercising powers under the FLA can be appealed. An application is made to the Family Court.

5.3 PRE- ACTION PROCEDURES

Rule 1.05 of the Family Law Rules 2004 (Cth) ("FLR") states:

> *"Before starting a case, each prospective party to the case must comply with the pre-action procedures, the text of which is set out in Schedule 1, including attempting to resolve the dispute using primary dispute resolution methods."*

Essentially, you are under an obligation to comply with the relevant court rules before filing any application in the Family Court. Pre-action procedures apply in Family Court matters, not Federal Magistrates Court matters.

5.3.1 Lawyers' obligations

The pre-action procedures place obligations on lawyers to advise their clients (Sch 1, Pt 1, cl 6 FLR). You should advise your client of the pre-action procedure obligations from the very first consultation. Schedule 1, Pt 1 cl 6(1) FLR sets out lawyers' obligations. Some key points to advise your client about:

- possible settlement outcomes and methods for non-legal resolution;
- whether it is in their best interests to accept a compromise or settlement, if, in your opinion, the compromise or settlement is reasonable;
- the client's duty of disclosure;

- the estimated costs of legal action;
- possible costs orders that can be made by the Family Court;
- documents prepared by the Family Court in relation to Legal Aid and primary dispute resolution services.

You should take special note that if your client does not wish to disclose a relevant fact or document, then you should cease acting for that client.

There are pre-action procedures for both financial (including property and maintenance) and parenting matters. The more onerous obligations on practitioners are in property matters.

5.3.2 Pre-action procedures in financial matters

Before making an application in the Family Court, each prospective party must make a genuine attempt to settle the matter. This involves:

- formal dispute resolution processes such as negotiation, mediation, conciliation, arbitration or counselling;
- advising each prospective party in writing of your intention to file an application unless the matter can be resolved by correspondence; and
- complying as far as practicable with the duty for disclosure in Ch 13 of the FLR.

Unless your matter falls into one of the exceptions to the pre-action procedures, these procedures are compulsory and costs orders may be awarded against not only the party in breach, but their solicitor as well: Sch 1, Pt 1, cl 1(2) and 1(3) FLR.

You should note that during this process, you must have regard:

- to protecting the best interests of any children;
- to ensuring that the costs of the matter are not disproportionate to the claim;
- to ensuring that the parties do not as a result of pre-action procedures engage in hostile and inflammatory conduct; and
- to the client's duty of disclosure: Sch 1, Pt 1, cl 1(6) FLR. (Clients should be aware that their duty of disclosure is a continuing obligation)

Parties must not use pre-action procedures as a delaying or harassing technique or to raise issues that are likely to cause the other parties to entrench their position. Parties are obliged to take a sensible approach to pre-action procedures: Sch 1, Pt 1, cl 1(7) and 1(8) FLR. Parties do not need to continue with pre-action procedures if to do so would cause some detriment to them.

The process for complying with pre-action procedures is set out in Sch 1, Pt 3(1) to (7). Practitioners should have a working knowledge of this part of the FLR. In a nutshell, the procedures require:

- A letter to each prospective party enclosing the Family Court brochure entitled "Before You File – Pre-action Procedure for Financial Cases", which is available on the Family Court website: http://www.familycourt.gov.au. That letter should also contain an invitation for each prospective party to attend some form of primary dispute resolution. This may even be a "round-table conference" between the parties. Each prospective party is under an obligation to make a genuine effort to resolve the issues by participating in primary dispute resolution.
- If an agreement is reached, then an Application for Consent Orders (Form 11) and Terms of Settlement may be filed.
- If you do not receive a response or primary dispute resolution methods fail, then a further letter should be sent to each prospective party advising the issues you believe are in dispute;
- a genuine offer of settlement;
- notice that if the offer is not accepted, you intend to file an application in the court;
- details of the orders you will be seeking in that application; and
- a time frame with which to comply with the offer being a date not less than 14 days from the date of the letter.
- The proposed respondent is obliged to respond in writing either:
- accepting the offer; or
- stating the issues they believe are in dispute, and proposing a counter-offer and a time frame for response, being a date not less than 14 days from the date of the counter-offer.
- An application can then only be filed if there is:
- no response from the proposed respondent; or
- an agreement cannot be reached by negotiation.

As part of the correspondence prepared in complying with pre-action procedures, you should have regard to the disclosure of documents requirements under r 13.04 of the FLR. However, as a minimum, it is advisable to exchange with all other prospective parties:

- a schedule of assets, income and liabilities;
- a list of relevant documents in the party's possession or control;
- a copy of documents requested by the other party; and
- a request for copies of documents held by the other party or authority to inspect documents held by a third party.

5.3.3 Pre-action procedures in parenting matters

The pre-action procedures in parenting matters are much less onerous on practitioners, and revolve around the use of primary dispute resolution.

From 1 July 2006, in all parenting matters, there is now a requirement that parties attend an approved joint counselling/mediation session and obtain a certificate of attendance prior to filing an application in the court. This requirement is to be phased in over a two year period. This session can be used as the primary dispute resolution requirement under pre-action procedures.

The certificate is known as a Section 60 I (FLA) certificate.

The requirement to attend the joint counselling/mediation applies:

- From 1 July 2006, the dispute resolution requirements must be complied with before filing an application in the Family Court, and the dispute resolution provisions of the Family Law Rules 2004 apply to an application to a court other than the Family Court.
- From 1 July 2007 to first proclamation date, before making an application in relation to parenting, the applicant party must file a certificate of attendance at primary dispute resolution (Family Relationship Centres provide this service) before filing. Further, the court must not hear the matter unless such a certificate is on the court file. This applies to all new applications.

From the second proclamation date, this requirement will apply to all Part VII parenting matters.

The same procedure as for financial pre-action procedures must be undertaken; including providing each prospective party with a copy of the Family Court brochure entitled "Before You File – Pre-action Procedure for Parenting Orders".

The process for complying with pre-action procedures is set out in Sch 1, Pt 2, cl 3(1) – (7). Practitioners should have a working knowledge of this part of the FLR. In a nutshell, the procedures require:

- A letter to each prospective party enclosing the Family Court brochure entitled "Before You File – Pre-action Procedure for Parenting Orders". That letter should also contain an invitation for each prospective party to attend some form of primary dispute resolution. This may even be a “round-table conference” between the parties. Each prospective party is under an obligation to make a genuine effort to resolve the issues by participating in primary dispute resolution.
- If an agreement is reached, then an Application for Consent Orders (Form 11) and Terms of Settlement may be filed.
- If you do not receive a response or primary dispute resolution methods fail, then a further letter should be sent to each prospective party advising:
- the issues you believe are in dispute;
- a genuine offer of settlement;
- notice that if the offer is not accepted you intend to file an application in the court;
- details of the orders you will be seeking in that application; and
- a time frame with which to comply with the offer being a date not less than 14 days from the date of the letter.
- The proposed respondent is obliged to respond in writing either:
- accepting the offer; or
- stating the issues they believe are in dispute, and proposing a counter-offer and a time frame for response, being a date not less than 14 days from the date of the counter-offer.
- An application can then only be filed if there is:
- no appropriate primary dispute resolution available;
- no response from the proposed respondent; or
- an agreement cannot be reached by negotiation.

5.3.4 Compliance

There is no obligation to make a declaration as to compliance with pre-action procedures. However, the court may take into account compliance with pre-action procedures when considering orders for case management directions and orders for costs.

It would be best practice to incorporate these procedures into every matter at the earliest possible time to avoid the likelihood of a costs order against either you or your client.

From 1 July 2007, the Court will not hear a matter unless a certificate is filed at court stating either:

That the parties have attended the counselling/mediation and although both parties made a genuine effort to resolve the matter, the matter has not been resolved; or

That the parties have attended the counselling/mediation and one or both parties have not made a genuine attempt to resolve the matter; or

Only one party would (or did) attend the mediation/counselling and therefore the matter has not been resolved.

It should be noted that costs consequences may later flow where a party has either attended mediation/counselling and not made a genuine effort or did not attend the counselling/mediation session.

CHAPTER 6 – INTERIM PROCEEDINGS

6.1 INJUNCTIONS

An injunction is an order preventing parties bound by that injunction from doing something or compelling a party to do something.

There are two sections in the *Family Law Act 1975* (Cth) which give the court the power to issue injunctions. The first is s 68B of the FLA. This gives the court the power to issue injunctions in relation to children. The second is s 114 of the FLA. This gives the court the power to grant injunctions in circumstances "arising out of the matrimonial relationship" which may include children's issues (if the parents of the child were married).

Certain conditions, such as proceedings being on foot, must be met before the court can grant an injunction either in relation to a child or property.

Specific types of injunction, such as for personal protection of a child or parent of a child or the occupation of the matrimonial home, are specified in both sections of the FLA. The types of injunctions that the court can grant are not limited to the injunctions specifically detailed in the FLA. The FLA refers to injunctions "including" those listed in the relevant sections.

Section 90AF of the FLA sets out when a court may make an order or injunction under s 114 binding a third party. The court's powers in relation to third parties have been greatly expanded by the introduction of Part VIIAA of the FLA.

6.1.1 Children

I. The best interest principle

There is conflicting authority from the Full Court as to the issue of whether the best interests of the child is the paramount consideration in applications for injunctions under s 68B: see *In Monticelli v McTiernan* (1995) FLC 92-617, where Nicholson CJ and Fogarty J held (albeit not in the context of the current s 68B) that the best interests (paramountcy) principle applied to

injunctions. This conclusion is consistent with the approach adopted by the High Court in *ZP v PS; Re PS; Ex parte ZP* (1994) FLC 92-480.

In *Bennett v Bennett* (2001) FLC 93-088, the Full Court determined that the power in s 68B was not subject to the express legislative requirement that the court must regard the best interests of the child as the paramount consideration. See also Kay and Holden JJ in *Flanagan v Handcock* (2001) FLC 93-074.

II. Relocation cases

Sections 68B and 114 (if the parties were married) can be used as the basis for an order imposed on a person (usually a parent) to prevent them from removing a child or children from a geographical region, such as a city. This result can be obtained by way of an injunction made pursuant to the FLA. See, for example, *H v E* (1999) FLC 92-845, where the Full Court considered the use of s 68B in the context of a relocation matter.

Matters arising from the matrimonial relationship

6.1.2 Property

The two fundamental requirements for an injunction to restrain a spouse from dealing with his or her property are:

- a reasonable claim to an order altering property interests under s 79 of the FLA; and
- a demonstrable danger that the claim under s 79 FLA may be defeated or prejudiced unless such an injunction is granted.

See *Stowe and Stowe* (1981) FLC 91-027.

A number of other factors may also be considered, such as:

- whether, and to what extent, the proposed injunction will affect the position and rights of third parties: see *Martiniello* (1981) FLC 91-050, and *Smith and Saywell* (1980) FLC 90-856;
- the balance of hardship and the balance of convenience between the parties: see *Sieling and Sieling* (1979) FLC 90-627;

- any special interest that the applicant may have in a particular piece of property: see *Stowe and Stowe* (1981) FLC 91-027;
- whether the proposed injunction would adversely affect a spouse in the performance of other duties which do not arise out of the marital relationship such as duties to a family company: see *Re Dovey; Ex parte Ross* (1979) FLC 90-616.

I. Mareva injunctions

A "Mareva" injunction is an interim order, restraining a person from removing property from Australia or dealing with property in or outside Australia.

The procedure for applying for a Mareva injunction is set out in r 14.05 of the *Family Law Rules 2004* (Cth) ("FLR"). The application must be supported by an affidavit that considers certain matters specified in this rule, including:

- the reason why the applicant believes property of the respondent may be removed from Australia;
- a statement about the damage the applicant is likely to suffer if the order is not made; and
- a statement about the identity of anyone, other than the respondent, who may be affected by the order and how the person may be affected.

Often, the applicant will apply for this type of order ex parte.

The court must not only consider issues relating to the balance of convenience and hardship to the parties but should also take into account whether there is any intention to dispose of assets, as part of an enquiry into the risk of disposal of assets to defeat judgment [See *Mullen & De Bry* (2006) FLC 93-293].

II. Anton Pillar orders

If a party has a reasonable belief that another party has failed to disclose documents or property that they have on their premises and there is a risk that the property may be disposed of to defeat a claim under the FLA, the party may seek an "Anton Pillar" order. An Anton Pillar order enables a

person to enter the other person's premises and inspect or seize documents or property relevant to the case. These orders are rarely sought and made.

The procedure for applying for an Anton Pillar order is set out in r 14.04 of the FLR. The application must be supported by an affidavit that considers certain matters specified in this rule, including:

- the reason the applicant believes the respondent may remove, destroy or alter the document or property unless the order is made; and
- a statement about the damage the applicant is likely to suffer if the order is not made.
- The application may be made without notice to the respondent but must be served on the respondent at the time the order is acted upon. Indeed, giving notice would defeat the purpose of the order.

For a summary of the law on this issue, see *Talbot and Talbot* (1995) FLC 92-586 per Lindenmeyer J.

6.1.3 Concurrent jurisdiction

The Family Court has the power to restrain a party from continuing with proceedings validly commenced to enforce legal rights in state courts when proceedings are on foot in the Family Court: see *Reynolds & Reynolds* (1979) FLC 90-728, and *Bak & Bak* (1980) FLC 90-877.

I. Exclusive occupation

In deciding whether to give a spouse exclusive use or occupation of the matrimonial home in *In the Marriage of Davis* (1976) 11 ALR 445, the Full Court said (at 448):

> "The criteria for the exercise of the power under s 114(1) are simply that the court may make such order as it thinks proper. The matters which should be considered include the means and needs of the parties, the needs of the children, hardship to either party or to the children and, where relevant, conduct of one party which may justify the other party in leaving the home or in asking for the expulsion from the home of the first party."

6.2 INTERIM MAINTENANCE

The court has the power to make orders in relation to both spousal (or partner) and child maintenance.

An order for spousal maintenance or partner maintenance is one where a spouse or de facto partner is ordered to maintain the other for a defined period.

An order for child maintenance is where a parent (or step-parent under certain circumstances) is ordered to maintain a child for a defined period.

6.2.1 Spousal maintenance and partner maintenance

All orders for spousal or partner maintenance can be made on an interim or final basis, under either the FLA (in relation to spouses) or the *Property (Relationships) Act 1984* (NSW) ("PRA") (in relation to de facto partners).

I. Orders under the Family Law Act 1975 (Cth)

To be eligible for spousal maintenance, the claimant spouse ("the claimant") must be unable to support him or herself adequately and the other spouse must have the capacity to pay spousal maintenance. This is often called 'needs and means'.

The ability to be self-supporting is determined having regard to the following:

- the need to care for a child of the marriage who has not yet attained the age of 18 years or is physically or mentally handicapped;
- age;
- physical or mental incapacity for employment; and
- any other adequate reason.

When deciding whether a spouse is entitled to maintenance and the amount of maintenance to award, the court will consider the matters listed in s 75(2) of the FLA.

In relation to interim spousal maintenance, the court will consider the issues listed in the bullet points above and the matters listed in s 75(2) of the FLA. It will also consider any other issues that suggest the claimant is in need of immediate financial assistance pending final determination or disposal of the proceedings. For example, where a spouse has been the primary carer of minor children and has forgone paid work for this reason, it is more likely the court will make an award for interim maintenance.

An interim order can provide for the amounts paid to be considered and taken into account when orders for final property settlement are made.

Final spousal maintenance orders usually cease upon:

- the claimant's new marriage;
- the claimant forming a new de facto relationship;
- the claimant obtaining employment; or
- the death of the spouse making the payments.

II. Orders under the Property (Relationships) Act 1984 (NSW)

The court has the power to make an order that one de facto partner maintain the other.

The requirements under the PRA are, however, stricter than under the FLA.

In order to apply for any order for partner maintenance, the parties must have lived together for two years, and:

- there must be a child of the parties; or
- the claimant must have made substantial contributions for which there is inadequate compensation, or the applicant must have the care of a child of the other party, and the failure to make such an order under those circumstances must be likely to result in serious injustice to the claimant.

Certain time constraints are imposed upon an application for maintenance under the PRA. For example, an application for rehabilitative maintenance must be made within two years from the date of the parties' separation and cannot be extended even on the grounds of hardship. (See Division 3

PRA.) Furthermore, an application for rehabilitative maintenance only lasts for a period of three years from the date of order or four years from the date on which the parties ceased living together, whichever is shorter.

Custodial maintenance is maintenance awarded by the court due to one partner having the care of a child of the relationship who is under 12 years or under 16 years if the child is disabled. (See s 30 PRA) In the case of custodial maintenance, the maintenance payment ceases upon the child attaining the age of 12 (or 16 years, if disabled) or upon the party in question ceasing to care for the child.

6.2.2 Child maintenance

Section 66E of the FLA provides that the court must not make, revive or vary a child maintenance order if an application could properly be made under the *Child Support (Assessment) Act 1989* (Cth) ("CSAA") for an assessment. To determine whether an application could property be made, it is necessary to refer to the CSAA: see Pt A, Ch 2.2 of this Handbook.

Except as provided in s 66L FLA, orders for child maintenance cease when a child turns 18 years of age. Section 66L of the FLA provides that a court must not make a child maintenance order for a child aged 18 or older, nor an order extending past a child's 18th birthday, unless that order is necessary:

- to enable the child to complete his or her education; or
- because of a mental or physical disability of the child.

Child maintenance orders can be made on an interim or final basis.

Interim orders for child maintenance are made when the court is satisfied that a child is in immediate need of financial assistance.

It is also relevant to note that child maintenance orders can be varied, suspended, or discharged in certain circumstances.

Orders for child maintenance can be sought by:

- the child's parents;

- the child's grandparents;
- the child; or
- any other person concerned as to the child's care, welfare or development.

In making an order for child maintenance, the court will consider:

- the age of the child;
- the manner in which a child is being (or in which the parents expect the child to be) educated or trained;
- any special needs of the child; and
- any relevant findings of published research relating to child maintenance.

The court will also consider the capacity of the child in question to earn or derive an income.

When determining what quantum of child maintenance to award, the court considers:

- the issues raised above;
- the fact that a duty to maintain a child takes priority (see s 66C FLA);
- the financial circumstances of the parties;
- the parties' respective commitments which are necessary to support themselves, another child, or any person the parties may have a duty to maintain;
- the cost of the child's expenses and care; and
- any special circumstances which may cause injustice or undue hardship to any person.

6.3 INTERIM LIVING AND SPENDING TIME ARRANGEMENTS

6.3.1 Documents to be filed

I. Family Court of Australia

An Application in a Case is used for all interim applications including those relating to parenting orders. An affidavit must be filed in support of the application. Each party is limited to relying upon one affidavit in interim proceedings. Parties may file affidavits by witnesses provided that the evidence is relevant and cannot be given by a party. See r 5.09 of the FLR.

II. Federal Magistrates Court of Australia

A Federal Magistrates Court application is used for both interim and final applications. If your client is seeking interim orders, check the interim orders box on the front of the application form and ensure the interim orders section of the form is completed. An affidavit in support must be filed with any FMC application. There are no restrictions on the number of affidavits which can be filed in the FMC for interim proceedings, however, it is important to limit the volume of material the Federal Magistrate is required to read given the matter will usually be heard in a busy duty list. As always, the affidavit material MUST be relevant.

6.3.2 Procedure

I. Family Court of Australia

Upon filing at the registry, interim applications relating to children's issues are generally listed for a case assessment conference conducted by a family consultant and a registrar. This allows the parties an opportunity to attempt to resolve the matter with the assistance of a family consultant. If there is a serious risk to the child and the applicant seeks to list the matter on short notice, the matter will be listed into a registrar's call over for possible referral to a Judicial Registrar on the first return date.

Interim applications for parenting orders are determined on the papers. The pro-forma affidavit, in a prescribed form, addresses those issues relevant to interim matters. Cross-examination is only allowed in exceptional circumstances. Subpoenas are limited to three for an interim hearing, however, this limit does not apply to an Independent Children's Lawyer.

At the conclusion of the interim proceedings, either by agreement or upon hearing, a trial notice will issue in relation to the final matters in dispute.

II. Federal Magistrates Court of Australia

Upon filing at the registry, applications seeking interim orders filed in the FMC are listed into the next available duty list unless an application seeking short notice is made. Interim applications are dealt with on the papers. Cross examination is only allowed in exceptional circumstances. There is no specific limit on subpoenas for interim proceedings but practitioners should note rule 15.15 of the *Federal Magistrates Court Rules 2001* which provides that each party is entitled to issue no more than 5 subpoenas without leave of the Court.

Upon finalisation of the interim proceedings, either by agreement or determination, the matter will usually be set down for hearing.

6.3.3 Interim parenting cases: principles to apply

For matters where interim parenting orders are sought, the principles to be applied are those set out by the Full Court in *Goode & Goode* (2006) FLC 93-286.

The principles are summarised as follows:

- Identifying the competing proposals of the parties;
- Identifying the issues in dispute in the interim hearing;
- Identifying any agreed or uncontested relevant facts;
- Considering the matters in s 60CC that are relevant and, if possible, making findings about them (in interim proceedings there may be little uncontested evidence to enable more than a limited consideration of these matters to take place);

- Deciding whether the presumption in s 61DA that equal shared parental responsibility is in the best interests of the child applies or does not apply because there are reasonable grounds to believe there has been abuse of the child or family violence or, in an interim matter, the Court does not consider it appropriate to apply the presumption;
- If the presumption does apply, deciding whether it is rebutted because application of it would not be in the child's best interests;
- If the presumption applies and is not rebutted, considering making an order that the child spend equal time with the parents unless it is contrary to the child's best interests as a result of consideration of one or more of the factors in s 60CC, or impracticable;
- If equal time is found not to be in the child's best interests, considering making an order that the child spend substantial and significant time (as defined in s 65DAA(3))with the parent, unless contrary to the child's best interests as a result of consideration of one or more of the factors in s 60CC, or impracticable;
- If neither equal time nor substantial and significant time is considered to be in the best interests of the child, then making such orders (in the discretion of the Court) that are in the best interests of the child, as a result of consideration of one or more of the factors in s 60CC;
- If the presumption is not applied or is rebutted, then making such orders as are in the best interests of the child, as a result of consideration or one or more of the factors in s 60CC; and
- Even then the Court may need to consider equal time or substantial and significant time, especially if one of parties has sought it or, even if neither has sought it, if the Court considers after affording procedural fairness to the parties it to be an outcome which is in the best interests of the child.

6.4 RECOVERY ORDERS

If a child has been removed without permission, an application to the Federal Magistrates Court or Family Court for a recovery order should be made immediately. If successful, this order may authorise officers of the Court, officers of the Australian Federal Police, and officers of the states' and territories' police forces to stop and/or search vehicles, vessels, aircraft, premises or places in which there is reasonable cause to believe the child

may be found, and to take possession of the child and return the child to the party who has made the application for the recovery order.

The court must regard the best interests of the child as the paramount consideration when making a determination.

As such, the making of recovery orders is very serious and requires you to act immediately. The consequence of a tardy or inefficient practitioner may result in the child being removed from Australia which can make the return of the child that much more unlikely.

Practitioners should;

- Immediately contact the after-hours emergency phone service of the relevant Court, police (state and federal) and the social welfare department.
- File an urgent interim application and a supporting affidavit and request that the matter be listed on short notice before a Federal Magistrate of Judicial Registrar. This application should be made without delay. In emergencies, it may not be necessary to file an affidavit. Instead, the evidence can be taken orally on the day that it is listed for hearing. At the very least, the following information should be provided:

    (a) give all relevant details about the child and the alleged abductor, including the child's full name or other names by which they may be known; and
    (b) whether the child has their own passport, more than one passport, or if they are on another person's passport.

- Request the following orders:

    (a) for the Federal Police to place the child on the Airport Watch List; and
    (b) that the child be returned to the Commonwealth of Australia.

- If successful, the court can use its wide powers and specific orders to locate and return the child.

If a child has been removed illegally to another country, it is first necessary to determine whether that country is a signatory to the Hague Convention. If that country has agreed to be bound by the Hague Convention, the Australian authorities and those of the other convention country will work together to have the child returned to Australia according to the procedures prescribed in the Hague Convention on the Civil Aspects of International Child Abduction.

However, if a child is taken from Australia to a country that is not bound by the Hague Convention, a practitioner will face increased difficulties in attempting to have the child returned. This increased complexity usually means that it is necessary to obtain a lawyer in the country to which the child has been taken and initiate proceedings in that country seeking the recovery of the child.

For more information about the Hague Convention, see Pt A, Ch 3.8 of this Handbook.

It is advisable to act quickly and may also be advisable to seek advice from an experienced barrister in this area.

6.5 INTERIM COSTS

Clients do not always have the capacity to meet their legal costs as and when they are incurred. This may be the case even though that person is likely to receive a sufficient amount of money to satisfy their legal costs at the conclusion of a final hearing for property matters.

For example, you act on behalf of the wife. The net pool of assets is $2 million, however, all of the assets are in the husband's name. The wife has the care of the children and is not working. She is likely to receive more than 50% of the assets at the conclusion of property proceedings. However, she has no means to pay her legal costs pending property settlement.

In these cases, it may be open to the client to make an application to the court seeking a lump sum payment from their spouse for their legal costs.

6.5.1 The Application

An application for interim costs must be in the form of an Application in a Case, if filing in the Family Court and an Application ticking the 'interim orders' box, if filing in the Federal Magistrates Court, supported by an affidavit from the client. You will also need to file a Financial Statement if one has not been filed already.

Example Order

The Application in a Case must set out the order that you are seeking. For example:

> "That within 7 days, the Husband pay to the Wife's solicitors, the sum of $50,000 with the characterisation of that payment to be determined by the trial judge."

6.5.2 Documents in support of the application

You will need to put on evidence in support of the application. That evidence must prove that:

- the client does not have the capacity to pay his/her legal costs; and
- the other party has the capacity to pay her/his legal costs;

Generally, the client will need to file an affidavit attesting to these facts. In addition, you should prepare an affidavit containing the following information:

- how much (the extent of the fees) the client has incurred to date;
- how much of the costs have been paid and the source of payments;
- how much is outstanding;
- an estimate of costs if the matter proceeds to a final hearing; and
- that you or your firm are not prepared to continue to act unless reasonable arrangements are made for the payment of legal costs as and when they fall due.

6.5.3 The court's approach

The court is not likely to make an order directing the spouse to pay a lump sum for the whole of the other party's costs at one time. Therefore, a party may need to make a number of applications for interim costs during the course of the proceedings.

The court will not make an order for interim costs unless it is satisfied that the other party has the funds to make the payment, such as, funds in a bank account or shares etc.

If the court makes an order for interim costs, is it likely to be on the basis that the characterisation of the payment is to determined by the trial judge.

6.6 URGENT & EX-PARTE APPLICATIONS

An interim hearing is a short hearing where the court makes temporary orders about a case pending the final hearing of the matter. Although these orders are only considered to be temporary, they are legally binding. These orders are usually required as it can take many months before an application for final orders will be heard before a Judge or Federal Magistrate and a final decision reached. The interim orders provide some form of stability and certainty in the interim until the final determination of the matter.

As a practitioner, it may be necessary for you to make an interim or urgent application on behalf of your client as follows:

- seeking a recovery order where a child has not been returned by a parent or other person in accordance with a parenting order for the child to live or spend time with a parent or other person;
- seeking an injunction to protect a party;
- seeking an order to spend time with a child or the enforcement of such an order;
- seeking spousal maintenance; and/or
- seeking child maintenance

6.6.1 Filing an urgent or ex-parte application in the Family Court of Australia

In most instances, it is the Family Court's general power under Pt 5.2 of the FLR which allows the court to hear and determine interim and urgent applications. However, the Family Court also has specific powers granted to it under s 77 of the FLA to make urgent applications for spousal maintenance or s 139 of the CSAA to make urgent child maintenance orders.

- For making general applications under Pt 5.2 of the FLA, it is necessary to consider whether there are sufficient grounds for making such applications.

6.6.2 Filing an urgent or ex-parte application in the Federal Magistrates Court of Australia

Rule 5.01 of the Federal Magistrates Court Rules 2001 (FMCR) provides that the Court may make an order until a specified time or until further order where service on the respondent is not practicable.

It is necessary to file an application on a Federal Magistrates Court application form, marking the "interim orders" box on the front of the form. Your client will be required to file an affidavit in support of his/ her application establishing the following [see Rule 5.03 FMCR]

- whether there are previous proceedings between the parties and, if so, the nature of those proceedings;
- whether there are any current proceedings in any court in which the applicant or the respondent are parties;
- the particulars of any orders currently in force between the parties, including the courts in which they were made;
- the steps taken to tell the respondent or the respondent's legal representative of the applicant's intention to make the application or the reasons why no steps were taken;
- the nature and immediacy of the damage or harm which may result of an order is not made;

- why the making of the order is a matter of urgency and why an abridgement of the time for service of the application and the fixing of an early hearing date would not be more appropriate.

6.6.3 Interim hearing

Cross-examination is only allowed in exceptional circumstances. Generally, all material relied upon is based in the affidavit with the exception of any material produced on subpoena that may be tendered at the interim hearing.

You need to make submissions on each of the points raised in your affidavit and application and be prepared to respond to matters raised by the other side.

You need to be as convincing and as prepared as possible. This is critical as the interim orders could be in place until the final hearing of the matter which could be several months later. As the court determines the best interests of the child as paramount, the outcome of the interim hearing will invariably have an effect on the outcome of the final hearing. For example, it is unlikely that a court, who after making an order that a child live with the father and spend time with the mother at the interim hearing, would significantly vary its interim decision if there is no new evidence presented at the final hearing to persuade the court to interrupt the stability of the children under the current living arrangements.

CHAPTER 7 – CASE PREPARATION

7.1 TIPS ON COMPLYING WITH THE RULES

Practitioners should be aware that the Family Court and the Federal Magistrates Court have different Rules. You must ensure you comply with the Rules that pertain to the Court you file in. The *Family Law Rules 2004* (Cth) ("FLR") are more voluminous than the *Federal Magistrates Court Rules 2001.* ("FMCR") It is important to note that in the event there is no corresponding Rule in the Federal Magistrates Court, the Family Law Rules apply.

File your client's documents on time, otherwise you may face sanctions. Personal costs orders may be made against lawyers for failure to file documents on time or failure to comply with pre-action procedures: r 19.10(1) FLR/ Rule 21.07 FMCR.

When you attend court, ensure you are familiar with your case. Rule 1.08(3) FLR requires that a lawyer attending a court event for a party must be familiar with the case and be authorised to deal with any issue likely to arise. Lawyers doing agency work are therefore encouraged to be more careful in ensuring that they receive comprehensive instructions. You would not like to find yourself as an agent/solicitor with a costs application made against you just because you had not been given proper instructions from your principals. Remember that the court may take into account a failure to comply with r 1.08 FLR when considering a costs order against a lawyer. In the Federal Magistrate Court, the presiding Federal Magistrate will generally stand a matter in the list if you need to get instructions from your client or from your principal, often resulting in a lengthy delay.

Diarise all the important dates. Rule 11.02 FLR is known as the nullity rule because it states that: "if a step is taken after the time specified for taking the step in [the FLR], [the *Family Law Regulations 1984* (Cth)] or a procedural order, the step is of no effect." The only way to obtain relief from the nullity rule and have a document effectively filed after the due date, is to make an application to the court. The court may then consider eleven factors when deciding whether or not the nullity rule stands: see rr 1.12(3) and 11.03(2) of the FLR. This application for leave to file would normally be

made in writing with a supporting affidavit. If the court allows it, this application may also be made orally at a court event. Inform your client of the consequences of applying for an extension of time. Rule 1.14(3) of the FLR deals with costs associated with an application for the extension of time for filing documents. It states:

> "a party who makes an application to extend time…may be ordered to pay any other party's costs in relation to the Application".

The court has wide powers if the FLR, *Federal Magistrates Court Rules 2001* or procedural orders are not complied with, including directing that a case loses priority (and, for Family Court matters, goes into the defaulter's list); adjourning the matter for further mention with costs against the party who has not complied and/or prohibiting a party from taking a further step in the case.

7.2 DISCLOSURE & DISCOVERY

The disclosure and discovery principles under the FLR follow the same principles as in the objectives, those principles being: "to ensure that each case is resolved in a just and timely manner at the lowest possible cost to the parties and the court that is reasonable in the circumstances of the case". Thus, there is an increased responsibility on the parties and the lawyers to assist the court achieve these objectives. Rule 10.05(4) of the Federal Magistrates Court Rules provides that parties must make a genuine effort to reach agreement and Rule 24.03 of the Federal Magistrates Court Rules provides that parties must ensure that they fully and frankly disclose their financial position.

This means that gone are the days of court cases being protracted due to parties' deliberate attempts to withhold information or deliberately being obstructionist in the provision of documents, particularly in complicated financial matters.

Similarly, there are new provisions for you to follow to obtain the necessary financial records from a non-party to the case where your client has been financially ignorant of the marital financial affairs. It is simply not enough for you to say that your client has no information about financial matters.

Whilst there are no formal pre-action procedures in the Federal Magistrates Court, the exchange of financial information between parties should happen as a matter of course. For matters filed in the Family Court, documents are to be identified and exchanged within a set timetable, all before the actual hearing.

- Stage 1: initial documents are identified and provided during the pre-action procedures if they are relevant to an issue in dispute.
- Stage 2: Rule 12.02 of the FLR requires that further evidence supporting the documents be exchanged two days before the first court case. These documents include the three most recent tax returns, financial statements and market appraisals of the value of any item of property owned by a party.
- Stage 3: requires a further exchange of documents to occur seven days before a conciliation conference. These documents provide the evidence about such things as initial contributions, the purchase of post-separation property and the value and types of gifts received.

Importantly, and critical to the objectives of the FLR, that all orders made in the pre-trial stages, whether it be case management orders or otherwise, are no less orders of the court and these orders must be complied with.

Thus, put simply, these steps require much, if not all, of the disclosure and discovery of documents to occur well before the case has even started which means an increase in the likelihood of resolution and a reduction in litigation.

Disclosure and discovery under the FLR are not simply confined to three separate stages. Contrastingly, the obligation to disclose and discover documents is a continuing process. This is evidenced by the Court's willingness to accept amended or revised financial statements.

The FLR also provide consequences for failing to provide full and frank disclosure of information to the court. These consequences include:

- fines
- being charged with contempt of court
- having a cost orders made against a non-compliant client; or
- stay or dismissal of all or part of the party's case.

- These sanctions are also intended to be a stimulus for parties to be honest in their financial statements and to disclose the relevant documents and information. You should ensure your client is advised that failure to fully and frankly disclose will be likely to have an adverse effect on the final outcome in the matter.

7.3 LIMITING ISSUES

7.3.1 Family Court of Australia of Australia

For matters filed in the Family Court, Chapter 11.2 of the FLR deals with ways in which issues may be limited in a case. The most commonly used methods are the Notice to Admit or by amending an Application or Response.

7.3.2 Federal Magistrates Court of Australia

For Federal Magistrates Court matters, Rule 15.31 sets out the procedure for filing a Notice to Admit Facts.

7.3.3 Notice to Admit

Where you wish to obtain an admission from the other party as to the truth of a fact or document, you may write to the other side requesting that admission.

The other party has the choice of:

- admitting the fact or document, which settles that issue;
- failing to respond altogether which can amount to an admission (r 11.08 FLR/ Rule 15.31(2) Federal Magistrates Court Rules); or
- denying the fact or document in which case you will be put to proof in the trial.

If a party wishes to dispute the fact or document, then they must file a notice of their dispute within 14 days of being served with the Notice to Admit. If that fact or document is later verified in court, the court may make a costs order for the costs of providing that proof.

This procedure may be of benefit when trying to reach agreement on values of property, trying to establish authenticity or existence of documents, or at any time where it would be beneficial to resolve certain issues prior to the trial.

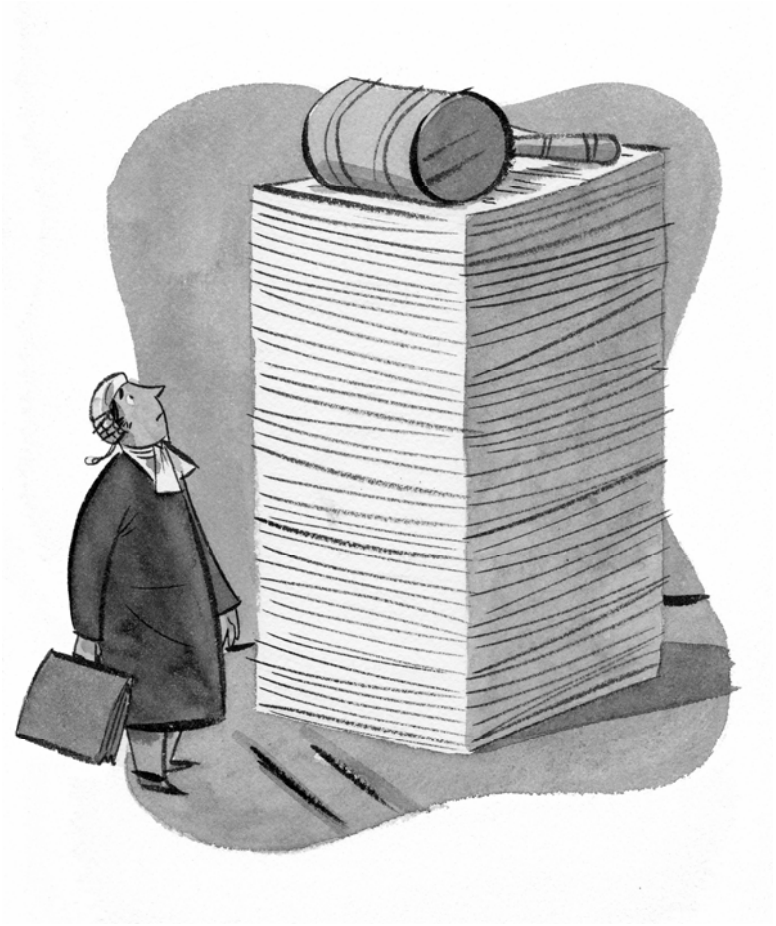
An admission may be withdrawn (r 11.09 FLR/ Rule 15.31(3) Federal Magistrates Court Rules), but only with consent of all parties or permission of the court. If an admission is withdrawn, the court may make an order for costs thrown away.

7.3.4 Amendment of Application/Response

A further way of limiting the issues is to amend your application or response to limit the pleadings to those points in issue or to note the issues that are agreed between the parties. An amendment may be necessary to add a third party to the action to save the parties' time and avoid later court action.

For proceedings filed in the Family Court, there are time limits for amending an application or response in relation to final orders, namely, 28 days from the final resolution event (conciliation conference), or at a later time if both parties consent and leave is sought from the court. If seeking to amend an application or response in a case (Form 2 or 2B), this must be done prior to the first court event.

PART C – AFTER ORDERS ARE MADE



CHAPTER 8 – WRAPPING IT UP

So the parties have agreed to a settlement, final orders are granted, what then?

You must then look at putting into action the orders and this can be sometimes the most difficult part of your role. This is another reason to emphasise the importance of careful drafting.

Here is a checklist of things you need to consider once orders are made:

- Do the sealed orders need to be served on the spouse or any of the other parties, for example, superannuation trustees, mortgagees and creditors? Careful consideration must be given to this.
- Divorce application – has the application been filed? Sometimes, in the course of trying to mediate a settlement, this gets forgotten or the client wants to do it themselves.
- Sale of property – how, when, who?
- Transfer of interests in property, for example, motor vehicles and securities such as shares, debentures, bonds.
- Superannuation splitting agreements, flags.
- Insurance polices on home, contents, motor vehicles; change names and/or cancellation of policies.
- Utilities – account names to be changed: electricity, phone, gas, Internet.
- Social security – if applicable, advise of change in circumstances.
- Registration of Child Support Agreements – particulars for payment, private agreements.
- Wills, powers of attorney, and enduring guardianships – need to be updated, revoked.
- Superannuation and life insurance – do the nominated beneficiaries need changing?
- Distribution and collection of goods such as furniture if not already done.
- Closure and payment of credit accounts, sever any liability, finalise amounts owed.
- Closure of bank accounts and cancel authorities on accounts.

- Recommendations for counselling; parenting programs to assist in keeping in contact and with residence arrangements.
- Check the orders, and your notes – is anything still outstanding?

CHAPTER 9 – APPEALS AND REVIEWS

9.1 REVIEWS

If you wish to challenge the decision of a deputy registrar, a registrar or a judicial registrar you may do so by filing an application for review as opposed to an appeal: r 18.10 of the Family Law Rules 2004 (Cth) ("FLR") and ss 26C(1) and 37A(9) of the Family Law Act 1975 (Cth). An application for review leads to the re-hearing of the whole matter, that is, the application proceeds by way of a hearing de novo which is a fresh hearing.

Registrars exercising delegated powers in the Federal Magistrates Court ("FMC") are reviewable by Federal Magistrates.

9.1.1 Evidence

The court may receive any of the following as evidence at the re-hearing:

- any affidavit or exhibit tendered in the first hearing;
- any further affidavit or exhibit;
- the transcript (if any) of the first hearing; or
- if the transcript is not available, an affidavit about the evidence that was produced at the first hearing sworn by a person who was present at the first hearing.

Often, transcripts are not necessary as the matter is being heard de novo.

9.1.2 Documents to file

- Application in a Case (Form 2);
- a copy of the order that is the subject of the review.

You do not need to file an affidavit nor do you need to comply with the notice requirement pursuant to r 5.12 of the FLR. Your application for

review will then be listed for hearing by a judge within 28 days after the date of filing.

9.1.3 Time limits

The relevant time limits are set out in r 18.08 of the FLR. Generally, an application for review must be made within either 28 days or seven days from the date of the decision, depending on whether the power was exercised by the registrar, judicial registrar or deputy registrar in making the order. If the time fixed by the FLR has passed, you may still apply for an extension of time, however, you may be ordered to pay the other party's costs in relation to the application.

9.1.4 Handy tips

An application for review does not operate as a stay of an order. You will need to make a separate application for a stay.

Ensure you file your application immediately upon receiving instructions so that you do not have to worry about explaining the reasons for your delay. The application may be amended later.

9.2 APPEALS

There are two types of appeals a party can make:

9.2.1 Appeal by way of hearing de novo

A complete rehearing of the issues before the court as if no hearing had ever occurred.

The appeal court can make any orders it considers appropriate, including an order affirming or reversing or varying the order which forms the subject of the appeal.

The appeal does not stay the proceedings or operation of orders and a party must apply for such an order separately.

Appeals from courts of summary jurisdiction are heard de novo by a judge of the Family Court of Australia, Western Australia or the Supreme Court of Northern Territory. It is very unusual for this sort of appeal to be heard by the Full Court.

A notice of appeal must be filed within one month of the original order (or as otherwise directed by a judge).

Grounds of appeal: an appeal by way of hearing de novo requires no error to be shown by the Magistrate.

Any party can appeal as of right, including:

- a successful party; and/or
- if the original orders were made by consent.

I. How to file an Appeal?

File a Form 20 Notice of Appeal attaching a copy of the order your client is appealing within 28 days after the date of the original order. Ensure you file enough copies to keep one, serve one on the other party, the separate representative if applicable, and any other relevant parties you need to serve.

A hearing de novo is conducted in the same way as the original hearing as if it had not been heard before. The features of a hearing de novo include:

- the court may consider any issues that arise regardless of whether or not they were raised at the original hearing;
- the facts and law relevant are those existing at the time of the rehearing not the time of the original hearing;
- the court cannot rely upon findings made or decisions taken at the original hearing;
- a party may withdraw consent to an order it had previously consented to at the original hearing; and
- parties may present new evidence and raise new issues at the hearing.

6.2.2 Appeal by way of rehearing

This type of appeal does not involve a complete rehearing of the issues and the title is somewhat misleading in this regard.

The court reviews the evidence presented in the first instance and determines whether or not the orders made by the first Court are justified in light of the evidence.

There are strict rules about the evidence that can be adduced and the issues that can be raised.

Again, the appeal does not stay the proceedings or operation of orders and a party must apply for such an order.

Appeals from the FMC, Family Court of Australia, Western Australia and the Supreme Court of Northern Territory are appeals by way of rehearing. These appeals are all heard by the Full Court.

Chapter 22 of the FLR govern the practice and procedure with respect to appeals in the Family Court. There is a useful table in Ch 22, Pt 22.3 FLR setting out the requirements and a timeline for appeals to the Full Court.

For appeals requiring leave of the court: an application for leave to appeal must be filed no later than one month after the day on which the original order was made (or as otherwise directed by a judge).

For appeals which do not require leave: a notice of appeal to the Full Court must be filed no later than one month after the day on which the original order was made (or as otherwise directed by a Judge).

An appeal to the Full Court requires the establishment of some error or miscarriage of justice in the proceedings appealed from.

I. Grounds of appeal:

- factual errors that may have influenced the outcome of the proceedings;

- failure of a judge to give reasons for a judgment which makes it impossible for the appeal court to determine whether or not the judgment was based on an error of law;
- fundamental and significant arithmetical errors; and
- miscarriage of justice by reason of the judge "pre-judging" some of the issues before the completion of the evidence.

A party can appeal to the Full Court in relation to orders made by:

- the Family Court (except from the Full Court of the Family Court or where the matter has been transferred from the Federal Court);
- the FMC;
- a state Family Court; or state or territory Supreme Court (constituted by a single judge) in a FLA matter; and
- a single judge rejecting an application to disqualify him or herself from hearing a family law matter.

A person can appeal as of right in some circumstances, but needs the court's permission to appeal from:

- an interim order other than an interim order relating to a child welfare matter of a Family Court or the Federal Magistrates Court; or
- an order made by a court under certain provisions of the Child Support (Assessment) Act 1989 (Cth) or the Child Support (Registration and Collection) Act 1988 (Cth).

II. How to file an Appeal?

File a Form 20 Notice of Appeal, attaching a copy of the order your client is appealing, within 28 days after the date of the original order. Ensure you file enough copies to keep one, serve one on the other party, the separate representative, if applicable, and any other relevant parties you need to serve.

Provide a copy of the Form 20 to the registrar of the Family Court within 14 days after the filing.

If your client is served with a Notice of Appeal, he or she can file a cross-appeal by using a Form 20.

If leave to appeal is required, file a Form 2 Application in a Case with an affidavit in support.

6.2.3 Appeals to the High Court

Appeals to the High Court are only possible by special leave of the High Court or upon a certificate from the Full Court of the Family Court that an important question of law or of public interest is involved.

CHAPTER 10 – ENFORCEMENT AND CONTRAVENTION

Applications for the enforcement and contravention of orders can be filed in the Family Court, the Federal Magistrates Court and a court of summary jurisdiction. Practice Direction: No 7 of 2001, issued by the Family Court provides that contravention and enforcement proceedings should be filed in the Federal Magistrates Court where there are no proceedings in respect of an associated matter pending in the Family Court.

10.1 ENFORCEMENT OF PROPERTY ORDERS – FAMILY COURT OF AUSTRALIA

Chapter 20 of the *Family Law Rules 2004* (Cth) ("FLR") provides for the enforcement of financial orders and obligations, including child support liabilities.

To enforce an agreement or liability, a party ("the payee") must first obtain an order of the court. Rule 20.04 FLR specifies the parties who may enforce an obligation.

The duty of disclosure as set out in Div 13.1.2 of the FLR applies to a party in an enforcement application: r 20.09 FLR.

If more information is required in respect of a liable party's financial position ("the payer"), the payee may obtain information by either serving a notice on the payer and advising the payer to complete and serve a Financial Statement (Form 13) within 14 days or by filing an Application in a Case (Form 2), together with an affidavit that complies with r 20.10 of the FLR.

An obligation to pay money may be enforced by any of the following enforcement orders:

- an order for seizure and sale of real or personal property, including under an enforcement warrant;

- an order for the attachment of earnings and debt, including under a Third Party Debt Notice;
- an order for sequestration of property; or
- an order appointing a receiver (or receiver and manager).

The court may also imprison a person for failure to comply with an order: see r 20.6 FLR.

10.1.1 Enforcement warrants

An enforcement warrant enables an enforcement officer to seize and sell property of the payer, pursuant to a court order, to satisfy the debt owing to the payee.

To request the issue of an enforcement warrant by the court, the following documents need to be filed:

- an affidavit complying with rr 20.06 and 20.16 FLR; and
- the enforcement warrant sought with a copy of it for service.

The warrant needs to be filed with the affidavit in support at the registry. The party filing the document must request that it be dealt with by a duty registrar (that is, no court date allocated). The registry will usually keep all copies of the documents for the duty registrar's consideration. Once the enforcement warrant is issued and returned to you, you need to send it to the marshal of the court together with a written request, in letter form, that it be forwarded to the sheriff of New South Wales for execution. The Sheriff's Office will usually require a fee to enable them to execute a warrant for the sale of real property.

The enforcement warrant remains in issue for 12 months from the date it was issued: r 20.17 FLR.

A person affected by an enforcement warrant may dispute the enforcement warrant: r 20.25 – 20.29 FLR.

10.1.2 Sequestration of property

A payee may apply to the court for an enforcement order appointing a sequestrator of the property of the payer. The payee must file an Application in a Case (Form 2) and an affidavit which complies with rr 20.06 and 20.42 FLR. The court may hear the application in chambers, in the absence of the parties, on the documents filed: r 20.42(4) FLR.

Prior to appointing a sequestrator, the Court must be satisfied of the following (r 20.43 FLR):

- if the obligation to be enforced arises under an order – that the payer has been served with the order to be enforced;
- the payer has refused or failed to comply with the obligation;
- an order for sequestration is the most appropriate method for enforcing the obligation.

If the court decides to appoint a sequestrator, it may also authorise and direct the sequestrator to, for example, enter and take possession of the payer's property or part of the property, and collect and receive the income from the property including rent, profits and takings of a business. The court will also make orders about the receiver's remuneration, if any, the power of the receiver, how they will submit their accounts etc: r 20.44 FLR.

10.1.3 Receivership

Part 20.6 FLR provides an avenue for relief with respect to disputed accounts submitted by receivers. The court has the power, amongst other things, to set aside the appointment of a receiver at any time and make orders in respect of the receivership and the receiver's remuneration.

10.1.4 Enforcement hearings

A payee may also, by filing an Application in a Case and an affidavit that complies with r 20.06 FLR, require a payer, (or if the payer is a corporation, then, an officer of the corporation), to attend an enforcement hearing. The hearing date is usually within 28 days of filing. As part of that enforcement hearing, the payee may require the payer to produce certain documents in his or her possession and control to the court.

The payee must serve upon the payer by special service, at least 14 days before the date fixed for the hearing, the following documents:

- Application in a Case;
- affidavit;
- list of documents the payee wants the payer to produce;
- written notice demanding production of the documents; and
- a copy of the Family Court brochure entitled “Enforcement Hearings”.

At least seven days before the enforcement hearing, the payer must complete a Form 13 Financial Statement and serve it upon the payee.

At hearing, the court may make the following orders:

- a declaration as to the amount owing under the obligation;
- providing that the total amount owing be paid in full or by instalments;
- for enforcement;
- in aid of the enforcement or to prevent the disposal of property or wasting of assets;
- for costs; and
- staying the enforcement of an obligation.

Contempt of court or a monetary penalty may be imposed upon a person who is served with enforcement proceedings but fails to:

- serve a Form 13;
- produce documents to the payee;
- attend the enforcement hearing;
- at the enforcement hearing, fails to answer a question put to the person; or
- fails to give an answer satisfactory to the Court.

10.2 ENFORCEMENT OF PROPERTY ORDERS – FEDERAL MAGISTRATES COURT OF AUSTRALIA

Division 25B.2 of the *Federal Magistrates Court Rules 2001* entitled “Enforcement of obligations” provides that Order 33 of the *Family Law Rules 1984* applies to enforcement proceedings conducted in the Federal

Magistrates Court. Order 33 is set out in Note 1 in Schedule 5 of the *Federal Magistrates Court Rules 2001*.

Rule 2(1)(b) of Order 33 provides that this Rule applies to 'an order that a party pay maintenance or other money for the benefit of the other party, or of a child, made under the Act'. A party seeking to enforce an obligation may file:

- An affidavit requesting the issue of a Form 45: Notice requiring financial information; or
- A Summons in accordance with Form 46.

If the party files an affidavit it must contain evidence of the request made, state whether any other order is in force or proceedings are pending for the enforcement and be accompanied by the appropriate form or summons.

If upon hearing the enforcement proceedings, the Court is satisfied a person has failed to meet an obligation, the court may:

- Order the payment of the amount found to be owing under the obligation; and
- A garnishment order – see Order 33, rule 4;
- Order for the seizure and sale of personal property – see Order 33, rule 5 for procedure and property that an order can be made against, specifically the exclusion of 'prescribed property' as defined in the Rules;
- Order that the estate of the person be sequestrated – see Rule 6;
- Order for the sale of an interest in real property belonging to the person – see Rule 7; and/or
- Any other order it thinks necessary to enable enforcement or prevent dissipation of property or wasting of assets.

A respondent's failure to attend the hearing, be sworn in and/ or answer questions on any matter in relation to the obligation to pay and/ or failure to produce documents as required by summons is an offence punishable by monetary penalty of 50 penalty units [see Rule 3(6)]. A respondent's failure to attend can result in the court issuing a warrant for arrest [Rule3 (7)].

10.3 CONTRAVENTION APPLICATIONS – CHILDREN

Contravention applications are filed when one party alleges another party has failed to comply with parenting orders. In parenting matters, contraventions frequently arise out of one party's failure to allow a child to spend time with the other party.

10.3.1 Before you file

Before filing a contravention application, the applicant should attempt to resolve the matter by either speaking or writing to the other party or attending mediation. The applicant should also consider the result they are seeking to achieve. The remedies available from the court range from an order referring one or both parties to a post-separation parenting program or the variation of an order, to the punishment of a person for failure to comply.

It is important to remember that contravention applications are difficult to prosecute, as they are quasi-criminal proceedings and must be strictly pleaded.

10.3.2 Material to be filed

A contravention application needs to be filed and personally served on the respondent. This is Form 18 in the Family Court and an "Application – Contravention" in the Federal Magistrates Court. In the contravention application, you will need to relate the alleged contravention to the relevant order.

A copy of the order which has allegedly been breached must be attached to the application.

The person serving the documents on the respondent should obtain an acknowledgment of service, signed by the respondent and complete an affidavit of service, which should be filed with the court.

The court may dismiss a contravention application if it has not been correctly pleaded. The applicant must precisely outline each breach, so the respondent knows what they must answer. If the contravention application

is dismissed, the applicant is likely to be ordered to pay the respondent's costs.

The respondent may choose to file a response and/ or affidavit with the court, however it is not a requirement. The respondent should prepare an affidavit if he/ she are relying on reasonable excuse, such affidavit will be handed up in Court if the Court finds that there is a prima facie case to answer.

10.3.3 Contravention hearings

The judicial officer presiding over the contravention hearing will generally proceed as follows:

- Establish precisely which order is alleged to have been breached;
- Advise the applicant that he/ she bears the onus of proving the facts to support the allegation that the respondent breached the order;
- Request that the respondent stand whilst each allegation is read out. The respondent will be asked whether he/ she admits or denies each breach;
- Advise the applicant that the respondent will be given the opportunity to cross-examine the applicant in relation to the alleged breaches and at the end of the applicant's case, each party will have the opportunity to make submissions as to whether a prima facie case has been made out;
- The court will make a decision as to whether the respondent has a case to answer. If no prima facie case to answer, the application will be dismissed;
- If the court finds there is a prima facie case to answer, the respondent will have the opportunity to submit an affidavit or provide a proof of evidence as to what he/ she says about the alleged breaches, so that the applicant is not taken by surprise;
- The respondent will then be cross examined about his/ her evidence;
- Each party will make submissions about reasonable excuse;
- The court will make a finding as to whether each contravention is made out. If not made out, the application will be dismissed and the court will deal with the question of costs. If made out, each party will be requested to submit on the question of penalty.

- Orders will be made including orders in relation to penalty and costs.

I. Submissions to make

- Establish that the orders were in place at the time of contravention and that the respondent was aware of the orders.
- Relate the evidence to the requirements in s 70NAC FLA.
- Establish that the respondent failed to comply with the orders and did so without a reasonable excuse (as defined under s 70NAE FLA).
- For low level offences, focus on options which will prevent contraventions occurring in the future.

The court will not consider breaches that have not been outlined in the contravention application, even those that occurred after the applicant filed the contravention application. The respondent needs to be given time to respond. Make sure your submissions relate only to those breaches set out in the application.

10.3.4 Responding to a contravention application

- Refute, on the evidence, that a breach occurred; or
- Admit that a breach occurred but that there was a "reasonable excuse": s 70NAE FLA;
- A parenting plan may be a defence: s70NBB.

10.3.5 When will the Court excuse on the basis of "reasonable excuse"?

Section 70NAE sets out the circumstances in which the Court will excuse a contravention on the basis "reasonable excuse". Some notable examples are:

- the respondent contravened the order because, or substantially because, he or she did not, at the time of the contravention, understand the obligations imposed by the order; and the court is satisfied that the respondent ought to be excused in respect of the contravention;
- the respondent believed on reasonable grounds that the actions constituting the contravention were necessary to protect the health or

safety of a person and the period for which the contravention occurred was not longer than necessary to protect the health or safety of a person.

I. "But the child did not want to go"

A client may instruct that the child's unwillingness to spend time with the other parent means that the orders could not be complied with. It is important to explain to the client that when orders are in place for a child to spend time with a parent, both parties are under an obligation to facilitate such an arrangement. Parents have a positive obligation to encourage a child to spend time with the other parent; passive resistance or token compliance does not suffice: *In the Marriage of O'Brien* (1992) FLC 92-396.

II. Contrary to the welfare of the child

A respondent may have a genuinely held belief that compliance with court orders would be contrary to the welfare of the child. However, that party's subjective opinion cannot be relied upon to support the defence of "reasonable excuse": *In the Marriage of Gaunt* (1978) FLC 90-468.

In *In the Marriage of Cavanough* (1980) FLC 90-851, Connor J adopted a more flexible approach, when he held that because the circumstances had changed, the father's "honest and reasonable belief" that the children did not want to participate in contact and would be subject to embarrassment if they did so, amounted to a reasonable excuse.

The more recent decision of *In the Marriage of O'Brien* (1992 FLC 92-396) is clearer in its findings. Smithers J said that the relevant question is not whether the respondent reasonably thought that carrying out the relevant orders might not be in the best interests of the child, but whether contravening the orders was necessary to protect the health and safety of a person, including the child.

It is important to note that s 70NAE FLA does not provide an exhaustive list of circumstances in which a person has a reasonable excuse for contravening orders: *Northern Territory v GPAO* (1999) FLC 92-838.

10.3.6 Compliance regime

The *Family Law Amendment (Shared Parental Responsibility) Act 2006* introduced a new compliance regime. Four subdivisions in the new Part V11 Div 13A, give the court different power depending on the outcome of the proceedings:

Subdivision C - Contravention alleged but not established. The court may order costs against the applicant and must consider making a costs order where the applicant has previously brought an unsuccessful application for contravention or where the court was satisfied that there was a contravention but did not order compensatory time;

Subdivision D – Contravention established but there is a reasonable excuse. The court may order compensatory time and may make a costs order;

Subdivision E – Contravention without reasonable excuse (less serious breach). The court may adjourn the proceedings until an application to vary orders is determined, order compensatory time, order the respondent to attend a post-separation parenting program or to enter into a bond, pay compensation for expenses or pay costs;

Subdivision F – Contravention without reasonable excuse (more serious breach). The court can make a community service order, require the respondent to enter into a bond, order compensatory time, impose a fine of up to 60 units, impose a prison sentence, order compensation for lost expenses and/ or make a costs order.

CHAPTER 11 – VARYING AND SETTING ASIDE ORDERS

11.1 VARYING ORDERS

11.1.1 Property

Generally speaking, once property orders are made by the court, they are final. Clients should be advised at the outset that they only get one attempt to make these orders.

An application may be made to vary the property order where there has been a material change in circumstances or the carrying out of the order has become impractical. These variations can be made by further consent orders but an affidavit by one or both of the parties should be included detailing the material change in circumstances that has brought about the change or impracticality. (For example, where one party was to discharge a mortgage and the lending institution subsequently refuses to refinance the mortgage). However, this is a risky process as the other party may simply seek to enforce the order rather than consent to the change. For this reason, clients should always be advised that a property order is final.

I. Section 79A application

A further way to re-visit property orders is through a s 79A application (being s 79A of the *Family Law Act 1975* (Cth)) where there has been:

- a failure to disclose assets or liabilities;
- fraud by one party; or
- duress applied by one party to the other when obtaining the orders.
- These applications apply in very limited circumstances and the legislation should be consulted before any advice is provided to the client to ensure that your matter will fall within the specific provisions of the section.

A s 79A application can be made to vary the property order or to set the whole property order aside and seek a different division of assets. However, it should be noted that the judge will apply the usual s 79 four-step approach (see Pt A, Ch 1.1 of this Handbook) when considering the assets and liabilities and may revisit the whole property order despite the fact that the application was simply to vary a particular aspect of the order.

See Pt C, Ch 11.2 of this Handbook for further information.

II. Slip rule

One further way of varying the property order is via the slip rule. This can only be used in limited circumstances where there has been an error in the making of the orders and where both parties agree that the error has occurred and the resulting orders therefore do not reflect the intention of the parties (or the judge). An example for the use of a slip rule application would be where there is an error made in a judgment relating to a date, and that makes the orders unenforceable; or where it was agreed that the wife was to transfer property, but in the order it states the husband is to transfer that property.

11.1.2 Parenting

Parenting orders do not have the same finality as property orders. Particularly where quite young children are involved, clients should be advised that parenting orders are not static and usually evolve as the children grow older and the parties' circumstances change. For example, orders that are appropriate for a one-year old are not likely to still be appropriate for an eight-year old.

Changing parenting orders is a very similar process to obtaining the initial parenting orders. Mediation between the parties is always a very good starting point, however if the parties are at the stage where they have involved lawyers, then perhaps a new set of consent orders can be negotiated and failing that, an application to the Family Court or FMC would be the appropriate method. Of course, the pre-action procedures requirements must be met prior to filing any application (see Pt B, Ch 5.3 of this Handbook).

If parenting orders are being changed only a short period after the original orders were made, the party seeking the change would have to show the court a significant change in the child's circumstances to justify the change. The reason for this is to ensure that the child can have a sense of stability.

Common examples of situations where parenting orders may need to be changed are:

- where one parent needs to relocate;
- where a parent suspects that there is a family violence or other risk issue for the child;
- where there has been a change in the child's needs such as a serious illness or the like.

11.2 SECTION 79A

Section 79A of the *Family Law Act 1975* (Cth) ("FLA") is a remedial section which allows the court, in certain circumstances, to overturn an order made by the court pursuant to s 79 FLA. Accordingly, this section applies only to orders made in relation to property.

Pursuant to s 79A(1) FLA, a person affected by an order made under s 79 FLA may apply to have that order set aside or varied. If the court considers it appropriate, it may make another order under s 79 FLA in substitution for any orders it has set aside.

An order under s 79 includes an order dismissing an application for property orders: see *Robson and Robson* (2003) FLC 93-145.

Before making any orders pursuant to s 79A FLA, the court must be satisfied the circumstances the subject of the application fall within one of 4 heads: s 79A(1)(a)-(d) FLA. Each of these four heads are discussed below.

11.2.1 Miscarriage of Justice: s79A(1)(a)

This subsection applies only to circumstances in existence at the time when the original order was made or before the original order was made, and not to circumstances occurring afterwards.

An application under s 79A(1)(a) is considered in four steps:

- whether there was fraud, duress, suppression of evidence, the giving of false evidence, or any other circumstance;
- whether that amounted to a miscarriage of justice;
- whether the court in its discretion should vary our set aside the order; and
- whether it should make another order under s 79: see *In the Marriage of Patching* (1995) 18 Fam LR 675 at 677.

Mullane J held in *In the Marriage of Arpas* (1989) 13 Fam LR 314 at 320 that "the concept of a miscarriage of justice does not equate with a wrong decision or a different result to what should have been".

In *In the Marriage of Holland* (1982) 8 Fam LR 233, the Full Court endorsed the following definition (at 236):

> *"the term 'miscarriage of justice' was not limited to vitiating elements in the procedure followed in the court but extended to any situation which sufficiently indicates that the decree or order was obtained contrary to the justice of the case".*

It is, however, clear that an absence of full and frank disclosure of all financial matters to the court and other parties may be decisive.

If a party to consent orders was in possession of all relevant facts, that is, he or she was aware of his or her rights under the FLA or chose not to take advice on that matter, and freely and voluntarily consented to the challenged orders, it would be difficult to establish a miscarriage of justice: *Clifton and Stuart* (1991) 14 Fam LR 511 at 512.

I. Miscarriage of justice in relation to consent

Property orders entered into by consent do not preclude an application under s 79A FLA if one of the four heads can be established.

A miscarriage of justice (by reason of the suppression of evidence or any other circumstance) may arise in relation to consent orders where that

consent is based on misleading or inadequate information: see *In the Marriage of Suiker*, as above.

II. What is fraud?

As with the term "miscarriage of justice", no single definition of this term has been applied by the court.

The minimum threshold to satisfactorily establish fraud for the purposes of s 79A FLA may be stated as "a conscious wrongdoing or some form of deceit": see *Taylor and Taylor* (1979) FLC 90-674.

III. What amounts to duress?

Like fraud, no one definition of duress has been adopted by the court.

It is clear the court prefers the equitable doctrine, as opposed to the more strict common law doctrine. Accordingly, unlawful threats and unconscionable conduct may be sufficient to establish this ground however, the categories are not closed: see *SH and DH* (2003) 93-164.

IV. Suppression of evidence

In the context of subsection (a), "suppression of evidence" means a failure to adduce available material evidence of facts to the court by the party who succeeds on the issue to which these facts are material. More than a failure to give evidence by choice or inadvertence is required: see *In the Marriage of Rohde* (1984) FLC 92-592.

The absence of full and frank disclosure of all financial matters to the court and the other party may support a finding of suppression of evidence.

This ground has been closely tied to "any other circumstance".

v. The giving of false evidence

The applicant under this ground should aim to produce material to the court which is such that the court may find affirmatively that some of the relevant

evidence given at the hearing, on which the order challenged was based, was false: see *Wilson and Wilson* (1967) 10 FLR 203.

The evidence may be either wilfully false, or demonstrably false. There is no requirement of wrongdoing or dishonesty: see *Taylor and Taylor*, as above.

VI. Any other circumstance

This phrase should not be read with "fraud, duress, suppression of evidence and the giving of false evidence". The words are intended to cover other situations where, for one reason or another, a miscarriage of justice has occurred. Justice means justice according to law: *Gebert and Gebert* (1990) FLC 92-137; *Clifton and Stuart*, as above.

It must not, however, be read as if were unlimited in scope: it is limited by the overarching principle of a "miscarriage of justice": *Gebert and Gebert,* as above.

Circumstances where a miscarriage of justice has been found under "any other circumstance" include:

- where a third party does not have notice of an application for property orders that may affect that third party's interest in the property the subject of the application: see, for example, *Semmens v Australia and Collector of Customs SA* (1990) FLC 92-116;
- if a party's legal representation was so lacking it was as if there was no representation at all, or alternatively such representation was found to be contrary to the interests and instruction of the party: see, for example, *Clifton and Stuart*, as above.

11.2.2 Impracticable for the order to be carried out: s79A(1)(b)

For an order to be "impracticable", within the context of s 79A(1)(b) FLA:

- it is not enough that circumstances arose since the order was made which made it unjust for the order to be carried out;

- impracticability as a concept involves something more than making it more difficult, but less than proof that it is impossible to comply with the orders; and
- provided more than one circumstance exists and that the circumstances arose since the making of the orders, it does not matter what the circumstances are or by whom they are brought about: *In the Marriage of Rohde*, as above.
- the circumstances creating the impracticability could not have been reasonably contemplated.

11.2.3 Default in carrying out an obligation: s79A(1)(c)

Two grounds must be met in order to be successful under this head:

- there must have been a default in the carrying out of one or more of the original orders made under s 79 FLA; and
- this default must have led to circumstances such that it is just and equitable for the original orders to be varied or set aside. Essentially, the default must be of a material nature.

It is unlikely that an application by the defaulting party would be successful: see *Monticone and Monticone* (1990) FLC 92-114.

11.2.4 New circumstances of an exceptional nature relating to the care, welfare and development of a child: s79A(1)(d)

This head provides a remedy in the situation where circumstances pertaining to the care, welfare and development of a child of the marriage make it so existing property orders are not fully consistent with promoting the best interests of the child.

The circumstances do not need to relate to the original property orders themselves. In *Liu and Liu* (1984) FLC 91-572, Nygh J provided the example where a child develops a serious illness and the existing property orders do not allow for access to funds or other resources necessary to, for example, make suitable adaptations to the home.

Generally, the circumstances would need to extend beyond the normal vicissitudes of life. That is, a mere change in residence would not ordinarily

be sufficient: see *Simpson and Hamlin* (1984) FLC 91-576. The question will largely turn on the particular facts of each case.

The persistent failure of the husband to pay child maintenance was held to amount to an exceptional circumstance in *Marras and Marras* (1985) FLC 91-635.

Just because exceptional circumstances are held to exist, this does not automatically lead to a variation or setting aside of the existing orders. The court must consider in the exercise of its discretion whether the hardship is of such a serious nature and results in such inequity that it can only be rectified by the extreme step of setting aside or varying an existing order of the court: *Simpson and Hamlin*, as above.

The fact that real estate sells for more or less than the parties anticipated is not a sufficient reason to set aside orders, as this is something that clearly is within the contemplation of the parties, or should be.

PART D: DE FACTO RELATIONSHIPS

CHAPTER 12 – DE FACTO PROCEEDINGS

De facto relationships law is something that you need to know about but may feel uncomfortable with because it is not part of your daily practice. Often, it is a matter of drafting a domestic relationship or termination agreement rather than going to court. This may change as de facto relationships become more and more common. Currently, de facto relationships law is governed by the *Property (Relationships) Act 1984* (NSW) ("PRA").

12.1 WHAT IS A DOMESTIC RELATIONSHIP?

In 1999 important amendments were introduced to the PRA. The definition of de facto was amended, no longer referring to a man and a woman living together as a couple. As a result same sex couples whose relationship has broken down after 28 June 1999 have the same rights as heterosexual de facto couples. Also another category of relationship was introduced, that of the close and personal relationship.

Section 4(1) PRA defines de facto relationships.

Section 5(1) PRA defines domestic relationships.

It is the definition of domestic relationships which enables same-sex couples to make a claim under the PRA, provided that the relationship ended after 1 July 1999.

The PRA also contemplates a different type of relationship entirely. A close personal relationship could potentially include siblings or flatmates.

12.2 THRESHOLD

There are threshold issues parties must satisfy before being able to make an application.

12.2.1 Residence in New South Wales

One of the parties must be resident in NSW on the day the application is made and both parties must have been resident in NSW for a substantial period: s 15 PRA. If the parties have lived together for at least a third of their relationship in NSW, this will be considered a substantial period. The other exception is if the applicant has made substantial contributions of the type referred to in s 20(1)(a) or (b) PRA.

12.2.2 Length of the relationship

The relationship must have lasted for at least two years: s 17 PRA.

Section 17(2) PRA contains three exceptions to this:

- where there is a child of the relationship;
- where the applicant has made a substantial contribution that would not otherwise be adequately compensated for if no order is made. The contribution must be of the type described in s 20 PRA; or
- where the applicant has the care and control of a child of the respondent and there would be a serious injustice to the applicant if no order was made.

12.2.3 Time limits & leave to file out of time

An application to a court must be made within 2 years of the relationship ending: s 18 PRA.

If the proceedings are not commenced within this period, the plaintiff must seek leave from the court before commencing proceedings. The court may grant leave where it is satisfied, amongst other factors, that the applicant would suffer greater hardship if leave were not granted that it would to the respondent if leave were granted. When considering a leave application to proceed out of the time, the court will consider whether the applicant has any other remedies such as an order under s 66G of the *Conveyancing Act 1919* (NSW) (which provides for an order for sale of a property).

12.3 PROPERTY AND MAINTENANCE PROVISIONS

12.3.1 Property adjustment

Section 20 PRA sets out the facts the court will consider when making an adjustment of the parties' property interests. The court may make an order that it considers just and equitable in the circumstances. The section is not identical to s 79(4) of the FLA, as some of the Court of Appeal cases have made clear.

As in cases under the *Family Law Act 1975* (Cth) ("FLA"), it is first necessary to determine the property pool.

The parties' contributions are then examined. This includes non-financial contributions such as contributions to the welfare of the family. In many cases, contributions are assessed more narrowly than in cases under the FLA.

There is no equivalent in the PRA to s 75(2) of the FLA. In many family law cases, the s 75(2) FLA factors represent a 5% to 25% adjustment on top of the adjustments for contributions. There is also no equivalent to s 79(d) to (g) of the FLA.

In order to have recognition of contributions to welfare of the family there must be a child: see s 20(2) PRA.

It is much more difficult to predict how the court will assess contributions under s 20 PRA than it is under the FLA. The decisions of differently constituted courts of appeal have applied very restrictive interpretations of s 20 PRA in some instances and much broader interpretations in other instances.

Cases on s 20 PRA illustrate problems. Early decisions emphasized direct contributions and took a narrow approach focusing on whether or not the plaintiff had been adequately compensated: see *D v McA* (1986) 11 Fam LR 214.

The Court of Appeal rejected this approach in *Dwyer v Kaljo* (1992) 27 NSWLR 728. Other cases followed which caused further confusion rather

than clarifying the position. Some judges took the narrow approach, others took the broad approach.

The case of *Evans v Marmont* (1997) 42 NSWLR 70 decided by a special five member bench of the Court of Appeal was designed to resolve this. *Evans v Marmont* did not provide clear guidance, but since then, a broader approach has been taken. There have also been conflicting decisions as to the treatment of pre-cohabitation contributions and post-separation contributions.

There are a number of matters which are generally agreed:

- there is no assumption that there should be an equal division of property;
- the homemaker and parenting roles should not be regarded as inferior; and
- the contributions of homemaker and parent should not be judged by reference to wage levels of domestic servants.

12.3.2 Superannuation

The Commonwealth reforms to the superannuation regime do not extend to the PRA. This means that superannuation is treated as a financial resource, not property, and it is not possible to make splitting and flagging orders.

12.3.3 Maintenance

Unlike under the FLA, there is no general liability for maintenance. It is much harder to get a maintenance order and the grounds are much narrower. The grounds include:

- the applicant cannot support himself or herself because of the responsibility to care for a child under the age of 12, or a disabled child under the age of 16; or
- the applicant cannot support himself or herself because his or her earning capacity has been affected by the relationship and maintenance will assist that person to retrain and in the circumstances maintenance is reasonable.

If an order for maintenance is made, it will last for a period of no longer than three years from the date of the order or four years from the date of separation, whichever is earlier.

Under the PRA, social security pensions are not disregarded for the purpose of considering the applicant's need for maintenance.

12.4 AGREEMENTS

Parties can enter into a domestic relationship agreement before or during cohabitation. Upon the breakdown of a relationship, parties can enter into a termination agreement.

Section 46 PRA states that despite any public policy to the contrary, two people who are not married can enter into domestic relationship or termination agreements. They cannot, however, contract out of custody, maintenance or access to children.

In order to be valid, the agreements must comply with s 47 PRA and must be:

- in writing;
- signed by the party against whom the agreement is sought to be enforced; and
- at or before signing the agreement each party must have received independent legal advice and there must be certificates attached to the agreement signed by the solicitor who provided the advice as to:

the effect of the orders on the rights of the party to apply for an order to the court; and

the advantages and disadvantages at the time of the advice.

Section 49 PRA states that where a party makes an application to set aside or vary a domestic relationships agreement (note this does not apply to termination agreements), the court will consider whether the circumstances have changed so much since the time of the agreement that it would do a serious injustice if one or more of the provisions of the agreement were enforced.

In both cases, both parties must obtain independent legal advice before signing the agreement.

It is not possible to enter into consent orders which are approved by the court.

12.5 POWERS OF THE COURT

Section 38 PRA sets out a wide range of powers the court can exercise including ordering a transfer, sale, lumps sum or instalment payments, periodic payments and making injunctions.

12.6 INJUNCTIONS

Part 5 PRA deals with domestic violence and harassment.

Section 53 PRA gives the court power to grant various injunctions including:

- for the personal protection of a party;
- restraining a party from entering a premises or specific area or place of work; or
- relating to the use of occupancy of the premises in which the parties reside.

12.7 JURISDICTION & PROCEDURAL ISSUES

The *Civil Procedure Act 2005* (NSW) and the *Uniform Civil Procedure Rules 2005* (NSW) ("UCPR") commenced on 15 August 2005 and represent major changes to the practice and procedure in the Local, District and Supreme courts of New South Wales. There is now one set of forms to use in the three courts and for the most part one set of rules dealing with discovery, subpoenas, notices to admit, costs and various procedural issues.

In addition to the UCPR, it is important to familiarise your self with the practice notes issued by the individual courts from time to time.

The Local Court has jurisdiction to deal with claims for adjustment up to $60,000 (or $72,000 under the deemed provisions introduced by s 66 of the *Local Courts Act 1982* (NSW).

The District Court has jurisdiction to deal with claims for adjustment up to $250,000 (or up to $375,000 under the deemed consent provision: see s 51 of the *District Court Act 1973* (NSW)). You should note that the relevant amount is the amount of the adjustment sought not the property pool.

The Supreme Court has unlimited jurisdiction and jurisdiction to deal with equitable matters.

12.8 COSTS

There are costs consequences for filing in the Supreme Court when it would have been possible to file in a lower court. There are also cost penalties for commencing in the District Court when the application falls within the jurisdiction of the local court.

Unlike under the FLA, costs generally follow the event. This is a significant difference. Offers of compromise become very important.

You need to familiarise yourself with the costs provisions in the UCPR.

12.9 EQUITABLE RELIEF

It is also important to give consideration as to whether a party has a claim to any equitable relief. These include:

- express contracts;
- implied contracts;
- express trusts;
- resulting trusts;
- constructive trusts (common intention);
- unconscionable conduct;
- promissory estoppel;
- proprietary estoppel; and
- unjust enrichment.

Plaintiffs should plead under as many different headings as possible.

Depending on which court you proceed in, you will have to consider:

- Civil Procedure Act 2005 (NSW);
- Uniform Civil Procedure Rules 2005 (NSW);
- Local Courts (Civil Procedures) Rules 2005 (NSW);
- District Court Rules 1973 (NSW);
- Supreme Court Rules 1970 (NSW); and
- Property (Relationships) Regulations 2005 (NSW).

Some procedures differ among the courts and you cannot assume that procedures will be similar to procedures in the Family Court.

It is also good to check to see if there are any practice notes published by the particular court as these can provide useful guidelines as to procedures.

12.10 FUTURE DIRECTIONS

In 2002, the Standing Committee of Attorney-Generals met and agreed to refer state powers in relation to de facto matters to the Commonwealth. Several years ago, the states did this in relation to children's issues with the result that parents, whether married or not, seek relief in relationship to residence, contact and specific issues from the Family Court.

If the states refer their powers, this will give the Family Court jurisdiction to deal with heterosexual de facto relationships as well as married relationships. The Commonwealth government has refused to accept a referral of powers in relation to same-sex couples. The Commonwealth government has not yet released its bill in relation to the referral of powers. Until it does, we will not know if the FLA will simply be amended to include heterosexual de facto relationships or whether different provisions will apply to heterosexual de facto relationships.

PART E: ALTERNATIVES TO COURT

CHAPTER 13 – ALTERNATIVE DISPUTE RESOLUTION

13.1 WHAT OF ADR?

Alternative Dispute Resolution ("ADR") refers to the various non-litigation methods used to resolve family law disputes, by reaching an agreement acceptable to the parties.

13.2 WHEN IS ADR USED?

ADR is used during the stage before court proceedings are commenced, where there may be an attempt to resolve the dispute between the parties using such methods. However, ADR methods can be used at any stage in the dispute.

You should regard ADR as an additional tool that you can use in conjunction with the representation of your client in a family law matter. ADR can only work effectively through the cooperation between you and the ADR professional. ADR methods include mediation, conciliation, and counselling.

13.3 IS ADR COMPULSORY?

There is a requirement under the Family Law Act that parents attend family dispute resolution and make a genuine effort to resolve their dispute before making an application to the Court in a parenting matter.; S 60I(i). The government has established Family Relationship Centres which provide support services to parents. Further information is available at the website **www.familyrelationships.gov.au**

From 1 July 2007, before an application relating to parenting matters can be listed before a Court, a certificate must be filed with the application confirming that the applicant has attended or attempted to attend family dispute resolution s60I (7). The parties are expected to attend and make a genuine effort to resolve issues. If there is evidence that a genuine effort

has not been made, the Certificate will be issued with a notation stating that a party did not make a genuine effort to resolve the dispute.

There are exceptions to attending family dispute resolution and these are set out in S 90I (9), with the most common being consent orders, abuse or risk of abuse of the child, family violence and urgency. In some of the cases that fall under the exceptions, the Court may still order the parties to attend family dispute resolution: S90I(10).

Note also that in financial cases, R. 1.05 requires that before starting a case, the parties must attempt to resolve the dispute by participating in dispute resolution. This can take the form of negotiation, conciliation or arbitration.

13.4 WHAT ARE MEDIATION, CONCILIATION & COUNSELLING?

13.4.1 Mediation

Purpose: An independent and impartial mediator assists the parties to identify and explore issues, in an attempt to reach an acceptable agreement. The mediator will manage the process and help generate options, but will not provide advice.

Focus: Developing solutions together, facilitated by a mediator.

13.4.2 Conciliation

Purpose: An independent and impartial conciliator assists the parties to identify issues in dispute and develop options. The conciliator may give expert advice, suggest alternatives and encourage an acceptable agreement.

Focus: Reaching a mutually acceptable decision. The conciliator will not determine the dispute, but may advise on process, content and possible outcomes.

13.4.3 Counselling

Purpose: A counsellor helps individuals, couples and families to work through relationship difficulties and family conflict.

Focus: Helping individuals and families achieve an understanding of the way thoughts, feelings and behaviours affect relationships. This may lead to alternative ways of dealing with issues and resolving conflict.

13.5 HOW DO I PREPARE MY CLIENT FOR ADR?

You can make the ADR process more effective by explaining aspects such as:

Intake: A preliminary assessment or interview conducted by the mediator or conciliator to assess the suitability of a specific case for mediation or conciliation. The mediator or conciliator explains the process in detail to each client, obtaining a history of the relationship and an understanding of the issues in dispute. Your client also has the opportunity to ask the mediator or conciliator any questions about the process. This intake interview is conducted with each client, separately.

Joint session: A “joint session” with both parties may be scheduled. This type of session is commonly used to allow each party to put their point of view so an agenda can be identified. Each issue on the agenda is then explored, and options can be generated and evaluated.

Impartiality: The mediator or conciliator is required to maintain their impartiality. While a conciliator may give information or even advice, he or she cannot “take sides”.

Confidentiality: Mediators and conciliators are required to maintain confidentiality, subject to statutory exceptions. You should explain this to your client. This should also be explained by the mediator or conciliator at the intake interview.

Early encouragement or identification of options: While each issue on the agenda should be explored in joint sessions, it is useful for your client to consider, as early as possible, any options that might be acceptable. It is

also useful for each party to be aware of their "best alternative to a negotiated agreement" as well as their "worst alternative" (which may be their "bottom line").

Explaining the role of legal services available to the client during the ADR process: You can provide ongoing consultation and support to your client during ADR. You can also draft the parties' consent orders, based on the agreement reached through ADR. There are also other legal services that you and your firm can provide, such as conveyancing, wills, and advice on business law.

13.6 HOW DO I WORK OUT WHAT IS RIGHT FOR MY CLIENT?

Your client could benefit from independent legal advice, preferably in writing, concerning the following:

- how entering mediation may affect their legal rights, entitlements and obligations;
- what further information or documentation should be produced before any proposals or agreements are made;
- the nature and extent of their legal rights, entitlements and obligations on separation and, in particular, if the matter being discussed went to court what would be:

    the "worst" possible outcome;

    the "best" possible outcome;

    the most likely outcome;

- the legal implications of any proposed agreement; and
- the likelihood of the proposed agreement being approved by the relevant court.

You are also in a position to suggest further options, which neither of the parties nor the ADR professional may have considered, or to improve the wording of any agreement reached. This can protect your client's interests

and minimise the likelihood of a further dispute, because of lack of clarity on a particular issue.

13.7 HOW CAN THE ADR PROFESSIONAL & I WORK TOGETHER?

- Set up ongoing consultation on practices and referrals between the two professions.
- Participate in information seminars being provided by both services.
- Explain each role, and its benefits, to your client.

The mediator or conciliator can assist you with specific matters in dispute, providing an extension of the round table conference, and conducting specific issue mediations or conciliations or negotiations on short notice, as well as more extended ADR processes.

If a prospective ADR client has not already received legal advice, he or she should be advised by the mediator or conciliator to obtain independent, and comprehensive, legal advice.

13.8 WHAT SERVICES ARE AVAILABLE?

Family Relationship Centre:
National Relay Service 1800 555 677
Centacare, Sydney
City: (02) 9390 5366
Sutherland: (02) 9545 1544
Bankstown: (02) 9793 7522
Fairfield: (02) 9725 7077

Centacare, Broken Bay
(02) 9913 3888

Relationships Australia
(02) 9387 4211
Services at Bondi Junction, Lane Cove and Parramatta

UNIFAM
Sydney and Parramatta:(02) 9261 4077

Campbelltown: (02) 4628 1577
Penrith: (02) 4732 3836

Community Justice Centres
Mediation only: (02) 9218 5955
Toll free: 1800 671 964

CHAPTER 14 – DRAFTING SETTLEMENT DOCUMENTS

14.1 CONSENT ORDERS

Precedent consent orders for both the Family Court of Australia and the Federal Magistrates Court will soon be available on the Family Law Court's website www.familylawcourts.gov.au.

14.1.1 Family Court of Australia

In the event that a proceeding has not commenced, parties may seek to file an Application for Consent Orders (Form 11). A comprehensive guide to filing consent orders for both financial and parenting proceedings in the Family Court of Australia is set out in the "Application for Consent Orders Kit" available at www.familycourt.gov.au. Consent Orders may also be filed at any stage during a proceeding.

The Court has the power to make an order as sought by the parties, require a party to file additional information or dismiss the application.

Rule 10.18 provides that a Respondent's consent to an application for consent orders lapses if 90 days have passed since the date in the first affidavit in the Form 11 and the Form 11 has not been filed.

14.1.2 Federal Magistrates Court of Australia

Once proceedings have commenced in the Federal Magistrates Court, consent orders may be filed at any stage. Division 13.2 of the *Federal Magistrates Court Rules 2001* provides that the parties to a proceeding may apply for an order in terms of an agreement reached about a matter in dispute in the proceeding by filing a draft consent order signed by each party. Rule 13.04(2) provides that the draft consent order must state that it is made by consent.

If a party to a proceeding seeks to have draft consent orders relating to financial matters made in chambers, most Federal Magistrates will require recitals and/ or a letter setting out the basis of the settlement so the Federal Magistrate can be satisfied the orders are just and equitable. Further, if the draft consent order proposes to deal with a party's interest in a superannuation fund, the Federal Magistrate will require evidence that the Trustee of the relevant superannuation fund is on notice of the proposed order and has no objection.

NOTE: Be aware that until the Court has made the Orders, each party has the right to withdraw consent at anytime prior to the Orders being made by filing a Form 10 Notice of Discontinuance.

14.2 BINDING FINANCIAL AGREEMENTS

Separating spouses can effect agreements reached between them by Consent Orders or in a "Binding Financial Agreement" ("BFA"). To some extent the nature of the agreement and the factual situation of a case will determine whether Consent Orders or a BFA are suitable.

Although BFA have existed since 2000 they remain a largely untested area of family law. This should always be considered when advising a client.

14.2.1 Types of BFA's

There are four types of BFA:

those made before a marriage (often described as a pre-nuptial agreement) –s.90B FLA;

those made during a marriage but before separation –s.90C FLA;

those made during a marriage but after separation –s.90C FLA; and

those made after a marriage has been dissolved–s.90D FLA.

Consent Orders, such as "pre-nuptial agreements" or the purported Certain arrangements between family law parties cannot be effected by extinguishment of future entitlements to spouse maintenance.

There may be certain taxation consequences for the parties to an agreement, whether Consent Orders or a BFA is used to document their agreement. If uncertain as to what those consequences will be, the practitioner should obtain specialist taxation advice from an accountant.

Please also note it is not uncommon for practitioners to deal with parts of a family law settlement in a BFA, such as future spouse maintenance entitlements, and to deal with other parts, such as property settlement, in Consent Orders.

14.2.2 Contact law

The jurisprudence of a BFA is to incorporate contract law into family law: s.90KA FLA.

When drafting and advising on a BFA, contract law is a relevant consideration and should be considered when providing advice or considering options available for clients seeking to set aside or enforce a BFA. Of course the application of concepts of contract law in the context of a BFA has not yet been considered by the Court.

14.2.3 Formal requirements

Certain formal legislative requirements are necessary to ensure a valid BFA: s.90G, 90F, 90B, 90C and 90D FLA. These sections deal with various issues such as the agreement being in writing and being signed by both parties.

S.90E FLA provides that a provision in a BFA that relates to the maintenance of a party to the agreement or a child or children is void unless the provision specifies:

- the party, or the child or children, for whose maintenance provision is made; and
- the amount provided for, or the value of the portion of the relevant property attributable to, the maintenance of the party, or of the child or each child, as the case may be.

There also a requirement for a "Separation Declaration" in certain BFA's (s.90DA FLA.) A Separation Declaration is in a form provided for by the FLA and states that one party regards the marriage as ended.

Of all the formal requirements for a BFA it is important for the young family lawyer to note the requirement for the provision of independent legal advice to each party in respect of:

- the effect of the Financial Agreement on the parties' rights; and
- the advantages and disadvantages, at the time that the advice was provided, to the party of making the Financial Agreement.

The status of a document that purports to be a BFA but does not comply with the formal requirements of the FLA has not yet been determined by the Court.

The requirement for strict compliance with s90G was espoused in the judgment of the Full Court of the Family Court of Australia in *Black v Black* [2008] FamCAFC7 in which the Court commented,

> *"The Act permits parties to make an agreement which provides an amicable resolution to their financial matters in the event of separation. In providing a regime for parties to do so the Act removes the jurisdiction of the court to determine the division of those matters covered by the agreement as the court would otherwise be called upon to do so in the event of a disagreement. Care must be taken in interpreting any provision of the Act that has the effect of ousting the jurisdiction of the court. The amendments to the legislation that introduced a regime whereby parties could agree to the ouster of the court's power to make property adjustment orders reversed a long held principle that such agreements were contrary to public policy…. The underlying philosophy that had guided the courts in enunciating that principle was seen to place too many restrictions on the right of parties to arrange their affairs as they saw fit. The compromise reached by the legislature was to permit the parties to oust the court's jurisdiction to make adjustive orders but only if certain stringent requirements were met."*

If there is a BFA Part VIII FLA does not operate in relation to ``financial matters'' (s 71A (a) FLA) or ``financial resources'' (s 71A (b) FLA) which are covered by the BFA.

14.2.4 Enforcement

A Financial Agreement may be enforced as if it were a contract or Order of the Court.

14.2.5 Setting aside a BFA

A BFA may only be set aside where:

- setting aside is provided for under the terms of the BFA;
- the parties enter into a Termination Agreement under s.90J FLA or a further BFA; or
- by Court Order.

The only bases on which a Financial Agreement may be set aside by the Court, are if the Court is satisfied that:

- either party to the agreement entered into the Agreement:
- for the purpose, or for purposes that included the purpose, of defrauding or defeating a creditor or creditors of the party; or
- with reckless disregard of the interests of a creditor or creditors of the party irrespective of when the agreement was made;
- the Agreement was obtained by fraud (conscious wrongdoing or deceit) including non-disclosure of a material matter);
- the Agreement is void, voidable or unenforceable; or
- in the circumstances that have arisen since the Agreement was made, it is impracticable for the Agreement or a part of the Agreement to be carried out;
- since the making of the Agreement, a material change in circumstances has occurred (being circumstances of an exceptional nature relating to the care, welfare and development of a child of the marriage) and, as a result of the change, the child or a parent of the child with whom the child lives or who has a residence order or responsibility for the child's care, welfare and development, will suffer hardship if the Court does not set the Agreement aside; or

- in the respect of the making of a Financial Agreement – a partner to the Agreement engaged in conduct that was, in all the circumstances, unconscionable.

(s.90K FLA for the authority for the above considerations).

14.2.6 Other issues to note regarding BFA's

A court is required to take into consideration "the terms of any financial agreement that is binding on the parties" when considering future needs: s. 75(2)(p) FLA.

The binding part of a BFA which deal with superannuation interests is a superannuation agreement: s 90MH(2) FLA. The formal requirements of a Superannuation Agreement should be observed.

Child maintenance and child support are not specifically referred to as matters which can be covered by a BFA.

14.3 CONSENT ORDERS vs BFA's

Binding Financial Agreements concern financial arrangements, not parenting arrangements. Parenting arrangements can be set out in a form that is binding upon parties to those orders, by way of Consent Orders or by way of a Parenting Plan made under the FLA. In deciding whether you should prepare consent orders or opt for a BFA in relation to property settlement and/or spouse maintenance matters, you should carefully consider the following:

14.3.1 Court Involvement

Consent Orders are filed with the court and considered by a registrar. They will be rejected if the court considers that they are not "just and equitable". The court has no input as to whether a BFA is just and equitable. By entering into a BFA, you are effectively precluding the court from any involvement in relation to the financial and property issues of the case.

14.3.2 Timing

Consent orders are made after separation. If property orders are sought as part of the consent orders then the consent orders must be filed with the court within 12 months from the date of the decree absolute. BFA's can be entered into before the marriage (s 90B FLA), during the marriage (s 90C FLA) and after the divorce (s 90D FLA).

14.3.3 Validity

Consent orders are enforceable only once they are made and sealed by the court. BFA's do not need to be registered or approved by a court. However, a separate application must be made to the Court in order to enforce a BFA (s 90KA FLA).

14.3.4 Disclosure

It is a requirement that parties entering into consent orders make full and frank financial disclosure. Although there is no such requirement with BFA's, non-disclosure may, depending on the circumstances, amount to fraud, and this is one of the grounds upon which an agreement may be set aside.

14.3.5 Setting aside

A BFA may be set aside if, amongst other things, it was obtained by fraud, it is impractical to carry out the agreement, or there has been a material change in circumstances relating to the care, welfare and development of a child of the marriage: s 90K FLA.

The grounds for setting aside or amending consent orders are set out in s 79A of the FLA. Briefly, circumstances of an "exceptional nature" must exist before the court will set aside or amend consent orders, whereas the court requires merely "a material change" in relation to BFA's. It a popular view that BFA's are more easily set aside and therefore provide less finality than consent orders.

PART F – LAWYER SKILLS

CHAPTER 15 – INTERVIEWING, NEGOTIATING, AND CLIENT SKILLS

15.1 INTERVIEW TIPS

Although client interviewing is not a science and every lawyer develops their own style of interviewing clients, an understanding of some of the theory of legal interviewing can provide guidance for less experienced lawyers. This chapter aims to give a summary of the various stages of a client interview and provide you with some general issues to think about.

In K A Lauchland and M J Le Brun's *Legal Interviewing: Theory. Tactics and Techniques*, Butterworths, Sydney, 1996, the authors suggest thinking about client interviews in the following stages:

15.1.1 Plan & prepare for an initial client interview

- Do a conflict check and identify any professional responsibility issues. Ensure professional responsibility issues are addressed before the meeting.
- Review any documents sent to you by the client.
- Prepare your room or conference space for the interview. Think about the temperature, forwarding your phone to voicemail and how tidy your office is. Files and papers should be organised so as to respect your other clients' anonymity and confidentiality.
- Consider who you are interviewing and the client's special needs, for example, interpreters or a child client.

15.1.2 Commence an interview

- Effective lawyers know that the first client interview or meeting is critical as it lays the foundation of the lawyer-client relationship.
- Meet and greet the client and then ensure that he or she is seated comfortably in your office or work space.

- Begin to establish a rapport and allow the client time to "settle" themselves comfortably before discussing business. Think about how using a client's name when addressing them or being sensitive to their cultural situation might help to establish a rapport.
- Professionally introduce yourself, perhaps summarise your qualifications.
- Educate your client by explaining what will take place during the interview, clarifying your professional role and addressing any concerns your client may have.
- Understand your client's expectations of you and the process.
- Develop an agenda of issues to be determined during the meeting.

15.1.3 Obtain your client's narrative

- Create an opportunity for your client to detail their narrative or story. Ask an open ended question, such as, "Tell me what has brought you here today?" and encourage them to get the whole story out. Try not to interrupt. Take notes. You can return to points which require clarification at a later stage.
- Think about using verbal cues such as "uh-huh" and "please go on" or non-verbal cues such as nodding to keep the story moving.
- Summarise your understanding of the client's story.
- Identify gaps and areas where further instructions, facts or documents are required.
- Determine a strategy to obtain any further information you need to advise the client properly.

15.1.4 Develop a theory of your client's care & strategies for proceedings

- Explore legal and non-legal issues and possible solutions.
- Explain the law, legal principles, terms and procedures where necessary. Consider whether a client will understand words you might take for granted such as "injunction" or "interim".
- Analyse the client's problem in the light of the legal options. Relate the law to the facts.

15.1.5 Generate & explore options that explore your client's concerns

- Generate options for solving client's concerns including non-legal options.
- Explore the pros, cons and consequences of each option available with the client's input.

15.1.6 Help your client make decisions

- Encourage the client to summarise his or her understanding of options discussed and state whether they have a preference.
- Encourage the client to determine a plan of action.

15.1.7 Draw the interview to a close

- Set a timetable for further work or events and who is to do those tasks.
- Get clear instructions for how to proceed.
- Confirm whether a retainer is to be entered into and make appropriate fees disclosure.
- Provide brochures required by the Family Court.
- Farewell your client from your office or work space.

15.1.8 The 'homework' stage. Organise, prepare & complete outstanding tasks

- Document, plan and prioritise further tasks that are required by you and the client.
- Follow up advice in writing if necessary.
- Send written retainer and costs disclosure.

15.1.9 General

- Be aware of professional responsibility issues at each stage of the process.
- See your client as a person, not just a legal problem.
- Listen actively to hear your client's real concerns. Active listening involves you demonstrating to a client that you are listening to him or

her and encouraging him or her to speak freely and openly. For example, you could reframe a statement made by a client in your own words to check you have understood the client's point.

- Open ended questions are helpful when you want to prompt your client to talk on a subject, for example, "Tell me more about …"
- Closed questions are specific and usually result in a "yes" or "no" answer. These questions are helpful when you want to clarify an issue.
- Think about the pace you are conducting the interview at. Efficiency is important but you do not want the client to feel rushed.
- Remember interviewing is a human process not a theory. The above points are just something to think about to help you maximise your time with clients.

15.2 TACTICS FOR NEGOTIATING

Most family lawyers spend a large proportion of their time at work negotiating, whether it is with other lawyers, clients or self-represented parties.

There are many theories of negotiation that you can read about if you are so inclined. Two major schools of thought are the "adversarial/bargaining" or "principled" approach to negotiation and the "interest based" approach to negotiation. You may wish to follow the advice of Spegel et al's *Negotiation: Theory & Techniques*, Butterworths, Sydney, 1998, which suggest synthesising the theories of negotiation by drawing skills from both schools of thought and developing your own style and skills.

An appreciation of theory can help you understand negotiation better.

According to the authors of *Negotiation: Theory & Techniques*, the three basic building blocks of successful negotiation are:

- Attitude: Self-awareness, thorough preparation and practising your skills will help you to approach a negotiation with confidence.
- Awareness: Be alert to what the other side is saying and not saying and why they are saying or not saying those things.
- Accountability: Remember you are accountable to the court and your clients and what you say binds your clients. Consider your instructions and prepare thoroughly.

It may help you to think of negotiation in three stages:

15.2.1 Stage 1: Preparation

- Identify the long-term and short-term needs of the parties. Remember your client's needs will shape their goals in the negotiation.
- Research information about the facts of the case and consider the law.
- Contact the other side. Working out the terms of the negotiation can be an indicator of how the negotiation itself will proceed. Remember the initial approach can set the tone of the negotiation to follow.

15.2.2 Stage 2: Negotiation

- Identify the parties' needs, positions and interests.
- Separate the people from the problem and the issue.
- Generate options that address the needs, positions and interests of both parties.
- Bargain. Any deal made has to offer enough to both sides to get a commitment.
- When giving something away, seek to get something in return whenever appropriate.
- Commit to an agreement. The strength of the commitment of both parties will determine their willingness to continue working with one other to implement the agreement.

15.2.3 Stage 3: Agreement

- Any agreement reached will only be successful if it can be implemented.
- The agreement must be one with which both parties can comply.
- Consider and plan for post-implementation obligations such who will prepare the orders and Application for Consent Orders (if applicable) should the settlement be Consent Orders or a BFA including court appearances to hand up terms.

15.2.4 Tips & Tactics

- Remember you are first and foremost an officer of the court and only second the representative of your client. Reassess your professional obligations on an ongoing basis throughout the negotiation and don't trade with ethics.
- Most family law matters are "unwanted negotiations" in that the parties do not want to negotiate with one another but know they must.
- Try not to prepare your response as the other side is speaking. Really listen to the other side and do not be afraid of silence or a short pause.
- Agreement does not necessarily mean success. Consider any long term disadvantages.
- Unidentified interests usually result in intractable disputes. Probe any hidden agendas.
- The more you know about the other side the easier it is to estimate their interests.
- The use of hard-nosed tactics, bluffing, deception, time pressures and verbal aggression are usually a waste of time. The other side will either see through it or their goodwill will be destroyed.
- Sometimes settlement can be difficult for clients as it involves relinquishing the dispute.
- Remember (and remind the other side) coming up with options to settle does not mean any commitment to those options.
- If you have thoroughly prepared and considered the issues it is not a problem to make the first offer.
- Don't let an extreme figure or option set one end of the range. Dismiss any extreme suggestion as impossible.
- Make sure any argument you put is supported by evidence.
- Be prepared to walk away. The power to walk away should not be used as a tactic or threat but simply as another option.

Older lawyers or more experienced lawyers are not necessarily better negotiators. On one view, experience can be just a collection of bad habits. Having said that, always remember your own abilities.

Remember that there is no "correct" way to negotiate. Practice with appropriate reflection afterwards makes you close to perfect.

15.3 DEALING WITH DIFFICULT CLIENTS

Most clients in family law matters will be “difficult” at some stage during the progress of their matter. By nature, family law is an area that is highly emotionally charged as it deals with highly personal issues.

It is often difficult to work out exactly what advice or information a client wants to receive from you.

It is important that you learn and develop good communication skills and acquire an understanding of the emotions that your clients may experience.

It is the your challenge to ensure that clear and effective communication is maintained with your client and with other parties.

As family law is highly individualistic, there is no set pattern to how your client will react during the matter. However, there are some “flash points” to be aware of, that may cause an adverse reaction and hinder progress of your matter:

- separation (depending on who initiated the separation);
- initial letters to the other party sent by you or received by you from the other party;
- first contact occasion with children;
- first financial disclosure;
- re-partnering – if one party re-partners;
- Christmas, birthdays, family holidays;
- if one party gets a new job, promotion etc – anything that means they are happy! – this can cause a strong reaction from the other party.

15.3.1 Tips

Listening – listen actively and passively. Look for clues that may indicate what the legal issue is. You need to listen for the key points to work out exactly what your client needs from you

Being aware that your client may need to “vent” and until they do they will not be in a position to articulately express what they need from you until they have had a chance to tell their side of the story. Clients may not feel

comfortable until they have provided you with some background information which leads them to what they really want to ask.

Empathising – do not sympathise; show understanding of your client's situation rather than sharing your personal feelings)

Normalising – emotional clients may go off on tangents about matters that are unrelated to the legal issues or simply get too distressed to speak. It may help to suggest a break (for tea or leg stretching) when you sense that your client is becoming distressed. Even if your client does not want anything, give them an opportunity to leave your office and some time to collect themselves.

Questioning – remember to use open-ended questions, not questions that end in a "yes" or "no" answer. By using these types of questions you can bring your client's attention back to the information that you need to gain from them.

Constant contact – do not ignore telephone calls, messages and letters from your clients. Clients will accelerate in their emotional levels if they cannot speak to their lawyers. Keep it brief and explain what is the progress and that you will contact them when you have news. If your client wants to tell you what their spouse has done, ask them to put it in writing if relevant to their case. Clients may want to ring you and "whinge" – but that's what friends and family are for!

Legal advice versus personal advice – the role of a family lawyer often includes assisting the client with non-legal issues. This may include making referrals to non-lawyers such as counsellors or social workers. Have a list of counsellors and organisations that can assist your client with the non-legal issues that arise in your practice.

Clients in denial – never tell your client what they want to hear; never lie to them about any procedure or what they may be entitled to. If you are unsure, just say you will have to get back to them, check on a few things or clarify some points of law before you are able to advise them fully. It is better to be frank as clients prefer frankness and honesty from solicitors.

15.3.2 Language barriers

Language barriers make communication more difficult. If there is a language barrier you need to be patient, clarify your client's instructions and make sure that both you and the client have understood what it is they have sought advice about. If need be, use an interpreter or someone in your office who may be familiar with your client's language to break the ice. It is important that clients fully understand your oral and written advice and any documents they read and/or sign. Do not assume that your client understands your legal advice simply because she or he can hold a conversation with you in English. Legal advice is technical in nature and the language used by legal practitioners can be difficult for clients to understand even when English is their first language. When in doubt, seek the assistance of a properly qualified, accredited interpreter and ensure that the interpreter provides written certification after translating any documents that your client signs, swears or affirms.

15.3.3 Abusive clients

If your client becomes violent and abusive, lower your voice and ask them to calm down, take a deep breath and stay focussed. Try not to get upset. Be calm and listen to what they are saying. They may be reacting to what you have told them or what they have just read. Consider their perspective and don't take it personally. It may also be a good idea to call on management staff to assist you. They may also make good witnesses, if need be.

Remember, you are not alone – all lawyers have had issues with dealing with difficult clients, seek advice and assistance from senior practitioners and colleagues.

CHAPTER 16 – DRAFTING SKILLS

Good drafting can be tricky. The consequences of poor drafting are not always immediately apparent. Poor drafting may lead to further litigation when the parties are not able to agree on an interpretation of the orders or where the orders are ambiguous or even unenforceable. The drafter may be faced with a professional negligence action years later.

16.1 DRAFTING ORDERS

Sometimes it is necessary to draft orders at court without having the benefit of having time to carefully consider the effect of each order. Problems with drafting can go unnoticed until it is time to put the orders into effect – by then, it is usually too late.

Here are some tips to keep in mind when drafting:

- Each order must require someone to do something.
- Do not use the passive voice.
- The order must set out step-by-step what each person must do to make something happen. Miss a step and you could face a law cover claim.
- Anticipate contingencies.
- Define the timing of events clearly. Avoid using words like 'forthwith'
- Be clear.
- Notations are not orders. They only provide useful background information.
- Consider the enforceability of each order.
- Consider including default order and/or enforcement order.

16.2 DRAFTING AFFIDAVITS

Affidavits are about what the witness heard, saw or perceived. Affidavits have an important role in the hearing. It is the judge's first insight into your client's case.

Consider the rules of evidence and follow a logical sequence of events. Common objections to affidavits include:

16.2.1 Relevance

Relevance can be hard to define. Refer back to the relevant sections governing your client's application. There may be a raft of things that are important to your client emotionally but are not relevant in the affidavit.

Also if there have been previous proceedings where orders were made it is likely that only the events which occurred after the orders were made will be relevant

16.2.2 Hearsay

Quoting witnesses not before the court – this is hearsay and will be struck out from final affidavits. The hearsay rule does not apply to interim affidavits, so in interim affidavits, you can quote conversations with a person who is not a witness in the case (for example, a police officer or doctor), but you will not be able to quote persons who are not witnesses in the final affidavit. An exception applies to the statements made by children.

16.2.3 Form

Conversations must be set out in direct speech. If a conversation is summarised it may be struck out as it is not in the proper form.

16.2.4 Generalities

Commonly, affidavits contain general statements that are not specific as to time. If a statement is too general, the other party cannot properly answer it. Avoid terms like "sometimes", "often", "several" and "occasionally". You will need to be more precise than this.

16.2.5 Conclusions

This is an easy trap to fall into. "She swore at me" is a conclusion and is inadmissible. Instead you should set out what she actually said. Other

examples are “he has a profitable business” or “he assaulted me” or “he was drunk”. You would need to provide evidence (probably business records) showing the profitability of the business, set out what he did or what you saw or smell (the things that lead you to your conclusion).

16.2.6 General tips

Generally, affidavits should be in chronological order. However, there are times when you should modify this. For example, when you have an urgent application you should set out the reasons for the urgency early.

Do not sanitise the evidence. It should be in the witness’ words, not the lawyer’s words.

Admit and avoid – apologise for bad behaviour; it minimises the impact.

Do not be afraid of the positives as well as the negatives regarding parenting issues as these can be a tactical advantage. Also, often is it just not credible to be 100% negative about the other party. It will be rare that in a 20 year marriage, the other party never washed a single dish.

If time allows, put the affidavit or the orders aside for a day or two before finalising them. It is amazing what a fresh look at a document can reveal! It is also a wise idea to have a more senior solicitor or counsel settle the affidavit.

CHAPTER 17 – IN THE COURT

17.1 TO BRIEF OR NOT TO BRIEF

"Brief early and brief often" should be your motto!

17.1.1 Interim hearings

When your legal advice and your client's instructions are diametrically opposed

Sometimes, it is difficult to persuade a client who has formed a relationship with you that their view of the world is unlikely to prevail. You say the words but you get the distinct impression that the meaning is lost in translation. In this situation you should consider briefing early.

A barrister in that situation has two obvious advantages:

- hopefully another person who will either:
  express the same view on the law as you, or, less likely,
  offer some hope to the client that their view will prevail;
- preserve the solicitor/client relationship in the event that the interim application is unsuccessful and/or the legal advice they received at the court room door is hard to take.

I. When your work load crazy?

Despite best intentions, it is not possible to be in eight courts at the one time. If you have prepared the documents, a barrister may agree to run your (simple) matter uninstructed, or instructed by a different solicitor. You (and your client) gain the advantage of having a person who has concentrated on one matter only and can freely negotiate with the other side on the day or run the hearing when called upon to do so.

II. More difficult interim matters

These include:

- jurisdictional arguments;
- leave to commence proceedings out of time;
- suspension of contact;
- exclusive occupation;
- spouse maintenance;
- interim costs;
- interim injunctions;
- child support applications;
- enforcement proceedings
- contravention or contempt applications.

That is not to say that you ought not run those applications, but rather that each of these applications requires a level of preparation, ability to respond to your opponent's submissions and questions from the bench together with a familiarity with the relevant legislation and case law.

Many solicitors run less complex interim applications including:

- disputes about the period of time children spend with either parent;
- disputes concerning specific issues;
- change of venue applications.

17.1.2 Final hearing

Most solicitors brief counsel to appear in a hearing. The reasons for briefing in a final hearing are similar to those outlined above, but in addition, include:

- the fact that two heads are almost always better than one;
- the need to be familiar with the rules of evidence;
- the need to have some experience leading new evidence;
- the need to have some experience cross-examining lay witnesses;
- the need to have some experience cross-examining expert witnesses;

- the desirability of being up-to-date in your knowledge of the relevant case law;
- the need to have someone who is free to run the case for the duration of the case without the commitments of a busy solicitor's practice.

I. Who should you brief?

It is a very individual decision. You need to be able to work closely with the barrister. If the barrister or barristers you usually brief are unavailable, ask them who they would recommend. Get to know the clerks. Ask your colleagues. Watch barristers in court (sometimes the barrister on the other side will end up on your briefing list). Make sure that the barrister has an appropriate level of experience in family law and is likely to be compatible with the client.

17.2 HOW TO BE A GOOD INSTRUCTING SOLICITOR

17.2.1 The brief

- Send the directions for trial to the barrister.
- Do not worry too much about making the brief beautiful with tabs etc. Just put all the court documents in the file in date order (with an index).
- If there is relevant correspondence, include copies in date order with an index. It will be a rare case where every letter is relevant.
- Send copies of all subpoenas issued by all parties (together with either inspection notes or photocopies).
- Observations are fine but non-essential. Remember, if it is not in the documents, then the judge is unlikely to get to know about it. You should draw to the barrister's attention any issues you consider important.
- Your client's notes on the other side's affidavits (preferably typed and in chronological order according to paragraph number).
- Any other documents that are relevant and/or may be used during cross examination.

17.2.2 Conference

- Let the barrister know what you (and/or the client) want to achieve at the conference.

- Schedule a conference after the barrister has had an opportunity to read the brief. If the conference is too early, another conference is likely to be necessary before the hearing.

17.2.3 Final conference

- Are there any preliminary issues, for example, affidavits filed out of time, subpoenas returnable, Notices to Produce etc to be called on?
- Are all witnesses available, particularly experts?
-

17.2.4 What to bring Court?

- Patience.
- All your files.
- Your costs disclosure letter
- Spare copies of all affidavits in your client's case.
- Multiple copies of all documents which are to be tendered.
- A calculator, sticky notes, spare papers and pens (including a pad and pen for the client).
- Mobile phone.

17.3 THE DO'S AND DON'TS OF ADVOCACY

In no particular order:

17.3.1 Do's

- Do prepare.
- Do be very organised.
- Do stand to address the bench.
- Do listen to the Bench. They make the decisions. That means read the signals and never speak over the top of them.
- Do master the facts.
- Do be succinct.
- Do understand what Orders your client is seeking and the alternatives.
- Do prepare a chronology (even if you do not hand it up, it will help you).
- Do prepare a list of the documents on which you intend to rely.

- Do bring the court handbook with you to court.
- Do read the leading case(s).
- Do turn your mobile phone off (and check that of your instructing solicitor and client).
- Do be silent during the oath (no writing or rustling papers either).
- Do try to estimate how long you will be with a witness.
- Do keep an eye on the time.
- Do take instructions when you need to.

17.3.2 Don'ts

- Don't call the Judicial Registrar "Registrar", use "Judicial Registrar".
- Don't call the Judge "Ma'am", use "Your Honour".
- Don't say "Good morning your Honour" unless the Judge has greeted you that way, or you know the Judge is happy to be greeted that way.
- Don't behave informally with the court staff in the presence of clients.
- Don't discuss the matter if the judicial officer invites you to chambers.
- Don't address your opponent, always address the bench.
- Don't talk for the sake of it.
- Don't lecture the Judge about the law.
- Don't put your handbag or brief case on the bar table.
- Don't fight with your opponent in front of the judge.
- Don't talk loudly at the bar table.
- Don't accuse someone of lying unless you have laid the foundation.
- Don't surprise your opponent with any document or issue not in the court documents.

CHAPTER 18 – ISSUES FOR REGIONAL PRACTITIONERS

The same rules and legal principles apply whether a family law matter is being conducted in the Family Court at Sydney or at a Local Court several hours away. However, the following factors differentiate the practice of family law in a regional area:

- time;
- distance;
- cost;
- resources and support.

These are significant factors that you should consider and evaluate prior to the commencement of any family law proceedings. These are factors that will directly relate to the progress of your family law matters and also your professional development as a family lawyer.

18.1 TIME

As a family lawyer, you will recognise that time is often of the essence – an urgent need to prevent a parent leaving the town, state or country with the children; an urgent need to preserve assets; an urgent need to determine with whom the children may reside.

18.1.1 How do you address the need for urgency as a regional family lawyer?

Consider and evaluate the following:

Where will your matter be likely to be listed and or determined sooner on an interim basis? In the local court, Federal Magistrates Court or the Family Court?

- Firstly, check if there are any jurisdictional limitations to your proposed proceedings.

- Telephone all the appropriate Court registries and speak to Registry staff about filing documents and return dates – be very wary of "over listing" and evaluate the risk of your matter being adjourned or not reached.
- Advise your clients of the pros and cons of each jurisdiction in respect of their ability to urgently consider and determine the matter in your client's favour.
- If the most appropriate jurisdiction is outside your region, consider making arrangements for an agent solicitor to file documents rather than posting them directly to the Court.
- Keep in mind that an application for waiver of the filing fee or your omission to remember to forward the filing fee as you become caught up in the haste of the situation may mean delays in processing your application.

18.1.2 Serving documents

- If the other side is legally represented, contact their lawyer to seek immediate instructions to accept service.
- If service must be effected personally, contact process servers in advance indicating the urgency of your matter – ensure that if the person being served lives on a remote property that sufficient directions are obtained and provided to identify the address for service.

18.1.3 Be prepared & think ahead

- Ensure that your affidavit material is served as soon as possible, is in proper form and comprehensively addresses the issues in dispute, and the need for urgency.
- If you intend on providing written submissions at an interim hearing in your Local Court, do not provide the other side with an opportunity to apply for an adjournment – serve your submissions on the other party prior to the hearing.
- If you intend to rely upon a recent or lesser known case and your matter is being heard in the Local Court, then extend your Magistrate (and his or her Registry staff) the courtesy of providing a copy of that authority alleviating the need for the Court itself to locate it.

18.2 DISTANCE

If your client's matter does not necessitate urgency but rather progression towards the resolution of a property settlement or of care arrangements for children, then distance will become a significant consideration in determining where to commence proceedings.

Consider and evaluate the following:

- Where do the parties reside? Where are their legal representatives? Where do the witnesses reside? Where do the experts reside?
- Does your client have the means and ability to travel? How is your client's health? Does your client have a reliable vehicle? Can your client afford to travel? Can they make arrangements for the care of the children and re-arrange work commitments?
- If you plan on commencing proceedings in your Local Court, is there a risk that the other party will seek a transfer of the proceedings to a Family Court or Federal Magistrates Court registry that may be closer to them?
- If you plan on commencing proceedings in the nearest Registry of the Family Court or Federal Magistrates Court, do they:

    i) provide Telstra link facilities for case assessment conferences?
    ii) undertake "circuits" in your region for the purposes of conciliation conferences and or hearings?

- If you plan on commencing proceedings in the Family Court or Federal Magistrates Court and the nearest Registry is several hours away, discuss with your client the cost advantages of enlisting the assistance of an agent solicitor for certain Court appearances.

18.3 COSTS

Notwithstanding the consideration given to the factors of time and distance, it is usually the financial means of your client that will ultimately dictate when and where you will commence family law proceedings.

Your client may only have a limited income and assets, or will be funded by Legal Aid.

You are duty bound to disclose the cost ramifications that may arise if you elect to pursue proceedings in a jurisdiction found only some distance away. Possible consequences include:

- What travel expenses will you and your client incur? Fuel, airfares, accommodation?
- If you as your client's lawyer attend the Court then your costs may be considerable.
- "Over listing" may mean that you and your client travel to the Court only to find that your matter is not able to be reached and will be adjourned to another date – a strong case for the cost effectiveness of using an agent solicitor.

As a young lawyer, be wary of taking instructions to commence urgent proceedings at a Court Registry outside your area unless you discuss the merits of your client's case and your client's costs arrangements with your supervising partner.

18.4 RESOURCES & SUPPORT

As you will find, regional law firms generally comprise either a sole practitioner, a sole principal with one or two employed solicitors or a small partnership of perhaps up to six principals.

It is very likely that you will be the new face in a small team, and often the young face in an older team. It is just as much likely that you will be interviewing and advising clients from your first day on the job. You will naturally feel anxious, require supervision and guidance along with access to legislation and case law and need support.

Not sure? Who to ask? Where to look? Here are some practical tips on how to locate resources and expand your support network.

18.4.1 Resources

- Websites that will provide you with information:

http://www.familylaw.gov.au

http://www.familycourt.gov.au

http://www.fmc.gov.au

http://www.austlii.edu.au

http://scaleplus.law.gov.au

http://www.legislation.nsw.gov.au

- Subject to the family law workload of your firm, investigate the benefits of annual subscriptions to CD-ROM or looseleaf services comprising family law legislation, case law and commentary; or in subscriptions to LexisNexis or CCH online resources which provide a similar service via the Internet.
- Request material from the Law Society Library – the staff are extremely knowledgeable and very obliging. Keep in mind, however, that the resources you seek may take a day or two to reach you.
- If you need resources urgently and your firm does not have Internet access, remember that your public library does. Return from the library laden with your increased knowledge and be certain to find your supervising partner and show him or her the research benefits of Internet access.
- Remember that NSW Young Lawyers has a library of CLE papers on family law seminars held throughout the year – call or email the office!

18.4.2 Support

- Is your employer or supervising partner familiar with family law? Is your supervising partner "always at court or with clients?" Remember that your professional development is not only in your personal interest but in the financial interest of your firm, so if you are having difficulties in obtaining supervision, speak to your employer, put forward practical suggestions, for example, setting aside a specific time daily to discuss matters.
- Develop contacts with other family law practitioners in your region, particularly, young lawyers. Do not be shy to ask for help. Admittedly

these practitioners may also be your competitors but if, as is likely in a regional area, your competitor is a sole practitioner or also works in a small firm, then he or she may equally benefit from having a third party to "bounce" hypothetical matters for discussion.

- Develop positive relationships with your Local Registry staff – if you live in a regional area, you are likely to see the staff outside working hours around your town. Always be courteous. Be sure that your frustration at the moral and/or legal outrage of your client's position does not carry over to your communications with Registry staff.
- Develop positive relationships with agent lawyers within firms that are located in direct vicinity of your nearest Federal Magistrates Court or Family Court registry. Make sure that if you are attending court in their town, that you telephone your agent and make arrangements to meet for coffee. Developing a relationship with your agent is vital as your clients place their trust in you to secure the services of an advocate that will best serve them.
- Join the NSW Young Lawyers Bushweb online discussion list.
- Join the NSW Young Lawyers Family Law Committee. The NSW Young Lawyers Family Law Committee meets monthly in Sydney but has the facilities for regional members to participate by teleconference.
- Working in a regional area may sometimes be an isolating experience. Irrespective of whether there is a strong young lawyer contingent or not, it is important to get involved in functions within your profession and to establish connections within your community. The more of a work/life balance you can develop for yourself, the more enjoyable your time in a regional community becomes.
- Take initiative. If you can identify difficulties in your local court registry, discuss them with some of your family law colleagues and then discuss them with your clerk of the Court or Magistrate – perhaps organise a Court users forum. Organise informal CLEs, for example, hire a CLE video and organise for yourself and some of your colleagues to meet and watch and discuss it.

CHAPTER 19 – ETHICAL CHALLENGES FOR YOUNG LAWYERS

Many times during your career, you will face ethical challenges. Some will be obvious, reminiscent of ethics classes, but many problems will not be so obvious. Ethical dilemmas may arise in various contexts:

- inside the firm;
- dealing with a lawyer acting for the other party;
- dealing with a client;
- dealing with a litigant in person;
- dealing with third parties.

You may find some situations more difficult to deal with because of your junior status. You can feel isolated and reluctant to ask someone for help, particularly within your own firm. Many family law firms are boutique firms and there may be no other junior lawyers to talk to. In the country, sometimes there is no other lawyer in the firm doing family law.

A common situation you may face is where someone has signed a document, such as an affidavit, which has to be witnessed by a lawyer. It may be a client who has started signing an affidavit while you were out of the room or it may be a work mate who wants you to witness an affidavit of service they have already signed.

Particularly in the case of the work colleague where you have seen them sign various documents and recognise their signature, it may be tempting to just sign the document and you may feel pressure to do so. You may think to yourself, *what is the harm*? The harm is to your integrity.

In each instance, you should require them to sign a new document in your presence. A senior practitioner explained the logic behind this in this way:

> "*I can't remember every instance where I have witnessed a document but if I am ever cross-examined about something I have witnessed, I*

will be able to say that it has been my invariable practice to always actually witness the document."

This is much better than having to be in the position of saying, "well, most of the time, I saw them sign, but sometimes, a colleague had already signed the document and I didn't want to inconvenience them" or "the client was in a hurry and had started signing when I was out of the room fetching something. The client got angry at the suggestion of having to start again and I've seen the client sign other documents so I didn't see the harm in it."

A client, even if annoyed at the inconvenience, is more likely than not to be pleased to have a lawyer who acts with integrity in relation to the smallest things.

A more serious situation is where you may be asked to sign a certificate of advice when you have little knowledge of the matter and feel that you are not competent to give that advice. Signing a certificate in such circumstances can land you in hot water. Rather than giving into that pressure, there may be another alternative that solves the problem. It may be that the client wants to sign the document (for example, a binding financial agreement) at a time when the lawyer with carriage of the matter is not available. You can witness the client's signature without signing the certificate. As a matter of good practice, the lawyer with carriage of the matter should have already given the client written advice in relation to the agreement.

Clients often complain about lawyers being poor communicators. Partly this is because we become so busy that some matters fall into that basket everyone has, the "too hard" basket. We all put off doing things we do not like, but do not make it worse but not keeping your client informed about your progress (or lack of it). Most of the time, clients just want to know that you have not forgotten them.

In the past few years, NSW Young Lawyers and the Law Society of NSW have devoted a lot of energy to highlighting this issue. Unfortunately, bullying is all too common in our profession.

It can come from a range of sources:

- your client;

- colleagues (senior and junior) within the firm;
- other practitioners;
- barristers.

Bullying is ultimately ineffective but can be very destructive. Bullying an employee is not going to result in increased productivity, but rather, the opposite.

Sometimes you will come across opponents who are very aggressive and overbearing. Is this good advocacy? No. Why isn't it? Ultimately it isn't persuasive.

It is easy to be intimidated by a more experienced opponent when you are inexperienced. It is important to remember that just because someone has been in practice for longer, and he or she is overbearing, does not mean that they are well versed in this particular area of law or have high quality experience and skills.

The situations discussed above are straightforward ones. There will be many situations where the answer is not so clear-cut. This is where a quick phone call to the ethics section of the Law Society can be very helpful.

PART G – LEGAL AID

CHAPTER 20 – LEGAL AID

20.1 LEGAL AID

The Legal Aid Commission of NSW (Legal Aid NSW) is a state statutory body. Most funding for the family law program is provided by the Commonwealth Government. Current information about Legal Aid is available on the Legal Aid NSW website (www.legalaid.nsw.gov.au).

In family law matters, Legal Aid has various roles. You are likely to have dealings with the Grants, Litigation and ADR Conferencing Divisions.

- The Grants Division processes applications for Legal Aid including, once aid is granted, extensions and the processing of invoices.
- Litigation (or in-house) solicitors do not administer grants of aid for private solicitors.
- Family Law Conferencing is now a prerequisite for most parties seeking aid. The ADR Conferencing section arranges the conferences.

Communication of file information between Grants and Litigation staff is strictly controlled. You may find yourself writing to Legal Aid NSW for a grant of aid, and at the same time writing to the solicitor for the other party or the Independent Children's Lawyer, who is a solicitor at Legal Aid NSW.

It is essential that you therefore pay attention to the Legal Aid file references and addresses so that correspondence does not get forwarded to the wrong Divisions as your correspondence may be delayed for significant periods.

Applying for Legal Aid

All applications for Legal Aid are processed through the Sydney office:

Grants Division (Family Law)

323 Castlereagh Street

SYDNEY NSW 2000

DX 5 SYDNEY

Ph: (02) 9219 5808

Fax: (02) 9219 5061

Or alternatively, applications for Legal Aid can be processed through the e-lodgement system on Grants Online (a link to this web site can be found by accessing the 'For Legal Practitioners' part of the Legal Aid website). Grants Online is a web-based system for lodging and tracking Legal Aid applications, extensions and invoices. There are several benefits of using the online system including:

- fast turnaround on application outcome and payment of invoices;
- easy to complete the application form;
- simple communication using e-mail versus traditional postal methods;
- improved support with access to a dedicated support team;
- the ability to enquire on the application status online;
- simplified process for submitting accounts and timely payment (usually within a couple of days);
- less hassle, for example, you no longer need to send documents to the Commission for verification of means (you do need to keep a copy on your file);

For more information about Grants Online you can contact the Grants Support Desk:

Email: elodge.support@legalaid.nsw.gov.au

Phone: (02) 9219 5999

All applications are determined in accordance with the *Legal Aid Commission Act 1979* (NSW) ("LACA"). Applications are assessed in accordance with the Legal Aid policies and guidelines (details of which can be accessed on the Legal Aid website – follow the links to Means and Merit Test).

20.1.1 Means test

The means test sets out principles and indicators for income-testing and asset-testing applicants for legal assistance. The test generally is used to assess whether or not your client's income and assets are such that they are eligible to receive legal aid.

The Legal Aid NSW Means Test Indicator which is a self-assessment tool for clients. It is designed to provide an indication of whether legal aid may be granted based on the means information provided by the client. It may save you time in applying for legal aid where your client is unlikely to satisfy the means test if you refer the client to this service at first instance, or test the financial information provided by your client through the Means Test Indicator (http://lacextra.legalaid.nsw.gov.au/meanstest/).

The means test guidelines have regard to the ability of your client to meet the ordinary professional cost of the legal services which are the subject of the application.

Accordingly, the means test guidelines are applied to the income and assets of:

- your client; and
- any financially associated person unless:
- it is considered that the income and/or assets are not available for the use or benefit of your client;
- your client does not have access to that income or those assets;
- the financially associated person has a contrary interest in the matter for which legal assistance is sought;
- disclosure of the legal problem may damage the relationship;
- in the case of a spouse, the applicant and spouse are separated; or
- there are other special reasons why the means of the financially associated person should be disregarded.

The Means Test is not the sole determinant of your client's eligibility for legal aid. Eligibility is also determined by other factors, for example, whether or not legal aid is available for the type of matter for which aid is sought, or whether or not your client's case has reasonable prospects of success.

If your client receives a Centrelink payment, check what the rate of payment is. It is important because the rate of payment may mean that your client immediately satisfies the income part of the means test where you can prove that he or she is entitled to receive an income support payment at the maximum rate payable. If that is the situation, then attach proof of the rate of payment with the legal aid application before sending it to Legal Aid NSW.

20.1.2 Merits test

The merits test is divided into the following:

- "reasonable prospects of success" test: where it appears on the information, evidence and material provided by your client that the proposed actions, applications, defences or responses for which legal aid funding is sought, have reasonable prospects of success, then legal aid may be granted.
- "ordinarily prudent self-funding litigant" test: your client's ability financially to be able to fund the legal action successfully
- the appropriateness of spending limited public legal aid finds" test: considering the limited funds available to Legal Aid, whether or not the action is likely to be resolved using limited funds.

Grants of Legal Aid may be made only when the costs involved in providing Legal Aid are warranted by the likely benefit to your client, or in some circumstances, the community.

Overall, the Legal Aid Commission needs to be satisfied that the matter for which legal aid is sought is an appropriate expenditure of public Legal Aid funds.

20.1.3 Guidelines

It is important to consider that irrespective of the means and merit test in order for an application for Legal Aid to be granted it must be a matter for which Legal Aid is available.

Generally, aid is available in children's matters and in some very limited circumstances, property matters. Different polices also apply for state matters and Commonwealth matters.

Considering that a great deal of time and effort can be put into applications for Legal Aid which may or may not be refused it is important to remember and consider the following points:

- You cannot charge your client personally for work performed whilst your client is in receipt of Legal Aid and you cannot charge for preparing an application for Legal Aid.
- You will not be paid for work performed prior to your application for Legal Aid and in most circumstances you will not be paid for work performed prior to being notified that you have a grant of Legal Aid.
- If the application is urgent, it is important to indicate this on the application and follow the application up with an email, fax or telephone call.
- If posting the application, it is important to send the application to the correct Legal Aid Section.
- Avoid the "requisition" by answering every question in the application and where necessary, providing a copy of all the documents requested on the application. If submitting the application online, you must keep a copy of any required documentation on your file, including financial information. If submitting the application by post or fax, make sure the client signs the application.
- Try to anticipate any merit requisitions by checking the Legal Aid Commission guidelines.
- If a matter is listed for hearing, then include both parties' documents and the family report. If your client's application relates to an appeal, include the reasons for judgment.
- If your client has previously applied for Legal Aid, include the file number.
- Manage your client's expectations and prepare your client for the delay in processing the application.
- Prepare your client where appropriate for the conferencing requirement. If conferencing is inappropriate, it is important to state this in your client's application and the reasons for this.
- Prepare your client for the compulsory contribution. Most clients will be required to contribute an initial fee (the minimum is currently $75) as a

condition of the grant of aid. Sometimes, if the client has assets or income available, a greater contribution will be levied.
- Make your role clear. If you are not going to act until a grant of aid is made, then make that very clear to the client. Avoid any misunderstanding about who is responsible for filing documents or attending court prior to Legal Aid being granted.

20.1.4 Refusal of aid

Most decisions to impose a condition or refuse aid can be appealed to the Legal Aid Review Committee.

You may appeal on your client's behalf to the Legal Aid Review Committee if dissatisfied with:

- a determination of an application for Legal Aid;
- a variation of a grant of legal aid that adversely affects a legally assisted person;
- a decision to refuse to pay part of or all of the costs awarded against a legally assisted person;
- a redetermination of application for Legal Aid;
- a redetermination of a variation that terminates the provision of Legal Aid.

It is important to note that for some determination and variations there are no rights of appeal.

The notice of appeal must be in writing using an appeal form or writing a letter setting out the grounds for appeal and should be made within 28 days of the decision. The Legal Aid reference number should be quoted.

Section 57 of LACA provides for the adjournment of proceedings before a court if an applicant for Legal Aid has appealed or intends to appeal to the Legal Aid Review Committee. It should be noted that it is a matter of discretion for the court to decide whether an adjournment will be granted. A court exercising commonwealth jurisdiction, for example, under the *Family Law Act 1975* (Cth), may override s 57.

In most matters, an appeal will usually take six weeks from the time of lodgement of an appeal to a determination by the Legal Aid Review Committee. In urgent matters, for example, where a final hearing will be shortly heard, the time frame may be shortened.

20.1.5 Free advice

Legal Aid provides short free advice in family law matters regardless of means. Where conflict arises, clients will be referred for advice to Community Legal Centres. Contact your local Legal Aid office for details or refer to the Legal Aid website for details. It may be helpful to refer clients to the closest Legal Aid office where assistance required is minimal.

The Legal Aid Sydney office also provides free divorce classes to assist clients who are self-represented in completing divorce applications regardless of means. Advance bookings need to be made to attend these classes by contacting (02) 9219 5790.

20.1.6 Children's representation

A court may make an order for the appointment of an Independent Children's Lawyer (ICL) and request Legal Aid to organise the appointment. It is important that all available information, including any documents filed to date, is sent to the following address as soon as the order is made:

The Senior Solicitor

Family Litigation

DX 5 Sydney

A determination will then be made as to whether the appointment will be handled by an in-house solicitor or referred to the private profession.

Once an appointment is made, the Independent Children's Lawyer notifies all parties' involved, including the court, by filing a Notice of Address for Service.

20.2 ROLE OF INDEPENDENT CHILD REPRESENTATIVE

The function of the Independent Child Lawyer ("ICL") is to represent a child's interests in parenting proceedings. The ICL is not the child's representative in the sense that they act on the child's instructions or owe a duty of confidentiality to the child, but rather, that they present to the Court an impartial view as to what would best benefit the child. In performing this function, the ICL ensures that the focus of proceedings is on the child's best interests.

The ICL was previously called the "Child Representative"; and thus some practitioners may continue to refer to the ICL by this name.

The ICL can be appointed either by the Court or upon application by:

- the child;
- either party;
- an organisation concerned with the welfare of children (State Welfare Agency); or
- any other person.

If a party is applying for appointment of an ICL, the application can be made either by inclusion of the order in an Application, Response or Application in a Case. The application can also be made orally, if necessary.

The ICL must be treated as though he or she was a party to the proceedings. Thus, the ICL must be served with all documents and included in all communications.

Circumstances where it is appropriate for an ICL to be appointed might include where there are issues relating to:

- family violence;
- allegations of abuse or risk to a child;
- substance abuse by one or both parties;
- mental illness of one or both parties;

- a high degree of conflict between the parties.

Remember, although in many parenting cases there will be conflict between the parties, an application for appointment of an ICL will only occasionally be appropriate.

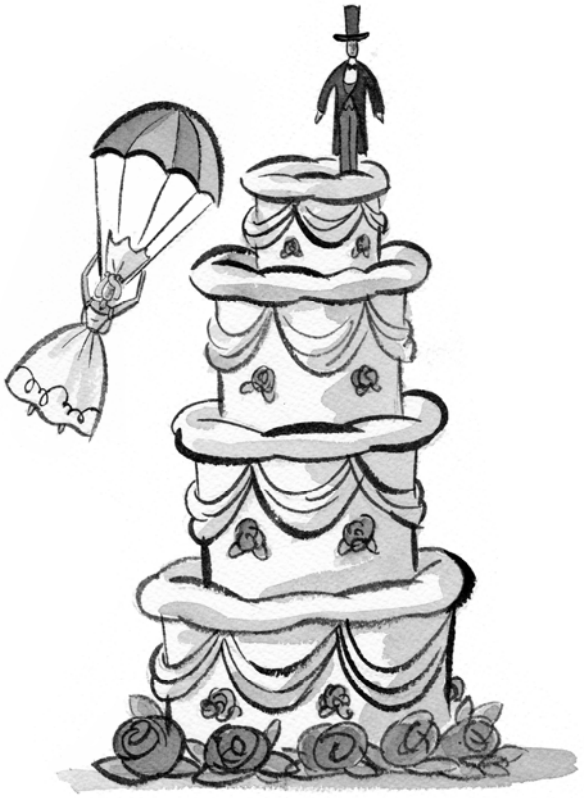
The extent to which the ICL involves the child (or children) in the proceedings will depend upon the age and maturity of the child. However, the ICL should make arrangements to interview the child early on in the proceedings.

The ICL must act impartially in dealings with the parties, and thus must not (or appear to) favour one party above the other in dealings with the parties. Although the FLA does not require children to express any wish in relation to parenting proceedings, if the child (or children) expresses any wish, the ICL must ensure the Court is made aware of those wishes. See also s68LA FLA.

In principle, the ICL should adopt a non-adversarial approach to the resolution of the matter, where appropriate. If parties to the proceedings agree on a settlement, the ICL should offer their view as to the appropriateness of such a settlement. The ICL may also be required to explain to the child the terms of any orders that have been made, or any agreement reached that affects the child.

Comprehensive guidelines as to the role of the ICL are available at http://www.familycourt.gov.au/presence/connect/www/home/directions/guidelines_for_child_representatives/ .

PART H – DIVORCE



CHAPTER 21 – DIVORCE

Divorce applications are filed in the Federal Magistrates Court ("FMC"). The FMC has a website which contains all relevant forms, fee information etc. It additionally, the website http://www.divorce.gov.au also contains forms and procedural information.

21.1 GROUNDS FOR DIVORCE

There is only one ground for divorce, which is, that the parties have been living separately and apart for at least 12 months. The parties must have been separated for at least 12 months at the date of filing the application.

If the parties have been living separately under the same roof, you will need to file an affidavit by your client and preferably, another witness, detailing the circumstances of separation.

21.1.1 Checklist

- Check that your client has been separated for 12 months (this can be under one roof) as no application can be filed if this requirement is not fulfilled.
- Check with your client whether or not the other party is likely to dispute the separation date as this may involve drafting affidavits in this regard.
- Check the ages of the children – if they are under 18, the applicant must attend court.
- If the marriage was shorter than 2 years, additional counselling will be required before the application can be filed. Alternatively, an affidavit can be filed in relation to any exceptional circumstances
- Check whether the client can provide a marriage certificate, as one will otherwise need to be ordered from the NSW Registry of Births, Deaths and Marriages or equivalent in other states. The website for the registry is http://www.bdm.nsw.gov.au.
- If your client was born overseas, copies of citizenship papers or Australian passport should also be included with the application, to prove jurisdiction.

21.2 PROCEDURAL MATTERS AFTER FILING A DIVORCE APPLICATION

Once the application has been filed, a copy must be served on the other party (if a single application) in accordance with the procedures described on the FMC or divorce website, or alternatively under Pt 6 of the *Federal Magistrates Court Rules 2001* (Cth). A hearing date will usually be a few months away.

Before the hearing, the other party might file and serve a response or other affidavit material.

If there are no children under 18, but the other party files a response, your client must attend the hearing, even if they had crossed the box on the application form stating that they did not want to attend the hearing.

This could have cost implications as the family law scale of fees allows for different fees for divorces depending on whether or not you (with your client) attend the hearing.

21.3 EFFECT OF DIVORCE ON PROPERTY PROCEEDINGS

Once a divorce has been granted, a limitation period of 12 months commences for applying for final or interim property or spousal maintenance orders. Therefore, you may wish to raise with your client the issue of commencing property proceedings before a divorce application is filed, if relevant.

21.4 BEFORE THE HEARING

- Confirm with your client and ask if there has been any change in circumstances since filing the divorce application of which you should be aware, in case the court asks questions.
- Check whether the issue of proper arrangements for the children will be an issue as it is possible for the hearing to be adjourned for a family report to be ordered by the court.

21.5 AT THE HEARING

At the hearing, the court needs to be satisfied as to:

21.5.1 Proper arrangements for the children under 18

The court must be satisfied that "proper arrangements" have been made for children. The court does not need to approve the arrangements. "Proper" does not mean perfect, but the best possible arrangements in the circumstances.

The court has the discretion to refuse to grant a divorce on this basis. You need to be prepared to be grilled by the Registrar on all aspects of your client's application, especially if the earlier property and children's proceedings were acrimonious.

21.5.2 Separation under one roof (where relevant)

If this is a contentious issue, it is better to be prepared with supporting affidavits from a party or third parties covering:

- the parties not participating together in the normal activities of a married couple, such as having meals together, communicating, sharing the same bed or room, sharing house duties, etc;
- what living arrangements were made for the care of the child or children during the period the client was living under the one roof; and
- whether a relevant government department was informed of changed circumstances, for example, regarding benefits to be paid to a separated or sole parent.

21.5.3 Resumption of cohabitation vs reconciliation

Cohabitation during separation will break up the 12 month period of separation in some cases. Note that "cohabitation" and "reconciliation" are not interchangeable concepts.

Cohabitation is the opposite of separation and includes a mental element of intention to resume the marriage as well as a physical element.

A second separation within 3 months of resumption of cohabitation will not break up the 12 months period of separation required before an application for divorce is filed. However, if the party stays for 4 months, then separates again, the 12-month period will re-commence.

21.6 WHAT HAPPENS AFTER THE HEARING AND THE DIVORCE ORDERS IS GRANTED?

Some parties are so eager to get divorced and re-married that they plan their second wedding before the divorce order has been granted. It is important to warn your clients that whilst they may have a general idea of the timeframes for a divorce from the Federal Magistrates Court listing clerk, it is always possible that their former spouse will object to the divorce or there will be a technical glitch which could delay matters.

The FMC will generally not act urgently on a divorce matter because your client has booked a reception hall etc.

An application to rescind the divorce can be filed after the hearing but before the divorce order takes effect if the parties reconcile or if there has been a miscarriage of justice by reason of fraud, perjury or suppression of evidence: s 58 of the *Family Law Act 1975* (Cth).

A court may extend the time for the divorce order to become final if it believes that an appeal is possible in the dissolution proceedings: s 55(2)(a) of the *Family Law Act 1975* (Cth).

However, all going well, the divorce order will become final one month and one day after the divorce order was granted in court.

21.7 WHAT IF THE CLIENT PLANS TO REMARRY?

As soon as the divorce order is granted the marriage celebrant may accept a Notice of Intended Marriage prepared by the client. However, the client must show their Certificate of Divorce (which is issued after the divorce becomes final) to the marriage celebrant before the wedding can take place.

Note that divorce certificates are not automatically mailed out one month and one day after the hearing. There may a few weeks waiting time.

21.8 WILLS

You should discuss with your client the need to update his or her will once the divorce becomes final.

PART I –CARE AND PROTECTION

CHAPTER 22 – CARE AND PROTECTION

The *Children and Young Persons (Care and Protection) Act 1998* ('the Act') provides for the care and protection of, and provision of services to, children and young people.

The objects of the Act as set out in s 8 are to provide that:

(a) children and young persons receive such care and protection as is necessary for their safety, welfare and well-being, taking into account the rights, powers and duties of their parents or other persons responsible for them, and

(b) all institutions, services and facilities responsible for the care and protection of children and young persons provide an environment for them that is free of violence and exploitation and provide services that foster their health, developmental needs, spirituality, self-respect and dignity, and

(c) appropriate assistance is rendered to parents and other persons responsible for children and young persons in the performance of their child-rearing responsibilities in order to promote a safe and nurturing environment.

This Chapter will focus on the object in s 8(a) of the Act and the statutory regime for achieving this object through care proceedings as set out at Chapter 5 '*Children's Court proceedings'* and Chapter 6 '*Children's Court procedure*' of the Act.

Care proceedings are heard in the Children's Court of New South Wales at first instance. A *de novo* appeal lies to the District Court of New South Wales (s 91).

Pursuant to s 247 of the Act, nothing in the Act limits the jurisdiction of the Supreme Court. This means that the *parens patriae* jurisdiction of the Supreme Court may be invoked for prerogative orders in relation to children (see *Re Oscar* [2002] NSWSC 453). However, as the Act provides for a

right of appeal to the District Court, the usual course is for a party to exercise that statutory right, or to seek judicial review through the Common Law Division of the Supreme Court.

Under the Act, a child is defined in s 3 as a person under 16 years of age. A young person is defined as a person aged 16 years or above but under 18 years of age. References in this Chapter to 'the child' or 'children' are inclusive of both children and young people, unless otherwise specified.

Reference will be made to the following documents:

- Children and Young Persons (Care and Protection) Regulation 2000;
- Children's Court Act 1987;
- Children's Court Rule 2000;
- Children's Court Practice Direction 24 entitled 'Case management in the care jurisdiction';
- Relevant Children's Court and District Court forms. Copies of the forms are available on each of the Court's respective websites
- Children and Young Persons (Care and Protection) Amendment Act 2006. That Act has been assented to but has not been proclaimed.

Practitioners should also be mindful of the following:

- Children's Court Practice Direction 25 entitled 'Requirements for Conferences of Expert Witnesses in Care Proceedings'; and
- Children's Court decisions and other relevant cases reported in Children's Law News ('CLN') and found on the Children's Court of New South Wales website.
- Information with respect to the Children's Guardian can be found at www.kidsguardian.nsw.gov.au.

Overall, there is no substitute for direct reference to the Act and supporting material.

22.1 BACKGROUND TO THE ACT

The Act came into force in December 2000 and although some provisions are not yet in force, Chapters 5 and 6 have been in force since that time. The Act significantly amends the previous *Children (Care and Protection) Act 1987*. It is founded on recommendations in a report prepared by Professor Patrick Parkinson. A useful overview can be found in the Second Reading of the Children and Young Persons (Care and Protection) Bill introduced into Parliament on 11 November 1998.

The principles underpinning the Act are set out in s 9 and include that:

- the safety, welfare and well-being of the child or young person must be the paramount consideration (s 9(a));
- a child must be given an opportunity to express their views freely and those views are to be given due weight in accordance with the developmental capacity of the child or young person and the circumstances (s 9(b));
- all actions and decisions made under the Act (whether by legal or administrative process) that significantly affect a child or young person, must take account of the culture, disability, language, religion and sexuality of the child or young person and, if relevant, those with parental responsibility for the child or young person (s 9(c)); and
- in protecting a child, the least intrusive intervention in the life of the child or young person and his or her family should be pursued, that is consistent with the paramount concern to protect the child or young person from harm and promote the child's or young person's development (s 9(d)).

Central to the Act is the principle of participation, as set out in s 10. The Act also sets out special principles in relation to Aboriginal or Torres Strait Islander children and young people in ss 11 – 14. In particular, s13 of the provides for the placement of Aboriginal and Torres Strait Islander children and young people, in 'out-of-home care' (see s 135 for the definition of out-of-home care).

22.2 REPORTS OF RISK OF HARM

The Director-General of the Department of Community Services ('Director-General') may become aware of a child who is at risk of harm by receiving a report about the child. A person who has reasonable grounds to suspect that a child or young person is at risk of harm, or that a class of children or young persons are at risk of harm, may make a report to the Director-General (s 24).

'Risk of harm' is defined as current concerns for the safety, welfare or well-being of the child or young person because of the presence of a number of specified circumstances including that the child's basic physical or psychological needs are not being met (see s 23). Some people are deemed to be mandatory reporters on the basis that they deliver, or supervise the delivery of particular services in the course of their paid employment (s 27). Part 3 of the Act sets out the Director-General's obligations in investigating and assessing reports.

22.3 CHILDREN AND YOUNG PERSONS IN NEED OF CARE AND PROTECTION

If the Director-General forms the opinion, on reasonable grounds, that a child or young person is in need of care and protection, the Director-General is to take whatever action is necessary to safeguard or promote the safety, welfare and well being of the child (s 34). Options open to the Director-General include:

- providing or arranging for the provision of, support services for the child or young person and his or her family (s 34(2)(a));
- developing a plan in consultation with the family or separately that does not involve the Children's court; or is registered with the children's court; or is the basis for consent orders. (s 34 (2)(b)
- ensuring the protection of child or young person by exercising the Director-General's emergency protection powers (s 34(2)(c)); and
- seeking appropriate orders from the Children's Court (s 34(2)(d)).

In considering what action to take, including in response to a report, the Director-General must have regard to the grounds under s 71 on which the

Children's Court may make a care order, that is, the grounds for assessing whether or not a child or young person is 'in need of care and protection'.

22.4 EMERGENCY PROTECTION OF CHILDREN AND YOUNG PEOPLE

The Director-General or a police officer has the power to remove a child from a place of risk, if the Director-General or a police officer is satisfied on reasonable grounds that the child is at immediate risk of serious harm and the making of an apprehended violence order would not be sufficient to protect the child or young person from that risk (s 43).

If a child is removed from premises or a place under power of removal conferred by or under the Act, the Director-General must apply to the Children's Court at the first available opportunity, but no later than the next sitting day of the Children's Court after the removal of the child, for one or more of the following care orders set out in s 45:

(a) an emergency care and protection order;
(b) an assessment order (within the meaning of Chapter 5, Part 1, Division 6);and
(c) any other care order.

An emergency care and protection order ('ECPO') is a care order defined in s 46, initiated by a care application, discussed below. Assessment orders are provided for in ss 52 – 59 and also discussed below.

A care proceeding may initially involve a care application for an ECPO. The Director-General may bring a further care application for interim and final care orders.

22.5 CHILDREN'S COURT CARE PROCEEDINGS

All proceedings in the Children's Court undertaken pursuant to Chapter 5 are defined as 'care proceedings' (s 60). Pursuant to this definition, the District Court may also hear care proceedings by way of an appeal under s 91.

22.6 TWO PHASES OF CARE PROCEEDINGS

22.6.1 Determination

The first phase of a care proceeding is the 'determination' phase. This may be also referred to as the 'establishment' or 'finding' phase. In the determination phase, the Court must make a determination on the balance of probabilities as to whether a child or young person *is* in need of care and protection on one or more of the grounds set out in s 71(1) of the Act; or *was* in need of care and protection at the time of the circumstances giving rise to the care application, and would still be in need of care and protection if action had not been taken by Department of Community Services ('Department'). This determination gives the Court jurisdiction to make care orders, including orders about the short and long-term placement of a child or young person. If all parties agree that a matter should be determined, then this can occur by consent. If a party does not agree, the issue will be decided by the Court at a determination hearing.

22.6.2 Placement

A second 'placement' hearing may occur after a matter is determined in order to decide where a child is to be placed, that is, whether the child is to be restored to the care of his or her parents, or whether they are placed to be placed in long-term 'out-of-home care'. This phase may also be referred to as a 'disposition hearing'.

22.7 CARE APPLICATIONS

A 'care application' is defined as an application for a care order (s 60).

Only the Director-General can bring a care application, except as otherwise provided by Chapter 5 (s 61). One such exception is an application to vary or rescind a care order under s 90. Section 90(3) sets out those persons who may bring an application to vary or rescind a care order. Also, pursuant to s 91*, any party* to care proceedings who is dissatisfied with an order (other than an interim order) of the Children's Court may appeal to the District Court against the order.

The Director-General must consider a variety of alternative means to provide for the safety, welfare and well-being of the child or young person before commencing proceedings in the Children's Court (s 34). This is consistent with the principle of least intrusive intervention as set out in s 9(d) of the Act.

A care application must specify the particular care order sought and the grounds on which it is based (s 61(2)). A care application will be served with an affidavit setting out the grounds on which the application is sought. A delegate of the Director-General, such as a child protection caseworker employed by the Department, will depose to the affidavit. The Director-General must make a reasonable effort to notify the parents of a child or young person of the making of a care application (s 64(1)) and to notify the child (s 64(2)) in such a manner as the child or young person can understand, having regard to his or her development and the circumstances.

22.7.1 Preliminary conferences

The Act provides that after copies of the care application have been served in accordance with s 64, a Children's Registrar of the Children's Court is to arrange and conduct a preliminary conference between the parties, unless the Children's Registrar is of the opinion that the holding of such a conference should be deferred until a later time in the proceedings (s 65). In practice however the preliminary conference is usually held after the matter has been before the magistrate for the first return date and phase one (determination) has been decided. It will often be the Magistrate who on giving directions for the filing of Care Plans enquires of the parties as to the utility of a conference. It may also be suggested by the court, the registrar or requested by any of the parties on the release of a Clinicians report (which has been produced pursuant to an assessment application under s53 –s55 see "Assessment orders" below). The purpose of the preliminary conference is to identify areas of agreement (s 65(2)(a)) and issues in dispute (s 65(2)(b)) between the parties. A party may be legally represented at a preliminary conference (s 65(3)). A matter may also be referred to independent alternative dispute resolution (s 65(2)(c)). Interim orders can be formulated by consent at the preliminary conference (s 65(2)(e). Information disclosed in the course of alternative dispute resolution in accordance with s 65 of the Act is not admissible in any proceedings before any court (see Children and Young Persons (Care and Protection) Regulation 2000 Regulation 11).Directions hearings The Court will also set

a timetable for each matter taking into account the age and developmental needs of the child (s 94(1)). The Court may give such directions as it considers appropriate to ensure that the timetable is kept (s 94(3)). It is important for practitioners to be mindful of the time standards for the hearing of Care applications as set out by the Attorney Generals Bulletin 2005/0011. This specifies that 90% of care matters will be finalised in 9 months and 100% will be finalised in 12 months.

22.7.2 Compliance check

A compliance check will be held close to the hearing of a matter in the Children's Court by a Children's Magistrate or Children's Registrar, to ensure directions of the Court have been complied with and that the matter is ready for hearing. Practice Direction 28 sets out the matters that the parties must ensure are completed. Parties should each file a notice to that effect. Assessment orders The Director-General can make an application for an assessment order outside of a care application. However, once a care application is on foot, any party can also apply for an assessment order to be made (s 55). A party will generally apply for an assessment order in the early stages of a proceeding in order to allow sufficient time for the Children's Court Clinician to prepare the report.

The Court may make an order for the physical, psychological, psychiatric or other medical examination of a child or young person or the assessment of a child or young person or both (s 53(1)). If the child is of a sufficient understanding to make an informed decision, the child may refuse to submit to such an examination or assessment (s 53(4)). The Court may also appoint a person to assess the capacity of a person with parental responsibility, or who is seeking parental responsibility, for a child. Such an assessment may only be carried out with the consent of the person whose capacity is to be assessed (s 54). When an assessment order is made, the Children's Court appoints the Children's Court Clinic to prepare and submit the assessment report concerning the child or young person, unless the Clinic is unable or unwilling to prepare the report, or considers that it is more appropriate for the assessment to be prepared by another person (s 58 and see *Re Oscar*). The assessment report submitted to the Court is taken to be a report to the Children's Court rather than evidence tendered by a party. The appropriate form when seeking an assessment order in the Children's Court is Form 2A - Application to Children's Court for an Assessment Order. The appropriate form in the District Court is Form 152-

Notice of Assessment Order. A Form 153 Assessment Order will then be sent to the Children's Court Clinic.

22.7.4 Care orders

A 'care order' is an order under Chapter 5 of the Act 'for or with respect to the care and protection of a child or young person'. A care order includes a contact order under s 86 of the Act (s 60). A care order may be made on an interim or final basis (s 62). The Court cannot make a care order in relation to a child or young person unless it is satisfied on the balance of probabilities that the child or young person is in need of care and protection (s 72). Grounds for a care order Section 71 of the Act sets out the various grounds that enable the Court to make a care order:71 Grounds for care orders

> (1) The Children's Court may make a care order in relation to a child or young person if it is satisfied that the child or young person is in need of care and protection for any of the following reasons:
>
> (a) There is no parent available to care for the child or young person as a result of death or incapacity or for any other reason,
>
> (b) The parents acknowledge that they have serious difficulties in caring for the child or young person and, as a consequence, the child or young person is in need of care and protection,
>
> (c) The child or young person has been, or is likely to be, physically or sexually abused or ill-treated,
>
> (d) Subject to subsection (2), the child's or young person's basic physical, psychological or educational needs are not being met, or are likely not to be met, by his or her parents,
>
> (e) The child or young person is suffering or is likely to suffer serious developmental impairment or serious psychological harm as a consequence of the domestic environment in which he or she is living,

(f) In the case of a child who is under the age of 14 years, the child has exhibited sexually abusive behaviours and an order of the Children's Court is necessary to ensure his or her access to, or attendance at, an appropriate therapeutic service,

(g) the child or young person is subject to a care and protection order of another State or Territory that is not being complied with,

(h) section 171 (1) applies in respect of the child or young person.

(2) The Children's Court cannot conclude that the basic needs of a child or young person are likely not to be met only because of:

(a) a parent's disability, or

(b) poverty.

Section 171 relates to a child in out-of-home care whose carer has breached an aspect of their carer's authorisation (an authorised carer is defined in s 137).

22.8 TYPE OF CARE ORDERS

22.8.1 Interim care orders

Assuming that the Court has determined that the child is in need of care and protection, the Court may make interim care orders in relation to a child or young person after a care application is made and before the application is finally decided (s 69(1)). The Act states that in seeking an interim care order, the Director-General has the onus of satisfying the Court that it is not in the best interests of the safety, welfare and well-being of the child that he or she should remain with his or her parents or other persons having parental responsibility (s 69(2)). This section is relevant in the context of an application by the Director-General for interim parental responsibility of a child, where residence will be allocated to a person other than the parent or parents of the child. In making interim orders that allocate parental

responsibility, it is not necessary for the Court to be satisfied of the matters set out in s 79(3) (see *Re Fernando and Gabriel* [2001] NSWSC 905.

The Court also has a broad power to make such other care orders as it considers appropriate for the safety, welfare and well-being of a child, in proceedings before it, pending the conclusion of the proceedings (s 70).

22.8.2 Emergency care and protection orders

An ECPO places a child in the care responsibility of the Director-General for up to 14 days. The order may be extended for a further 14 days. An ECPO will be granted if the Children's Court is satisfied that a child is "at risk of serious harm". See Practice Note 28 (Practice Note 28 repeals Practice Note 24) in relation to requirements for filing an application for an extension of an ECPO under s 46(4).

22.8.3 Orders allocating parental responsibility

Pursuant to s 79, if the Court finds that a child is in need of care and protection it may make an order allocating parental responsibility for the child or specific aspects of parental responsibility:

- to one parent to the exclusion of the other parent (s 79(1)(a)(i));
- to one or both parents and to the Minister or another person jointly (s 79(1)(a)(ii);
- to another suitable person (s 79(1)(a)(iii)); or
- to the Minister (s 79(1)(b)).

The specific aspects of parental responsibility that may be allocated include

- residence;
- contact;
- education and training;
- religious upbringing; and
- medical treatment.

The Court must consider the principle of the least intrusive intervention in the child's life when allocating parental responsibility (s 79(3)). Also, the Court must not make a final order for the *removal* of a child from his or her parents *or* for the allocation of parental responsibility in respect of a child unless it is considered a care plan presented to it by the Director-General (s 80), see below.

22.8.5 Orders allocating parental responsibility to the Minister

When making an order placing a child under the parental responsibility of the Minister, the Children's Court must determine which aspects of parental responsibility are to be the responsibility of the Minister and/or others (s 81).

22.9 CARE PLANS

If the Director-General applies to the Children's Court for an order for the *removal* of a child from his or her parents, the Director-General must present a care plan to the Court (s 78). Matters that must be canvassed in a care plan include the allocation of parental responsibility proposed, the kind of placement proposed to be sought for the child or young person and any interim arrangements proposed for the child or young person pending permanent placement (s 78(2)).

A care plan will usually be prepared by a Departmental employee with current responsibility for a particular child's case such as the child protection caseworker, and/or manager casework in consultation with the child's family and with others. The care plan will be served on all of the parties before the final hearing of a matter.

The care plan is only enforceable to the extent to which its provisions are embodied in or approved by orders of the Court (s 78(4)). See also Children and Young Persons (Care and Protection) Regulation 2000 Regulation 12 in relation to requirements with which the Director-General must comply, with respect to information to be included in care plans.

22.9.1 Permanency planning & realistic possibility of restoration

If the Director-General applies to the Court for an order for the removal of a child from his or her parents, the Director-General must assess whether there is a realistic possibility of the child being restored to their parents (s 83).

Permanency planning is 'the making of a plan that aims to provide a child with a stable placement that offers long term security', amongst other things (s 78A). The Director-General must prepare a permanency plan reflecting his assessment of the realistic possibility of restoration. The Act provides particular provisions for permanency plans that canvas restoration (see ss 84, 85 and 85A).

The permanency plan will usually be prepared by the Departmental employee with current responsibility for a particular child's case, as in relation to the care plan. It will be served on all of the parties before the final hearing of the matter with, or as part of, the care plan.

A permanency plan is only enforceable to the extent to which its provisions are embodied in, or approved by, an order or orders of the Children's Court.

22.9.2 Section 82 report

If the Court makes an order allocating parental responsibility of a child to a person (including the Minister) other than a parent, the Court may order that a written report is made to it within six months, or such other period as it may specify, concerning the suitability of the arrangements for the care and protection of the child or young person (s 82).

22.9.3 Order for contact

Contact between a child and young person and another person, including his or her parents is an aspect of parental responsibility that the Court may allocated to a person, including to the Minister jointly or separately (s 79).

The Court may make an order stipulating the minimum requirements of contact concerning the frequency and duration of contact between the child

and his or her parents, relatives or other persons of significance to the child. The Court may also order that contact is supervised (s 86(1)(b)). Further, the Court can make an order denying contact with a specified person if contact with the person is not in the best interests of the child or young person (s86(1)(c).

An order pursuant to s 86 does not prevent more frequent contact with a child with the consent of the person having parental responsibility for the child or young person.

22.9.4 Order prohibiting an act

At any stage of the proceedings, the Court may make an order on an interim or final basis, prohibiting any person, including a parent of a child or young person, from doing anything which could be done by the parent in carrying out his or her parental responsibility in accordance with such terms as are specified in the order). An example of an order pursuant to s 90A is an order prohibiting a parent from attending a contact visit in the company of another person.

22.9.5 Order accepting undertakings

The Court may make an order accepting undertakings from a parent and/or a child. The person must sign Form No 15 – Form of Undertakings. The Director-General or a party to proceedings in which an order accepting an undertaking was made, may notify the Children's Court of an alleged breach of an undertaking (s 73(4)). The appropriate form is Form 7 Notification of Breach of an Undertaking.

22.9.6 Order for provision of support services

The Court may make an order directing a person or organisation named in the order to provide support for that child or young person for such period (not exceeding 12 months) as is specified in the order.

22.9.7 Order for supervision

The Court may make an order placing a child in relation to whom a care application has been made under the supervision of the Director-General if

it is satisfied that the child is in need of care and protection (s 76). The maximum period of supervision is 12 months. The Court may require the presentation of a report before the end of the period of supervision stating the outcome of the supervision, amongst other things. The Court may extend the period of supervision for another 12 month period (s 76(6)). Section 77 deals with the implications of a breach of a supervision order. The Director-General may file a Form 10 Notification of Breach of a Supervision Order pursuant to s 77(2).

22.10 COSTS IN CARE PROCEEDINGS

Costs are only awarded in care proceedings in exceptional circumstances (s 88).

22.11 CONDUCT OF PROCEEDINGS IN THE CHILDREN'S COURT

Proceedings are not to be conducted in an adversarial manner (s 93(1)) but with as little formality and legal technicality and form as the circumstances of the case permit. The Court is not bound by the rules of evidence unless it determines that they apply (s 93(3)). On this basis, care proceedings are not an inquiry but proceedings involving an action between parties resulting in a determination by the Court (*Talbot v Minister of Community Services* (1993) 30 NSWLR 487).

Delay must be avoided in all matters before the Court and all matters must proceed as expeditiously as possible (s 94(1)). Adjournments should be avoided (s 94(4)). Proceedings should also be conducted with a view to the principle of participation. To that extent, the Court must take such measures as are reasonably practical to ensure that a child or young person in proceedings before it, understands the proceedings, taking into account the age and developmental capacity of the child or young person (s 95).

The Court may require the attendance of a child and parent at the court house when the proceedings are conducted (s 96). However, if a child does not wish to be present before the Court during the hearing, the child's wishes are to be taken into account by the Court (s 96(2)). Further, the Court may also direct the child to leave the place where the proceedings are being heard at any time during the proceedings, if it is of the opinion

that the prejudicial effect of excluding the child or young person is outweighed by the psychological harm that is likely to be occasioned to the child if they were allowed to remain in the Court (s 104(a)).

While the Court is hearing proceedings with respect to a child, any person who is not directly involved in the proceedings must be excluded from the Court, unless the Court otherwise directs (s 104(1)(a)). A person preparing a report of the proceedings for dissemination through a public news medium is entitled to enter and remain in the court (s 104(1)(b)) however, it is an offence to publish or broadcast the name of a child involved involving in any proceedings (s 105).

22.12 RIGHT OF APPEARANCE

In any proceedings, the child and each person having parental responsibility for the child as well as the Director-General and the Minister may appear in person or be legally represented, or with the leave of the Court appear by way of an agent (s 98). They may also examine and cross examine witnesses on matters relevant to the proceedings (s 98).

However, if the Court is of the opinion that a party to the proceedings who seeks to appear in person is not capable of adequately representing themselves, it may require the party to be legally represented (s 98(2)).

22.13 LEGAL REPRESENTATION OF CHILDREN & YOUNG PEOPLE

If the Court is of the view that the child needs to be represented in any proceedings before it, the Court may appoint a legal representative for the child (s99(1)). A legal representative will be appointed through the Legal Aid Commission. Practice Note 28 states that the appointment referred to in s 99(1) of the Act shall be deemed to have been made on the announcement of the appearance on behalf of a child by a solicitor or barrister employed or engaged by the Legal Aid Commission unless otherwise ordered (at paragraph [10]).

There are two bases on which a legal representative may appear for a child as a (direct) legal representative (s 99 A (1)) or as an independent legal representative (s 99 A (2)). A person appearing for a child must therefore

clarify the basis of their representation as soon as they are retained. The role of the Direct legal representative or an independent legal representative is defined by s99 D (a) and s 99 D (b) respectively.

Broadly this role is to ensure that the childs views are placed before the court (s99 D (a)(i) all relevant evidence is adduced and where necessary tested (s 99 D (a)(ii)) and either acting on the child's instructions, if they are capable of giving instructions, or acting as an Independent representative or on the instructions of the guardian ad litem (see s 100 in relation to the appointment of a guardian ad litem).

22.13.1 Direct legal representation

There is a rebuttable presumption that a child who is not less than 12 years of age and a young person is capable of giving proper instructions to his or her legal representative (s 99 C). See the *Children and Young Persons (Care and Protection) Amendment Act 2006* at [35

22.13.2 Independent legal representation

An Independent legal representative will therefore act for a child who is less than 12 years of age, or otherwise incapable of giving instructions. A legal representative may apply to the Court for a declaration that a child who is 12 years of age or over is not capable of giving instructions. The legal representative may also apply for a declaration that a child who is less than 12 years of age is capable of giving such instructions.

The role of the – Independent legal representative includes interviewing the child (s 99 D (b)(ii)) and presenting direct evidence to the Court about the child and matters relevant to his or her safety, welfare and well-being. The Independent Legal representative must also present evidence of the child's wishes (and in doing so the Independent Legal representative is not bound by the child's instructions).

The Law Society of New South Wales has adopted the 'Representation Principles for Children's Lawyers'. Reference should be made to the Principles when representing a child or young person.

22.14 WITNESSES IN CARE PROCEEDINGS

Parties may call witnesses in support of their case. The Director-General is likely to call relevant Departmental employees such as the caseworker with responsibility for a particular case. In the usual course, each witness will have filed and served an affidavit in the proceedings (Practice Note 28 at paragraph [16]).

A Children's Magistrate (or on appeal, a Judge of the District Court) may examine and cross examine a witness in any proceedings to such extent as they think proper for the purpose of eliciting information relevant to the exercise of the Children's Court powers (s 107). There are limits on the type and number of questions that may be asked of a witness. The Court must forbid a question that it regards as offensive, scandalous, insulting, abusive or humiliating unless the Court is satisfied that it is essential in the interests of justice that the question is asked or answered (s 107(2)).

Children the subject of proceedings are only permitted to give evidence as a witness with the leave of the Court, unless they are giving evidence on his or her own behalf (Children's Court Rule 2000 Rule 26).

If a report has been prepared by a Children's Court Clinician, a Form 13B Notice to Authorised Clinician to Attend Court Form may be issued for the Clinician to attend at the Children's Court to give evidence in relation to their report.

The provisions of the *Criminal Procedure Act 1986* relating to warrants and subpoenas for the attendance of witnesses in proceedings before a Local Court for offences punishable on summary conviction apply to the attendance of witnesses in proceedings before the Children's Court, and the production of documents in proceedings before the Children's Court, in the same way as those provisions apply to the attendance of witnesses in proceedings for such offences (s 109).

22.15 RESCINDING OR VARYING A CARE ORDER

Pursuant to s 90, an application for the rescission or variation of a care order may be made with the leave of the Children's Court (s 90(1)). This is a discretionary power (see *Re Brett v Children's Court of NSW* [2006]

NSWSC 984 per Sully J).The appropriate form is Form 3 - Application for leave to apply for rescission/ variation of care order and application for rescission/ variation of care order.

An application may be made by:

- the Director-General (s 90(3)(a));
- the Children's Guardian (s 90(3)(b);
- a person having parental responsibility for a child (s 90(3)(c);
- a person from whom parental responsibility has been removed (s 90(3)(d); or
- any person who considers himself or herself to have a sufficient interest in the welfare of the child or young person (s 90(3)(e)).

If an application seeks to change the parental responsibility for the child or those aspects involving care responsibility as defined in s 157 of the Act, the applicant must notify the Director-General and the Children's Guardian and they are entitled to be parties to the application.

22.15.1 Leave to apply to rescind or vary a care order

The Children's Court *may* grant leave if it appears that there has been a significant change in any relevant circumstances since the care order was made or last varied. The Children and Young Persons (Care and Protection) Regulation 2000 sets out factors that might indicate such a change including that the parents of the child or young person have not met their responsibilities under an applicable care plan or restoration plan (see Regulation 6(a)) or the Children's Court has found that proper arrangements have not been made for the care and protection of the child or young person pursuant to s 82(2) (see Regulation 6(b)).

Before granting leave to vary or rescind the care order(s), the Children's Court must take a number of matters into consideration as specified in s 90(2A). These matters include the age of the child or young person (s 90(2A)(b)) and whether the applicant has an arguable case (s 90(2A)(e). In some cases, the Children's Court may consider both the leave application and the substantive application together (*S v Department of Community Services* [2002] NSWCA 151).

An application for leave is considered to be an application with respect to the care and protection of a child or young person (see *Re Brett*). As such, a decision regarding leave requires a discerning assessment of all the criteria that are laid down in s 90(2) and s 90(2A) and relevant findings of fact. On this basis, all parties to the application may test evidence seeking to support or contest the granting of leave (see also 2006 CLN 10).

22.15.2 Application to rescind or vary a care order

Before making an order to rescind or vary a care order that places a child or young person under the parental responsibility of the Minister, or that allocates specific aspects of parental responsibility from the Minister to another person, the Children's Court must take a number of matters into consideration, including the wishes of the child or young person and the weight to be given to those wishes (s 90(6)(b)) and the strength of the child or young person's attachments to their birth parents or present care givers (s 90(6)(d)).

If the Children's Court is satisfied that it is appropriate to do so, it may by order, vary or rescind an order for the care and protection of a child. If an appeal against a refusal of the Children's Court to grant leave to vary or rescind a care order is successful, the substantive aspect of the s 90 application should be remitted to the Children's Court (*Stephens v Langham,* unreported, District Court of New South Wales, 28 November 2003 per Ainslie-Wallace J).

22.16 APPEALS TO THE DISTRICT COURT

Pursuant to s 91 of the Act, a party to proceedings who is dissatisfied with an order (other than an interim order) of the Children's Court may, in accordance with the District Court Rules ('the Rules'), appeal to the District Court against the order. The relevant part of the Rules is Part 6 Division 5. Regard should also be had to District Court Practice Note (Civil) No 5 dated 9 August 2005.

Rule 6.36(1) of the District Court rules has been repealed and is replaced by provision 50.3 of the UCPR it provides that an appeal must be filed within 28 days. The respondents to the appeal are set out in Rule 6.37.

A preliminary issue for the appellant may be whether a stay of the existing care order(s) is necessary. A stay could be obtained from the Supreme Court, utilising the jurisdictions described above, as appropriate.

22.16.1 Conduct of the appeal

The appeal will be listed for directions before the Child Care Appeals List Judge on the first available date after filing. The Court will notify the relevant Children's Court that the appeal has been lodged and request the Children's Court file and that a transcript of the proceedings in the Children's Court be provided to that Court: see Practice Note No 5 at 1.1.

The appeal will proceed by way of a new hearing (s 91(1)). It is not necessary to show that the Children's Court Magistrate made an error of law. An appeal may proceed on the basis that it is an all grounds appeal or an appeal only in relation to the placement of the child or young person. The District Court Judge sits with all the functions and discretions of the Children's Court under Chapters 5 and 6 of the Act (s 91(4)). The District Court may confirm, vary or set aside the decision of the Children's Court (s 91(5)). The decision of the District Court in respect of an appeal is taken to be a decision of the Children's Court and has effect accordingly (s 91(6)).

The District Court aims that the appeal will be listed for trial within three months of the filing of the summons.

22.16.2 Further evidence on appeal

On the basis that the appeal is a new hearing, the usual course is that the Director-General presents his case first, although, this may not happen in an appeal from a refusal to grant leave under s 90. The parties will be provided with the opportunity to file and serve updating affidavit evidence and issue further subpoenas. The District Court may also decide to admit as evidence the transcript of the proceedings before the Children's Court and any exhibit tendered during those proceedings (s 91(3) and the Practice Note (Civil) No 5 indicates this is the preferred course.

A party to an appeal may also make an application for an assessment by an Authorised Clinician under ss53 or 54 of the Act. This may be an updated report from the report prepared by the Clinician in the Children's Court. There are specific District Court forms for both an application for an order

and a notice to the Children's Court Clinic. The forms may be accessed on the District Court web site.

22.17 OPERATION OF THE FAMILY LAW ACT 1975 (CTH)

If a child is under the care of a person pursuant to a child welfare law, a court with jurisdiction under the *Family Law Act 1975* may not make an order under that Act unless:

(a) the order is expressed to come into effect when the child ceases to be under that care; or
(b) the order is made in proceedings relating to the child in respect of the institution or continuation of which the written consent of a child welfare officer of the relevant State or Territory has been obtained (s 69ZK).

Children and Young Persons (Care and Protection) Act 1998 is a child welfare law (Schedule 5 of the Family Law Regulations 1984).

22.17.1 Intervention of the Department in Family Court matters

There are three types of reports of risk of harm that may arise in Family Court proceedings. These are

- reports made by a Family Court Judge, Judicial Registrar or Deputy Registrar pursuant to s 91B;
- a report made a member of the Family Court pursuant to s 67ZA.; and
- reports made by a party to the proceedings pursuant to s 67Z, by virtue of Form 66

Pursuant to s91B, the Family Court can request the Department to intervene in a matter. When this request is made, the Family Court Registry will forward the Department Helpline, a copy of any orders together with notice of the next date that the matter is listed before the Family Court.

Pursuant to s 67ZA certain Family Court personnel as defined including court counsellors, mediators and welfare officers are mandatory reporters in

accordance with s 27 of the *Children and Young Persons (Care and Protection) Act 1998*.

Pursuant to s 67Z, a party to proceedings who alleges a child has been abused or is at risk of being abused, must file Form 4 Notice of Risk of Abuse. As a result the Family Court must make a report to the Department as soon as practicable. The Department may then intervene in the matter.

22.17.2 Intervention pursuant to s92A

Pursuant to s 92A of the *Family Law Act 1975*, specified persons are entitled to intervene in proceedings in which it has been alleged that a child has been abused or is at risk of being abused. In accordance with s 92A(2)(d) a prescribed welfare authority is such a person. A prescribed welfare authority is defined as an officer of the State or Territory who is responsible for the administration of the child welfare laws of the State or Territory, or some other prescribed person. The Department is a prescribed welfare authority.

In a case of alleged abuse, a delegate of the Director-General of the Department will file a Form 5 Notice of Intervention of Person Entitled to Intervene. In accordance with Rule 6.06 of the Family Law Rules, the Notice will be accompanied by an affidavit stating the facts relied on in support of the intervention and attaching a schedule stating the orders sought. On the filing of a Form 5, the Registry Manager must fix a date for a procedural hearing. The person intervening must also give each other party written notice of the procedural hearing.

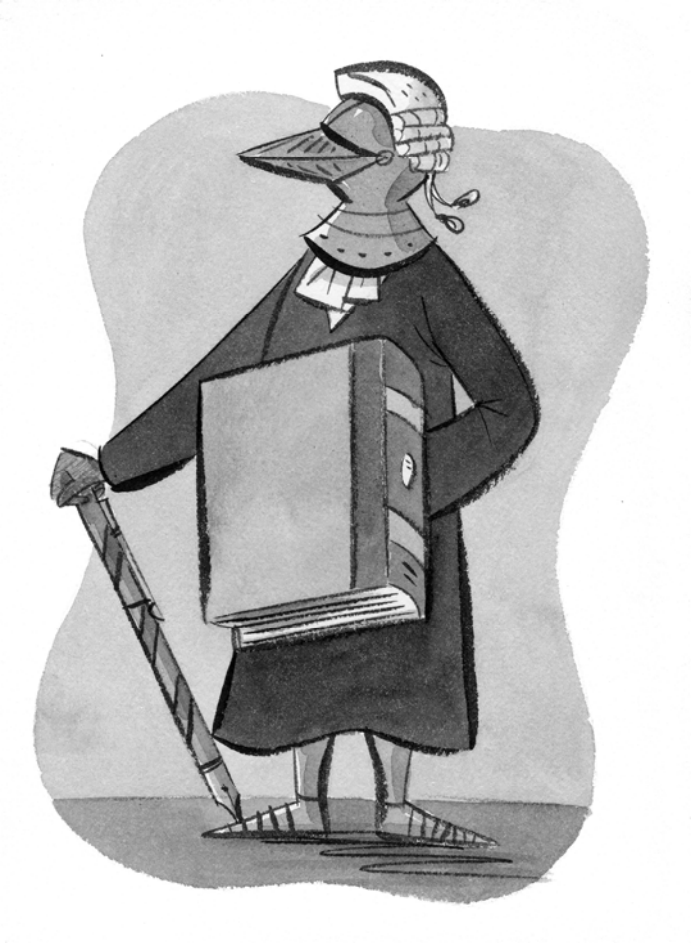
It should also be noted that if a party subpoenas the Departmental file in relation to a child, the Department must comply with the requirements of s 29 of the Act by removing the name or any identifying information of any reporters of children at risk of harm.

22.17.3 Magellan list

The Magellan List involves cases in the Sydney Registry that the Family Court has identified as involving child abuse which require particular judicial management. The Magellan List is designed to ensure that matters involving serious allegations of child abuse are dealt with as efficiently and effectively as possible.

If a matter is identified as suitable for inclusion in the Magellan List, the Department may seek to intervene in the matter as a party. Further, the Family Court may request that the Department prepare a report regarding the involvement of the Department in relation to the child and/or their family. The timeframe for the report should be approximately four weeks.

PART J – AVOS AND FAMILY LAW



CHAPTER 23 – AVOS AND FAMILY LAW

An Apprehended Violence Order, referred to as an AVO, is an order under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ("CDPVA").. The parties in AVO proceedings are referred to as the complainant (applicant) or where the police make the application, the PINOP (Person In Need of Protection), and the defendant.

An AVO restrains the behaviour of the defendant and lists certain things which the defendant is prohibited from doing. You should familiarise yourself with the "standard" orders made, so that you know which areas to take specific instructions, for example, are there children for whom contact orders are in place or, does the defendant need to travel within a certain distance of a specified residence in the course of his or her business or daily routine. These issues may require the drafting of alternate orders to suit those circumstances.

Important definitions

- Protected person or Person In Need of Protection (PINOP): This is the person for whose protection an AVO is made: s 3 CDPVA.
- Defendant: The person against whom an AVO is made or is sought to be made: s 3 CDPVA.
- Complainant: The person who seeks (or has sought) an AVO. This may either be the PINOP or a police officer.
- Cross-application: When a defendant to an AVO applies for an AVO against the complainant.
- Interim order: An order made by the court in order to protect the PINOP from the defendant prior to the hearing: Part 6 CDPVA.
- Provisional order: An interim AVO order made by an authorised officer (usually via telephone) in accordance with Part 7 CDPVA.
- Order: An AVO (including a provisional order or an interim order made by the court) in force under the Act.

23.1 CATEGORIES OF AVOS

There are two categories of AVO's:

23.1.1 Apprehended Domestic Violence Order (ADVO's)

ADVO's are used in circumstances where there is a domestic relationship (defined in s 5 CDPVA) between the PINOP and defendant.

In order for an ADVO to be made, a domestic relationship needs to have existed between the complainant and defendant. A domestic relationship includes:

- a current or former spouse;
- a current or former de facto partner;
- a person who has lived in the same house (excludes a tenant or boarder); or
- a person who has been in an intimate personal relationship with the defendant.

23.1.2 Apprehended Personal Violence Orders (APVOs)

APVO's are used in circumstances where there is no domestic relationship between the PINOP and defendant.

An APVO protects a complainant from a defendant where no domestic relationship exists.

23.2 THE TYPES OF BEHAVIOUR AVOS CAN RESTRICT

AVO's can be used to restrict or prohibit a person from engaging in certain activities and behaviour, for example, intimidation, assault, threats, stalking, harassment, and molestation. AVO's can also restrict or prohibit access to premises where the PINOP resides or works and prohibit or restrict possession of firearms: s 35 CDPVA.

A court has a wide discretion to impose restrictions or prohibitions that it may consider to be necessary or desirable: Parts 8 an 9 CDPVA..

A breach of an AVO is a criminal offence: s 14 CDPVA

23.3 THE TYPES OF ORDERS TO BE SOUGHT

Section 35 of the CDPVA also sets out the orders that you may seek. This is not an exhaustive list and there is a provision of "other" orders sought. It is important to remain realistic about the orders that are necessary to protect the applicant's safety. It is also important to think about practicalities such as child care arrangements and contact visits.

Two particular orders will always be made: statutory orders A and B (pursuant to s 36 CDPVA) relating to intimidation and stalking.

Other orders that can be sought include:

- not to assault, molest or harass;
- not to reside at the same premises;
- not to enter specified premises (including work or residence);
- not to go within a particular distance;
- not to approach, contact or telephone the protected person;
- not to contact the protected person through any means including through a third party;
- to surrender all firearms and licences;
- not to approach within 12 hours of consuming alcohol or drugs;
- not to destroy or deliberately damage property of the applicant; and
- that the orders may extend to specified persons.

The existence of an AVO does not prevent people living under the same roof. You should warn a respondent client about continuing to reside in the same premises when an AVO is in force as there are strict penalties for breaches of an AVO.

23.4 THE RELATIONSHIP BETWEEN FAMILY LAW CONTACT AND RESIDENCY ORDERS & AVOS

Optional orders can allow for exemptions of contact made pursuant to the *Family Law Act 1975* (Cth). A respondent may contact an applicant notwithstanding the existence of the AVO when the contact is for any

purpose permitted by an order or direction under the FLA as to counselling, conciliation or mediation, or when the contact is for the purpose of arranging or exercising contact with children as agreed in writing or as authorised by an order or a registered parenting plan under the FLA.

It is imperative that both parties are aware that AVO's do not automatically prohibit or inhibit contact orders. An applicant does not have the "right" to refuse contact between a party and a child which is required pursuant to an order of the Family Court simply because there is an enforceable AVO in place.

An AVO does not override an order of the Family Court. These orders can act symbiotically. However, the wording of the AVO should be considered to ensure that by adhering to an order of the Family Court, a party is not breaching the terms of an AVO. Both orders should be simultaneously considered to ensure that they do not contradict each other.

Further, a defendant is not prohibited from attending contact with children due to the imposition of an enforceable AVO. A defendant should ensure that the precise wording of both orders is considered before making contact with either children or the other party.

You should ensure that the court is aware of the terms of an AVO when making residency and contact orders and alternatively, that the court is aware of the terms of contact and residency orders when imposing an AVO.

23.5 HOW TO APPLY FOR AN AVO

A PINOP can apply for an AVO in one of two ways:

- by attending a local court registry personally (or with the assistance of a solicitor) and, following discussion with the Chamber Magistrate, swearing an application for an AVO; or
- as a consequence of either the police being called to an incident or an individual attending a police station, a police officer may swear an application for an AVO on behalf of the PINOP.

Only a police officer can make a complaint for an order on a child's behalf: s 48(3) CDPVA.

An application for an AVO will generally contain the following:

- a summary of the incident(s) of violence or abuse which led the PINOP or police officer to apply for an AVO;
- an outline of the specific restrictions or prohibitions which the PINOP asks the court to place on the defendant; and
- a summons to the defendant to appear at court at a specific time and date so that the court can hear the complaint.

A copy of the application is given to the PINOP and a copy is served on the defendant either by the clerk of the court or the police at the address provided by the protected person.

An AVO has no legal force until it is served on the defendant, unless the defendant is present at court when the order is made: s 77 CDPVA..

23.6 COMMENCING PROCEEDINGS FOR AN AVO

AVO proceedings can be initiated in two ways (ss 50 and 88 CDPVA):

- by issuing an application notice for the defendant to appear in court on a specified day; or
- by issuing a warrant for the arrest of the defendant.

An authorised officer can only issue a warrant for the arrest of the defendant if the authorised officer believes that the personal safety of the PINOP will be put at risk, unless the defendant is arrested for the purpose of being brought before the court.

23.6.1 Provisional orders: s26CDPVA

An application can be made by telephone by a police officer to an authorised officer in the following circumstances set out at s 26 CDPVA:

- where an incident has occurred involving the defendant and PINOP; and

- the police officer attending the incident has good reason to believe that an order is necessary to ensure the safety of the PINOP or to prevent substantial damage to any property of the PINOP; and
- it is not practicable (due to the time and location of the incident) to apply personally for an interim order by a court.

A provisional order:

- will contain a summons for the defendant to appear at court for the complaint to be heard by an authorised justice, as well as information regarding the terms of the order: ;
- remains in force until midnight on the 28th day after the order is made, unless it is revoked before that day, or it otherwise ceases to have effect: s 32(1) CDPVA..
- ceases to have effect if a court order is made against the defendant in favour of the protected person: s 32(2) CDPVA..
- can be varied or revoked by an authorised officer or court: s 33 CDPVA.
- cannot be renewed, nor can a further provisional order be made for the same incident: s 34 CDPVA.

23.6.2 Interim orders: Part CDPVA

An interim AVO will be granted by a magistrate only if it is necessary or appropriate to do so in the circumstances: s 22(1) CDPVA.

A registrar of a local court or of a children's court may make an interim order if both parties consent: s 23(1) CDPVA.

A magistrate may grant an interim order without the defendant being at court even if there is no evidence of the summons having been served on the defendant: s 22(3) CDPVA. This usually occurs if the written complaint alleges that there has been severe violence or abuse.

A defendant who is before the court when an application for an interim order is made should be allowed to cross-examine a PINOP as a matter of procedural fairness: *Smart v Johnson* (unreported, Supreme Court, 8 October 1998).

A person cannot lodge an appeal against the making of or failure to make an interim order.

An interim order operates until is revoked, a final order is made, or the complaint is withdrawn or dismissed: s 24 CDPVA..

23.6.3 Final orders

Only a magistrate can make a final order for an AVO (s 16 (for ADVO's) and s19 (for APVO's) CDPVA).

A court must be satisfied on the balance of probabilities that the PINOP has reasonable grounds to fear and in fact fears:

- the defendant committing a personal violence offence against him or her;
- conduct amounting to harassment or molestation, being conduct that, in the opinion of the court, is sufficient to warrant the making of the AVO; or
- conduct amounting to intimidation or stalking, being conduct that, in the opinion of the court, is sufficient to warrant the making of the order.

The test as to whether a PINOP is fearful is a subjective test.

The test as to whether a PINOP has reasonable grounds to fear the defendant is an objective test.

A court has the power to extend the order to protect a person or a child under the age of 16 years with whom the protected person has a domestic relationship.

If a PINOP is under 16 or is suffering from an appreciably below average general intelligence function, a magistrate does not need to be satisfied that the person does in fact fear that such an offence will be committed, or that such conduct will be engaged in.

23.7 WAYS AVOS CAN BE FINALISED

23.7.1 Withdrawal of complaint & the giving of undertakings

In some cases, a PINOP may agree to withdraw the application for an AVO on the basis that the defendant gives an undertaking to the court (either written or verbally) in terms similar to the AVO sought.

An undertaking is a promise to the court and is not legally enforceable. The undertaking is recorded on the court file.

If possible, you should ensure that all undertakings are put in writing, signed by both parties, and the original copy is provided to the court.

The benefit of undertakings in family law related matters is that the parties' relationship is considerably preserved by the imposition of a promise as opposed to a court sanctioned order.

23.7.2 AVO's made by consent & without admissions: s78 CDPVA

An AVO can be granted by a court if both the PINOP and the defendant consent to the order being made. In addition, a defendant does not have to make any admissions regarding the contents of the complaint. This is commonly referred to as "consenting to an AVO without admissions".

The advantage of having orders made by consent is that there is no hearing, thus reducing costs, time, and inconvenience of giving evidence.

23.7.3 Following a contested hearing

If a defendant does not consent to an AVO and the AVO application is sought by the protected person, the matter will be listed for a "show cause hearing". The PINOP is required to "show cause" as to why an AVO should be granted.

The major disadvantages of securing AVO's by hearing are that the costs will be greater where the parties have lawyers, and a hearing can strain the continuing relationship of the parties.

23.8 REVOCATION OR VARIATION OF AVOS

An AVO remains in force for the period of time specified by the court. If the period is not specified, the duration of the order is 12 months: s 79 CDPVA.

An application can be made to the court at any time to vary or revoke the AVO. The court may vary or revoke the order if it satisfied that it is proper to do so in all the circumstances: s 73(1) CDPVA

Variation or revocation of orders may be necessary where, for example, the parties have reconciled and they want non-contact and different residence orders removed.

The application can be made by the PINOP, the defendant or a police officer on behalf of the PINOP. A police officer must make the application if the PINOP was less than 16 years of age at the time of the application.

An AVO can be varied in a number of ways, such as having its duration extended or reduced, or adding, deleting or amending prohibitions or restrictions.

An AVO cannot be varied or revoked unless notice of the application to vary or revoke has been served on the corresponding party. The court can extend the period during which the order is to remain in force, in certain circumstances, for a period of not more than 21 days if there has been a failure to give notice to one of the parties: s 73 CDPVA.

A court may refuse to hear an application to vary or revoke an order if it is satisfied that the circumstances have not changed, and must refuse to grant the application to revoke or vary an order unless it is satisfied that a child under the age of 16 years no longer needs either protection (in the case of revocation) or greater protection (in the case of variation).

23.9 CRIMINAL LIABILITY

An AVO application is not a criminal charge. It is intended to protect the person taking out the order from future violence, harassment and/or intimidation.

The making of an AVO does not give the person against whom the order is made a criminal record. However, where the circumstances relied upon to establish an AVO also amount to a breach of the criminal law, criminal charges may be laid in addition to the application for the AVO. Concurrent criminal proceedings do not prevent an application for an AVO (s 81 CPDVA).

It is a crime to disobey an AVO once it has been made. If the Defendant disobeys any of the orders contained within the AVO, the maximum penalty is 2 years imprisonment and/or a $5,500 fine.

Contacting complainants in ADVO proceedings

Sometimes it will be necessary to contact a complainant in an ADVO matter.

If contact with the complainant is essential, it is prudent to discuss this with the police officer in charge in the matter, the police prosecutor or the solicitor from the DPP with carriage of the matter prior to making contact.

Practitioners should be aware of the Law Society's Guidelines for Contact with the Complainant in Apprehended Violence Matters and Criminal Matters. The Guidelines serve to assist practitioners when acting for clients involving apprehended domestic violence matters and criminal matters.

The Guidelines can be accessed at the Law Society's website (http://www.lawsociety.com.au) or can be obtained directly from the Law Society.

In summary, the Guidelines state that:

- apprehended domestic violence matters are particular types of matters where you must act prudently and be very cautious that you do not breach your obligations and responsibilities
- you should be very careful when coming into contact with a complainant in apprehended domestic violence matters, irrespective of who initiates the contact
- you should be mindful of your duties not to influence witnesses and to preserve the integrity of evidence
- you should contact a complainant in an apprehended domestic violence matter only if it is necessary. When making contact, you should be sensitive and careful not to suggest any impropriety or intimidation
- where it is necessary for you to contact a complainant, whether in person or via telephone, and there is no order in place prohibiting this contact, you should state details such as: your name; the name of your firm; who you act for; and the reason for contacting the complainant.
- it is imperative that you keep a detailed file note of any contact with the complainant, clearly dated and as far as possible in the exact words said by each party
- if a complainant contacts you suggesting that they will not attend court, or refuse to comply with a subpoena, or change the evidence they propose giving, you must make a detailed file note and ensure no further discussion is entered into, and no further contact is made with the complainant
- you must not be a material witness in your client's case.

23.10 COSTS IN AVO PROCEEDINGS

A court has the power to order costs in favour of the PINOP or defendant in accordance with the *Criminal Procedure Act 1986* (NSW): s 99 CDPVA..

A court can only award costs against the PINOP if it is satisfied the complaint was made frivolously or vexatiously: s 99(3) CDPVA. .

Costs are not to be awarded against police officers unless the court is satisfied the police officer made a complaint on behalf a PINOP knowing that complaint contained material which was false or misleading: s 99(4) CDPVA.

23.11 APPEALS TO THE DISTRICT COURT

The provisions relating to appeals to the District Court are contained in Part 9 Division 7 of the CDPVA.

A defendant may appeal to the District Court against an AVO made by a local court or children's court.

Appeals must be made to the District Court within 28 days of the local or children's court decision.

Leave must be granted to tender further evidence at the District Court.

23.12 TIPS WHEN APPEARING IN AVO PROCEEDINGS

- Have a detailed understanding of the legislation.
- Remember that proceedings for an AVO are not criminal proceedings. Therefore, there is no obligation on police to provide a defendant with a brief of evidence.
- The standard of proof in AVO hearings is the civil standard of the balance of probabilities.
- In appropriate circumstances, consider whether undertakings would be a satisfactory way of resolving the matter.
- Be aware of any mediation services (such as community justice centres) that may be available to the parties.
- Consider whether alternative remedies are more appropriate than an AVO application.
- Ensure that your client understands the precise nature of the terms of the AVO.
- When appearing for a defendant, ensure that your client is advised that it is an offence to contravene any term of the AVO. This offence carries a maximum penalty of 50 penalty units and/or two years imprisonment.
- Be aware of the consequences of an AVO being made against a client who is the holder of a firearm licence or permit. The *Firearms Act 1996* (NSW) states that a firearms licence is automatically revoked if the licensee becomes subject to a firearms prohibition order or an AVO.
- When appearing for a defendant, advise your client of the potential career implications with regard to obtaining and/or retaining employment in a field involving contact with children. Section 38 of the

Commission for Children and Young People Act 1998 (NSW) requires disclosure in certain circumstances of AVO's against a person for the purpose of employment screening.

- Ensure that AVO's are not in conflict with any existing family law orders between the parties.

PART K – FUTURE DIRECTIONS

CHAPTER 24 – FUTURE DIRECTIONS

Family Law is a dynamic and evolving area of the law. By the time that this Handbook is published, parts of it may be out of date and require some amendment, but if we waited until there were no proposed amendments to family law we would never publish!

The past few years have been challenging ones for family law practitioners and the next few years ahead look set to be just as challenging.

In 2004, the entirety of the Family Law Rules were replaced.

In 2005, there were significant changes to the *Family Law Act* 1975 (Cth) ("FLA") in relation to bankruptcy and third parties.

In 2006, the Children's Cases Programme was introduced as a forerunner to what is now called the Less Adversarial Trial System.

Ever since the release of the Standing Committee on Family and Human Services' report, *Every picture Tells A Story: Inquiry into Child Custody Arrangements in the Event of Family Separation,* the push for radical change to parenting issues in Family Law has been gaining momentum. The *Family Law Amendment (Shared Parental Responsibility) Act 2006* is the result of this push. This Act heralded significant amendments to the FLA and the way that judicial officers determined both interim and final parenting issues (and with it the need for practitioners to stay abreast with new case authorities that reviewed and substantially changed well-regarded case authorities.)

In particular, the Shared Parental Responsibility Act saw a greater emphasis on parties having equal shared parental responsibility in their children's lives and with it, a requirement for Courts to consider giving parents equal time or, at the very least, substantial and significant time.

Hand in hand with the Shared Parental Responsibility Act was the establishment of Family Relationships Centres ("FRC's"). The need for these FRC's has been fuelled by the requirement that parties attend upon a Family Dispute Resolution Practitioner and obtain a certificate in relation to this attendance, before they are able to file an Application in the Family Court in respect of parenting issues.

At the same time as coming to grips with changes in legislation and the emergence of new case authorities, family law practitioners have also recently found themselves trying to grasp changes in the procedure at the Family Court. These changes have seen a movement towards the case management of matters by designated Judges and Registrars. Whether this will result in the more timely and cost-effective resolution of matters is yet to be seen

Add to this, significant changes to the Child Support legislation, which again arose as a result of the report, *Every Picture Tells a Story*. Of the three stages of reforms, we have seen the first two, which commenced on 1 July 2006 and 1 January 2007 respectively. The final stage of reforms will commence on 1 July 2008 with the most significant changes being a new Child Support formula and significant amendments to Child Support Agreements.

And the future is set to be just as demanding in terms of a family law practitioner's need to "stay on top" of changes, what with:

- anticipated changes to the *Property Relationships Act (2003)* which will see de facto property disputes fall within the parameters of the Family Court; and
- proposed amendments to the FLA which will see property matters fall under Division 12A and thus, be dealt with in the same way as parenting issues.

And we are sure that there are even more changes to come which make family law an exciting area of the law to be practising in!

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