



FAMILY LAW
COMMITTEE

**The Practitioner's Guide
to Family Law**

5TH EDITION

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THE LAW SOCIETY OF NEW SOUTH WALES
youngLAWYERS

A Practitioner's Guide to Family Law

5th edition

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(New South Wales Young Lawyers
Family Law Committee)

2015

**A Practitioner's Guide to Family Law
5th Edition**

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About This Guide

This is a project of the NSW Young Lawyers Family Law Committee.

This publication is designed as a guide for legal practitioners and to provide information only and not to provide legal advice.

It is aimed at young lawyers learning about practising family law in New South Wales and for those practitioners who do not regularly practice in family law.

The Guide is particularly focused on the practical aspects of family law procedure and everyday practice in New South Wales.

It is not a textbook, nor a comprehensive guide on any particular topic, but should be used as a good starting point when appearing in the Family Court of Australia or Federal Circuit Court of Australia.

The law is at August 2015.

The practice and procedure of the Family Court of Australia and the Federal Circuit Court of Australia referred to in the Guide is also current as at August 2015 and is based primarily on experience in the Sydney Registry. Both courts are undertaking significant procedural changes on a regular basis. Accordingly, while accurate at the time of writing, further changes are likely.

An electronic version of the Guide is also available through the NSW Young Lawyers website.

Jennifer Hyatt
Chair of the Practitioner's Guide to Family Law Subcommittee
September 2015

About NSW Young Lawyers and the NSW Young Lawyers Family Law Committee

NSW Young Lawyers (NSWYL), a division of the Law Society of NSW, is a forum for young lawyers in NSW to initiate and express fresh ideas and directions of 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 practice for less than 5 years, and law students.

The objects and purposes of NSWYL include to:

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

NSWYL Family Law Committee

The NSWYL Family Law Committee (the Family Law Committee) was formed in April 2000 and was established to give Young Lawyers and students who are interested in or want to practice in Family Law a forum to share their views and news.

The Family Law Committee is a dynamic group of professionals, including lawyers from private practice, the court, Legal Aid and community organisations. Our members are law students, legal practitioners or court associates under the age of 36 or in their first 5 years of practice.

This Guide has been written by members of the Family Law Committee.

The aims of the Family Law Committee are to:

- provide professional education in family law for the whole profession by organising CLE seminars as part of the NSWYL CLE Program, including our Confidence in the Courtroom Program and Annual One Day CLE;

- proactively monitor and have input into changes in family law, including commenting on proposed legislation, and making submissions to governments, courts and other organisations on various issues relevant to family law as they arise;
- organise meetings, seminars, publications and public forums on issues relating to family law;
- provide a forum for young practitioners to discuss issues of concern to them;
- provide a peer support network for young practitioners and practitioners in the first 5 years of practice involved in family law;
- promote issues which are of relevance and concern to young lawyers; and
- promote NSWYL's activities and enhance the image of NSWYL.

We welcome new members. If you are interested in joining the Family Law Committee or have any questions please contact our committee chair, Anna Domalewski, at <flaw.chair@younglawyers.com.au>.

We also invite you to follow us on Facebook at <www.facebook.com/nswylflaw>.

Anna Domalewski
Chair of the Family Law Committee
September 2015

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Sincere apologies to those who have been inadvertently omitted.

Letter of Recommendation



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A Practitioners Guide to Family Law

There are many differing views as to the importance of Family Law and how it might compare to other areas of legal practice.

Family Law is very important. Indeed it is of profound significance to the tens of thousands of families who access the Federal Circuit Court of Australia or the Family Court of Australia in relation to relationship break down and the often difficult aftermath especially the effect on children.

Family Law practitioners have a real opportunity to positively influence the lives of the families who come to them for assistance. The work can be emotionally challenging, confronting, sad on occasion, but also intensely rewarding. Practitioners need not just knowledge of the law but also empathy and compassion.

Family Law reflects the changing priorities of society and intersects with many other areas of Law, including bankruptcy, trusts, taxation, human rights, and sometimes criminal law. The range and depth of legal issues one encounters in Family Law is truly extraordinary.

Communication and the sharing of wisdom is of fundamental importance. This publication is very positive as it helps practitioners to navigate the intricacies of Family Law in a confident and easily-understood format.

Constant learning and interaction with colleges of law is a critical part of being an effective lawyer and ensuring the best outcomes.

I recommend this guide to you and wish you success in your practice.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'John Pascoe'.

John H. Pascoe, AO CVO
Chief Judge
Federal Circuit Court of Australia

September 2015

Abbreviations

AAT	Administrative Appeals Tribunal
ADVO	Apprehended Domestic Violence Order
AFP	Australian Federal Police
AVO	Apprehended Violence Order
BDM	NSW Registry of Births, Deaths and Marriages
CAC	Case Assessment Conference
CDC	Child Dispute Conference
CDPVA	Crimes (Domestic and Personal Violence) Act 2007 (NSW)
CIC	Child Inclusive Conference
CSA	Child Support Agency
CSAA	Child Support (Assessment) Act 1989 (Cth)
CSR	Child Support Registrar
CSRCA	Child Support (Registration and Collection) Act 1988 (Cth)
FACS	Department of Family and Community Services
Family Court	Family Court of Australia
FCC	Federal Circuit Court Of Australia
FCCR	Federal Circuit Court Rules 2001 (Cth)
FDR	Family Dispute Resolution
FLA	Family Law Act 1975 (Cth)
FLR	Family Law Rules 2004 (Cth)
ICL	Independent Children's Lawyer
PINOP	Person in Need of Protection

Part I

A Practical Approach to Family Law Practice

Chapter 1

Overview of Family Law Practice

Jurisdiction

1.1 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.

1.2 New South Wales, along with four other states, handed 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 (referred to as 'live with' and 'spend time') and parentage issues.

Marriage

1.3 Section 4 of the Family Law Act 1975 (Cth) (FLA) sets out what constitutes 'matrimonial cause'. It includes divorce, declarations as to the validity of a marriage or divorce, maintenance, property and financial or maintenance agreements.

1.4 Section 39 of the FLA sets out the requirements for commencing proceedings under the FLA.

1.5 In respect of divorce proceedings a party to a marriage may commence proceedings under the FLA if either party is an Australian citizen, domiciled in Australia or ordinarily resident in Australia for at least the past 1 year.

1.6 In respect of other proceedings falling under the definition of 'matrimonial cause', a party to a marriage may commence proceedings under the FLA if either party is an Australian citizen, domiciled in Australia or ordinarily resident in Australia at the date of filing.

De facto relationships

1.7 Section 4AA of the FLA was introduced in 2009 and sets out the meaning of 'de facto relationship':

- (1) A person is in a **de facto relationship** with another person if:
 - (a) the persons are not legally married to each other; and
 - (b) the persons are not related by family (see subsection (6)); and
 - (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.

Paragraph (c) has effect subject to subsection (5).

...

- (5) For the purposes of this Act:
 - (a) a de facto relationship can exist between 2 persons of different sexes and between 2 persons of the same sex; and
 - (b) a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.

1.8 In some cases, there can be issues about the length of the de facto relationship or even the existence of a de facto relationship. For statutory relief, the minimum period of cohabitation is 2 years: s 90SB of the FLA.

Children

1.9 Section 31(1)(v) of the FLA states that the Family Court has jurisdiction over the rights and status of a child and their relationship with their parents.

1.10 Unlike de facto or matters falling under matrimonial causes, there is no specific requirement for the child to be an Australian citizen, resident or domiciled in Australia. However, in practice, except in exceptional or unusual circumstances, the court is unlikely to make orders referable to a child that is not at least resident in Australia.

Courts exercising jurisdiction

1.11 It is important to understand that there are two Commonwealth courts where jurisdiction under the FLA is predominantly exercised: the Family Court and the FCC. Family law cases filed in the Western Australia are dealt with by the Family Court of Western Australia.

1.12 The following courts exercise jurisdiction under the FLA:

- Family Court of Australia (**Family Court**)
- Federal Circuit Court of Australia (**FCC**)
- Courts of summary jurisdiction which, in most cases, will be the Local Court.

1.13 The Family Court only deals with a small percentage of all first instance family law cases. The FCC is considered the trial court and deals with the majority of family law cases, including both parenting and property. Since the establishment of the FCC in 2000 there has been a progressive shift in the balance of filings between the two courts, with the majority of all family law parenting cases now filed in the FCC. Of course, the Family Court deals with all appeals.

1.14 Practitioners should be aware that the Family Court and the FCC 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 comprehensive than the Federal Circuit Court Rules 2001 (Cth) (**FCCR**). It is important to note that in the event that the FCCR are silent or deficient, the FLR apply.

1.15 An applicant can choose to file an application in either the Family Court or the FCC. Each of those courts will apply the provisions of the FLA and relevant legislation, but will differ in their Rules of Court and, therefore, the procedure that will be followed in each case.

1.16 As the family law system is a national one, it is permissible for an applicant to file in any Family Court or FCC registry within Australia, without regard to geographic location. However, filing an application in a registry that has no obvious connection with the case will invariably result in a successful application (including possibly an order for costs) for change of venue being brought by the respondent.

1.17 When preparing your client's case, the first decision you will need to make is which court the application should be filed in.

Family Court of Australia

Website: <www.familycourt.gov.au>

Twitter account <@FamilyCourtAU>

Legislation: Family Law Act 1975 (Cth); Family Law Rules 2004 (Cth); Family Law Regulations 1984 (Cth)

Chief Justice Diana Bryant AO

1.18 The Family Court is a superior court of record which has original jurisdiction to hear family law matters and also acts as an appeal court from decisions of single judges of the Family Court and the FCC.

1.19 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.

1.20 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 the court where parent etc refuses to consent etc); s 17 (re-hearing of applications by a judge); and s 92 (declaration of legitimacy).
- Child Support (Registration and Collection) Act 1988 (Cth) (**CSRCA**) and Child Support (Assessment) Act 1989 (Cth) (**CSAA**).
- The CSRCA and the CSAA both confer original and appellate jurisdiction on the Family Court in respect of matters arising under these Acts: ss 104(1) and 106(1) of the CSRCA and ss 99(1) and 101(1) of the CSAA.

1.21 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; and
- 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.

Federal Circuit Court of Australia

Website: <www.federalcircuitcourt.gov.au>

Legislation: Family Law Act 1975 (Cth); Federal Circuit Court Rules 2001 (Cth); and, in particular circumstances, Family Law Rules 2004 (Cth) and Family Law Regulations 1984 (Cth)

Chief Judge Pascoe AO CVO

1.22 The FCC (known as the Federal Circuit Court since 12 April 2013 and before then, the Federal Magistrates Court) 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 objective of the court is to provide a simple and more accessible alternative to litigation in the Family Court and the Federal Court and to relieve the workload of those courts.

1.23 The FCC has power to develop procedures which are as streamlined and user-friendly as possible, with the intention of reducing delay and cost to litigants. As a general rule, the FCC will not list matters which will require more than 3 or 4 days of hearing time, so while there is no rule forcing the commencement of less complex proceedings in the FCC, practitioners should exercise some degree of discretion when deciding in which court to file their client's application. Occasionally, the court will retain a longer matter because, the complexity of the matter becomes apparent only in the hearing, or it is in the interests of justice for the court to continue to hear the matters notwithstanding the hearing time required. This policy will be applied flexibly by the court.

1.24 The FCC is a court of both record and of law and equity and, accordingly, has the power to apply both the rules of law and the rules of equity. It is not a superior court.

1.25 The FCC is the only federal court that regularly conducts regional circuits with judges based in all capital cities and the regional cities of Cairns, Launceston, Newcastle and Townsville. The court also conducts regular circuits in rural and regional areas.

1.26 The jurisdiction conferred on the FCC is concurrent with that of the Family Court and the Federal Court. That is, the FCC has no exclusive jurisdiction and in some areas its jurisdiction is less extensive than that of the Federal Court and Family Court.

1.27 The jurisdiction of the FCC includes family law, child support, administrative law, bankruptcy, human rights, consumer matters, privacy, migration, intellectual property, industrial law and admiralty law. The court shares those jurisdictions with the Family Court and the Federal Court.

1.28 In the family law area, the FCC has jurisdiction in the following matters:

- applications for divorce;
- dissolution of marriages (but not declarations as to validity of a marriage or of dissolution or annulment of a marriage);
- declaration and adjustment of property interests, irrespective of value;
- applications concerning spousal and de facto maintenance property disputes;
- all parenting orders including those providing for where a child lives, and who a child spends time and communicates with;
- contravention, maintenance or enforcement of orders made by either the FCC or the Family Court; and
- child support.

1.29 The FCC has no jurisdiction to determine matters relating to adoption or applications concerning nullity or validity of marriage.

Local Courts

1.30 Although an applicant may commence proceedings in a Local (state or territory Magistrates') Court, that court only has jurisdiction to hear the matter if the respondent consents. If proceedings are commenced in the Local Court and

the respondent seeks to have the proceedings transferred to the FCC or the Family Court, the Local Court must transfer the proceedings notwithstanding the other party does not consent: s 69K of the FLA.

1.31 Proceedings cannot be commenced in a Local Court of a territory unless at least one of the parties to the proceedings is ordinarily a resident of that territory when the proceedings are instituted or transferred: s 69K of the FLA.

1.32 Unless there is a very good reason to do so, including geographic convenience and an assurance from the respondent that consent to the court's jurisdiction will be forthcoming, it is preferable to commence proceedings in either the Family Court or the FCC. This is because the federal courts are specialist courts with greater expertise and resources to deal with family law matters.

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

- jurisdiction in respect of all matrimonial causes except proceedings for a decree of nullity of marriage, a declaration as to the validity of a marriage or for the dissolution or annulment of a marriage by decree or otherwise: s 39(6);
- 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: s 46(1); and
- jurisdiction to deal with proceedings under Pt VII of the FLA (children). The court of summary jurisdiction cannot determine contested proceedings for parenting orders without the consent of the parties: s 69J. The court must transfer the proceedings to a higher court such as the FCC or the Family Court: s 69N(3).

1.34 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.

1.35 While 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 FCC, unless the parties consent to the jurisdiction: s 69N(3). Any order made by a Local Court magistrate can, of course, be appealed, which results in a Hearing

de Novo. While 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 FCC.

Which court should I file in?

1.36 The Family Court deals with the most complex and intractable parenting disputes requiring substantial court time. These cases often involve allegations of physical or sexual abuse of children; family violence; mental health issues and substance abuse. Other areas of family law affecting children dealt with by the Family Court include domestic and international relocation; international child abduction and the Hague Convention; and medical procedures requiring court authorisation. The Family Court will also deal with those cases involving complex questions of jurisdiction or law.

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

1.38 For most young lawyers, the types of matters that you will be dealing with will almost exclusively be in the FCC.

1.39 There is no tactical advantage to filing in the Family Court as opposed to the FCC. If you file in the Family Court and the court is of the view that your matter is not sufficiently complex and does not fall in the protocol (see below), your matter will be transferred to the FCC and will not receive any priority.

1.40 Although it is very difficult to ascertain estimated hearing times at the commencement of a matter, if the matter is complex or there are multiple third parties involved and is likely to exceed 4 days final hearing, then you should file in the Family Court.

Protocol

1.41 In January 2010, the Chief Justice of the Family Court and the Chief Judge of the FCC published a protocol about the division of work between the courts. This is a useful resource in determining which matters should be filed in the Family Court. Either court can, of its own motion, transfer a matter to the other court. There is no right of appeal against a decision to transfer the matter to the other court.

Protocol for the division of work between the Family Court of Australia and the Federal Circuit Court

The Chief Justice and the Chief Judge have published this Protocol for the guidance of the legal profession and litigants, so as to enable matters to be directed properly to the court appropriate to hear them. The Protocol may on occasions give way to the imperatives of where a case can best be heard and is not intended to constrain the discretion of a judicial officer having regard to the applicable legislation and the facts and circumstances of the case before him or her.

If any one of the following criteria applies, then the application for final orders ordinarily should be filed and/or heard in the Family Court, if judicial resources permit, otherwise the matter should be filed and/or heard in the FCC.

1. International child abduction.
2. International relocation
3. Disputes as to whether a case should be heard in Australia.
4. Special medical procedures (of the type such as gender reassignment and sterilisation).
5. Contravention and related applications in parenting cases relating to orders which have been made in Family Court proceedings; which have reached a final stage of hearing or a judicial determination and which have been made within 12 months prior to filing.
6. Serious allegations of sexual abuse of a child warranting transfer to the Magellan list or similar list where applicable, and serious allegations of physical abuse of a child or serious controlling family violence warranting the attention of a superior court.
7. Complex questions of jurisdiction or law.
8. *If the matter proceeds to a final hearing, it is likely it would take in excess of four days of hearing time.*

NOTE: The Family Court has exclusive jurisdiction in relation to adoption and the validity of marriages and divorces.

Transfers

1. Either court on its own motion or on application of a party can transfer a matter to the other court.
2. There is no right of appeal from a decision as to transfer.

Other

1.42 Delays vary from registry to registry and from court to court and, if possible, enquiries should be made prior to filing as to the expected delay periods in each case. This can affect the decision as to the court and registry in which an application should be filed.

Reporting and publication of family law matters

1.43 Unlike other jurisdictions, very strict rules apply to repeating information about family law proceedings and the disclosure of personal or identifying information about parties to family law matters. The FLA restricts how court proceedings are recorded and what information can be published or broadcast, including on social networking sites. Section 97 of the FLA provides that all proceedings are held in open court unless the court decides otherwise.

1.44 Section 121 of the FLA makes it an offence to publish proceedings or images that identify people involved in family law proceedings unless a Publication Order has been made or another s 121 exemption applies. Penalties of up to 1 year imprisonment can apply for breaches of s 121.

Chapter 2

Before You File and Case Preparation

Opening a file

Costs

2.1 If you hold a practising certificate in New South Wales, you are bound by the Legal Profession Uniform Law. This legislation, among other things, places obligations on legal practitioners in relation to costs. There are also family law specific obligations in relation to costs (see, for example, Ch 19 of the FLR and Pt 21 of the FCCR). You should read these pieces of legislation and make sure you understand your obligations.

2.2 To make sure you stay on top of costs, you might want to:

- read your firm's Cost Agreement;
- keep track of any costs estimates sent out on your matters;
- keep track of any invoices that are sent out on your matters;
- set up reminders for court events, or other important dates that are coming up where you may need to provide a written costs disclosure.

File management

2.3 Proper file management will not only help you feel organised and in control of your practice, it is also essential for auditing, risk management and providing optimum service to your clients.

2.4 Try to imagine what would happen if you were hit by a bus on your way out to lunch. Would any other lawyer in your office be able to pick up your file and

run it in your absence? Would they be able to quickly locate any document they might need? Could they get an idea of the important issues in the matter, without having to read the entire file?

2.5 Every firm will have its own way of organising client files. Learn the way your firm operates and make sure your files are organised consistently.

2.6 There is no right or wrong way to manage your file. These are some things you may want to consider, however, so that you can stay on top of all of your matters:

- Prepare a chronology, or basic outline of case document for each matter. This can be in simple table format, with columns for dates, relevant events and your notes, including details of any source material. This should be a living document that you update as each matter progresses. It can be easily adapted when you need to file a case outline for mediation or hearing, but is also a great reference for drafting affidavits, or quickly reminding yourself about the important history of your client's matter.
- For financial matters, prepare a balance sheet that references all of the party's assets, liabilities, superannuation and financial resources. The balance sheet can be regularly updated as the matter progresses and disclosure/valuations occur.
- Organise your files into useful sections, so that you can easily find what you need. Include an index if necessary. Sections might include:
 - correspondence;
 - disclosure documents;
 - orders;
 - pleadings;
 - accounts;
 - drafts.
- You can have as many (or as few) sections as you like, but keep your organisation as consistent as you can across all of your files.
- Keep track of disclosure. It can be time consuming to trawl back through a file to try and work out when disclosure has been requested and whether there has been a response to all disclosure requests.

- Develop a system so you can easily identify correspondence that relates to disclosure — this might involve tagging correspondence about disclosure in some distinctive way, or copying correspondence about disclosure into a separate section of your file.
- Record details of the dates that you send and receive individual items of disclosure for quick reference — this can, for example, be easily incorporated into your index of documents.
- Manage your electronic records. Every firm will have different practice management software, but try to work out a filing and labelling system for your electronic records that is clear and easy to navigate. Again, try to ensure consistency, so that it is easy for you and anyone else who needs to work on your files to locate anything they need.
- Keep contemporaneous file notes of your attendances on the file, including a record of times, dates and the relevant file. This is not only to help you remember what has happened, it will help anyone picking up your file. If you keep records of the times you start and end tasks, this can also help in the event a client queries costs.
- Keep track of your 'to do' items. You can do this by creating diary appointments and reminders, using features like the 'task list' in Outlook or keeping a separate file list. Colour code if you need to. Find out how the other lawyers in your firm manage their 'to do' lists. Experiment to work out the best method for you, but then stick with it.
- Develop a set of checklists for different tasks you might need to complete in a matter. This might include:
 - what to do in and immediately after an initial conference with a client;
 - how to prepare a brief to counsel;
 - what to do to prepare for and appear at court events including:
 - divorce hearings;
 - subpoena hearings;
 - case assessment conferences (CACs);
 - conciliation conferences;
 - interim hearings; and
 - final hearings.

- Diarise important dates. This might include:
 - court dates;
 - time limits (eg, when your client can file for divorce, when you need to have commenced proceedings);
 - due dates for compliance with court orders/directions.

Pre-action procedures

2.7 The purpose of pre-action procedures is for parties to attempt to resolve matters without litigation, or at least to try and narrow the issues in dispute before proceedings are commenced. They include obligations on prospective litigants and on lawyers.

There are pre-action procedures for both financial (including property and maintenance) and parenting matters. There are more specific obligations associated with financial matters.

The pre-action procedures are set out in Sch 1 of the FLR. Unless there are good reasons for not doing so, all parties are expected to have followed pre-action procedures before an Initiating Application is filed: r 1.05(1) of the FLR.

TIP

Pre-action procedures are generally only mandated for proceedings in the Family Court, not the FCC. That said, you should try to follow pre-action procedures in all cases, and encourage your clients to do so too.

Property matters

2.8 Before starting court proceedings, parties should make genuine efforts to resolve their dispute. This involves:

- providing all other prospective parties with the Family Court brochure 'Before You File — Pre-action Procedure for Financial Cases';
- engaging in dispute resolution, including inviting prospective parties to participate and cooperating for the purposes of organising dispute resolution, as well as participating in the chosen method of dispute resolution;
- sending a notice of intention to claim, in the form of a letter, which:
 - sets out the issues in dispute;

- sets out the orders that will be sought, if proceedings are commenced;
- makes a genuine offer of settlement; and
- nominates a time for the recipient to respond (at least 14 days after the date of the notice).
- responding to a notice of intention to claim, by letter, which states whether the offer of settlement is accepted and, if not:
 - sets out the issues in dispute;
 - sets out the orders that will be sought, if proceedings are commenced;
 - makes a genuine counter-offer of settlement; and
 - nominates a time for the recipient to respond (at least 14 days after the date of the response).
- unless there are time limits to contend with, only commence proceedings if there is no response to a notice of intention to claim or the matter cannot be resolved after reasonable attempts have been made to settle the dispute by exchange of letters as outlined above;
- complying with their duty of disclosure.

Financial disclosure

2.9 A distinguishing feature of financial disputes, as opposed to parenting disputes, is the specific disclosure requirements that are outlined in the family law legislation. In order to properly understand disclosure obligations, and any exceptions to them, you should (at least) read rr 4.15, 12.02, 12.05, Ch 13 and r 15.55 of the FLR, as well as Pt 14 of the FCCR.

2.10 Documents that are typically exchanged include:

- a list of assets and liabilities;
- three most recent individual tax returns and notices of assessment for each party;
- information about any interest in superannuation, including a recent statement and/or Form 6 information kit;
- pay slips;
- statements for the most recent 12 months for any account with a financial institution in which the party has an interest;
- specified financial documents in relation to any entity (including any company, trust or partnership) in which the party has an interest.

2.11 Note that disclosure obligations can differ between maintenance/spouse maintenance and property settlement matters: for example, Sch 1 Pt 4(2) and (5) of the FLR.

REMEMBER

Clients should be aware that their duty of disclosure is a continuing obligation and is not conditional upon any other party making disclosure. Furthermore, the legislation does not provide an exhaustive list of required disclosure. If your client has any information or document that may be relevant to an issue in the proceedings, it should be disclosed.

Parenting matters

Family dispute resolution

2.12 The FLA requires all parties (whether proceedings are in the Family Court or the FCC) to attend Family Dispute Resolution (**FDR**) before applying for orders under Pt VII of the FLA (see s 60I(2)). When an application seeking parenting orders is filed with the court, a 'section 60I' certificate from a registered FDR practitioner must also be filed. There are some exceptions to the requirement for FDR, which are set out in s 60I(9) of the FLA.

TIP

You can find a registered FDR practitioner local to your clients by using the Family Dispute Resolution Register at <fdrr.ag.gov.au>. You will see that FDR practitioners come from a variety of backgrounds and each has different experience and expertise. You may wish to consider which FDR practitioner is likely to be most effective for the circumstances of each case.

2.13 Additionally, if the parties in a matter are already undertaking another form of alternative dispute resolution (such as mediation) you might want to check whether the person conducting that session (ie, the mediator, arbitrator, etc) is also an FDR practitioner. If so, you might want to check in advance whether they will issue a 'section 60I' certificate at the end of the session.

Other requirements

2.14 Similarly to financial matters, you/your client should also:

- provide all other prospective parties with the Family Court brochure 'Before You File — Pre-action Procedure for Parenting Orders';
- invite all prospective parties to attend dispute resolution;
- explore options for settlement, including by making an offer of settlement;
- make genuine attempts to resolve issues in dispute;
- exchange a notice of intention to claim;
- exchange disclosure of any facts or documents that are relevant to any issue in the proceedings. In parenting matters this might include, for example, reports from treating medical practitioners where there is an issue in the case about a party's health.

Lawyers' obligations

2.15 Your obligations as a practitioner are set out in Sch 1 Pt 6 of the FLR. You should familiarise yourself with this part of the Rules and keep these obligations in mind as each matter progresses.

Your obligations include:

- advising clients of alternative dispute resolution pathways;
- advising clients of their duty to make full and frank disclosure and of the possible consequences of breaching that duty;
- assisting clients to resolve their matter by agreement, rather than by commencing or continuing legal action, provided that is in their best interests and the best interests of any child;
- telling your clients if you think it is in their best interests to accept a compromise or settlement, if you think the proposal is reasonable;
- where there is unexpected delay in a matter, explaining the delay and advising whether or not your client may assist to resolve the delay;
- advising clients in relation to their costs: FLR r 19.03 and the Legal Profession Uniform Law;
- advising clients about the factors that may affect the court's decision-making in relation to costs orders;
- giving clients copies of any documents prepared by the court about:

- the legal aid services and dispute resolution services available to them; and
- the legal and social effects and the possible consequences for children of proposed litigation; and
- discouraging your client from making an ambit claim.

2.16 In some cases, you may have a client who is reluctant to follow the pre-action procedures. You should explain to them their obligations as a party to the case and your obligations as a legal practitioner.

Schedule 1 of the FLR provides:

- the pre-action procedures do not override your duty to your client;
- if you cannot comply with a procedure because your client refuses to take advice, you still have a duty as an officer of the court and must not mislead the court;
- if your client refuses to disclose a fact or document that is relevant to the case, you must cease acting for them.

2.17 Rule 1.08 also requires you, as far as possible, to promote and achieve the main purpose of the FLR. In other words, you must try to 'ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case'. An important aspect of this obligation, for a legal practitioner, is making sure you are prepared for every appearance in court. If you are going to appear in court, r 1.08(3) requires you to be familiar with your case and be authorised to deal with any issue that is likely to arise.

Consequences for non-compliance

2.18 Non-compliance may include failure to:

- send written notice of a proposed application;
- provide sufficient disclosure;
- follow a required procedure;
- respond appropriately to a written notice of a proposed application, within the nominated time;
- respond appropriately to a reasonable request for information, within a reasonable time.

2.19 Aside from filing a 'section 60I' certificate, parties are not generally required to file any document or declaration confirming their compliance with the pre-action procedures. The FLR assume these things will ordinarily be done.

2.20 The court can, however, take into account any failure to comply when making orders and directions in the case. The court may, for example, make orders requiring a party to provide specific information or documents by way of disclosure.

2.21 More serious consequences for non-compliance can include costs penalties. These may be awarded against a party and, in some cases, against a legal practitioner.

Exemption from pre-action procedures

2.22 Rule 1.05(2) and Sch 1 Pt 1(4) of the FLR set out the circumstances in which it may not be appropriate or possible to comply with pre-action procedures. This might include, but is not limited to, cases involving:

- urgency;
- allegations of child abuse or family violence;
- allegations of fraud;
- a genuinely intractable dispute;
- undue prejudice to the applicant if notice is given to another person (in the dispute) of an intention to start a case;
- a time limitation is close to expiring;
- a divorce application only;
- certain issues in relation to de facto relationships; and/or
- issues in relation to bankruptcy.

KEEP IN MIND

The purpose of the pre-action procedures is to help parties resolve their dispute or at least narrow the issues in dispute, to facilitate a reasonable resolution. This includes an outcome that is reasonable having regard to the law applicable to the dispute, but also in terms of proportionality of costs. Parties (and legal practitioners) are expected to behave reasonably in their approach to pre-action procedures.

At all stages of a matter, Sch 1 Pt 1(6) requires parties to have regard to:

- protecting and safeguarding the interests of any child;
- the continuing relationship between a parent and a child and the benefits that cooperation between parents brings a child;
- the potential damage to a child involved in a dispute between the parents, particularly if the child is encouraged to take sides or take part in the dispute;
- the best way of exploring options for settlement, identifying the issues as soon as possible, and seeking resolution of them;
- the need to avoid protracted, unnecessary, hostile and inflammatory exchanges;
- the impact of correspondence on the intended reader;
- the need to seek only those orders that are reasonably achievable on the evidence and that are consistent with the current law;
- the principle of proportionality and the need to control costs because it is unacceptable for the costs of any case to be disproportionate to the financial value of the subject matter of the dispute; and
- the duty to make full and frank disclosure of all material facts, documents and other information relevant to the dispute, including any significant changes.

Schedule 1 Pt 1(7) prohibits parties from:

- using the pre-action procedures for an improper purpose (for example, to harass the other party or to cause unnecessary cost or delay); or
- raising, in correspondence, irrelevant issues or issues that may cause the other party to adopt an entrenched, polarised or hostile position.

Chapter 3

Commencing Proceedings

Jurisdiction

3.1 Before you file any application, you should consider whether the court has jurisdiction to hear the application.

3.2 Section 39(3) — 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 1 year immediately preceding that date.

3.3 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.

3.4 Section 39(4)(b) — in any other case (ie, 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.

3.5 Section 69E — proceedings relating to a child may be instituted under FLA only if one of the following apply:

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

Which application to file?

3.6 To commence proceedings under the FLA, a party must file an application in accordance with r 2.01 of the FLR; r 4.01 of the FCCR. Generally speaking, this will require a party to complete an Initiating Application. All applications (no matter what type) must be filed in the registry or e-filed.

3.7 There are six types applications which can be used, depending on the orders sought and include an Initiating Application, an Application in a Case, an Application — Contravention, Application — Contempt, an Application for Consent Orders and an Application for Divorce. Each application has different uses and will depend on the orders sought.

3.8 Initiating Applications are used for:

- property settlement;
- parenting;
- maintenance;
- child support;
- medical procedures;
- nullity;
- declaration as to validity of marriage, divorce or annulment;
- orders relating to passports.

3.9 Applications in a Case are used for:

- interim, procedural or ancillary orders if you have already filed an Initiating Application;
- in certain circumstances, costs applications;
- enforcement of a financial or parenting order;
- review of a registrar's decision.

NOTE: An Application in a Case cannot be used if an Initiating Application has not been filed. Further, it cannot be sustained if the Initiating Application it was filed 'under' has been dealt with, such as by being discontinued, deemed abandoned or summarily dismissed.

3.10 Applications — Contravention are used for:

- contravention of an existing parenting order;
- contravention of a property order;
- failure to comply with a bond entered into under the FLA.

3.11 Applications — Contempt are used when a party alleges there has been contempt of court.

3.12 Application for Consent Orders are used when the parties have reached agreement as to parenting, property or maintenance orders. This application can only be filed in the Family Court and cannot be used if there are current proceedings on foot.

3.13 Applications for Divorce are only used when a party or parties seek a divorce order. You cannot seek any other orders with this application. See Ch 14 of this *Guide*.

3.14 Nearly all applications will attract a filing fee and the application will not be filed unless this fee is paid or waived.

TIP
Make sure you use the correct form for the correct court!

Filing requirements

3.15 The filing requirements differ slightly depending on whether the application is filed in the Family Court or the FCC.

REMEMBER

The FCC hears about 80% of all family law matters and generally you should file in this court. More complicated matters (and appeals) are heard by the Family Court. If you are unsure where you should commence your client's case, see the *Protocol for the division of work between the Family Court of Australia and the Federal Circuit Court* which has been extracted under 1.41.

Commencing Proceedings in the Federal Circuit Court	Commencing Proceedings in the Family Court
<ul style="list-style-type: none"> • Initiating Application • Filing Fee • Affidavit • Financial Orders: <ul style="list-style-type: none"> — Financial Statement — Superannuation Information Form (only if you seek superannuation orders) • Parenting Orders: <ul style="list-style-type: none"> — Notice of Risk — Section 60I Certificate or Affidavit of Non-Filing of s 60I • Maintenance <ul style="list-style-type: none"> — Financial Statement • Child Support Departure <ul style="list-style-type: none"> — Financial Statement • Application for exemption from fees (if applicable) 	<ul style="list-style-type: none"> • Initiating Application • Filing Fee • Property Orders: <ul style="list-style-type: none"> — Financial Statement • Parenting orders: <ul style="list-style-type: none"> — Section 60I Certificate or Affidavit of Non-Filing of s 60I — Form 4 Notice of Risk if there are allegations of violence • Affidavit (only if you seek interim orders) • Maintenance <ul style="list-style-type: none"> — Financial Statement — Affidavit • Application for exemption from fees (if applicable)

How to file

3.16 Documents can be filed in person at a registry, by post, fax or electronic or 'e-filing'.

3.17 There has been a significant move towards e-filing in the recent past. This is a benefit for both lawyers and parties as documents can be filed at any time of day without waiting in line.

3.18 In order to file electronically, you or your firm will need to register with the Commonwealth Courts Portal.

3.19 There are a number of things to remember when e-filing court documents:

- The document must not exceed 100 pages.
- If you file the document after 4.30 pm, it will be taken to have been filed the following business day.
- If you file the document on a weekend or public holiday, it will be taken to have been filed the next business day.
- If you e-file a document, you do not then also need to file the original by hard copy.
- Even though other parties may be able to access the document on the Commonwealth Courts Portal, all documents must still be served on the other parties.

3.20 See the FCC *Notice to Practitioners and Litigants 2011* regarding procedures for e-filing for more information.

The Commonwealth Courts Portal

3.21 The Commonwealth Courts Portal provides web-based services for litigants and lawyers in the Family Court, the Federal Court and the FCC. Before you can access file-specific information, you must register. Registration is free and both individuals and organisations (such as law firms) can register.

3.22 Once registered, a user will be able to access all files to which they are linked. This will enable you to view e-filed documents, adjourned dates, orders and other file specific information.

Service

3.23 Once proceedings have been commenced, all parties must serve relevant documents on all other parties. Service is often paid insufficient regard. Failure to serve documents, within a reasonable period before an issue is before the court, can lead to the matter being dismissed or adjourned as well as costs orders against the party.

3.24 You should be aware of the type of service that different documents require. Generally speaking, all documents that commence proceedings require special service. There are different requirements for proceedings before the Family Court or the FCC and lawyers should ensure that they comply with the correct Rules.

Proceedings before the Family Court

3.25 The following documents must be served by special service:

- applications which commence proceedings;
- applications for divorce;
- subpoenas;
- contravention applications;
- contempt applications;
- any document filed in support of the above applications, including affidavits or financial statements;
- an order made ex parte or without notice.

3.26 There are three methods of special service:

- by hand by a person over 18 years and not a party to the proceedings;
- by post or electronic communication, provided that the other party signs the Acknowledgment of Service;
- by service on a lawyer, if that lawyer agrees in writing to accept service.

3.27 For all other documents, see r 7.12 of the FLR for the various means of ordinary service. Generally, service of all other documents can be effected by delivery, ordinary pre-paid post, fax or email without the need for an Acknowledgment of Service.

Proceedings before the Federal Circuit Court

3.28 The following documents must be served by hand:

- applications which commence proceedings;
- any document filed in support of the above applications, including affidavits or financial statements;
- subpoenas requiring attendance at court (as distinct from subpoenas requiring production of documents).

3.29 The above listed documents do not need to be served by hand if:

- there are current proceedings and a party has filed a Notice of Address for Service;
- the court orders that a document can be served in another way;
- a lawyer for a party accepts service and then files a Notice of Address for Service;
- a lawyer for a person other than a party accepts service.

3.30 Service by hand requires that the document be handed to the person. If they do not accept the document, it can be put down in their presence and told what the document is. A party to the proceedings cannot serve documents. Some judicial officers also consider it inappropriate to serve documents in the court building and it should be avoided. Rules 6.08, 6.09 and 6.10 of the FCCR outline the rules for service on corporations, unregistered businesses and partnerships.

3.31 If a lawyer agrees to accept service by any other means than service by hand, it is best practice to request confirmation in writing.

3.32 For all other documents, see r 6.11 of the FCCR for the various means of service. Generally, service of all other documents can be effected by delivery, ordinary pre-paid post, fax or email.

3.33 If a party has filed a Notice of Address for Service, the documents should be served to the nominated address. This applies even if the recipient has informally suggested an alternative address.

Service issues

3.34 If after making all reasonable attempts you cannot serve the relevant application on the other party, you can apply to the court for:

- substituted service; or
- dispensation of service.

Substituted service

3.35 An application for substituted service can/should be made when the respondent cannot be located and an alternative method of service should 'substitute' personal service: s 37A of the FLA, r 7.18 of the FLR and Pt 6 of the FCCR.

3.36 An application for substituted service should be made in the interim orders of the Initiating Application or by way of an Application in a Case supported by an

affidavit setting out the difficulties in arranging personal service and the way that the proposed order for substituted service will (or may) notify the respondent. The affidavit should address the following:

- what attempts, efforts and enquiries you made to find the respondent;
- when your client last saw, spoke to or communicated in any way with the respondent and the circumstances of that sighting or communication;
- the last known address of the respondent;
- who are the respondent's nearest relatives and friends, what enquiries you made of these people about the respondent and any replies received;
- what employment, if any, the respondent had;
- what enquiries you made with the respondent's last-known employer and any replies received;
- details of any current child support or maintenance arrangements or orders. If correspondence has been received from the Department of Human Services (Child Support), attach a copy to your affidavit;
- details of any property, bank accounts or businesses jointly owned;
- if the respondent lives overseas, details about the country they are living in, how long they have lived there and if they plan to travel or move back to Australia;
- any reasons why the respondent may not be contactable;
- the costs of trying to locate the respondent and whether such costs are creating financial difficulties for the client;
- any other relevant information that may help the court.

3.37 Common applications for substituted service involve serving the respondent by pre-paid or registered post, by email, on a friend or relative or by notice in a newspaper of general circulation. Depending on the circumstances a substituted service order can be made to the effect that the court documents are forwarded to the Child Support Agency (CSA) or Centrelink and request that agency forward the documents to the respondent at the address on record.

3.38 The court may adjourn the case and make directions regarding extra steps to find the respondent.

3.39 If an order for substituted service is made you should file an Affidavit of Service attesting to compliance with the court's directions before the next court event.

Dispensation of service

3.40 The court will be very cautious making orders where a person affected has not been served and will require a high standard of evidence and satisfaction as to the efforts made to locate the person. This is particularly so when the orders are final as opposed to interim or ancillary.

3.41 If the court is satisfied that you have made all reasonable attempts to find and serve the other party the court can dispense with service: r 7.18 of the FLR. Such applications are usually only appropriate in circumstances where the respondent has not been in contact with the applicant for a considerable period of time and there is no realistic way of finding them. You will need to make whatever enquires possible that may lead to information regarding the whereabouts of the respondent, or of a way to contact the respondent.

3.42 An application to dispense with service is made by filing an Application in a Case and an affidavit in support, which should address possible people who may have or be able to contact the respondent, ie, family, friends or employers.

3.43 The court may have regard to the following factors when considering any such an application:

- whether all reasonable steps have been taken to serve the document or bring it to the notice of the person to be served;
- whether the person to be served could reasonably become aware of the existence and nature of the document by another way, ie, post, email, advertisement, or even through social media;
- the likely associated costs of service; and
- the nature and circumstances of the case.

3.44 Keep in mind that the court may make an order for substituted service rather than dispense with service.

Ex parte proceedings

3.45 An ex parte application is an application to have the matter urgently heard, such as in cases when one party has uplifted children or where there is the possibility that one party may dispense or otherwise deal with assets. In the application, you will have to specifically seek that the matter be heard on an urgent ex parte basis and that the rules of service be dispensed. Generally speaking, you will be asked if you have attempted to serve or otherwise notify the other party of the application so be prepared to answer. You will have to prepare an affidavit in

support of the application. Therefore ensure that you know the affidavit well and can field any questions that may be asked in relation to the matter.

REMEMBER

After you have filed a document, you must serve it on the other parties as soon as possible or in accordance with any specific order as to service. A document cannot be served if it was filed more than 12 months prior.

You must serve any documents on all parties to the proceedings, including any Independent Children's Lawyer (ICL), third parties or intervenors. If you are filing an Application for Consent Orders in the Family Court which contain superannuation splitting orders, you must also serve the superannuation trustee with a copy of the application or in the FCC forwarding proposed terms to the docket judge to consider in chambers require evidence of procedural fairness.

Depending on the nature of the application, the Child Support Registrar (CSR) or a prescribed child welfare authority may also need to be served.

3.46 For service of documents on persons with a disability: r 7.09 of the FLR.

3.47 For service of documents on persons in prison: r 7.10 of the FLR.

3.48 The following are documents that do not need to be served:

- a joint application, such as an Application for Consent Orders or a joint Application for Divorce;
- any document signed by all parties;
- any application without notice or ex parte;
- an Affidavit of Service.

Parties to proceedings

3.49 Any person whose rights or interests will be affected by the orders you seek, must be a party to the proceedings. In most proceedings, this will be the parents of the child in parenting proceedings or the husband and wife or de facto partners in property proceedings.

3.50 However, the possibilities are wide and varied and will include any person whose rights might be directly affected by an issue in the case or whose

participation is necessary for the court to determine the issues in dispute. The following persons may be parties who commence proceedings or are ultimately joined as parties:

- Any person who has a current parenting order in their favour or with whom the child lives.
- Grandparents or other relatives in parenting proceedings. See s 65C of the FLA.
- An ICL. An ICL is not strictly a party to the proceedings, but is treated like one. See r 6.01 of the FLR.
- Creditors in property proceedings, particularly if their interests may be affected. See s 79F of the FLA. Commonly, if a party alleges a loan from their parent, that parent will be joined if they seek to enforce the loan.
- A child welfare authority. See s 91B of the FLA. The court can only request the intervention of a child welfare authority.
- Case guardians (Pt 6.3 of the FLR) or litigation guardians (Pt 11 of the FCCR).
- The Attorney-General. See r 11.06 of the FCCR.

3.51 Generally, the relevant parties will be included in the Initiating Application. However, if you seek to add another party after a case has commenced, you must do so by filing an Application in a Case and supporting affidavit.

Chapter 4

Legal Skills: in General and Specific to Family Law

Interviewing skills

4.1 This chapter provides a summary of the various stages of a client interview and provides some general guidance in relation to issues that may arise.

Preparation

4.2 Before you conduct a client interview, you should make enquiries as to whether there is a conflict of interest. A conflict of interest will generally exist if you are serving or attempting to serve two or more interests that aren't compatible. For example, the client you are about to see might have an issue or dispute with a person you have previously given advice to. Alternatively, the interests of the client you are about to see might be in conflict with your personal interests. If you have any concern that a conflict exists, take appropriate steps to avoid it.

4.3 It is also important to review and understand all of the documents that the client has provided you before the interview. The client will expect you to have read any documents provided and it does not look professional, nor instil confidence in the client, if you are not aware of the documents that exist and how they are relevant or not.

4.4 Consider the particular circumstances of the client (eg, language, age, disability or religion) and how to accommodate the client to the best of your ability. Make sure you have a comfortable and private place to conduct the interview so that the client feels at ease.

Introduction

4.5 The first client meeting is critical because it lays the foundation of the lawyer–client relationship.

4.6 Establish a rapport with the client before discussing their legal matter. This will help to develop your relationship with the client and will help to settle any nerves.

4.7 Introduce yourself to the client. Inform the client of your qualifications, your role at the firm, the agenda for the interview and your role in the current meeting. Address any concerns that the client may have at the earliest opportunity.

Obtain your client's narrative

4.8 Ask open-ended questions, as they encourage full and meaningful answers. You might start the interview by asking the client ‘how can we help you today?’ or ‘what brings you here today?’ As the interview progresses, ask questions that begin with ‘why’ or ‘how’, and use phrases such as ‘tell me about ...’.

4.9 Separately, you need to be in control of the interview. The information the client gives to you allows you to give advice. The client needs to have a rapport with you, but they expect, and are entitled to, guidance. They will feel some comfort from a directed process, which signals you know where the interview is going.

4.10 Take notes so that you do not forget anything important and so that you have a record of what you were told. Remember, it is not unusual for a client to seek initial advice but then not return for a significant period.

4.11 Convey your interest, attention and understanding through eye contact and short verbal or physical cues such as ‘I see’, a nod of the head or your brief summary of a part of their story.

4.12 Make sure you are speaking at an appropriate pace. Make sure that the client has enough time to consider what you are saying and to ask any questions. Be efficient without appearing rushed or uncaring.

4.13 Identify gaps and where further information, documents or instructions are necessary, but do this at the end rather than interrupting the flow of information.

Develop a strategy

4.14 Explore the legal and non-legal issues with the client, as well as potential solutions to those issues. Explore the advantages and disadvantages of each of the potential ways to proceed with the client.

4.15 Explain the law, and the principles and procedures that have a bearing on the case. However, make sure the client's understanding is not lost by using technical words and legal jargon such as 'injunction', 'interim' and 'onus of proof'. Encourage the client to summarise their understanding of the interview and obtain instructions on their preferred course of action.

Conclusion

4.16 Before closing the meeting, confirm the client's instructions, set a timeline for tasks or events and identify who will complete those tasks.

Retainer

4.17 If you are retained, provide the client with a costs' disclosure and fee agreement at the earliest opportunity.

4.18 Provide any brochures required by the Family Court or the FCC.

4.19 Confirm the client's instructions and your advice in writing. Diarise agreed tasks, events, activities and timeframes within which to complete each task.

Negotiation skills

4.20 The three things to remember in all negotiations are:

- (a) Yourself: Practice your skills to build confidence. Be aware of your own conduct such as body language and verbal tone, volume and vocabulary during negotiations.
- (b) Others: What is the other person saying and not saying. Why might this be the case?
- (c) Court: Your primary duty and accountability is to the court. You are required to be truthful and accurate. Your second duty is to the client. Be aware that your representations and actions bind your clients. Accordingly, be careful to understand your instructions and carry them out accurately.

4.21 It is helpful to think about negotiation in three stages:

Stage 1: Preparation

4.22 Identify the long-term and short-term goals of each of the parties and familiarise yourself with the cases and legislation that will help your case.

4.23 Make copies of any document you may wish to show to the other parties.

4.24 Consider contacting the other party's solicitor prior to the negotiation to discuss an agenda and possible outcomes. This can also help to create a harmonious tone for the negotiation and narrow the issues in dispute.

Stage 2: Negotiation

4.25 Introduce the attendees, who they attend for, their role and the relevance of their attendance.

4.26 Address any housekeeping matters such as the location of refreshments, amenities and equipment, as well as any time restrictions relating to the venue or any of the attendees.

4.27 Identify the issues that need to be resolved as well as any common ground, even if it is simply an agreed desire to resolve the dispute.

4.28 Address any unidentified interests or hidden agendas so they are not a stumbling block to constructive negotiations.

4.29 Discuss your client's position and possible solutions. Remember that negotiating depends upon each of the parties compromising their position to a degree. Ensure that your client is aware that he/she must make concessions and explain that this does not necessarily mean he/she is conceding isolated issues.

4.30 If appropriate, discuss the options that are available to the parties. Remember, discussing options does not mean commitment to those options, unless all relevant parties agree at the end of the negotiation.

4.31 Do not be scared to make the first offer. The first offer is always an important step as it identifies the ballpark or range of negotiations.

4.32 Be prepared to end negotiations when necessary, but do not use this as a tactic or threat.

Stage 3: Terms of agreement

4.33 Agreement does not necessarily mean success. Make sure that you have carefully considered the long-term implications of the agreement for your client.

4.34 Ensure that the agreement reached can actually be implemented, complied with and, if necessary, enforced by the parties. For example, if an agreement is

reliant upon your client obtaining a loan, you might need to 'reality test' your client as to whether they are in fact able to do this.

4.35 Commit to the agreement reached on the day by filing consent orders at the earliest opportunity; the sooner the agreement is formalised, the sooner the parties move on with their lives and the less chance there is for one of the parties to renege on the agreement.

4.36 Agree on future tasks and timeframes, such as the documents that need to be prepared, who will prepare them, when they need to be prepared and if relevant, who will pay the costs and attend further court appearances.

TIPS AND TACTICS

Hard-nosed tactics, such as bluffing, deception and verbal aggression hinder agreement (and are a breach your professional obligations). This behaviour undermines goodwill and will reduce the likelihood of a resolution.

- Don't provide an emotional response to an extreme offer. Take time to consider all offers in consultation with the client and formulate a courteous and appropriate response.
- If you are making factual or legal arguments, ensure your position is supported by evidence. Alternatively, acknowledge that the parties are aware of the issues, do not want to get distracted by the minutia of detail and want to work positively towards an agreement.
- Discuss BATNA (Best Alternative to a Negotiated Agreement) with your client. At a certain point, proceeding to a full court hearing may be better than any agreement that can be reached with the other side.
- Older or more experienced lawyers are not necessarily better negotiators. Treat each person with the respect they deserve and have confidence in your ability.
- Reflect on the negotiations and think about how you can improve your performance on the next occasion.

These bullet points are useful guides; however, you should not underestimate negotiation as a skill. Taking a course in negotiation is not a waste of time or money.

Dealing with difficult clients

4.37 Family law can be an extremely emotional area of law and it can be unrealistic to expect a client to maintain their focus and composure from the beginning to the end of the proceedings.

4.38 Difficult clients can be demanding, impossible to satisfy and sometimes rude and dealing with them can be one of the most challenging aspects of legal practice. If you sense that a client is going to be difficult, you should let them know from the outset what services you can realistically provide and set parameters around how you will work together.

4.39 Be aware of potential 'flash points' that may affect your client and hinder progress of your matter:

- separation;
- the introduction of another person into the family unit;
- involvement of solicitors and the first round of correspondence;
- receiving or providing the first financial disclosure;
- Christmas, birthdays, family holidays, school holidays, anniversaries or other dates of significance; and
- change of circumstances, such as employment, a holiday, promotion, living arrangements or health.

TIPS

- Allow the client to 'vent' their frustration if necessary, but be mindful of time and costs.
- Work out exactly what the client needs from you. Quite often, the client simply needs practical advice about how to deal with a certain situation.
- Empathise, but don't sympathise. Let your client know that you understand their situation, but do not share your personal feelings. This could cloud your judgment or your client's perception of your professional judgment.
- If you sense that your client is becoming too distracted from the legal issues or too distressed, suggest a break.
- Maintain appropriate levels of contact with the client. Ignoring their phone calls, messages or letters will only escalate their emotional state.

- If necessary, clarify your role in an appropriate and sensitive way. For example, you have been engaged to provide legal advice and charge for your service on a time basis. Other types of communications may be better directed to friends or family.
- 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 non-legal issues that may arise.
- Never be untruthful with a client. Do not simply tell them what you think they want to hear. If you are unsure or pressured, state that you will need to clarify a couple of matters before you can advise on that aspect. Lawyers have a duty to the court to be honest and honesty is also an appropriate client expectation.
- It is important to remember that if the client becomes difficult to handle at times, this is not necessarily a poor reflection on the solicitor.
- Keep records. The more difficult or challenging the encounter with a client, the more detailed your file note should be.

Language barriers

4.40 If there is a language barrier, be patient. Do not assume that your client understands your legal advice simply because he/she can hold a conversation with you, nods or replies 'yes'. Perhaps get them to repeat back to you what you have explained to them. 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.

4.41 When in doubt, seek the assistance of a properly qualified, accredited interpreter. If you are using an interpreter, always ensure that the interpreter provides written certification after translating any documents that your client signs, swears or affirms.

Abusive clients

4.42 If your client becomes violent or abusive, lower your voice and ask them to calm down. Take a deep breath, stay focused and, if necessary, give them a few minutes of privacy and leave the room.

4.43 If appropriate, listen to what the client is saying, as it might be the only way that the client is able to convey important information to you regarding the case.

4.44 Consider the stress of the matter from the client's perspective and don't take the client's aggression personally.

4.45 Make a judgment call as to whether or not it is appropriate to call for assistance or for a third party to conduct future communications between yourself and the client.

4.46 Remember, you are not alone. All lawyers deal with difficult clients. Be proactive and seek advice and assistance from senior practitioners and colleagues, as they will be able to assist you with strategies to move beyond the difficulty at hand.

Drafting skills

4.47 Drafting legal documents is an integral part of being a solicitor. While a proper understanding of the law is always necessary, good drafting techniques are just as important.

4.48 The consequences of poor drafting are not always immediately apparent, but can include further litigation, complaints, cost orders and professional negligence claims against solicitors, even years after the relevant document was drafted.

4.49 Before you put pen to paper, plan or at least give some meaningful consideration to the following:

What are you writing?

- letters;
- court documents;
- submissions;
- observations.

Why are you writing?

- What message are you trying to convey?
- Are you making an argument or trying to 'sell' your case?
- A communication from a lawyer is a tool which should be used appropriately. It is not simply a vehicle for venting a client's emotions.

Who is your audience?

- another lawyer;
- client — remember, don't use legal jargon or insert long pieces of legislation;
- an unrepresented individual with whom your client is 'in dispute';
- judicial officer.

What is the tone?

- What should the document sound like? Friendly or stern? If stern, always avoid protracted and unnecessary language.
- Be wary of letters which express threats or ultimatums. They will be powerless, and perhaps render you so, if not later acted upon.
- Prefer facts over emotion.
- Use active, not passive, tone.

TIPS

- Tailor your document to the purpose and your audience.
- Convey your message in as few words as possible. If you can get your message across in 10 words, that is preferable to 100 words.
- Learn how to use commas, apostrophes and capital letters correctly; a properly punctuated document avoids misinterpretation and misunderstanding.
- If you are unsure, read a sentence out loud.
- Use spell check.

Court orders

4.50 Sometimes it is necessary to draft orders at court without having the benefit of time to carefully consider the effect of the orders. Errors can go unnoticed until it is time to put the orders into effect — by which time, it is usually too late.

4.51 Some tips to keep in mind when drafting consent orders are:

- Each order must require someone to do something and the order must set out, step-by-step, what that person must do to make the particular

event happen. For example, if monies are held in a trust account and are to be distributed:

- DO say: ‘The parties shall do all acts and things to cause the money held in the XYZ Trust account to be distributed as follows ...’
- Do NOT say: ‘The XYZ Trust account shall be distributed as follows ...’
- Define the timing of events clearly.
- Consider the enforceability of each order.
- Anticipate contingencies and consider including default and/or enforcement orders.
- If you are handwriting the orders at court, one of the parties will generally be required to prepare a typescript of the orders for the court. If so, you will need to certify that the typescript is a true and correct copy of the orders.
- Do not use the passive voice.
- Use simple and unambiguous language where possible, avoiding the use of words like ‘henceforth’ and ‘aforementioned’.
- Do the orders address all the parties’ assets, liabilities and resources? If not, do you need a ‘catch all’ order?
- Remember, notations are not orders and only provide useful background information.

Court documents

Financial statements

4.52 Financial statements can be one of the most difficult and damaging documents that your client must complete.

4.53 Do not give your client a financial statement and expect him/her to complete it correctly. Instead, try and get an idea of your client’s financial situation and help the client put the information on paper.

4.54 In the life of a court case, most clients will prepare at least two financial statements, the first when initially filing and the second prior to the final hearing. Very commonly, the client finds the first statement incomprehensible and/or treats it somewhat glibly. This document can be used effectively against them if and when they are ever cross-examined. You owe it to the client to essentially

interrogate them over the figures before they sign, ie, ask them how they arrived at the figures. Was it by looking at a record or was it just a 'guess'?

4.55 If there is a corporate structure around the client, separate that from client's personal circumstances. The financial statement should be a reflection of your client's personal situation and not a combination of his/her personal and corporate interests. For example, if the client typically drives a car but it is a 'company car', then they do not personally own that asset. They might own shares in the company which in turn owns the car, but that will be reflected in the company accounts.

TIPS

- Talk to your client's accountant about the information in the financial statement, but beware that you ask the right questions and understand the information they give you.
- Provide your client with the relevant rules about disclosure and explain both parties' obligations in that regard.
- Advise your client that he/she is responsible for the information contained in the financial statement and it is their obligation to make sure that the information in the financial statement is correct.
- See *Tsocas and Rilak* [2014] FAMCA 410, which highlights some of the difficulties that clients can get into when drafting a financial statement.
- Don't forget that if your client has given you funds for their litigation but it is sitting in your trust account that needs to be included in the statement.

Financial questionnaires

4.56 Financial questionnaires are an important court document as they force clients and lawyers alike to focus on the real issues in dispute.

TIPS

- A financial questionnaire is the client's document and, accordingly, it should be in the client's voice, use the client's words and written in the first person. That said, the lawyer should always settle the final draft.
- Set out the facts; avoid making a legal argument.

- Keep it brief, but make sure you address every issue.
- As the cover page makes clear, the client signs a Statement of Truth and will likely be asked to adopt the document in evidence. Accordingly, it has an equivalent status to an affidavit.

Affidavits

4.57 An affidavit is a legal document that should reflect what a witness heard, saw or perceived first hand. It should set out facts (ie, evidence), not opinion. Affidavits are an important court document as they are often a judge's first insight into the matter before a hearing and last reminder of the case before finalising a written judgment.

4.58 For compliance with the formal requirements, refer to rr 15.08, 15.09, 15.10 and 15.13 of the FLR.

TIPS

- Use headings where appropriate and numbered paragraphs.
- Follow a logical sequence of events. It is often, but not always, preferable to write an affidavit in chronological order.
- Consider the purpose of the affidavit. Is the affidavit in support of an urgent application? If so, make sure the affidavit justifies the urgency of the application. Also, get to the point quickly and concisely. Judges have limited time so avoid details that don't relate to the issue at hand.
- Do not 'sanitise' the evidence. The affidavit should be the words of the witness, not the words of the lawyer. Using language that the witness does not use or understand may lead to trouble in the witness box.
- Acknowledge, deal with or apologise for poor behaviour, errors, weaknesses or holes in the case before the other side does.
- Always follow the rules of evidence even if not strictly necessary. They are a very useful discipline and are far more likely to be given weight by the judge.
- Think of the application as '*What do I want*' and the affidavit as '*Why do I want it*'. So, every order sought in the application should be supported by admissible evidence in the affidavit.

4.59 Chapter 3 of the Evidence Act 1995 (Cth) contains provisions regarding the admissibility of evidence and often forms the basis of objections to evidence.

Relevance

4.60 One of the main complaints about affidavits is that there is too much irrelevant content. Remember, while s 69ZT(1) FLA means certain parts of the Evidence Act 1995 are excluded in parenting cases, s 55 is preserved. That is, the requirement for evidence to be relevant.

4.61 Also, s 69ZT(1) goes only to parenting cases. It does not affect a myriad of other cases such as financial matters, contraventions and the like.

4.62 A statement in an affidavit is only admissible if it impacts the assessment of a fact in issue. To determine whether or not the relevant statement affects the assessment of a fact in issue, you should refer back to the legislation that governs your client's application, as well as the wording of the relevant application.

4.63 Clients often try to include information that is important to them personally, however not relevant to the affidavit or the proceedings generally. If the statement is not relevant to the fact in issue, it should be deleted. Clients will resist you on that. You should be ready with a narrative as to why it is not helpful, and sometimes detrimental, to include such information in an affidavit with such material.

Hearsay

4.64 Quoting witnesses who are not present for cross-examination is hearsay and these quotes will likely be struck out or deleted from the affidavit by the court. Alternatively, they will have no weight and will effectively be disregarded by the judge. That said, several exceptions apply, such as statements made by children and statements made to witnesses who the court are prepared to treat as unavailable for the purpose of the hearing. This latter situation involves a number of steps under the Evidence Act 1995 and you should not simply assume it will be 'OK'.

4.65 The hearsay rule does not apply to interim affidavits. Accordingly, you can quote conversations with a person who is not a witness in the case (eg, a police officer or doctor). The fact though that the hearsay is admissible does not mean it will be given weight. The best evidence is always first hand. Of course, interim applications often come on quickly and it is not always possible to gather witnesses to give first hand evidence.

Conversations

4.66 Conversations must be set out in direct, first person speech, such as — I said ‘x’ and he said ‘y’. If a conversation is summarised, it may be struck out for not being in the proper form.

Form

4.67 Ensure that Practice Notes, directions and orders are complied with regarding the form of evidence including font size, margins, pagination, use of annexures or exhibits, cover pages, selection of oath or affirmation (not leaving both options expressed) and the typescript of orders if certain wording is suggested, for example, on the court website.

4.68 Each page of the affidavit must be signed by the deponent and a witness.

4.69 If any alterations (such as corrections, cross-outs or additions) are made to the affidavit, the person making the affidavit and the witness must initial each alteration.

Annexures

4.70 Refer to r 15.12 of the FLR for the requirements relating to documents attached to affidavits.

4.71 If you refer to a document in your affidavit, you must attach a copy of it as an annexure and if there is more than one annexure, each annexure must be referred to by a number or a letter, for example, ‘Annexure A’.

4.72 Annexures must be paginated consecutively.

4.73 Each annexure must be signed and authorised as being the annexure referred to in the affidavit. The wording of the statement is:

This is the document referred to as Annexure [insert reference number] in the affidavit of [insert deponent’s name], sworn/affirmed at [insert place] on [insert date] before me [authorised person to sign and provide name and qualification].

4.74 If the annexures, or the annexures and the affidavit combined, are more than 2.5 cm in thickness, the annexures must be included in a separate volume or in as many separately indexed volumes as required.

Generalities

4.75 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 'never', 'sometimes', 'always', 'often', 'several' and 'occasionally', which are often found to be inadmissible.

4.76 Avoid jumping to conclusions, such as 'he was drunk' or 'she was emotional'. Such statements without further explanation are inadmissible. Instead you should set out what was actually seen, heard, felt or otherwise experienced by the witness first hand. For example 'I saw him drink five beers, I could smell alcohol on his breath, he was not walking in a straight line and he was slurring his words'. Evidence such as bank statements or a bar tab can also assist because when considered with the observation of the witness, the logical conclusion that the relevant person was intoxicated.

4.77 Do not be afraid to recognise the positives as well as the negatives. It will rarely be the case that during a 20-year marriage the other party never washed a single dish and such statements may damage the reputation of your client's evidence.

4.78 Where time permits, put the affidavit or the orders aside for a day or two before finalising them. Refer back to the original application and ensure that all orders sought are supported by evidence and that each part of your evidence supports at least one aspect of the orders sought and so is likely to survive a challenge on the ground of relevance.

4.79 A fresh look at a document can reveal important errors or amendments that ought to be made, and where appropriate, based on factors including importance and cost, it is also a good idea to have a more senior solicitor or counsel settle the affidavit.

Chapter 5

In the Court

Court events

First return date

5.1 The first court date for family law applications will be a fixed period after the filing date, depending on the type of application. Most applications have a first court date about 6 weeks after filing, to allow time to serve the application and for the other party to prepare a response. In more recent times, due to resource constraints and retiring judicial officers not being replaced, the time between filing date and first return date has blown out to several months. Some more urgent applications will have shorter periods.

5.2 A first return date is generally the first occasion that your matter will be listed before the court. In the FCC, your matter is usually allocated to what is known as a 'duty list'. A duty list is a list of matters (usually between 15–20 matters) that are all listed before the court on the same date and generally at the same time.

5.3 When you arrive at court you should try and locate the judge's associate, who will be either standing outside the allocated court room or just inside the court room with a list. You should approach the associate and advise them of your name and who you are appearing on behalf of and whether your client is present at court, for example:

My name is Ms Smith and I appear on behalf of the applicant mother. The mother is present in person.

5.4 You should *always* be courteous and polite to the associate. You may also indicate briefly to the associate what you are seeking the court to order that day, for example:

We are seeking that the matter be listed for a conciliation conference. We are here to hand up consent terms. We seek that the matter be heard on an interim basis today.

5.5 This information may influence when your matter is called in the list. The associate will call through the cases in the list, sometimes alphabetically or sometimes depending upon the complexity of your matter. Usually, the least complex matters will be dealt with by the judge towards the beginning of the list. Please remember this is only a guide. Ultimately, it will be a matter for the judge to decide when your matter will be called.

5.6 If you need time to discuss your matter with the other party you should ask the associate whether the matter can be stood in the list. However, should your matter be called, despite your request, you should immediately make your way to the bar table without delay and ask the judge directly that the matter be stood in the list.

TIPS

On the first return date the judge will likely seek to address the following matters:

1. Whether all relevant documents have been served and filed by both parties.
2. A brief outline of the issues in the case, ie, is it a property or parenting matter.
3. Directions will usually be made for the future conduct of the case. This may include the following:
 - 3.1 adjourning the matter to a later date. For example, to allow negotiations between the parties to continue or for the respondent to file responding documents;
 - 3.2 directing the parties to attend a Conciliation Conference or private mediation in matters involving financial issues;
 - 3.3 directing the parties to attend a Child Dispute Conference (CDC) with a Family Consultant of the court for parenting matters;
 - 3.4 other directions in relation to investigations which need to be carried out such as those for specific questions to be asked of the other party, subpoena to be issued, discovery, disclosure and valuations which may need to be obtained in financial matters.

Depending on the urgency of the matter and judicial availability, the judge may hear your matter on an interim basis on the first return date.

5.7 If you are able to reach an agreement with the other party on the day of your first return date, you should prepare Terms of Settlement or Minute of Orders sought which once signed by each party and a solicitor will be handed to the judge, who may make the orders by consent. The Consent Orders may be interim or final orders and may be procedural or substantive orders. There is no point saying to the judge 'We have settled' and expect the judge to craft the orders. Apart from anything else, the judge is managing a busy list and does not have that time. Be proactive and have a signed document with the orders sought. Also, be prepared to explain the orders, particularly if they are substantive financial orders as the orders probably won't disclose the underlying logic and the judge has a duty not simply to 'make' the orders but to understand and approve them.

5.8 Further to the judge's directions, the matter will usually be adjourned for a further court event on another day. For example, the matter may be adjourned for a mention/directions hearing or an interim hearing.

Interim hearing

5.9 The purpose of an interim hearing is to put in place temporary arrangements until the matter can be heard on a final basis. Generally speaking, unless there is a specific issue which needs to be addressed, such as a spousal maintenance application, property applications are not heard on an interim basis. But it is important to ensure that any interim issues, such as valuations of the family home and other issues, are resolved before the matter is set down for final hearing.

5.10 The interim hearing is generally the first occasion in which your client's case will substantively be heard. Interim hearings are usually run 'on the papers', except in exceptional circumstances. This means that there is no evidence in chief or cross-examination. Ensure that you know the facts of the matter, such as dates of birth of children, the current parenting arrangement and are prepared for any question that may be directed at you. Both parties will get the opportunity to make oral submissions based on the material that has been filed. Your submissions need to focus on why your client's application is in the best interests of the children or alternatively, in a maintenance application, why the orders you are seeking are just and equitable in the circumstances. Although not specifically required, it assists the court to traverse the material if a case outline is prepared in advance. In the case outline, give a brief outline of the facts of the matter and specifically go through the s 60CC requirements, which are relevant to the particular case, and include any other factors which you think may be relevant to the case. Keep in mind that it is always preferable when parties can

come to their own resolution rather than having an outcome imposed by the court. Therefore, if there is scope to negotiate, do this before running the interim hearing. The judge will no doubt ask you whether you have attempted to settle the matter and may not hear the matter until some negotiations have taken place. Even if the matter does not settle by consent, you will likely narrow the issues in dispute and assist the court in the process.

5.11 Procedurally, the court will usually deliver *ex temp* reasons, unless the matter is particularly complex.

Case assessment conference

5.12 If your matter is listed in the Family Court and orders are sought in relation to financial matters, the first court event you will generally attend will be a CAC. You will not have a CAC if your matter is in the FCC.

5.13 Parties are required to exchange relevant financial documents at least 2 days before the CAC, as provided in the FLR.

5.14 The CAC is run by a registrar of the court with the parties and their lawyers, generally lasting 1–2 hours. The precise conduct of each CAC will depend on the matter and the registrar conducting the conference, but usually involves:

- each party providing a brief outline of the issues;
- the registrar asking questions, identifying issues in the matter and encouraging the parties to resolve issues;
- the parties and their lawyers negotiating settlement of the matter;
- the registrar summarising the outcome of the CAC;
- a procedural hearing, where the registrar will make orders/directions for the next steps in the matter.

5.15 In most cases, the discussions held during a CAC are confidential and details of any settlement proposals made cannot be used later in court. Exceptions to this include:

- reporting obligations of the registrar and other court staff if, for example, they suspect there is a risk of child abuse;
- any procedural hearing held at the end of the CAC will not be confidential.

5.16 Within 21 days after the CAC, each party is required to file and serve a Financial Questionnaire.

Conciliation conference

5.17 Conciliation Conferences are held in both the Family Court and FCC in matters where financial orders are sought.

5.18 Many judicial officers will not order a Conciliation Conference unless they are satisfied that the parties are largely in agreement in relation to the asset pool or that appropriate appraisals/valuations have been arranged for disputed items. Before you ask the court to order a Conciliation Conference, you should:

- work with the other party to prepare a joint balance sheet;
- be ready to answer questions from the court about items in the balance sheet, particularly items that are disputed;
- be ready to explain to the court why the conference should be ordered, even though some items are still disputed.

5.19 Once you have an order for the parties to attend a Conciliation Conference, you will need to ensure you comply with any orders/directions to prepare and file material for the conference and/or exchange disclosure. This can include exchange and filing of the balance sheet and preparation and filing of a Financial Questionnaire (Family Court only). Also consider whether you need to write to the other party to ask for any further disclosure.

5.20 The Conciliation Conference is similar to the CAC, although usually involves more detailed discussion. It will generally involve:

- each party providing an outline of the issues;
- the registrar asking questions, identifying issues and attempting to help the parties resolve issues in their matter;
- the parties and their lawyers negotiating settlement of the matter;
- the registrar summarising the outcome of the conference;
- a procedural hearing, where the registrar will make orders/directions for next steps in the matter.

5.21 In some cases, the registrar might offer their opinion as to the likely range of outcomes in the matter, if it were to progress to final hearing before a judge. They will also discuss costs with the parties.

Child dispute conference

5.22 A Child Dispute Conference, often referred to as a CDC, is a meeting between the parties and a Family Consultant as ordered by the court. The CDC is

to conduct a brief and preliminary assessment to provide the court a preliminary understanding of the family situation and the issues in dispute. There may be time for some negotiations, however this is not the primary purpose.

5.23 CDC's are reportable and are not confidential. There is no cost for a CDC. Failure to attend a CDC will result in delays in the matter and potentially additional costs and the court will be notified in instances of non-attendance.

5.24 Judges take different approaches for giving matters a date for a CDC in the Sydney Registry. Some will allocate a date in court while others refer parties to Child Dispute Services (CDS) on level 2 of the Sydney Registry to obtain a date. Usually, a confirmation appointment letter will be sent to the client, or the lawyer on record.

5.25 The Family Consultant usually conducts separate interviews with each party and an interview with both parties would only occur if there is agreement to do so.

5.26 After the CDC, the Family Consultant will write a memorandum (often referred to as the CDC Memo). The original will be placed on the court file and a hardcopy sent to the parties' lawyers (or the parties themselves if they are self-represented) and any ICL. The memorandum will outline the Family Consultant's assessment, focusing on the needs of the children, and will usually have comments under the following headings: agreements reached (if any), issues in dispute, risk factors, co-parenting relationship, the children, future directions and recommendations.

5.27 It is very important that the client understands the session is reportable. This will be unlike counselling or FDR sessions they might have attended outside the court, where there is a high degree of confidentiality. Anything the client says, or concedes, in the assessment is liable to be written down and included in the memorandum.

REMEMBER
The memorandum is admissible as evidence and cannot be shown to anyone other than the parties and the legal representatives. It cannot be shown to anyone else, even family members or partners: s 121 of the FLA.

5.28 If your client disagrees with the memorandum, remind them that the court is not bound by the advice contained and the appropriate place to challenge the memorandum is in court.

Child inclusive conference

5.29 A Child Inclusive Conference (CIC) (either pronounced as the letters C-I-C or 'kick'), is similar to a CDC except that the subject children also attend and, consequently, the conference goes for much longer. It is a preliminary and limited assessment, intended to assist the court, usually for making short-term orders and to provide guidance as to the best way for the matter to proceed. It is often the first time that the judicial officer will have independent evidence regarding the children's views and wishes though no child is expected to do so. The intention is for the court to gain an understanding of the family situation, particularly the children.

5.30 A CIC is otherwise the same as a CDC in the manner in which it is allocated and it also reportable and a memorandum will be provided to the court. Requesting a CIC rather than a CDC early on in proceedings may be appropriate where there are allegations that the children are expressing certain views or wishes or where the circumstances of the case, such as the age of the children, make it appropriate.

Child responsive program

5.31 The Child Responsive Program only occurs in the Family Court and involves a series of meetings between a Family Consultant, the parents (or other carers) and usually the child/ren. It focuses on the child/ren's needs and the aim is to help parents and the court understand what the child/ren need and how the court can best deal with the matter.

5.32 When parents cannot agree on the best arrangements for the child/ren, the case will proceed to a Less Adversarial Trial (LAT) and the same Family Consultant will assist the court with expert opinion and evidence about the child/ren and the family. See further, below, at 5.35.

5.33 There are five potential steps in the Child Responsive Program:

- **Intake and Assessment Meeting:** This step involves only the parents, and the Family Consultant meets separately with each parent to find out about the child/ren, any difficulties with parenting arrangements and any risk issues.
- **Child and Family Meeting:** If the Family Consultant believes this step would be helpful, this step usually starts with the Family Consultant meeting with the parents, and then the child/ren, both individually and together, without either parent being present. The child/ren are given an

opportunity, should they wish, to talk about their feelings and experiences of the family situation. The Family Consultant may then give feedback to the parents about the child/ren's experiences and views, and may give the parents an opportunity to discuss future arrangements for the child/ren.

- **Children and Parents Issues Assessment** (described by the court as CAPIA): This is the written preliminary assessment of the Family Consultant and provides a summary of the main issues identified in relation to the child/ren and parents. A copy of the assessment will be sent to the legal representatives (or parties themselves if self-represented).
- **The LAT:** On the first day, the Family Consultant may give evidence based on their involvement with the family and their understanding of the issues involved, including an assessment of the child/ren's needs and the most significant issues for the parents. The court may then decide whether any further reports, or any other assistance from the Family Consultant, would help in deciding what would be in the child/ren's best interests.
- **Post-orders review and referral meetings:** In some circumstances the court may order the parents and/or child/ren to meet with the Family Consultant after the trial to make sure everyone understands the orders that have been made and decide how the orders will work. Parents and child/ren may be referred to services in the community for further help.

5.34 The Family Consultant will have access to the filed documents and those documents as directed

Less adversarial trial

5.35 LATs run in the Family Court only. They are intended to be less formal than other court events and generally only occur in relation to parenting matters, although may be ordered in financial matters by consent.

5.36 Prior to the first day of a LAT, the matter will usually be listed for a compliance check before a registrar to make sure the parties have attended to everything that is required, such as filing and service of Financial and/or Parenting Questionnaires and a balance sheet.

5.37 The first day of a LAT is the first day of the final hearing of a matter and will take place before the same judge who is likely to make the final determination. If you are briefing counsel for the final hearing, your counsel should be present at the

first day. The conduct of the first day will depend on the judge and the particular matter being heard, but generally results in orders/directions in preparation for the final stage of hearing. This might include:

- obtaining a Family Report/updating Family Report;
- filing and service of trial affidavits;
- allocating hearing dates.

5.38 Some judges like parties to sit at the bar table. In a LAT, it is not uncommon for the judge to ask questions directly of the parties. In those cases, the judge may begin by having the parties ‘sworn in’. These (and other) variations may or may not occur. It is up to the judge who has a wider role under Div 12A of the FLA.

Mention/directions

5.39 The terms ‘mention’ or ‘mention hearing’, ‘directions’ and ‘directions hearing’ are used interchangeably. Mentions are an opportunity for the judicial officer case-managing your matter to assess any progress made to date, consider what needs to happen for the matter to progress to the next stage and make procedural orders/directions about the next steps required of the parties.

5.40 When you appear at a mention, you should have a good idea of where the matter is up to and what you think needs to happen (and why) for the matter to progress. If, for example, the parties have been negotiating and it looks like the matter will settle by consent, you may ask that the court relist the matter for mention at a future date to allow negotiations to continue. On the other hand, you may want the court to move the matter along and might request orders for disclosure, preparation of expert reports, or the attendance of the parties at a Conciliation Conference or CDC.

5.41 Unless the parties ask that the court make orders by consent, the judicial officer will not generally hear or determine the substantive aspects of any applications on foot during a mention. Sometimes, though, one party may use the opportunity of the matter being listed to try to press a particular application. In some cases, the judicial officer may be inclined to hear it. If you are confronted with that situation at court, consider:

- If you do not want the matter to proceed at that point, what arguments might you make against the court hearing the matter immediately?
- Do you need to ask that the court stand the matter in the list so you can, for example, obtain instructions?

5.42 When you attend a mention to receive final hearing dates, make sure you have checked the availability of all witnesses and your barrister. If there is a single expert, be the proactive one who has checked their availability (of course, only communicating with them in accordance with the Rules).

Final hearings

Defended

5.43 A final hearing is the point at which the matter will be determined on a final basis. A final hearing is a big event and it is important to ensure that you are thoroughly prepared. It is a good idea to brief counsel for final hearings. At a final hearing, you can expect there to be cross-examination of the parties, supporting witnesses and any Family Consultants or expert witnesses. At the time when the date for final hearing is set down, the court will make specific trial directions which set the timetable for filing of relevant documents. This deadline for filing will depend on whether the matter is parenting, property or both, whether there is an ICL in the matter and other case specific matters. Ensure that you comply with the trial directions, as these are often unique to the individual judge. There is generally an extensive amount of material to read by the time a matter reaches final hearing and it is difficult for the judge to read everything if documents are filed last minute. As with interim hearings, case outlines assist the judge to traverse the material. If you are briefing counsel, you can expect counsel to prepare the case outline.

5.44 Be aware that due to the sheer volume of matters before the court, other matters may also be listed for final hearing at the same time. This is because many matters settle on the steps of the court and it would be a waste of resources for this time to go unused. Therefore, your matter may be 'stood over' to another time if another matter takes priority. This will usually be a shock to clients so be prepared to explain this to them if necessary. Matters often settle in between this time and the stood over date.

5.45 Most judges will reserve the judgment and may take some time to prepare the reasons. Generally speaking, most courts try to deliver a decision within 3 months of the hearing date. However, if the judge's workload is particularly onerous, this may take longer.

5.46 If a decision is not handed down within 3–6 months of the hearing, it is open to you to contact the Chief Judge's chambers of the FCC or Chief Justice's chambers in the Family Court.

Undefended

5.47 Matters are generally set down for undefended hearing if one party has failed to make any appearance or has ‘checked out’ of the proceeding. The court will not usually list undefended matters unless the party has been given several opportunities to appear and put their case forward. It is important that if your matter is set down for undefended hearing, you can demonstrate to the court that the party is on notice about the proceedings and has been given every opportunity to appear.

5.48 An undefended hearing is similar to an interim hearing in that it will often be run on the papers. However, keep in mind that each individual judge may run an undefended hearing differently.

5.49 It is important to be thoroughly prepared for an undefended hearing, because there is no other party that the judge can turn to and ask questions about the matter. It is wise to prepare a case outline, whether you are directed to or not. The case outline should include a brief outline of the facts of the matter and the application of relevant law, submissions and your attempts of service on the other party. It is imperative that the court is satisfied that procedural fairness has been accorded to the other party. This is usually achieved through an affidavit of personal service or of service in accordance with an order previously made for substituted service of the application (and orders to be sought), the affidavits relied upon and the undefended hearing listing date. It is important that any relevant documents have been forwarded to the other party, such as the application and any documents which the court may have directed you to serve on the other party, such as a copy of any previous orders made.

5.50 If it is a property matter and a superannuation order is sought, or where third party interests will be affected by the orders sought, evidence by way of affidavit that adequate notice of the orders sought and the hearing date will also be required. Particularly, in relation to a superannuation order, the court must be satisfied that the relevant superannuation fund has had sufficient notice and consent to the orders being made.

5.51 It is a big deal for the court to make orders about a party in their absence, so the court must be satisfied that the orders you are seeking are just and equitable. Ensure that you explain in your case outline, in some depth, why the orders are just and equitable in reference to the particular facts of the matter and be prepared to make oral submissions if necessary. As stated, each judge runs their court differently so you may or may not be required to make oral submissions — be prepared!

Etiquette

5.52 In court — refer to the judge as ‘your Honour’.

5.53 In person — address as ‘judge’ and refer to them as ‘judge (surname)’ or ‘his/her Honour’.

5.54 In writing — there should be no need for you to contact the judge directly. Indeed, it is inappropriate to seek to do so. If you need to send any correspondence to chambers relating to a matter before the court, it should be addressed to the ‘Associate to judge/justice (Surname)’.

5.55 Remember, in the Family Court judicial officers are known as ‘justice’. In the FCC, judicial officers are known only as ‘judge’. For justices of the Family Court, it is also appropriate to address them in writing as ‘the Honourable Justice (Surname)’ or ‘(Surname) J’. This does not apply to judges of the FCC.

Briefing counsel

To brief or not to brief?

5.56 There are many things to consider when making the decision of whether to brief or not; however, in general, ‘Brief early and brief often’ is a good motto for the family lawyer!

5.57 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.

5.58 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.

When your work load is crazy

5.59 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.

More difficult interim matters

5.60 These include:

- jurisdictional arguments;
- leave to commence proceedings out of time;
- suspension of contact;
- exclusive occupation;
- spouse maintenance/maintenance;
- interim costs;
- interim injunctions;
- child support applications;
- enforcement proceedings;
- contravention or contempt applications.

5.61 That is not to say that you ought not to run those applications, but rather that each of these applications requires a level of preparation, ability to respond to the other party's submissions and questions from the bench together with a familiarity with the relevant legislation and case law.

5.62 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.

Final hearing

5.63 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;
- need to be familiar with the rules of evidence;
- need to have some experience leading new evidence;

- need to have some experience cross-examining lay witnesses;
- need to have some experience cross-examining expert witnesses;
- desirability of being up-to-date in your knowledge of the relevant case law;
- 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.

Who should I brief?

5.64 This is a very individual decision. You need to be able to work closely with the barrister. If the barrister/s 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.

How to be a good instructing solicitor

The brief

5.65 Send the directions for trial to the barrister.

5.66 Do not worry too much about making the brief beautiful with tabs etc. Equally don't be offended when the barrister re-orders the brief. Everyone has a different system!

5.67 Put all the court documents in the file in date order (with an index).

5.68 If there is relevant correspondence, include copies in date order with an index. Avoid the temptation to copy and send everything — it will be a rare case where every letter is relevant.

5.69 Send copies of all subpoenas issued by all parties (together with either inspection notes or photocopies).

5.70 Observations should be included in all briefs, other than in urgent cases where there may not be the time. Observations are your summary of what the case is about and a helpful guide for the barrister as to the key issues. You are the conduit of the client's instructions. What the client seeks in their application or response may not accurately reflect their current position or thinking. This is especially so, when those documents may have been filed some time previously.

A summary of a few pages can be of immense assistance when the barrister is about to delve into reading lengthy material. 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.

5.71 You should also include your client's notes on the other side's affidavits (preferably typed and in chronological order according to paragraph number) and any relevant reports. These are important as they form the basis of the client's instructions for cross-examination.

5.72 Lastly, be sure to also include any other documents that are relevant and/or may be used during cross-examination.

Conference

5.73 Let the barrister know what you, and/or the client, want to achieve at the conference.

5.74 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.

Final conference

5.75 Are there any preliminary issues, for example, affidavits filed out of time, subpoenas returnable, notices to produce etc to be called on?

5.76 Are all witnesses available, particularly experts?

What to bring to court:

- all your files;
- your costs disclosure letter;
- spare copies of all affidavits in your client's case;
- multiple copies of all documents, for example, correspondence, which are to be tendered;
- a calculator, sticky notes, paper and pens (including a pad and pen for the client);
- mobile phone.

THE DO'S AND DON'TS OF ADVOCACY	
DO	DON'T
<ul style="list-style-type: none"> • prepare; • be very organised; • be on time; • introduce yourself to the other party; • stand to address the bench; • sit when the other party is speaking; • do not interrupt with the other party is speaking; • listen to the bench. They make the decisions. That means read the signals and never speak over the top of them; • master the facts; • be succinct; • understand what orders your client is seeking and the alternatives; • prepare a chronology (even if you do not hand it up, it will help you); • prepare a list of the documents on which you intend to rely; • bring the court handbook with you to court; • read the leading case(s); • dress appropriately, usually a suit or dress/skirt with jacket; • tell your client to dress appropriately/ smart casual; 	<ul style="list-style-type: none"> • call the principal registrar 'registrar'. Instead, use 'judicial registrar'; • call the judge 'Ma'am', use 'your Honour'; • behave informally with the court staff in the presence of clients; • address the other side; always address the bench; • talk for the sake of it; • lecture the judge about the law, such as reading out commonly referred to sections; • put your handbag or brief case on the bar table; • leave the bar table unattended; • chew gum, carry coffee or wear sun glasses; • place food or drink (even a water bottle) on the bar table; • bicker or fight with the other side in front of the judge; • talk loudly at the bar table; • accuse someone of lying or abusing process unless you have a good faith foundation, which you have laid out. This is not just good practice, failure to do so might lead to finding of Unsatisfactory Conduct or Professional Misconduct;

THE DO'S AND DON'TS OF ADVOCACY	
DO	DON'T
<ul style="list-style-type: none"> • tell your client not to react to the other party; • turn your mobile phone off (and check that of your instructing barrister and client); • be silent during the oath (no writing or rustling papers); • try to estimate how long you will be with a witness; • bring copies of documents you might wish to tender; • try to anticipate any objections, such as to parts of affidavits and/or documents tendered, then be ready with your argument as to admissibility; • keep an eye on the time; • take instructions when you need to; • ask the judge to be excused after you have concluded your matter. 	<ul style="list-style-type: none"> • surprise the other side with any document or issue not in the court documents. If you are provided with a document which you want to rely upon, give the other side a copy in sufficient time for them to absorb it.

Preparing for court

Yourself

5.77 Think about the reason you are going to court on that particular day:

- Why is the matter listed — what is the court expecting it will need to deal with on the day?
- What does your client expect will happen on the day — do you need to manage their expectations or is it reasonable to press a particular issue on that occasion?
- What does the other party expect will happen on the day — have you given appropriate notice of any application you will be making?
- What do you expect will happen on the day — what is your backup plan if things take an unexpected turn?

5.78 You may wish to prepare a draft Minute of Orders before each court event, setting out the orders you would seek if the matter:

- settles, ie, your proposal for settlement;
- does not settle, ie, any specific orders you would ask the judicial officer to make about disclosure to be provided by the other party, valuations to be obtained, next listing of the matter, etc.

5.79 Make several copies of this draft minute, which can then be used as the basis for your discussions with the other party and/or handed up to the court to be made as orders once you have agreement.

5.80 Plan in advance and think about what else you might need at court, including:

- which parts of the file you might need on hand;
- whether you need extra copies of any correspondence or document you would like to tender for the court and/or the other party;
- whether you have prepared the appropriate costs disclosure for your client/the other party;
- whether you need extra copies of any cases you will seek to rely on, particularly if they are not widely known;
- whether you need to bring paper, photocopy cards, a laptop, etc, if you think orders will need to be typed up and/or printed at court;
- prepare a one page summary of details you might need to have to hand, such as the names and ages of the parties' children, the date on which documents were filed and served, etc.

5.81 Remember to dress for court as you would for a job interview, in neat office attire.

The client

5.82 For most significant court events, your client will be required to attend the court in person. Exceptions to this include simple divorce hearings, mentions or other court events where the judicial officer has specified that the attendance of the parties is not required.

5.83 If you are unsure whether your client should be at court for a particular court event, check well in advance of the court date.

5.84 If your client is unable to attend in person for any reason, you should ask the court for leave for them to attend by phone (or, occasionally, video link). This can be done by making an oral application at a prior listing of the matter or by writing to the court. Generally, the court will not grant leave unless you have provided adequate reasons for your client's inability to attend in person.

5.85 Once you have leave, make sure you have a reliable means of contacting your client on the day. Technical issues are sometimes unavoidable, but you will only cause frustration and delay to the judicial officer, the other party and all the other matters listed in the court that day if your client's phone is engaged, or they do not answer when called.

5.86 Before you go to court, make time to speak to your client about what might happen at each court event, how they should behave inside and outside of the courtroom, including where they should sit, when they should speak, how they should address the judicial officer and what they should wear to court.

5.87 If at a final hearing, encourage the client to bring a notepad and pen. It helps them make notes for you and means they are less likely to be tapping at your chair.

5.88 Also if it is a final hearing, you will need to organise the attendance of any witnesses required for cross-examination. As it is hard to gauge when a witness will be finished and the next one required, have them there earlier than necessary and suggest they bring a book. Usually, you will be able to give most witnesses 1–2 hours' notice.

5.89 If the other party is self-represented it may be a good idea to prepare your client in that they will be speaking to the judge directly and the court is bound to assist self-represented litigants etc.

Inside the courtroom

5.90 Once your matter is called, make sure you sit on the correct side of the bar table. Protocol about where to sit varies between jurisdictions. The protocol in New South Wales is generally as follows:

- only approach the bar table once your matter has been called;
- if you appear for the applicant, sit on the left hand end of the table (as you face the bench);
- if you appear for the respondent, sit on the right hand end of the table (as you face the bench);

- the ICL will sit in the middle of the table;
- if you are instructing counsel, you should sit further towards the end of the bar table (ie, counsel sits on your right hand side if your client is the applicant or on your left if the respondent);
- unless you are specifically directed to do so by court staff, you should never walk around the bar table (in the space between the bar table and the bench) or sit with your back to the judicial officer;
- your client may sit directly behind you or in the public seating at the back of the courtroom.

5.91 The only items you should put on the bar table are your files and stationary. Bags, mobile phones, water bottles etc belong on the floor. Be careful not to leave items unattended when you leave the courtroom, unless you are certain the room will be secured (eg, over lunch break).

5.92 Make sure you address the judicial officer correctly. When in court, you should refer to judicial officers as follows:

- a Family or FCC judge is 'your Honour' when addressed directly or referred to as either 'his/her Honour' as appropriate when addressed indirectly;
- registrars are addressed by their title, either 'senior registrar' or 'registrar'.

5.93 The first thing you will need to do is to announce your appearance. Keep in mind that the judicial officers see many different matters, many different practitioners and many different parties in their day. They may not remember your name or who you act for. Help them out by:

- telling the court who you act for first — this is especially helpful if they are required to complete a standard form bench sheet where spaces for applicant/respondent are already allocated;
- being as specific as you can about who you act for — rather than just saying 'applicant' or 'respondent' try to use 'applicant/respondent mother/father' for parenting matters or 'applicant/respondent wife/husband' for financial matters involving married couples;
- spelling your name out, even if you think it's easy to spell.

5.94 If, for example, your name was Ms Smith and you were appearing on behalf of the applicant, you might use the following wording:

May it please the court, I appear on behalf of the applicant wife. My name is Ms Smith, S-M-I-T-H.

5.95 When you are speaking, you should stand. If the other party is speaking, you should sit.

5.96 If you need to walk in and out of the courtroom, remember to bow to the judicial officer as you leave and re-enter. Remind your client to do the same.

5.97 Take copious notes during your appearance, particularly of any orders or directions made, including the dates by which you/your client are required to do things.

5.98 After your matter has been dealt with, you should not leave the bar table unless the judicial officer excuses you. Wait for the parties in the next matter to arrive, so that the bar table is not left empty.

Outside the courtroom

5.99 It is important to always be aware of how and what you say to other practitioners, parties and with chambers.

5.100 It is wise to try and discuss the matter with other party's lawyer or the other party themselves, before going in to court. It is acceptable, and expected, that parties will discuss the matter prior to going before the judge. In a busy list, the court will try to hear matters with consent minutes or adjournment applications first. This will usually give you time to have a chat with the other party. Otherwise, if you are not ready and your matter is called, simply go to the bar table and ask the judge for further time. They will usually be more than happy to stand the matter down to give you this opportunity.

5.101 Be careful what you say around court; remember that you are an officer of the court first and foremost. You will often come across many of the same faces in court so it is not wise to be particularly aggressive or rude to other practitioners.

5.102 Litigants may often be self-represented. This can pose particular challenges. When negotiating with self-represented litigants, keep in mind that they may not understand phrases or terms which are thrown around by judges and practitioners. For example, if they are unsure what a conciliation conference is, you may want to explain what happens at that event. However, there is a fine line between assisting them and exceeding your scope.

5.103 Communication with chambers should be limited and should always include the other party — this issues comes back to procedural fairness. Some chambers will not even consider communication if it does not indicate that the

other party has been included, and keep in mind that judges will generally not see the communications to chambers, unless in exceptional circumstances.

Back at the office

5.104 Once your court appearance is over, there will probably be a number of things for you to do. This might include:

- Preparing typescripts — this simply means providing a typed, soft copy of any agreed orders to the judicial officer's chambers so that the court can issue sealed orders. Remember to certify the typescript as a true and correct copy of the original signed document.
- Diarising future dates — this includes dates for next listing of the matter, as well as the dates by which you need to complete tasks (eg, appointment of valuers, filing and service of documents).
- Getting sealed orders from the court.
- Complying with orders.

Chapter 6

Dispute Resolution

6.1 Family Dispute Resolution (FDR) is a form of mediation that normally takes place without lawyers being present. Section 60I of the FLA provides that it is compulsory for parties to attend FDR and make a ‘genuine effort to resolve the dispute’ before being eligible to commence court proceedings. FDR is defined in s 10F of the FLA as a process in which a FDR practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other and who is independent of the parties.

6.2 Parties can pay to attend upon a private FDR practitioner or attend upon their local Family Relationships Centre for free or heavily-subsidised mediation, provided by the Australian Government.

How does it work?

6.3 Parties can either directly approach a FDR practitioner or be referred to one by their solicitors. Both parties independently attend an intake session with the FDR practitioner, before both attending the mediation.

6.4 During the mediation, the mediator assists the parties to arrive at a mutually acceptable outcome. The mediator will write down any settlement reached during the mediation. These documents may be used as parenting plans between the parties (provided that both parties sign the plan), or the parties may decide to hand these documents over to their solicitors with the aim of formalising them by way of Consent Orders.

6.5 If the mediation is unsuccessful, the FDR practitioner may issue a s 60I Certificate, which allows either party to file a court application seeking parenting orders.

Who are the practitioners?

6.6 FDR practitioners are usually experienced in dispute resolution and many qualified mediators and family lawyers are also FDR practitioners. An FDR practitioner is defined in s 10G of the FLA as:

- a person who is accredited as a family dispute resolution practitioner under the Accreditation Rules; or
- a person who is authorised to act on behalf of an organisation designated by the Minister for the purposes of this paragraph; or
- a person who is authorised to act under section 38BD, or engaged under subsection 38R(1A), as a family dispute resolution practitioner; or
- a person who is authorised to act under section 93D of the Federal Circuit Court of Australia Act 1999, or engaged under subsection 115(1A) of that Act, as a family dispute resolution practitioner; or
- a person who is authorised by a Family Court of a State to act as a family dispute resolution practitioner.

FEATURES OF FDR
<ul style="list-style-type: none">• Confidentiality of communication — see s 10H of the FLA. Accordingly, evidence of anything that was said during the FDR or in any referrals made to an FDR practitioner, is inadmissible in any court, unless the admission relates to abuse or risk of abuse of a child.• Negotiations are non-binding.• Discussions are held face-to-face and may be terminated by either party or the mediator at any time.

Round-table conferences

6.7 Round-table conferences are meetings that take place between parties to a dispute and their existing solicitors. They are a form of private mediation. Discussions that take place during round table conferences and settlement offers made are done on a 'without admissions' basis and so will not be able to used in court at a later date, except in limited circumstances (ie, in support of an application for costs following the conclusion of proceedings or where evidence subsequently led in proceedings is likely to mislead the court, unless evidence of

the offer/discussion is led to correct/qualify the evidence, pursuant to s 131(2)(g) of the Evidence Act (1995).

How do they work?

6.8 The solicitor for one of the parties will invite the other party to participate in a round-table conference. This typically occurs after the solicitors have already been communicating for a period and some financial disclosure has been provided.

6.9 Round-table conferences take place at the offices of one of the parties' legal representatives. Sometimes clients sit in separate rooms and their respective lawyers carry instructions and negotiate back and forth.

Who are the practitioners?

6.10 Generally they are the solicitors who have already been retained by the parties to the dispute.

Features of round-table conferences

6.11 They are in many ways a form of collaborative law, however, parties and their lawyers do not enter into a Participation Agreement and are not prevented from continuing to act for their client, if one of the parties commences court proceedings.

Arbitration

6.12 Arbitration is defined in s 10L of the FLA. It is a process whereby parties involved in a dispute present arguments and evidence to an arbitrator, who must then make an 'award', to resolve the dispute. Arbitration is limited to cases involving financial matters, such as property settlement, financial agreements and spousal maintenance. Parenting matters cannot be the subject of arbitration.

How does it work?

6.13 Both parties consent to attending private arbitration and then choose an arbitrator. A timetable is decided upon and the arbitration takes place at a time convenient to both parties. If they want to, parties may use lawyers to present their arguments and evidence to the arbitrator.

Who are the arbitrators?

6.14 A person meets the requirements for an arbitrator under s 10M of the FLA and reg 67B of the Family Law Regulations 1984 as follows:

- (a) the person is a legal practitioner; and
- (b) either:
 - (i) accredited as a family law specialist by a State or Territory legal profession body;
 - (ii) or the person has practised as a legal practitioner for at least 5 years and at least 25% of the work done by the person in that time was in relation to family law matters; and
- (c) the person has completed specialist arbitration training conducted by a tertiary institution or a professional association of arbitrators; and
- (d) the person's name is included in a list, kept by the Law Council of Australia or by a body nominated by the Law Council of Australia, of legal practitioners who are prepared to provide arbitration services under the Act.

6.15 Parties interested in engaging an arbitrator should refer to the Australian Institute of Family Law Arbitrators and Mediators (AIFLAM), who control and maintain the list of arbitrators qualified in Australia.

Features of arbitration

6.16 Control over decision-making is vested in a third party: The arbitrator will hear arguments and evidence (similar to how a judge would), before making a determination. This is different from other forms of mediation, whereby an independent mediator facilitates dialogue between parties and assists them to reach a decision.

6.17 Communications can be admissible in court: Unlike mediations undertaken with FDR practitioners, communications with an arbitrator are not confidential, and may be admissible in court.

6.18 Freedom to choose: Parties are able to choose their own arbitrator.

6.19 Less formal: It is much less formal than a court hearing and parties nominate the time and place at which it will take place.

6.20 Awards are registrable and enforceable: An arbitral award is registrable in court under s 13H of the FLA and is enforceable under reg 67S of the Family

Law Regulation. Courts do, however, retain the power to review and set aside registered awards under ss 13J and 13K of the FLA.

6.21 Cost: Arbitration can be a cost effective way of resolving disputes and removing the costs that are associated with court processes. Because arbitration takes place at a time chosen by the parties, it means that financial disclosure documents and any valuations that may have been performed remain current.

Collaborative law

6.22 Collaborative law uses an interest-based negotiation model where clients and their lawyers work together to resolve a dispute. It is appropriate for both financial and parenting matters.

6.23 Upon reaching an agreement, lawyers for both parties will usually prepare Terms of Settlement which are then filed in court. If approved, Consent Orders will issue from the court.

Features of collaborative law

6.24 Both parties and their lawyer sign a Participation Agreement prior to engaging in the collaborative law process. The agreement provides that if the collaborative law process fails and either party decides to commence court proceedings, both collaborative lawyers will be prevented from representing either client.

6.25 Parties and their lawyers will often need several meetings together in order to arrive at an agreement. In between meetings, lawyers keep their communication to a minimum. The effect of this is that parties are more involved in the mediation process. Minutes are taken at each meeting and items to be actioned at the next meeting are decided. If appropriate, other specialists, such as accountants, may attend a meeting to help the parties discuss a particular issue of concern.

6.26 Because meetings are held ‘four ways’, both parties will hear the legal advice the other is receiving from their collaborative lawyer.

6.27 Conversations are confidential: the contents of discussions and offers of settlement are confidential and made on a ‘without prejudice’ basis.

Community-based mediation

6.28 Before referring parties to community-based mediation services, regard must be had to their financial situation. Many community-based mediation

services are free, while others are means-tested. Wait-times are often long. If your client has the financial means to do so, it may be worth their while to pay to engage a private mediator.

6.29 It should also be noted that free mediation services are only ever provided for parenting matters. Pro-bono assistance will never be extended to property matters.

Legal aid

6.30 Legal Aid offer an FDR service. One of the parties involved must qualify for a grant of legal aid for their family law problem to be eligible for this service. Legal Aid will then pay for a lawyer to represent the eligible party at a mediation conference.

Family relationship centres

6.31 Family Relationship Centres (FRCs) are funded by the Australian Government. They provide one hour of FDR for free. Clients who earn over \$50,000 gross per annum will be charged \$30 per hour for the second and third hours of FDR, while clients earning under this amount, or who are in receipt of government benefits, will receive their second and third hours for free.

6.32 FRCs commonly assist parties to agree on parenting arrangements for children, and are also generally able to issue s 60I Certificates if mediation is unsuccessful.

Court-ordered mediation

Conciliation conferences

6.33 In property matters, after financial disclosure has occurred and parties have provided a balance sheet to the court, judicial officers will typically order the parties to attend a Conciliation Conference. For Family Court matters, they will only ever take place after a CAC has taken place. Conciliation Conferences are governed by rr 12.05 and 12.07 of the FLR.

6.34 Conciliation Conferences are relatively informal court events and are attended by the parties and their lawyers (if applicable). They are conducted by a court registrar in chambers. Parties must make a genuine effort to settle their property dispute.

6.35 At the Conciliation Conference, the registrar will first hear from the applicant's solicitor, followed by the respondent's solicitor. After hearing from both solicitors, the registrar may ask the solicitors to leave the room so that they can speak with the parties alone.

Family law settlement service

6.36 The FCC and Family Court are able to refer financial matters to the Law Society Family Law Settlement Service. These matters are usually referred in the post-conciliation conference and pre-final hearing stage. If the parties consent to participate in the service, they will enter into Consent Orders and will then be referred to the Family Law Settlement Service by the court.

6.37 This service allows parties to enter into further negotiations during a later stage of court proceedings. It is relatively informal and inexpensive in comparison to the cost of court proceedings. Lawyers may represent their clients and formalise settlement documentation if an agreement is reached.

6.38 If mediation is unsuccessful, then the matter should be re-listed with the referring court.

Chapter 7

Family Violence

Cases involving family violence

7.1 An unfortunately high number of family law matters involve family violence to some extent. Family violence encompasses domestic violence as well as any other violence occurring within a family, including in relation to children. Any practitioner in the area must be familiar with:

- the definition of family violence;
- the effect it has on parties and on children;
- how to assist clients to keep themselves and their children safe; and
- how to effectively gather and present evidence of family violence to a court.

What is family violence?

Family violence in the Family Law Act

7.2 Amendments to the FLA made in 2012 have provided an extensive definition of family violence.

7.3 Family violence is defined at s 4AB of FLA as being violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member) or causes the family member to be fearful.

7.4 The section goes on to provide specific examples which clearly extend past physically violent behaviour. Family violence includes withholding finances from a partner, repeated derogatory taunts and stopping a person from keeping connections with their family and friends. Family violence does not have to be physical to have a serious effect on parties and children.

7.5 The section further defines what is considered to be exposure to family violence.

7.6 The amendments have also prioritised the need to protect children from physical or psychological harm over the benefit to a child in maintaining a meaningful relationship between a child and a parent: s 60CC(2) of the FLA.

Types of family violence

7.7 There has been extensive scientific research about family violence. The research shows that some types of family violence are more likely to continue and increase in seriousness. Of course, while any system of classification has limits when describing human behaviour, one well-known system holds that violence can generally be defined as being within four categories:

- Coercive controlling violence is an ongoing pattern of use of threat, force, emotional abuse and other coercive means to unilaterally dominate a person and induce fear, submission and compliance in them. Its focus is on control and does not always involve physical harm.
- Violent resistance occurs when a partner uses violence as a defence in response to abuse by a partner. It is an immediate reaction to an assault and is primarily intended to protect oneself or others from injury.
- Situational-couple violence is partner violence that does not have its basis in the dynamic of power and control. Generally, situational couple violence results from situations or disputes between partners that escalates into physical violence.
- Separation-instigated violence is violence instigated by the separation where there was no history of violence in the relationship or in other contexts.

Keeping clients and children safe from family violence

Identifying clients at risk from family violence

7.8 Solicitors are a crucial point of contact for many women who have experienced family violence. It is essential that practitioners have systems in place to identify parties and children at risk and to take steps to protect them.

7.9 Serious consideration should be given to putting in place a family violence screening assessment. The Australian Government has produced a screening tool specifically for family law professionals to identify risks and to assist in developing

plans for clients to keep themselves and their children safe. More information about this free system can be found at <www.familylawdoors.com.au>.

When attending court

7.10 Clients or practitioners can call the Family Law Courts National Enquiry Line to arrange a safety plan for the client to attend court dates. This can involve things such as the client entering and leaving by a separate entrance, having a security guard remain with the client and the client having access to a safety room on the floor of the court with a locked door.

7.11 Practically, if appropriate many clients who are concerned about their safety may feel more comfortable meeting you at your office and travelling to court together.

Disclosing addresses

7.12 There is no need to put a client's address on court documents if they are concerned about disclosing their address. Many practitioners simply put the address as c/o their firm.

7.13 Be aware of subpoenaed material that will disclose your client's address. If you have concerns, seek first access to the material. If it does disclose the address, seek leave from the court to copy and redact the subpoenaed material.

Sources of assistance for clients

7.14 Clients that have been involved in domestic violence almost always need a significant amount of support to set up a new life for themselves and the children. While the practitioner will be the source of some support for the client, there are many other sources of support that may be better suited to assist with their non-legal needs.

7.15 Many clients benefit from engaging in a support service run by a not-for-profit agency. These agencies can offer a range of assistance from free counselling in relation to domestic violence to supported housing. Many agencies will assign a case worker to assist a family if they are in particular need of assistance.

7.16 Clients should be encouraged to seek counselling in relation to domestic violence. If they have limited finances they can approach their GP for a mental health care plan or make an application through Victims' Services.

7.17 The National Domestic Violence Hotline is a ‘one-stop-shop’ that acts as a starting point for any person suffering from domestic violence. They offer counselling and support, as well as a comprehensive database of refuges and agencies where the clients can be referred. This hotline is 1800-799-SAFE (7233).

7.18 Consider encouraging the client to seek an Apprehended Domestic Violence Order (ADVO) through the NSW Police. ADVOs are much easier to enforce and have much more significant penalties than Family Court Orders. They can also be obtained immediately in many circumstances. Be aware that some clients are not able to advocate their case well to the Police. If the client is from a non-English speaking background or cannot communicate well, be prepared to send them to the Police Station with a typed statement and copies of any evidence such as threatening text messages. If they don’t get a response, give the relevant police officer a phone call to discuss why they haven’t taken action. If the Police will not take action consider whether a private ADVO application is appropriate. For a more detailed discussion see further below at 7.34.

Exclusionary orders

7.19 Often there are few places for the victim of family violence to go. Without access to money or income, getting away from the matrimonial home can be difficult, particularly with a reduction in funding for women’s refuges.

7.20 Practitioners should be aware that parties can apply to the Family Court for exclusionary, or ‘sole occupation’, orders, which can restrain the other party from continuing to live at the matrimonial home until further order.

7.21 These orders can also be made as part of an ADVO. If an exclusionary order is made as part of an ADVO, then there is nothing to stop the victim changing the locks on either the matrimonial home or rented premises.

7.22 In rented premises, there are statutory provisions that allow victims of domestic violence to either continue the tenancy alone or to seek to terminate the tenancy before the end of the lease without penalty. More detail is available on the website of the Tenants Union NSW at <www.tenants.org.au>.

Gathering and presenting evidence in family violence cases

7.23 As a solicitor representing a party or child/ren at risk of family violence, you have a serious responsibility to ensure that all cogent evidence is put before the court. This part provides an overview of how to present evidence in cases involving family violence; however, there is no substitute for experience.

Tips for preparing affidavits and other court documents

7.24 Where affidavits address incidents of family violence, they need to be well drafted. These incidents and histories are often contested and drafting that is overly general will not be persuasive to the judicial officer. While the rules of evidence do not strictly apply in parenting proceedings, they should be followed to the extent possible when drafting. Other conventions as to form should be closely followed, including:

- putting important conversations in direct speech;
- avoiding generalisations, for example, 'he was always angry';
- avoiding conclusions, for example, 'he was abusive to me'. Describe the actions in detail;
- putting important events at specific dates, times and places.

7.25 Be aware that in many cases there needs to be a detailed history. In some relationships there are few serious incidents of physical violence; however, the other factors, such as financial control and denigration, can paint a serious picture of control and fear.

7.26 Ensure that denigration is specifically detailed. Rather than saying 'he abused me', instead put the exact words and phrases in.

7.27 Often, text messages, Facebook messages and emails provide evidence of controlling or denigrating communication. Ensure that these are presented in a way that is easy to read.

7.28 Consider putting on affidavits from any other witnesses who were present at incidents of violence. If possible, affidavits from relatively independent witnesses can be very powerful at an interim stage. However, avoid putting on 'cheerleader' affidavits, where the witnesses provide little more than a character reference for the party.

Notice of risk form

7.29 The previous 'Notice of Child Abuse, Family Violence or Risk of Family Violence' or 'Form 4' was required only in cases where such allegations were made. This form has recently been replaced by the 'Notice of Risk' form which must be filed in all parenting cases on filing the application.

7.30 Ensure that it is filled out properly. The form itself gives examples of the way incidents should be set out. Remember that the Notice of Risk form is an

important tool and judicial officers will often refer to this form to quickly locate the major risk issues.

Issuing subpoenas

7.31 Subpoenas are very important in the vast majority of matters involving family violence. Material produced under subpoena can serve a number of purposes, including:

- providing evidence to support incidents of violence, such as criminal histories;
- showing that a party has made consistent reports over time, such as discussing violence with General Practitioners;
- providing evidence to contradict the other party's version of events, such as inconsistent reports to police.

7.32 Subpoenaed material is useless if it has not been read. Practitioners need to take the time to review subpoenaed material well in advance of court dates. This is particularly so because subpoenas often point to further organisations to whom subpoenas should be issued. Important parts should be clearly tagged so that the judge can be taken to those parts at the appropriate time.

7.33 A list of organisations that practitioners should consider issuing a subpoena to in cases involving family violence includes:

- New South Wales Police for COPS Events and criminal histories;
- Department of Human Services, for their records;
- General Practitioners, medical centres and hospitals, for medical notes in relation to injuries sustained and complaints of violence.
- Counsellor's records, including those of the children, for complaints of violence.
- Schools and day care centres for relevant notes; also for school counsellor's records if the children have seen the school counsellor.
- Corrective Services, if the other party has been imprisoned.
- Justice Health (the medical wing of Corrective Services) if the other party has been imprisoned.
- Local or District Court files from criminal matters involving the parties, or either of them.

Apprehended violence orders and family law

7.34 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 Person in Need of Protection (**PINOP**) and the defendant.

7.35 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 about. 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 of the CDPVA).
- Defendant: The person against whom an AVO is made or is sought to be made (s 3 of the 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 (Pt 6 of the CDPVA).
- Provisional order: An interim AVO order made by an authorised officer (usually via telephone) in accordance with Pt 7 of the CDPVA.
- Order: An AVO (including a provisional order or an interim order made by the court) in force under the Act.

Categories of AVOs

7.36 There are two categories of AVOs:

- Apprehended Domestic Violence Order (ADVOs).
- ADVOs are used in circumstances where there is a domestic relationship (defined in s 5 of the CDPVA) between the PINOP and defendant.

7.37 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.

7.38 Apprehended Personal Violence Orders (APVOs)

- APVOs 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.

Types of behaviour that AVOs can restrict

7.39 AVOs 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. AVOs can also restrict or prohibit access to premises where the PINOP resides or works and prohibit or restrict possession of firearms: s 35 of the CDPVA.

7.40 A court has a wide discretion to impose restrictions or prohibitions that it may consider to be necessary or desirable: Pts 8 and 9 of the CDPVA.

7.41 A breach of an AVO is a criminal offence: s 14 of the CDPVA

Types of orders to be sought

7.42 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.

7.43 Statutory Orders (a), (b) and (c) will always be made which prohibits the defendant from assaulting, molesting, harassing, threatening or otherwise interfering, intimidating or stalking the protected person: see s 36 of the CDPVA.

7.44 Other orders that can be sought include:

- not to reside at the same premises;
- not to enter specified premises (including work or residence);
- not to go within a particular distance of the premises or the protected person;
- 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 the premises or the protected person 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.

7.45 The existence of an AVO does not prevent people from 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.

Relationship between family law parenting orders and AVOs

7.46 Optional orders can allow for exemptions of contact made pursuant to the FLA. 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.

7.47 It is imperative that both parties are aware that AVOs 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 or FCC, simply because there is an enforceable AVO in place.

7.48 An AVO does not override an order of the Family Court or FCC. 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 considered simultaneously to ensure that they do not contradict each other.

7.49 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.

7.50 You should ensure that the court is aware of the terms of an AVO when making parenting orders and, alternatively, that the court is aware of the terms of parenting orders when imposing an AVO.

How to apply for an AVO

7.51 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. There has recently been introduced provision for certain police officers to issue provisional AVOs.

7.52 Only a police officer can make a complaint for an order on a child's behalf: s 48(3) of the CDPVA.

7.53 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.

7.54 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.

7.55 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 of the CDPVA.

Commencing proceedings for an AVO

7.56 AVO proceedings can be initiated in two ways (ss 50 and 88 of the CDPVA) by issuing:

- an application notice for the defendant to appear in court on a specified day; or
- a warrant for the arrest of the defendant.

7.57 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.

Provisional orders: s 26 of the CDPVA

7.58 An application can be made by telephone by a police officer to an authorised officer in the following circumstances set out at s 26 of the 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.

7.59 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) of the CDPVA);
- ceases to have effect if a court order is made against the defendant in favour of the protected person: s 32(2) of the CDPVA;

- can be varied or revoked by an authorised officer or court: s 33 of the CDPVA;
- cannot be renewed, nor can a further provisional order be made for the same incident: s 34 of the CDPVA.

Interim orders: ss 22–24 of the CDPVA

7.60 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) of the CDPVA.

7.61 A registrar of a Local Court or of a Children’s Court may make an interim order if both parties consent: s 23(1) of the CDPVA.

7.62 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) of the CDPVA. This usually occurs if the written complaint alleges that there has been severe violence or abuse.

7.63 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* (NSW Supreme Court, 8 October 1998, unreported).

7.64 A person cannot lodge an appeal against the making of or failure to make an interim order.

7.65 An interim order operates until it is revoked, a final order is made, or the complaint is withdrawn or dismissed: s 24 of the CDPVA.

Final orders

7.66 Only a magistrate can make a final order for an AVO: s 16 of the CDPVA for ADVOs and s 19 of the CDPVA for APVOs.

7.67 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.

7.68 The test as to whether a PINOP is fearful is a subjective test.

7.69 The test as to whether a PINOP has reasonable grounds to fear the defendant is an objective test.

7.70 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.

7.71 If a PINOP is under 16 years of age 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.

Ways AVOs can be finalised

Withdrawal of complaint and the giving of undertakings

7.72 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.

7.73 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.

7.74 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.

AVOs made by consent and without admissions: s 78 of the CDPVA

7.75 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'.

7.76 The advantage of having orders made by consent is that there is no hearing, thus reducing costs, time, and the inconvenience of giving evidence.

Following a contested hearing

7.77 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.

7.78 The major disadvantages of securing AVOs 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.

Revocation and variation of AVOs

7.79 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 of the CDPVA.

7.80 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 is satisfied that it is proper to do so in all the circumstances: s 73(1) of the CDPVA

7.81 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.

7.82 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.

7.83 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.

7.84 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 of the CDPVA.

7.85 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).

Criminal liability

7.86 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.

7.87 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 of the CPDVA).

7.88 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 \$5500 fine.

Contacting complainants in ADVO proceedings

7.89 Sometimes it will be necessary to contact a complainant in an ADVO matter.

7.90 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.

7.91 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.

7.92 The *Guidelines* can be accessed at the Law Society's website <www.lawsociety.com.au> or can be obtained directly from the Law Society.

7.93 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 that 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.

Costs in AVO proceedings

7.94 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 of the CDPVA.

7.95 A court can only award costs against the PINOP if it is satisfied that the complaint was made frivolously or vexatiously: s 99(3) of the CDPVA.

7.96 Costs are not to be awarded against police officers unless the court is satisfied that the police officer made a complaint, on behalf a PINOP, knowing that complaint contained material which was false or misleading: s 99(4) of the CDPVA.

Appeals to the District Court

7.97 The provisions relating to appeals to the District Court are contained in Pt 9 Div 7 of the CDPVA.

7.98 A defendant may appeal to the District Court against an AVO made by a Local Court or Children's Court.

7.99 Appeals must be made to the District Court within 28 days of the Local Court or Children's Court decision.

7.100 Leave must be granted to tender further evidence at the District Court.

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 2 years' imprisonment.
- Be aware of the consequences of an AVO being made against a client who is the holder of a firearms' 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 AVOs against a person for the purpose of employment screening.
- Ensure that AVOs are not in conflict with any existing family law orders between the parties.

Chapter 8

After Court: Finalising a Matter

8.1 Once a matter has been finalised, whether after a defended hearing or by agreement, what comes next?

8.2 It is imperative that your client and the other party comply with the orders or clauses of various settlement documents within the time frames provided following the dating of the settlement documents.

8.3 First, it is important that you provide to your client the settlement documents and as often will be the case with complex orders, a letter setting out what the particular orders mean in plain English for your clients reference. It is important that you also retain a copy of these documents for your own file.

Property

8.4 In respect of complying with orders relating to the alteration of property interests, some issues that may arise are as follows:

8.4.1 Service of orders: Do the sealed orders need to be served on other third parties, for example, the trustee of a superannuation fund in order to implement any superannuation splitting provisions, banks or other third party creditors? Careful consideration must be given to this.

8.4.2 Sale of property: In the event a property is required to be sold pursuant to the orders, you need to consider what mechanisms for sale are included in the orders, including how a selling agent and conveyancer/solicitor are to be appointed. Often there will be provision for reimbursement of expenses paid by a party to prepare the property for sale. You should ensure that if your client

is arranging and paying for work to be undertaken to prepare the property for sale they understand and comply with the preconditions to ensure there are no issues with claiming those reimbursements on settlement.

- 8.4.3 Transfer of a property in New South Wales: If your client is the party that is retaining possession of the property then you need to prepare the transfer, attend to have it stamped exempt from stamp duty at the Office of State Revenue (if applicable) and forward it to the other side in anticipation of the settlement date. You will also need to obtain an eNos ID from the Department of Land and Property Information. If the property is encumbered, then you will need to liaise with the bank as to the discharge of the mortgage and organise a settlement date. Your client should have made enquiries with the bank as to the discharge and you will likely need to provide to the bank a copy of the orders and a copy of the transfer. You will need to enquire with the relevant authorities in each state as to the process involved outside of New South Wales.
- 8.4.4 Transfer of interests in property, for example, motor vehicles and securities such as shares, debentures, bonds: In the event property is being transferred to your client, you need to ensure that all appropriate transfer documents are provided to the other party to allow for their execution within the time provided for in the orders. If your client is receiving property by way of transfer you should request from the other party all required transfer documents for your client's execution.
- 8.4.5 Change of details: Does your client need to change names and details on insurance policies on home, contents or motor vehicles or on utility accounts such as electricity, phone, gas and internet and/or cancellation policies?
- 8.4.6 Superannuation and life insurance: Do the nominated beneficiaries on your client's superannuation and/or life insurance policies need to be changed?
- 8.4.7 Distribution and collection of goods such as furniture: Do the orders make provision for your client to collect any items? If so, your client needs to make arrangements to collect those items within the time period provided.
- 8.4.8 Bank accounts: Do any bank accounts or credit accounts need to be closed or access to the other party revoked?

Parenting

8.5 In respect of complying with orders relating to parenting matters, some issues that may arise are as follows:

- 8.5.1 Have a copy of the orders been served on any relevant third parties, such as a contact centre, supervisor or the children's school?
- 8.5.2 Do a copy of the orders need to be provided to a counsellor or therapist who is appointed in accordance with the orders?
- 8.5.3 Do the orders including a Family Law Watch List Order and, if so, has it been served on the Australian Federal Police (AFP)?
- 8.5.4 Do you need to provide your client with recommendations for parenting after separation courses or counselling providers?

Child support agreements

8.6 Ensure that the parties each have a completed document in accordance with the terms of the agreement.

8.7 Ensure that the Child Support Agreement is registered with the CSA.

Financial agreements

8.8 Ensure that both parties have a complete agreement, with one party retaining the original and another party a copy.

8.9 In the event any funds are to be paid by the parties pursuant to the agreement, regardless of the amount, ensure those funds are paid and a receipt for the same is provided.

General

8.10 Do wills, powers of attorney and/or enduring guardianships need to be updated or revoked?

8.11 Social security: If applicable does your client need to advise of a change in circumstances?

TIP

Following the finalisation of a matter and the making of orders or finalising settlement documents, you should write to your client confirming their obligations pursuant to the orders, including dates upon which certain tasks are required and also those of the other party. Diarising dates upon which tasks are required to be completed at this stage also ensures you keep on top of the matter following its resolution.

Chapter 9

Varying and Setting aside Orders

Varying financial orders

9.1 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 at a property settlement.

Consent orders

9.2 An application may be made to vary property orders with the consent of the parties.

9.3 These variations can be made by filing further consent orders but may also include an affidavit, by one or both of the parties, detailing why the orders need to be varied. For example, the orders are impractical, ie, where pursuant to the orders, one party was to discharge a mortgage and the lending institution subsequently refuses to refinance the mortgage.

9.4 However, there are a number of risks associated with seeking to vary a final property order. For example, if the other party refuses to consent to varying the orders then they may 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 except in limited circumstances.

Slip rule

9.5 Rule 17.02 of the FLR and r 16.05(2)(e) of the FCCR provide for orders to be corrected due to a typographical error, commonly referred to as using the 'slip rule'.

9.6 The slip rule can only be used in limited circumstances, for example, where there has been an error in the making of the orders and 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, that makes the orders unenforceable; or where in the body of the judgement it refers to the wife to transfer property to the husband, but in the orders it states the husband is to transfer that property to the wife. The slip rule can rectify this error. However, you cannot use the slip rule to fix an error which arose which the parties nor the court anticipated.

Section 79A

9.7 Section 79A of the FLA is a remedial section which allows the court, in certain circumstances, to overturn an order made by the court pursuant to s 79 and accordingly, this section applies only to orders made in relation to property. To re-visit property orders through a s 79A FLA application you will need to show:

- a failure to disclose assets or liabilities;
- fraud by one party; or
- duress applied by one party to the other when obtaining the orders; or
- circumstances have arisen since the orders were made that make it impracticable for the order to be carried out or impracticable for part of the order to be carried out.

9.8 These applications apply in very limited circumstances and reference to the legislation should be considered before any advice is provided to the client to ensure that your matter falls within the specific provisions of the section of the FLA.

9.9 A s 79A Application can be made to vary the property order or to set aside the whole property order and seek a different division of assets. However, it should be noted that the judge will apply the usual s 79 four-step approach when

considering the assets and liabilities and may revisit the whole property settlement despite the fact that the application was simply to vary a particular order.

9.10 Pursuant to s 79A(1) of the FLA, a person affected by an order made under s 79 of the 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 in substitution for any orders it has set aside.

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

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

Miscarriage of justice: s 79A(1)(a)

9.13 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.

9.14 An application under s 79A(1)(a) of the FLA is considered in four steps of whether:

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

9.15 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.

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

... 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.

9.17 It is clear, however, that an absence of full and frank disclosure of all financial matters to the court and other parties may be decisive. The Full Court in *In the Marriage of Morrison* (1994) 18 Fam LR 519 at 525:

The constant emphasis of the cases is that in order for there to be a just and equitable and an appropriate order altering the interests of parties in their property there must be a full and frank disclosure between them of all circumstances which may be relevant to the determination of their true financial position both presently and in the foreseeable future ... we take this opportunity once again to reinforce the view that the duty of disclosure is a basic duty. Ordinarily, a failure to comply with that duty will amount to a miscarriage of justice.

9.18 If a party to consent orders was in possession of all relevant facts, ie, 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.

Miscarriage of justice in relation to consent

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

9.20 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* (1993) 17 Fam LR 236.

9.21 A miscarriage of justice is unlikely to be found where one party is under a unilateral mistake of fact that was not induced by, or not known to, the other party at the time a consent order is made: *Bigg v Suzi* (1998) 22 Fam LR 700. However, if a mistake is known by the other party, and the other party does nothing to correct it, there may be grounds to set the order aside: *Lowe and Harrington* (1997) 21 Fam LR 583.

9.22 If a party deliberately refrains from seeking legal advice as to the consequences of an agreement which is freely entered into, even if that agreement reflects a more substantial allowance to the other party than what would normally result from an order of the court, miscarriage of justice will not apply: see *Gebert and Gebert* (1990) FLC 92-137. This will be the case even in circumstances where a party suggests they did not understand the orders or the financial evidence: *In the Marriage of Prior* (2002) 30 Fam LR 72.

What is fraud?

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

9.24 The minimum threshold to satisfactorily establish fraud for the purposes of s 79A of the FLA may be stated as ‘a conscious wrongdoing or some form of deceit’: see *Taylor and Taylor* (1979) FLC 90-674; *Marriage of Kokl* (1981) 7 Fam LR 591 at 598.

What amounts to duress?

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

9.26 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) FLC 93-164.

Suppression of evidence

9.27 In the context of subs (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.

9.28 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.

9.29 This ground has been closely tied to ‘any other circumstance’.

The giving of false evidence

9.30 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.

9.31 The evidence may be either wilfully false or demonstrably false. There is no requirement of wrongdoing or dishonesty: see *Taylor and Taylor*, above at **9.24**.

Any other circumstance

9.32 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*, above at 9.22; *Clifton and Stuart*, above at 9.18.

9.33 It must not, however, be read as if it were unlimited in scope: it is limited by the overarching principle of a 'miscarriage of justice': *Gebert and Gebert*, above 9.22.

9.34 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 that 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*, above at 9.18.
- Where a party did not have the capacity to enter into the final orders. Admissible evidence demonstrating this incapacity will need to be produced: *Stamp v Stamp* (2007) 37 Fam LR 235.
- Where a party failed to disclose their financial circumstances in accordance with the rules of the court, even where a consent order has been signed by a court registrar: *In the Marriage of Pelerman* (2000) 26 Fam LR 505.

Impracticable for the order to be carried out: s 79A(1)(b)

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

- It is not enough that circumstances arose since the order was made which make 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.

- Provided more than one circumstance exists and that the circumstance 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*, above at 9.27.
- The circumstances creating the impracticability could not have been reasonably contemplated.

9.36 Evidence is required of ‘the happening of events which cannot reasonably be foreseen’ at the date of making the order: see *In the Marriage of Franklin and McLeod* (1993) 17 Fam LR 793. However, it is important to remember that ‘it must remain at all times in the forefront of the court’s deliberations that the task before the court is to interpret and administer a section of the Act’: see in the *Marriage of Cawthorn* (1998) 23 Fam LR 86. ‘Impracticable’ is not the same as ‘impossible’: see in the *Marriage of Rohde*, above at 9.27.

Default in carrying out an obligation: s 79A(1)(c)

9.37 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.

9.38 It is unlikely that an application by the defaulting party would be successful: see *Monticone and Monticone* (1990) FLC 92-114. It is similarly unlikely that a party will obtain relief if they do not appear before the court with ‘clean hands’: *In the Marriage of Cawthorn*, above at 9.36.

9.39 By way of example, where orders were made for the sale of a property and the division of the proceeds, and then one party demolished the house thereby reducing the value, the court found that this was a breach of the order and that it was just and equitable to make orders under s 79A adjusting the distribution of the proceeds of sale: *Marriage of Gaudry* (2004) 33 Fam LR 342.

New circumstances of an exceptional nature relating to the care, welfare and development of a child: s 79A(1)(d)

9.40 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.

9.41 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.

9.42 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.

9.43 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.

9.44 A change in custody which occurred at the instigation of the children of the marriage, unexpectedly and quickly after the property orders were made, and which was not within the reasonable contemplation of the parties nor circumstances which either party consciously contributed to, was held to amount to exceptional circumstances in *In the Marriage of Sandrk* (1991) 15 Fam LR 197.

9.45 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*, above at 9.42.

9.46 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.

Varying parenting orders

9.47 Parenting orders have the same finality as property orders, which means it is important when clients are entering in final parenting orders that they understand that these arrangements will be in place until the child turns 18 years of age, *unless* the parties agree to vary the current order or there has been a significant change in circumstance.

Rice and Asplund (1979) FLC 90-725

Rice and Asplund (1979) FLC 90-725 is the leading authority on changing existing final orders. The facts of the case involved:

- orders were made granting custody of the child to the father;
- approximately 9 months later the mother made an application to vary the custody orders;
- the court, at first instance, varied the order and granted the mother custody of child.

The husband appealed.

Held:

- The court should have regard to any earlier order and the reasons for that order and the material on which that order was based.
- The court should not lightly entertain an application to reverse an earlier custody order. Prior to changing existing orders, the court would need to be satisfied, by the applicant, that there was some changed circumstance which would justify such a serious step, some new factor arising or, at any rate, some factor which was not disclosed at the previous hearing which would have been material.
- There should be circumstances, which require the court to consider afresh how the welfare of the child should be served.
- Once the court is satisfied that there is such a factor, then the issue of custody is to be determined in the ordinary way.
- While the court should give weight to an earlier decision, the judge is not bound to the earlier court's assessment of the parties or views as to the best interest of the child.

Appeal dismissed.

9.48 Examples of what may satisfy a significant change in circumstance, include:

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

9.49 Particularly where young children are involved, clients should be advised that parenting arrangements 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. Therefore, entering into final orders when a child is young may not be appropriate and a client should be advised that these orders will continue to operate until such time as there has been a significant change in circumstance and/or the parties agree to vary the orders.

9.50 Changing parenting orders is a very similar process to obtaining the initial parenting orders. Mediation or FDR between the parties is always a very good starting point, however, if the parties are at the stage where they have retained lawyers, then perhaps a new set of consent orders can be negotiated and failing that, an application to the Family Court or FCC may be an option. Of course, the pre-action procedures requirements must be met prior to filing any application. See Chapter 2 of this *Guide*.

Part II

General Principles of Family Law

Chapter 10

Parenting

Parenting orders

10.1 Part VII of FLA deals with children. Parenting orders are a set of orders made by a court regarding parenting arrangements for a child, either by consent or after a court hearing or trial. Parenting orders are defined in s 64B of the FLA and deal with where a child is to live, the time that a child spends with another person and the circumstances as to how that time is spent, parental responsibility, and 'any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child'.

10.2 A parenting order can deal with who a child will live with, the time the child will spend with each parent and other people, such as grandparents, parental responsibility, communication and any other aspect of the care, welfare and development of the child.

10.3 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: s 65C of the FLA.

Compulsory family dispute resolution

10.4 The family law system encourages parents to develop cooperative parenting solutions outside of court.

10.5 A person is not able to apply for a Pt VII parenting order without first obtaining a certificate (often referred to as a s 60I Certificate) from a registered FDR practitioner. Such a certificate indicates the parties have attempted to resolve their dispute through less adversarial means, ie, out of court. This requirement applies even if there are pre-existing orders in relation to the subject child.

10.6 There are certain exceptions to filing a certificate such as urgency, abuse, family violence or the risk of one of those: s 60I(9) of the FLA.

10.7 To apply for an exemption you need to file an Affidavit — Non-filing of Family Dispute Resolution Certificate or include the relevant information in the affidavit filed in support of the initiating application. Note that in the Family Court an affidavit is only required to be filed with an Initiating Application, which seeks interim orders as well as final orders.

10.8 The court will not accept an application without a certificate or, should the matter fall within an exception, then with an affidavit and exemption granted by a registrar after consideration of the material.

TIP
Family Relationships Advice Line on 1800 050 321 < www.familyrelationships.gov.au > See Chapter 6 of this <i>Guide</i>

During the proceedings

Independent children's lawyers

10.9 Pursuant to s 68L of the FLA the court may make an order that the child be independently represented by a lawyer known as an Independent Children's Lawyer or more commonly referred to as an ICL. The court may make this order by application of a party or on its own motion at any stage of the proceedings, either orally or as an interim order. The appointment of an ICL may be recommended by a family consultant in their memorandum(s) to the court, which the judicial officer will usually raise with the parties when the matter is next before the court or even make such appointment in chambers on its own motion.

10.10 The leading 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 ICL, and practitioners should consider whether the following factors exist in their parenting matters:

- Allegations of child abuse, be it physical, sexual or psychological.
- An apparently intractable conflict between the parents.
- The child is apparently alienated from one or both parents.

- Real issues of cultural or religious differences affecting the child.
- The sexual preference of either the parents, or another significant person, are likely to impinge upon the child's welfare.
- 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.
- Issues of significant medical, psychiatric or psychological illness or personality disorder relating to either a party, another significant person or a child.
- Neither party may be a suitable parent.
- A mature child is expressing strong views which could result in the change of a long-standing arrangement.
- One of the parties proposes that the child will be permanently removed from the jurisdiction.
- It is proposed to separate siblings.
- Neither of the parties are legally represented.
- The child's interests are not adequately represented by one of the parties, particularly in relation to medical treatment of children.

10.11 In most cases, after making such an order the court notifies the NSW Legal Aid Commission, which arranges for representation by a Legal Aid solicitor or a private practitioner, accredited through the National Independent Children's Lawyer Training scheme and appointed to a panel of private solicitors maintained by the Legal Aid Commission. Upon appointment, the ICL will contact the parties to obtain the documents filed to date and, if appropriate, make arrangements to meet with the subject child/ren.

10.12 The role of an ICL is set out at s 68LA of the FLA and includes forming an independent view of what is in the best interests 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. They are the child's voice in the proceedings, though not the child's representative acting on instructions.

10.13 The ICL is treated as a party (though they are not strictly a party) so they should be served with all filed documents and included in all correspondence and negotiations between the parties and, where relevant, the court in relation to adjournments, proposed consent orders etc. They may issue subpoenas and, indeed, often bear the burden of issuing the majority of subpoenas to gather

evidence in respect of the parties and the child/ren (further noting that they are exempt from paying subpoena filing fees and photocopying fees at the registry).

10.14 Depending on the age of the child/ren, the ICL will likely interview the child/ren unless there are good reasons not to.

10.15 An ICL can be discharged or removed upon application of a party because their appointment is no longer necessary or for some reason particular to the lawyer appointed such as conflict of interest.

10.16 Pursuant to s 117(2) of the FLA, the court has the power to make a costs order in favour or against an ICL. If appropriate and warranted, ICLS will usually make an application for costs at the conclusion of proceedings. That said, s 117(3), (4) and (5) of the FLA are of particular relevance to the issue of costs involving an ICL and should be read carefully.

10.17 Helpful cases on this specific issue include: *Separate Representative v JHE and GAW* (1993) 16 Fam LR 485; (1993) FLC 92-376 and *Telfer and Telfer* (1996) 20 Fam LR 619; (1996) FLC 92-376; *Re David (No 2) (Costs)* (1998) 23 Fam LR 139; (1998) FLC 92-809; *Lyriss and Hatziantoniou* (1998) 24 Fam LR 391; (1998) FLC 92-840; [1998] FamCA 1311; and *Kest v Olsson* [2012] FamCA 148.

Referral to dispute resolution during proceedings

10.18 Pursuant to s 13C of the FLA the court usually orders the parties to attend a dispute resolution session with either a family consultant at the court or, less commonly, through a body such as Relationships Australia, Centacare or Unifam or private mediator.

10.19 Communications with a family counsellor or FDR practitioner are confidential and not admissible in court.

10.20 There are specific procedures and requirements for compulsory FDR in family law proceedings.

See Chapters 5 and 6 of this *Guide*.

Family consultants

10.21 Family consultants are psychologists and/or social workers who specialise in child and family issues after separation. Part III of the FLA deals with family consultants and their function includes 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.

10.22 On a practical level, a family consultant will generally be assigned to a case from the start of proceedings and right throughout the matter. Everything said in the sessions with the family consultant is ‘reportable’ to the court and clients should be advised accordingly. Family consultants must notify a child welfare authority if they reasonably suspect that a child has been, or is at risk of being, abused and/or reasonably suspect a child is being, or is at risk of being, ill-treated, or a child has been, or is at risk of being, exposed or subjected to psychological harm.

10.23 As the Family Court and the FCC have different case management pathways, family consultants are involved at different stages and levels of proceedings in each court, though play a vital role in both. For example, family consultants are often present in court throughout the LAT hearings.

Parenting programs or courses

10.24 It is also common for parties to be ordered to attend a course, program or other service during the period between the first return date and final hearing or after the final hearing. Parties must attend such courses or programs as ordered as without a reasonable excuse, a party may be in breach of a parenting order and be penalized. See Chapter 15 of this *Guide*.

TIP — EXAMPLES OF PARENTING PROGRAMS

Relationships Australia: Being the Best Dad, Circle of Security, Flying Solo, Managing Anger and Managing Strong Emotions, Taking Responsibility — A Course for Men, Women — Choice and Change, Parenting After Separation — Focus on Kids

CatholicCare: Keeping Kids in Mind

Unifam: Keeping Contact — Parenting Orders Program, The Anchor (support kids through separation)

Child dispute conference

10.25 A CDC is a meeting between the parties and a family consultant as ordered by the court. The CDC is to conduct a brief and preliminary assessment to provide the court a preliminary understanding of the family situation and the issues in dispute. There may be time for some negotiations; however, this is not the primary purpose.

10.26 CDCs are reportable and are not confidential. There is no cost for a CDC. Failure to attend a CDC will result in delays in the matter and potentially additional costs and the court will be notified in instances of non-attendance.

10.27 Judges take different approaches for giving matters a date for a CDC in the Sydney Registry; some will allocate a date in court while others refer parties to Child Dispute Services (CDS) on level 2 of the Sydney Registry to obtain a date themselves. Usually, a confirmation appointment letter will be sent to the client or the lawyer on record.

10.28 The family consultant usually conducts separate interviews with each party and an interview with both parties will only occur if there is agreement to do so.

10.29 After the CDC, the family consultant will write a memorandum (often referred to as the CDC Memo). The original will be placed on the court file and a hardcopy sent to the parties lawyers (or the parties themselves if they are self-represented) and any ICL. The memorandum will outline the family consultant's assessment, focusing on the needs of the children, and will usually have comments under the following headings: agreements reached (if any), issues in dispute, risk factors, co-parenting relationship, the children, future directions and recommendations.

REMEMBER
The memorandum is admissible as evidence and cannot be shown to anyone other than the parties and the legal representatives. It cannot be shown to anyone else, even family members or partners: s 121 of the FLA.

10.30 If your client disagrees with the memorandum, remind them that the court is not bound by the advice contained therein and the appropriate place to challenge the memorandum is in court.

Child inclusive conference

10.31 A CIC (either pronounced as the letters C-I-C or 'kick'), is similar to a CDC except that the subject child/ren also attend and, consequently, the conference goes for much longer. It is a preliminary and limited assessment, intended to assist the court, usually for making short-term orders and to provide guidance as to the best way for the matter to proceed. It is often the first time that

the judicial officer will have independent evidence regarding the children's views and wishes, though no child is expected to do so. The intention is for the court to gain an understanding of the family situation, particularly the child/ren.

10.32 A CIC is otherwise the same as a CDC in the manner in which it is allocated. It is also reportable and a memorandum will be provided to the court. Requesting a CIC, rather than a CDC, early on in proceedings may be appropriate where there are allegations that the children are expressing certain views or wishes or where the circumstances of the case, such as the age of the children, make it appropriate.

Child responsive program

10.33 The Child Responsive Program, which only occurs in the Family Court, involves a series of meetings between a family consultant, the parents (or other carers) and usually the child/ren and focuses on the child/ren's needs. The aim is to help parents and the court understand what the child/ren need and how the court can best deal with the matter.

10.34 When parents cannot agree on the best arrangements for the child/ren, the case will proceed to an LAT and the same family consultant will assist the court with expert opinion and evidence about the child/ren and the family.

10.35 There are five potential steps in the Child Responsive Program:

- **Intake and Assessment Meeting:** This step involves only the parents and the family consultant meets separately with each parent to find out about the child/ren, any difficulties with parenting arrangements and any risk issues.
- **Child and Family Meeting:** If the family consultant believes this step would be helpful, this step usually starts with the family consultant meeting with the parents, and then the child/ren, both individually and together, without either parent being present. The child/ren are given an opportunity, should they wish, to talk about their feelings and experiences of the family situation. The family consultant may then give feedback to the parents about the child/ren's experiences and views, and may give the parents an opportunity to discuss future arrangements for the child/ren.
- **Children and Parents Issues Assessment:** This is the written preliminary assessment of the family consultant and provides a summary of the main issues identified in relation to the child/ren and parents. A copy of the

assessment will be sent to the legal representatives (or parties themselves if self-represented).

- The LAT: On the first day, the family consultant may give evidence based on their involvement with the family and their understanding of the issues involved, including an assessment of the child/ren's needs and the most significant issues for the parents. The court may then decide whether any further reports or any other assistance from the family consultant, would help in deciding what would be in the child/ren's best interests.
- Post-orders review and referral meetings: In some circumstances the court may order the parents and/or child/ren to meet with the family consultant after the trial, to make sure everyone understands the orders that have been made and decide how the orders will work. Parents and children may be referred to services in the community for further help.

10.36 The family consultant will have access to the filed documents and those documents as directed by the court, though will not read any subpoenaed documents unless it has been specifically ordered.

Reports

Family reports

10.37 Pursuant to s 62G of the FLA the court may direct that a Family Report be prepared by a family consultant. A Family Report provides an independent assessment of the issues in the case and forms part of the evidence before the judge. It often assists with negotiations and can help the parties reach agreement. The court may make this order pursuant to an application, or of its own motion, though it is rare for a matter to proceed to final hearing without a family report having been prepared. The family consultant may be 'internal' or be appointed under reg 7 of the Family Law Regulations 1984. 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.

10.38 Where a Family Report is ordered, the parties to the proceedings, the child/ren and sometimes other significant persons in the child/ren's lives (such as grandparents, step- or half-siblings or partners) are required to attend upon a family consultant for the purpose of preparing the report. A series of

interviews will be conducted, usually on the one day though they could be over several days, and usually involves separate interviews with the adults and the child/ren and then often the child/ren will be observed with each parent (and other significant people). The family consultant may speak to doctors, teachers and other professionals involved with the family for more information and have access to the subpoena material.

TIP
If drafting orders for a Family Report include an order for inspection and/or copy access to subpoenaed material for the report writer to avoid having to seek leave later on.

10.39 The Family Report is formally released by the court from chambers or, in extenuating circumstances, in open court, 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, they would usually bear the burden of organising the consultant to attend court to give that evidence and you should look to the trial directions made for the final hearing to see if any specific directions as to time or day of hearing were made on this issue.

10.40 The Family Report cannot be shown to anyone other than the parties and their legal representatives. Even those family members and partners who were interviewed for the report are not permitted to read the report without leave from the court. The information gathered by the family consultant is reportable and admissible in court.

10.41 If your client does not agree with the Family Report recommendations, then you will most likely need to call the family consultant at any final hearing to cross-examine them. No less than 14 days' notice is required, though as much notice as possible is best practice.

10.42 It is possible for Family Reports to be funded privately. While this is not very common in New South Wales, it is common practice in other Family Law Registries around the country.

Expert reports

10.43 An Expert report in children's matters can be commissioned by one party or, more commonly, by both parties and then will be referred to as a single Expert Report and be released by the court. It becomes evidence at a hearing once it is tendered.

10.44 There are specific rules as to expert reports: see s 69ZX of the FLA, Pt 15.5 of the FLR and Div 15.2 of the FCCR.

10.45 Expert Report obtained by one party: In the Family Court, if an Expert Report is obtained for the proceedings by only one party, then that party will need to file an Application in a Case with an affidavit to rely on that report. The affidavit should include details of whether attempts were made to agree with the other party on the appointment of a single expert witness: r 15.52(2) of the FLR. If a party is granted leave to tender a report or adduce evidence from an expert witness (other than a single expert), the permission is limited to expert witness and the field of expertise in the order: r 15.52(4) of the FLR. If each party is to obtain their own expert, then directions may be made for the experts to file a joint statement: r 15.69 of the FLR. Moreover, any Expert Report obtained in relation to children's issues must be disclosed, noting the time restrictions and ongoing obligations in this regard: rr 15.55 and 15.58 of the FLR.

10.46 See r 15.08 of the FCCR in relation to expert evidence for 2 or more parties.

10.47 Single/Court Expert Report: Often referred to as a 'Chapter 15 Expert' or 'Chapter 15 Report' (though covered under Div 15.2 of the FCCR), parties can agree to resolve a substantial issue in a case by jointly appointing a single expert to prepare a report on that issue. The expert is often a psychologist or psychiatrist in circumstances of alleged or admitted issues of mental health, disability or extreme violence that a family consultant is not qualified to report on. All instructions must be agreed upon and provided jointly by the parties and any ICL, including but is not limited to the joint letter of instruction, which should be signed by all legal representatives.

10.48 The costs of an Expert Report are usually paid for by the parties equally, though it can be agreed otherwise or as ordered by the court: r 15.48 of the FLR; r 15.11 of the FCCR. Keep in mind that if there is an ICL and one or both of the parties are funded by Legal Aid, then the Legal Aid Commission may fund some or all of the costs of the report and the expert may charge at a lesser rate often referred to as 'Legal Aid Rates'.

10.49 Also keep in mind that the expert is often required to attend any final hearing, by one or both parties and/or the ICL for which a further fee will usually be charged. It is often said that 14 days' notice should be provided to the expert to attend in person for cross-examination; however, in reality the more notice that can be provided the better, to ensure the expert can attend in person.

Determining best interests

10.50 When a court is making a parenting order, the FLA requires it to regard the best interests of the child as the 'paramount' consideration. Parents are encouraged to use this principle when making parenting plans.

The Legislative Pathway

The best interests of the child are the paramount consideration: s 60CA of the FLA

Objects and Principles: s 60B of the FLA

Both parents having a meaningful involvement, protecting the child from physical or psychological harm or exposed to abuse, neglect or family violence, children receive adequate and proper parenting to achieve their full potential, parents fulfil their duties and meet their responsibilities concerning the care, welfare and development of the child: Objects s 60B(1) of the FLA.
Except when contrary to a child's best interests, children have a right to know and cared for by both parents, children have a right to spend time with both parents and other significant people (ie, grandparents, relatives), parents jointly share duties and responsibilities concerning the child, parents should agree about future parenting, children have a right to enjoy their culture, Aboriginal and Torres Strait Islanders, give effect to Convention on the Rights of the Child: Principles s 60B(2) of the FLA.

Presumption of Equal Shared Parental Responsibility: s 61DA of the FLA.

1. Are there reasonable grounds for a finding that a parent has engaged in child abuse or family violence (as defined in ss 4 and 4AB of the FLA)?
2. Are there grounds to believe there is abuse or family violence?
3. Does the court consider that it is inappropriate to apply the presumption because the orders are interim?
4. Is the court satisfied that equal shared parental responsibility is not in the best interests of the child?

NO

Presumption of Equal Shared Parental Responsibility applies: s 61DA(1) of the FLA.

The Court must consider equal time (s 65DAA(1)). Is equal time BOTH in the child's best interests (s 65DAA(1)(a)) AND reasonably practicable (s 65DAA(1)(b) of the FLA)?

YES

Court must consider making an order for equal time.

NO

The Court MUST consider substantial and significant time (s 65DAA(2)). Is substantial and significant time BOTH in the child's best interests (s 65DAA(2)(c)) AND reasonably practicable (s 65DAA(2)(d) of the FLA)?

YES

Court must consider making order for substantial and significant time: s 65DAA(2)(e) of the FLA.

NO

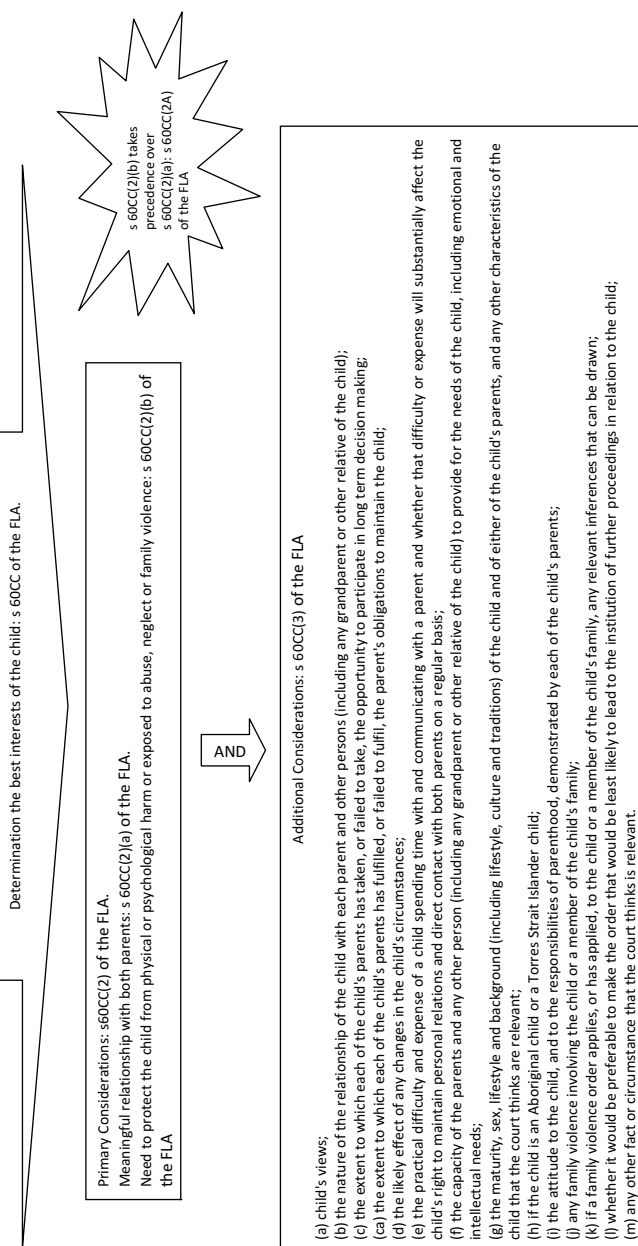
Court must have regard to best interests of the child in making such Parenting Order as it considers appropriate: ss 60B, 60CC and 60CA of the FLA.

If yes to questions 1, 2 or 3, the presumption does not apply.
If yes to question 4, the presumption is rebutted.
Court must still have regard to the best interests of the child in making parenting order(s): ss 60B, 60CC and 60CA of the FLA.

YES

"Substantial and significant time" includes both days that falls on weekends, holidays, weekdays and allows the parent to be involved in the child's daily routine and occasions and events of significant to the child and the parent: s 65DAA(3) of the FLA.

Reasonably practicable includes consideration of how far apart the parents live, parents' current and future capacity to implement the arrangements and communicate with each other; the impact of that arrangement on the child and any other relevant matter: s 65DAA(5) of the FLA.



Parental responsibility

10.51 Parental responsibility, as defined in s 61B of the FLA, does not set out what is covered by those words and reference should be made to the definition of 'major long term issues' in s 4 of the FLA, which 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.

10.52 Each parent has, subject to any court order to the contrary, parental responsibility for a child until that child turns 18 years of age: s 61C of the FLA.

Presumption of equal shared responsibility

10.53 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: s 61DA of the FLA. Equal shared parental responsibility can only be conferred by court order.

10.54 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: s 4 of the FLA. It means that each parent equally has the duty, power, responsibility and authority as parents of a child and they need to consult the other parent about any major long-term issue, make a genuine effort to come to a joint decision and make major long-term decisions about the child together: s 65DAC of the FLA.

10.55 Parents are not required to consult on matters that are not long-term issues, such as what a child eats or wears and general day-to-day care of the child when in their care: s 65DAE of the FLA.

10.56 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: s 61DA(2) of the FLA.

10.57 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: s 61DA(3) of the FLA.

10.58 The presumption can be rebutted if the court is satisfied that such an order would not be in the child's best interests: s 61DA(4) of the FLA.

10.59 The court may also make specific orders regarding the allocation of parental responsibility however be wary of the terms used in these circumstances. See in *Pavli & Beffa* (2013) 48 Fam LR 677.

10.60 Practitioners must keep in mind that the impact of an order for equal shared parental responsibility requires the court to then consider orders for equal time with both parents or significant and substantial time with the parent the child does not live with: s 65DAA of the FLA.

Sole parental responsibility

10.61 A party may apply for an order to be made for them to have sole parental responsibility. Such an order will only be made where the presumption is rebutted/ does not apply and the court considers such an order to be in the best interests of the child. For example, where the parental relationship is one of high conflict and communication between the parents is so poor that jointly deciding on parenting issues is unworkable.

Applying the law in practice

10.62 The best guidance can be obtained from the Full Court's decision in *Goode and Goode* (2006) FamCA 1346. The decision in *Goode* dealt with an interim parenting application; however, [10] and [82] provide guidance for practitioners in relation to the application of the amendments to the FLA generally:

[10] 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 and the framework in which best interests are to be determined are the factors in s 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.

...

[82] 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.

Parenting plans

10.63 A Parenting Plan is a written agreement that sets out parenting arrangements for a child. The plan is discussed and agreed jointly between parents without a need to go to court and is intended to provide a simple and less formal process for documenting agreements about parenting between parents.

10.64 To be recognised as a Parenting Plan under the FLA, the document must be made, signed and dated by both parents of the child, though others (such as grandparents or step-parents) can be included: ss 63C, 64D, 65DA and 70NBB of the FLA.

10.65 A Parenting Plan is not a legally enforceable agreement and is different from a Parenting Order. A court can be asked to make an order in terms of a parenting plan.

10.66 If parents end up in court, the court must consider the terms of the most recent Parenting Plan when making Parenting Orders. The court will also consider the extent to which the parents have complied with their obligations in relation to the child, which may include the terms of the Parenting Plan.

10.67 If Parenting Orders are made after 1 July 2006, the parents can agree to change those arrangements by way of a Parenting Plan (unless the court order says otherwise). This would allow parents to make changes to orders without having to go back to court. Note though that a parent may not be able to enforce those parts of the 'old' Parenting Order that are inconsistent with the terms of the new Parenting Plan. Nor can they enforce the terms of the Parenting Plan which vary the court order.

10.68 Special rules apply when child support is included in Parenting Plans so that if the CSA has a copy of the plan they can base the child support assessment on the care levels set out in the Parenting Plan. If the Parenting Plan specifies the amount of child support payments, the Agency cannot enforce that unless there is also a valid child support agreement in place and the Agency is asked to accept it. See Chapter 12 of this *Guide*.

10.69 Lawyers, FDR practitioners, family consultants and counsellors are obliged to advise parents that they can consider a Parenting Plan and there is compulsory information that must be provided to parents.

10.70 Unlike child agreements that existed under the pre-Family Law Reform Act period, and Parenting Plans registered prior to 2004, Parenting Plans can no longer be registered with the court. Consequently, they are not enforceable by a court, like a court order is. That said, it is important to note that pursuant s 65DAB of the FLA, where the court is considering making a Parenting Order in relation to a child, then it is to have regard to the terms of the most recent plan if doing so would be in the interests of the child.

Overview of the role of social science

10.71 Evidence-based social science plays a crucial role in parenting matters. In any hearing the court will receive evidence from a qualified expert, either a family consultant who will usually have a background in social work and/or psychology

or a psychologist/psychiatrist experienced in providing reports in parenting proceedings. They provide their evidence in the CDC/CIC memo, the Family Report and/or the Chapter 15 Expert Report.

10.72 In particular matters the expert may give opinions about issues such as a party's mental health. In all matters, the expert will give opinions about the appropriateness of the various proposals for the child/ren. These opinions are based on social science research.

10.73 Good family law practitioners will be well versed in the relevant social science research. There are extensive publications available through the website of the Australian Institute of Family Studies, the Government's research body into families. There are also a number of papers available by judges and lawyers that provide an overview of the important points.

10.74 A proper understanding of the relevant social science will ensure that practitioners are advising their clients to enter into agreements that are appropriate for the child/ren involved. They will also be able to give their clients a more realistic assessment of the likely outcomes at court. It will also avoid the embarrassing situation where Consent Orders are not approved by the court because the court does not believe those orders will operate in the child's best interests.

10.75 As a minimum, practitioners should be aware of 'attachment theory' and the follow through this has for the appropriateness of various proposals depending on a child/ren's age and development. Practitioners also need to be aware of the effect on child/ren of being exposed to family violence.

Attachment theory

10.76 Attachment Theory is a complex area of social science, which is why expert evidence is required. As a brief overview, studies show that:

- Children have one person who is their primary attachment figure. They turn to this person for comfort.
- Children usually have other attachment figures who they can turn to for comfort. This is usually the other parent but can include grandparents, step-parents, nannies and other important figures in the child's life.
- Children's attachment relationships are incredibly important to their development. Damaged attachment relationships have negative consequences for children as they get older.

- Attachment relationships are particularly important as they develop from birth until school age. Most experts will be cautious about recommending that very young children spend significant time away from their primary attachment figure during the newborn to school age stage.

10.77 When considering whether proposed arrangements are appropriate the court and practitioners will consider questions such as:

- Who is the primary attachment figure?
- How does the child cope when separated from that person?
- Are the two parents supportive of each other's parenting?

10.78 A good understanding of the social science will allow practitioners to ensure that the relevant evidence is presented to the court.

Effect of family violence on children

10.79 The direct effects of family violence on children are obvious. Less obvious, but well supported by research, is the psychological effect on children of being exposed to family violence. There is significant social science literature to suggest that exposure to family violence causes delayed development, behavioural problems and may result in them copying the behaviour they have witnessed.

10.80 This may show up in children as regressive symptoms such as anxiety, bedwetting and delayed speech development. Practitioners need to be aware of these issues in order to present the relevant evidence to the court and to ensure that they give advice that is appropriate for children that have been exposed to family violence.

Solicitors' duties in parenting matters

10.81 In addition to the usual duties of a solicitor, practitioners in parenting matters are under a number of further obligations.

10.82 Most importantly, s 60CA of the FLA sets out the child's best interests as the paramount consideration and this overrides a practitioner's duty to their client. Practitioners need to actively encourage their clients to make decisions that are in the best interests of the child/ren, not blindly accept instructions.

10.83 The FLA sets out further specific obligations including:

- An obligation to advise parties about the child's best interests being the paramount consideration and encouraging them to act in their best

interests by considering the primary considerations set out in s 60CC: s 60D of the FLA.

- An obligation to advise clients of the availability of a Parenting Plan and to advise of certain things that need to be considered when preparing a parenting plan: s 63DA of the FLA.

10.84 Obligations in relation to disclosure apply just as stringently in parenting cases as they do in property matters. Parties must disclose any reports prepared by an expert and will likely be in breach of their obligations if they fail to disclose issues such as serious criminal convictions. Solicitors must not continue to act for a party who has breached their disclosure obligations.

Settling parenting matters

Consent orders

10.85 Consent Orders are orders agreed upon between the parties and have the same legal effect as if they had been made by a judicial officer after a court hearing. The courts have different approaches to considering and making Consent Orders.

In the Family Court

10.86 The Application for Consent Orders form can only be filed in the Family Court. Such an application needs to be filed with an Annexure to Draft Consent Parenting Orders, as well as the signed Consent Orders (with enough copies, certified as true copies of the original consent order, for all parties as well as one for the court). This application will attract a filing fee. See also Pt 10.4 of the FLR which may require you to meet additional requirements.

10.87 The Application for Consent Orders will be referred to a registrar in chambers for consideration

In the Federal Circuit Court

10.88 If a matter has already been commenced in the FCC, parties can file consent orders with the docket judge at any time throughout the proceedings. The signed consent orders (along with a cover letter and Draft Consent Parenting Orders annexure) can be sent to judge's associate by mail (care of the Registry) or by email. Due to the volume of matters in a judge's docket at any time, it is

best practice to advise the docket judge's associate at the first possible opportunity if matters settle and will not require judicial time so the resources can be best utilised.

10.89 Another option is to provide to the docket judge with the Consent Orders when the matter is next in court and make submissions as to why the orders should be made. If the orders are unusual in some way, this latter approach may be better so as to explain to the judge why the agreed orders are in the best interests of the child/ren and should be made.

10.90 Keep in mind that the overriding objects and principles of the FLA remain and a judicial officer can only approve Consent Orders if satisfied that the orders are in the best interests of the child/ren.

10.91 See further above at 10.63.

Common applications made in parenting matters

10.92 In making an application for interim or final Parenting Orders, practitioners should discuss, with their clients, other matters which may require an order and in support of which there is evidence available, or matters which the court may make an order in relation to. Examples include:

- live with, time spent with the other parent and facilitation of these arrangements (ie, where and how will changeover occur);
- weekend and school holiday time (commencement, conclusion, when such time should recommence following school holiday time, how school holiday periods are to be defined);
- time spent on other special days and holidays such as Mother's Day, Father's Day, birthdays, religious holidays etc;
- communication orders:
 - with a parent when not in their care (ie, 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/ren's accustomed routine; provision for Skype, Facetime and other internet communication); and/or
 - between parents about the child/ren's schooling; health;
 - directly with a school, medical practitioner etc;

- ancillary orders to facilitate communication such as keeping each other advised of phone numbers, emails, residential addresses etc;
- restraints on bringing the child/ren into the presence of a particular person;
- restraints on denigrating the other parent in the presence of the child/ren;
- restraints on discussing the proceedings in front of the child/ren;
- restraints on consuming drugs or alcohol prior to or during time spent with the child/ren;
- restraints on relocating a specified distance from current address;
- school;
- overseas travel (or restraints on such) as well as passports.

10.93 A brief discussion on some of these common applications are discussed below; however, to go into each of these aspects is beyond the scope of this *Guide*. Practitioners should refer to case law in relation to specific issues and speak to colleagues or review previous files and judgments for precedent orders which will assist.

‘Live with’ and ‘spend time with’ orders

10.94 The majority of parenting matters will involve an application for a ‘live with’ and ‘spend time with’ order.

10.95 There is no definition in the FLA for these terms and the ordinary meaning should be given. There is, not surprisingly, a wealth of case law on these applications.

10.96 The court must consider s 60CC of the FLA before making an order in relation to which parent a child/ren should live with.

10.97 If a Parenting Order is to provide for the child/ren's parents to have equal shared parental responsibility, the court is then required under s 65DAA of the FLA to consider whether the relevant child/ren's best interests would be served by making an order that the child/ren spend equal time with or, if not, substantial and significant time with, each parent. Either outcome requires the court to consider whether the child/ren spending equal time, or substantial and significant time in lieu, with each parent would also be ‘reasonably practicable’ given the circumstances. See flowchart at 10.50 of this *Guide*.

10.98 Unless an order is made otherwise, the parent with whom a child/ren is in the care of has the parental responsibility to make decisions necessary

for the day-to-day care of the child/ren. An order is often drafted and made to this effect.

10.99 The case of *MRR and GR* (2010) 240 CLR 461; 42 Fam LR 531; [2010] HCA 4 is the leading case in relation to the fact that when the court makes an order for equal time with each parent, the court must consider whether such an order is in the best interest of the child AND if such an order is reasonably practicable in the circumstances. Only then can an order for equal time be properly made.

10.100 Section 65DAA(5) of the FLA provides the matters the court must look to in determining 'reasonable practicability'.

10.101 Should the court find that an order for equal time is not appropriate, then the court must look at an order for the child/ren to spend substantial and significant time, which is defined in s 65DAA(3) of the FLA to include regular week days, weekends, holidays and special family events, with each parent: see also *Vance v Vance* [2010] FamCAFC 250.

10.102 The court can make any orders that it believes are in the best interests of the child in relation to a child/ren spending time with a particular person, which could include that such time is supervised either at a contact centre or by a third party.

10.103 The court can also make an order for a child/ren to live or spend time with any person who has a sufficient interest in a child/ren's welfare, ie, grandparents: ss 65C and 65G of the FLA; and *Valentine and Lacerrra* [2013] FamCAFC 53.

Education

10.104 Education, and thus which school a child attends, is defined as a 'major long-term issue' pursuant to s 4 of the FLA, which commonly arises in family law practice. The main instigators for education-related disputes relate to the costs associated with private schooling, a school's religious affiliations (or not) and/or the location of the school in relation to the parents' residences.

10.105 If possible, disputes as to educational matters should be commenced in the appropriate court well in advance of the school year so that appropriate directions, preparations and interim (or final) hearing dates can be allocated.

Relocation

10.106 Relocation matters are parenting matters where the proposal of one party involves an application to move with child/ren, such that the child/ren's time with the other parent is impacted, be it intrastate, interstate or internationally. The FLA does not expressly address the issue of relocation and such cases are usually quite vexed and may be difficult for 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.

10.107 Generally, when considering a relocation matter, the court should treat the matter as an ordinary parenting matter and follow the same legislative steps. The court has the power to order a parent to change a child/ren's place of residence to a certain suburb or state but it cannot compel a parent to move, except in very limited circumstances.

10.108 A full review of this complex area is outside the scope of this *Guide* and practitioners should refer to Full Court authority for guidance.

10.109 See *Morgan v Miles* (2007) 38 Fam LR 275; [2007] FamCA 1230 at [79]–[81]; *MRR v GR* (2010) 240 CLR 461; [2010] HCA 4; *C and S* [1998] FamCA 66; *Taylor and Barker* (2007) 37 Fam LR 461; *Hepburn and Noble* [2010] FamCAFC 111; *Sampson and Hartnett (No 10)* (2007) 215 FLR 155; 38 FLR 315.

Injunctions and restraints

10.110 The court has the power to grant injunctive relief in matters relevant to child/ren, but can include adults in the situation associated with the child/ren: s 68B of the FLA.

10.111 The best interests of the child is an important but not the paramount consideration in the exercise of these injunctive powers unless the order or injunction is a Parenting Order.

Paternity issues

Presumption

10.112 A child conceived or born during a marriage is presumed to be the husband's child. The FLA 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: Div12 Subdiv D of the FLA.

10.113 The FLA also 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 FLA.

Declaration

10.114 If the court has decided an issue of parentage, it may make a declaration that is conclusive evidence of parentage.

Evidence

10.115 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.

10.116 The court may order a 'parentage testing procedure' to be carried out if an issue about parentage arises: s 69W of the FLA. The laboratory which carries out the testing must be accredited by the National Association of Testing Authorities (NATA) and they will produce a report showing the results of the tests in accordance with Sch 1 Form 5 of the Family Law Regulations 1984 (Cth).

10.117 A Parentage Testing Order may be made in relation to the child/ren, the mother and any other person about whom parentage testing information might assist in determining the parentage of the child/ren: s 69W(3) of the FLA. Consequential orders may be made, for example, in relation to costs. Parentage testing can only be carried out if a parent or guardian of a child/ren under 18 years of age consents.

10.118 An application can be made by a party or an ICL and the court may make an order of its own motion. Such applications should be made to the FCC by filing an Initiating Application seeking interim orders as to testing and the like with an affidavit in support and final orders seeking a declaration as to parentage.

10.119 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': s 69Y(3) of the FLA.

10.120 The standard of proof in parentage proceedings is the civil standard, ie, 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/ren.

Change of name

10.121 The naming of a child is considered to be a matter of parental responsibility and thus one which both parents have responsibility for, subject to order of the court. Consequently, parental consent is needed to change the name of a child under 18 years of age.

10.122 Where both parents consent to changing the child's name, they can apply to the NSW Registry of Births, Deaths and Marriages (BDM) for registration of a change of name by completing the Application for Change of Name of the Child, available at <www.bdm.nsw.gov.au>.

10.123 The BDM requires the consent of both parents listed on the birth certificate to sign an application for change of name or a specific court order permitting a party to change a child's name.

10.124 Section 28(3) of the Births, Deaths and Marriages Act 1995 (NSW) allows an application for registration of a child's name to be made by one parent, if the applicant is the sole parent on the child's birth certificate or there is no other surviving parent of the child, or a court approves the proposed change of name.

10.125 Where one parent refuses consent, or the parent's whereabouts is unknown, the other parent can apply to a court having jurisdiction under the FLA to approve the change of name.

10.126 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 judge 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;
- the child's wishes; and
- the degree of maturity of the child.

10.127 Normal service rules apply; however, 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.

10.128 If the other parent refuses to complete the appropriate documents after the court order to change the name of the child has been made, the parent can seek an order that a registrar be authorised to sign the necessary paperwork, pursuant to s 106A of the FLA. The applicant can avoid having to bring enforcement proceedings by seeking the s 106A order in the first instance.

10.129 If a parent uses a child's name other than that as registered (such as when enrolling at school) the other parent can seek an injunction restraining a parent from enrolling or permitting the child to be known by any other name as that on the birth certificate: see *In the Marriage of Parkes* (1980) 8 Fam LR 375.

10.130 Other helpful cases on this issue: *D v B (otherwise D) (child: surname)* [1979] Fam 38; *In the Marriage of Chapman and Palmer* (1978) 34 FLR 405; 4 Fam LR 462; *In the Marriage of Beach and Stemmler* (1979) FLC 90-692.

Medical procedures

10.131 The Family Court has the jurisdiction to approve or refuse permission for special medical procedures under s 67ZC of the FLA, which deals with the power to make orders for the welfare of children. Also see Div 4.2.3 of the FLR, which deals with medical procedure applications.

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

10.133 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 of the FLR sets out the issues that the evidence must address, including evidence from medical, psychological or other relevant expert witnesses.

10.134 The FLR provide for a medical procedure application to be listed before a judge of the Family Court as soon as possible after the date of filing. It is common for an ICL to be appointed in medical procedure applications.

10.135 The most common application has historically been 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. Applications for orders such as these are becoming increasingly more frequent.

10.136 The High Court has endorsed and followed the decision of the House of Lords in *Gillick v West Norfolk 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. 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. 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'.

10.137 The case of *P and 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.

Passports

10.138 To obtain an Australian passport for a child under 18 years, the written consent of all persons with a caring responsibility for the child (ie, a parent, 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 Australian passport. Information for when both parties consent is available on the website of the Australian Passport Office.

Refusal by one parent

10.139 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.

10.140 If the whereabouts of the non-consenting parent is unknown, the applicant should also seek an order dispensing with service.

10.141 The court's power to permit a child's passport to issue, under the FLA, is either as an injunction or a Parenting Order (or an order about the welfare of a child).

10.142 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
- when only the mother is named on the birth certificate.

10.143 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 Office website).

10.144 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 Office website) should be completed.

Surrender of passport

10.145 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 (eg, an order restraining the removal of a child from the country, or seeking orders for approval to take the child overseas).

10.146 When there are no other orders sought in the application it will be listed for hearing before a judge.

International travel

10.147 A party wishing to travel overseas with a child/ren must make a reasonable attempt to resolve a dispute and comply with pre-action proceedings before commencing proceedings: r 1.05 of the FLR.

10.148 Sections 65Y and 65Z of the FLA provide that if there is a parenting order in place or if there are proceedings pending for the making of a parenting order, the child/ren must not be taken outside Australia without the written consent, in the form of a statutory declaration, of the non-travelling party.

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

10.150 Prior to the parent taking the child/ren away on holidays and where there is a risk, no matter how small, that the child/ren may not be returned, it is

recommended that, as a minimum, 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/ren travel only on Australian passports; and
- provision of proper security for the return of the child/ren 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.

10.151 Alternatively, court orders can be made proposing that prior to the parent taking the child/ren on an overseas trip, written notice is provided to the other parent detailing the:

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

10.152 However, even if court orders are in place, parties need to be aware of the limited ability to seek the return of child/ren from other countries. See Chapter 16 of this *Guide*.

10.153 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/ren will not be returned, a court order can be sought to restrain the parent from leaving Australia with the child/ren.

The factors that will be considered by the court

10.154 Whether to let a child/ren travel overseas with one parent against the objection of the other parent is a discretionary parenting decision where the court needs to find that it is in the best interests of the child to do so.

10.155 The court considers a number of factors as set out in the Full Court authorities of *Line and Line* [1997] FLC 29-729, those being:

- the length of the proposed stay out of the jurisdiction;
- the bona fides of the application;

- the effect on the child of any deprivation of access;
- any threats to the welfare of the child by the circumstances of the proposed environment;
- the degree of satisfaction of the court that a promise of a return to the jurisdiction would be honoured;
- the degree of risk that the departing parent will choose not to return;
- whether the country to which the parent intends to travel with the child/ren is or is not a signatory to the Hague Convention on Child Abduction;
- the financial circumstances of both parties and the relative hardship imposed on the departing parent by fixing security at a particular level as compared with the hardship, as a result of risk of non-return, which the non-departing parent would suffer if security were fixed at a lower level.

10.156 In relation to whether the destination country is a Hague Convention country, the Full Court noted in that case that although the destination country may be a Hague Convention country, once out of Australia there is little to stop the departing parent deviating to a non-convention country.

What to do if a child is about be removed from the country

The airport watch list

10.157 The Airport Watch List (also known as the Family Law Watch List) is a list of persons maintained by the AFP and enforced at all points of exit and entry to Australia, largely airports and passenger cruise terminals. 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.

10.158 To place a child on the Watch List, a court order or a court application for an orders specifically directing the AFP to place the child/ren's name on the list needs to be obtained/filed. An order placing the child/ren on the Family Law Watch List must be specific and not implied. The AFP prefers that orders include a defined period of 2–3 years for any restrictions on a child's travel.

10.159 The AFP Family Law Team regularly publishes preferred wording for the order (as family law can and does frequently change). Accordingly, you should check the AFP website for correct wording.

10.160 Parties do not need to wait for the orders to be made by the court. The child/ren's name may be temporarily placed on the Watch List once an application, or a response, which seeks orders to place a child/ren's name on the Watch List has

been filed with a court that exercises the family law jurisdiction under the FLA. Practitioners must complete the forms and follow the instructions at <www.afp.gov.au/policing/family-law/family-law-kit>.

10.161 Once an order is made, the court will usually send that order to the AFP on the same day that the order is made. However, if there are concerns about the imminent removal of a child/ren, you should phone the AFP and provide a copy of your order by email or fax, marked as urgent to the contact available on the AFP website.

10.162 Be aware that the relevant officers at the AFP work business hours and it may take up to a business day to process an application or court order. If the matter is urgent it should be followed up immediately by a call to the AFP.

10.163 To confirm whether a child is on the Watch List you can complete a 'Family Law Watch List Enquiry Form' available on the AFP website. Allow up to 10 days to receive a response from the AFP.

Removal from the watch list

10.164 To remove the child from the Watch List an order must be obtained directing the removal of the child/ren's name from the Watch List and a discharge or vacation of the original court order placing the child on the Watch List. Once that order has been obtained, an original sealed order should be provided to the AFP. A child's name will automatically be removed from the Watch List when he or she turns 18 years of age or at the end of the period specified on the order.

Child alert request

10.165 If there are concerns that one party may apply for a passport for a child without informing the other party, a Child Alert Request can be completed. This form effectively puts the Australian Passport Office on notice that there are circumstances such that they should pay particular attention to any passport application made, and they will likely contact the person who lodged the Child Alert Request, if any passport application is made.

10.166 The fact that a Child Alert Request is made does not have to be disclosed to the other party. It does not require a court order.

10.167 Keep in mind that a Child Alert Request is of no assistance if the child/ren have already been issued valid passports or the other parent may be able to obtain

a passport for the child/ren from another country and travel with the child/ren on that passport. If this may be a concern Airport Watch List orders should be sought.

Interim parenting proceedings

10.168 This section describes the usual progress of interim parenting proceedings. The procedure for matters that are particularly urgent or involve issues of risk are discussed below.

Documents to be filed

10.169 Family Court of Australia

- If parenting proceedings have not been already started, an Initiating Application must be filed that seeks final and interim orders. If proceedings are already on foot about parenting, an Application in a Case needs to be filed. An affidavit must be filed when seeking interim orders and with every Application in a Case. Each party is limited to relying upon one affidavit from themselves and from each witness in interim proceedings. Parties may file affidavits by witnesses provided that the evidence is relevant and cannot be given by a party: r 5.09 of the FLR.
- Note that subpoenas can be filed in relation to interim proceedings without leave: r 15.21 FLR.

10.170 Federal Circuit Court of Australia

- If parenting proceedings have not been already started, an Initiating Application must be filed that seeks final and interim orders. If proceedings are already on foot about parenting, an Application in a Case needs to be filed. An affidavit must be filed whether seeking final or interim orders.
- The Sydney, Canberra and Newcastle Registries have produced a Notice to Litigants that sets out guidelines for documents filed in interim hearings. Each party is to rely on one affidavit of each witness, such affidavit to be no longer than 10 pages of text.
- It is good practice to limit the length of affidavits to what is relevant to the facts in issue. Lengthy affidavits are likely to be given less attention and the important points may be missed.
- Up to five subpoenas can be filed in FCC proceedings by each party without leave.

Getting a date for an interim hearing

10.171 Family Court of Australia

- 10.171.1 The 2009 Amendments to the FLR set out a case management pathway that is to be followed in the majority of matters. Upon filing in the registry, interim applications will be generally listed for an initial procedural hearing before a registrar, along with any final applications.
- 10.171.2 The usual practice is for the parties to attend the Child Responsive Program. This involves the parties and children meeting with a family consultant at the court, following which a report will be produced. If by the next mention date the parties have not agreed on interim arrangements the matter will be listed for an interim hearing.
- 10.171.3 If the matter has been listed at short notice, on the first return date it will likely be listed in a duty list before a registrar for possible transfer to the judge running the duty list on that day.

10.172 Federal Circuit Court

- 10.172.1 On filing the Initiating Application the matter will be given a listing date and allocated to a judge who will then be the docket judge for that matter. On the first return date the judge will make any directions for the filing of the response or any other appropriate directions to progress the matter. The parties may be allocated a CDC date. If appropriate, a CIC may be ordered. Consideration may also be given to the appointment of an ICL. This will involve the parties meeting with a family consultant at the court, following which a short memorandum will be posted out to the parties or their solicitors. If appropriate, a CIC will be ordered, which will include the children. Other directions, such as the filing of a Response or the appointment of an ICL will be considered. The judge will often have read the material and is likely to raise issues included in the material.
- 10.172.2 If the parties have not agreed on an interim arrangement the judge may then set the matter down for an interim hearing.

TIP
The above practice varies between registries and judges and it is always helpful to seek advice from a practitioner experienced in appearing before the particular judge.

10.173 *In both courts*

- Even if the matter is only listed for mention, practitioners need to know the material and should be ready to answer questions about the affidavits and the orders the client is seeking. Some judges are flexible about whether a CDC needs to be conducted before the matter can be listed for an interim hearing.
- Every court event, even if only listed for directions, is an opportunity to have meaningful discussions and to move the matter forward productively. Parties are expected to attend unless they have good reason and/or seek to be formally excused.
- Pay attention to the recommendations made in the report or memo produced by the family consultant. The court will want to know whether your client has taken up any recommendations in relation to parenting courses or similar.

TIP

It is helpful to take along a draft minute of order — it will rarely be agreed but it is easier to amend a typed minute than to draft orders from scratch.

TIP

The resources of both courts are currently very stretched. It is a good idea to manage your client's expectations about when the matter will first be listed and that a date for an interim hearing may not be set for a number of months.

The interim hearing

10.174 Interim hearings are run on the papers. Evidence in chief and cross-examination are only allowed in exceptional circumstances. This means that unless there is persuasive independent evidence, the court is not able to resolve disputes of fact. In parenting matters this will often mean that the court takes a cautious approach.

10.175 In practice, most interim hearings run for about one to two hours. Most are expected to conclude within two hours, which includes reading time, submissions and the delivery of judgement. In almost all cases the hearing will

involve submissions from the legal representatives rather than oral evidence. These submissions must be based on the affidavit material, any documents produced under subpoena, the memorandum produced by the family consultant and the relevant law. It is usual practice for submissions to be made in the structure of the s 60CC factors, however this will not be appropriate in all cases. Many judges will ask questions and direct advocates to issues on which they would like to be addressed.

10.176 Even if not specifically ordered/directed by the judicial officer, it is good practice to prepare a case outline document and submit it to the associate and the other parties, ideally a few days before the date for the interim hearing. This should include at minimum a list of the documents relied upon, a minute of the orders sought (if they differ at all from your application) and a brief chronology of relevant events.

Interim parenting cases: principles to apply

10.177 For matters where interim parenting orders are sought, the principles to be applied are those set out by the Full Court in *Goode and 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).

10.178 Deciding whether the presumption in s 61DA of the FLA 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 should not consider it appropriate to apply the presumption;

10.179 If the presumption does apply, deciding whether it is rebutted because application of it would not be in the child's best interests;

10.180 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 of the FLA, or impracticable;

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

10.182 If neither equal time nor substantial and significant time is considered to be in the best interests of the child/ren, then making such orders (in the discretion of the court) that are in the best interests of the child/ren, as a result of consideration of one or more of the factors in s 60CC of the FLA;

10.183 If the presumption is not applied or is rebutted, then making such orders as are in the best interests of the child/ren, as a result of consideration of one or more of the factors in s 60CC of the FLA; and

10.184 After considering the s 60CC factors the judge may still make an order for equal or substantial and significant time. The Court is not limited to the proposals of the party and, subject to providing the parties procedural fairness, may make orders not sought by either party, provided they are in the best interests of the child/ren.

Urgent and ex parte applications

10.185 The usual case management pathway detailed above can be abridged in circumstances of urgency or a risk to children. If there are circumstances that warrant urgency, practitioners should consider seeking that the interim application be listed at short notice, or ex parte (without giving any notice to the other side).

10.186 Some of the types of matter that may warrant an urgent listing are:

- the refusal to return a young child to a primary carer;
- where there is a risk of a child/ren spending time with a parent due to physical or sexual abuse, use of drugs, exposure to family violence or serious neglect;
- a party is planning to relocate or remove the child/ren from the country without the other parent's permission.

How to seek that a matter be listed ex parte or at short notice

10.187 An application for interim orders (whether included within an Initiating Application or in an Application in a Case) needs to be supported by an affidavit.

Even more so than in usual cases, it is important that this affidavit is concise and focuses on the urgent issue. Take note:

- When filing such an application, practitioners need to ensure that they have sought orders for the matter to be listed *ex parte* or at short notice in their application.
- Applications in which short notice is sought are referred to the duty registrar. Depending on the practice at the local registry, you may be able to speak to the duty registrar in person. Be prepared to explain the need for urgency concisely and to be able to refer them to the relevant parts of your client's affidavit.
- More usually, the application will be taken to the duty registrar in chambers. It is essential that you provide a cover letter to your application that sets out a very brief description of the parties and the reason that the matter should be listed at short notice or *ex parte*. The facts that you assert in that letter should be backed up by your affidavit material, by including references to the relevant paragraphs within the affidavit.

10.188 If your matter is not listed *ex parte* or at short notice (or at sufficiently short notice) you may consider filing an Application for Review. A review of a decision made by a registrar is a form of appeal. While this review may be considered in chambers by a judge of the relevant court, it may also be listed in court on relatively short notice. An Application for Review must be filed with 7 days.

PRACTICAL TIPS

- If the matter is listed at short notice it will be listed at the court's convenience, sometimes the same or the following day. If the client cannot afford to brief counsel, there are solicitors located near most registries that may be able to appear on short notice, some who appear for legally aided clients.
- Once the application has been filed, call the National Enquiry Line, or check the Commonwealth Courts Portal to find out which judge the matter has been allocated to. Then try and speak with an experienced practitioner about that judge's usual practice when dealing with similar matters. Some judges are more likely than others to deal with the matter on the first day.
- Be aware that all matters are urgent and important to some extent, but the court has the unfortunate role of having to prioritise those matters. Make sure your client knows that the matter may not be dealt with on the first day.

- Be ready to arrange for personal service on the other side at very short notice. If you anticipate that this will be a problem, then you should seek orders for substituted service in your application and deal with this in your cover letter and your client's affidavit.
- Often the first step is to refer the parties for a CDC. On each duty day there should be at least one Duty Child Dispute Conferences available. The clients will see a family consultant that morning who will prepare a CDC memo, usually by lunchtime. If this is going to take place, then you should speak to the associate in the morning and let them know that it is likely that a duty CDC will be necessary and that you would like your matter to be mentioned early on. Otherwise it may be too late by the time your matter is called and you will have to have an adjournment to obtain a CDC some weeks later. However, be wary that by the time the CDC has taken place there is usually little time left in the day for an interim hearing.
- Interim matters are also often adjourned for the appointment of an ICL. If this is likely, you should ask for their appointment on the first return date to avoid further delay if they are appointed at a later date.
- If you do not have the resources to deal with an urgent matter, consider referring them to a solicitor that does or to the Legal Aid Duty Service (if operating at your registry). Similarly, if there is a risk to a child, consider whether it is appropriate to wait weeks for a Legal Aid grant to be approved before taking action.
- If the client does not live near a full-time registry, consider filing in the Local Court, which has limited jurisdiction under the Act.
- File any subpoenas with your application to give them the best chance of being returned by the date of the interim hearing.

Parenting matters involving urgency or risk, including family violence

10.189 A significant percentage of parenting matters in the Family Court and the FCC involve allegations of risk to a child, or other urgency.

Supervised time

10.190 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 the child/

ren spends with a parent, that such time be supervised by a relative/friend or a professional supervision service or to seek orders that the child/ren 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;
- reintroduction for child/ren to a parent after an extended break in the relationship;
- a demonstrable undermining of the relationship between the child/ren and the other parent;
- a demonstrable risk of the child/ren being 'abducted' by the parent.

10.191 In such cases it may be appropriate for any time spent with the child/ren and the parent to be 'supervised' to ensure that the child/ren continues to see a parent while providing a safeguard against any alleged risks to the child/ren until such time as the court can make a decision on the allegations.

10.192 Supervision can take place with a person known to the other party, usually a family member such as the supervised party's mother (the child/ren's grandmother). If you are proposing that a family member or other person supervise, then ensure that you have filed and served an affidavit of that person consenting to supervise, acknowledging that they are fully aware of the allegations made and detailing what they would do if they observed inappropriate behaviour (for example, call the police or notify the other party). The affidavit should be as objective as possible — a person who says that the allegations are completely made up will often not be viewed as a suitable supervisor. You should also ensure that that person attends court on the relevant date. They may be required to give an undertaking to the court about the supervision or to be cross-examined about their suitability.

10.193 Another option for supervision are the publicly-funded Contact Centres. These Contact Centres provide professionally-trained staff to supervise the time. They have high security and keep detailed and objective notes of the visits. It is unusual for the court not to allow child/ren to at least spend time through a professional Contact Centre. However, the wait lists for the centres can be over 6 months long. You should ensure that the parties undertake the intake assessment and get their names on the wait list on the first return date if supervised time is likely, even if there is not yet agreement as to whether it will take place. Contact

Centres also have very limited periods of time that they provide supervision per family, usually 2 hours per fortnight.

10.194 The third option is to hire a private supervision service. There are a number of professional supervision services available that are available with no waiting time, for long periods and at locations such as a parent's home. However, the costs are significant and prohibitive for many families.

10.195 Practitioners should be aware that supervision requires the supervisor to be physically present at all times the child/ren is with the parent. If this is not intended, the words 'in the presence of' may allow more flexibility and allow the supervisor to duck to the shops (or just to the toilet).

10.196 It is of the utmost importance that prior to confirming your instructions to file an application for supervision of the time spent by the child/ren with a parent or an application that no time be spent by the child/ren 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 the child/ren. It is also important to advise your client that orders as to supervision are very rarely long-term measures adopted by the court.

10.197 Finally, parties will often be averse to having their time supervised and will want to wait for 'the judge to decide.' When appropriate, practitioners should explain it as a stepping stone to unsupervised time. It provides good evidence of the relationship with the child/ren and the capacity of the party to parent appropriately and often allays the concerns held by the other party. Practitioners should be sure to explain that the court has a limited ability to resolve contested facts at an interim stage and will lean towards a cautious approach.

Matters involving allegations of serious physical or sexual abuse of children

10.198 The 'Magellan Program' is a case management pathway within the Family Court for cases that involve allegations of serious physical or sexual abuse of children. These matters are allocated to a specific registrar and the 'Magellan judge' for the registry in which the application is filed. It will be given priority and an expedited hearing date.

10.199 The Department of Community Services will prepare a 'Magellan Report' which provides a detailed summary of any involvement that the Department has had with the children. In many Magellan matters, a report will be prepared by a

psychiatrist with experience in dealing with the allegations. An ICL will almost always be appointed.

10.200 If your matter involves allegations of serious physical or sexual abuse of children, then you should ensure that you file the matter in the Family Court, to avoid delays in transferring the matter at a later date. It is important to remember that historical allegations already investigated by the police or child protection that were not pursued are unlikely to warrant inclusion in the Magellan program.

Matters involving allegations of drug use or excessive alcohol use

10.201 These matters are increasingly common and can be difficult for parties and practitioners. There can be a range of risks to children from a parent using drugs. This can range to a lack of sufficient attention being given to the child/ren by a parent who is a regular user of cannabis. More seriously, persons using crystal methamphetamine, or 'ice', are known to have incidents of severe violence and the use of 'ice' while in the presence of the child/ren would be considered a risk to their physical safety.

10.202 If you are acting for a party who has concerns about the drug use of the other party, ensure that the client's affidavit puts their allegations at their highest. Although the application of the rules of evidence is affected by Div 12A of the FLA, little weight will be put on affidavit material that is hearsay or without foundation. If the relevant witness is not your client, consider putting the person who can give direct evidence on affidavit.

Subpoenas

10.203 It can be very difficult to prove (and to disprove) drug use. Consider issuing a subpoena to a person's GP and/or to any hospitals to which they were admitted.

10.204 If there have been drug urinalysis testing orders, it may be worth issuing a subpoena to the pathology lab that did the tests to ensure that all completed tests have been disclosed.

10.205 If the other party has been sentenced to jail, even for a period on remand, Corrective Services will have records of their reported drug use at the time. If the other party ever spent time on probation, then Corrective Services will often have records of drug urinalysis during that period.

Urinalysis testing

10.206 Urinalysis testing can be a good way to ensure that a party who is having contact with children is not using illegal drugs. However, it has limitations, as many drugs will only show up through a urinalysis test for a short time. This differs from drug to drug and person to person. Drugs such as methamphetamine may not show up in a urinalysis as little as 24 hours later. On the other hand, cannabis can show up in a urinalysis for over a month. It is important therefore that if there are concerns about the use of drugs other than cannabis, the testing must be random and completed within 24 or 48 hours of the request.

10.207 Be aware of the difference between ‘chain of custody’ testing and regular urinalysis testing. The actual test itself is the same, however ‘chain of custody’ tests that comply with A/NZS 4308:2008 have provisions to ensure that the test is not falsified. These provisions include supervision and production of identification. Chain of custody testing costs more than \$120 per test, while regular testing may be bulk billed by some providers.

10.208 Chain of custody testing requires a referral before the provider will allow the client to undertake a test. If the client cannot obtain one from a GP in time, the large laboratory chains may accept a letter from a solicitor as a referral.

Hair follicle testing

10.209 Hair follicle testing involves a sample of a person’s hair being analysed for the use of drugs. It has a much longer time frame and can reliably indicate drug use up to 3 months beforehand. However, it is significantly more expensive, with tests costing up to \$2000, and it also takes much longer to receive results. It may be useful if the question is whether a party was using drugs in the past, however, it is not well suited to ongoing regular testing. There are only a limited number of laboratories that perform the testing in Australia, however the sample can be taken by a client’s GP.

Testing for abuse of alcohol

10.210 There are two commonly accepted tests for the abuse of alcohol — a Carbohydrate Deficient Transferrin test and a Liver Function Test. The results can be difficult to interpret and it may be appropriate to have the party’s GP annotate the results with their interpretation.

Expert report

10.211 If drug and alcohol issues are present in a case, give consideration to the appointment of an expert to prepare the Family Report who has experience in dealing with drug and alcohol issues.

Rehabilitation centres

10.212 If your client has a problem with drugs, it is unlikely that they will be able to resolve this on their own. It can also be very difficult to convince the other party and the court that they have kicked the habit if they have not accepted professional help.

10.213 Encourage your client to speak to their GP for an appropriate referral. In more severe cases there are a number of residential rehabilitation centres that are effectively free. These can be difficult to get into; however, if the client is persistent they will succeed. Some rehabilitation centres even accept young children of dependent mothers.

Matters where you cannot locate the child

10.214 Practitioners may be faced with the task of locating the child/ren in circumstances where there is little or no information known about the child/ren's whereabouts. Sections 67J–67P of the FLA deal with applications that can be made to obtain information as to the location of the child/ren from a government department (Commonwealth Information Orders), private company or natural person (Location Orders).

10.215 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.

10.216 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.

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

Recovery orders

10.218 If the child/ren has not been returned/made available to a parent pursuant to orders, the court has the power to direct (generally) police to find and return the child/ren. This is referred to as a Recovery Order.

10.219 Generally speaking, a Recovery Order may be necessary in circumstances where a person has failed to return the child/ren 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 the child/ren 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.

10.220 It is usual that a Recovery Order is addressed to all officers of the AFP and all police officers of the various states and territories of Australia. The FLA at s 67Q dictates the powers that are authorised to be used when acting in compliance with a Recovery Order made by the court. Additional information on Recovery Orders is available on the AFP website: <www.afp.gov.au/policing/family-law/family-law-kit#recovery>.

Matters involving allegations of mental health issues

10.221 Mental health issues are prevalent in the community and many would suggest particularly so in family law matters. Like drug use, issues around mental health can be difficult to prove or disprove.

10.222 Keep in mind when drafting affidavits that unless your client has the necessary qualifications, or has personal knowledge that the other party has been diagnosed with a particular disorder, they cannot come to conclusions about the other person's mental health. Ensure that a client's affidavit includes the basis for any allegation about a particular diagnosis. If there is no basis, draft the affidavit to focus on the behaviour itself. Remember that a huge proportion of the community (including lawyers) suffer from disorders such as depression and anxiety.

Evidence

10.223 If there are grounds for concern about the mental health of the other party, you may wish to consider issuing subpoenas to their GP, any psychiatrist or psychologist that they have seen, any hospitals to which they have been admitted and NSW Police. If the other party has been imprisoned, there will often be extensive psychological notes and assessments as part of their file. Note that a subpoena needs to be issued to 'Justice Health NSW', as inmates' medical records

are not kept by Corrective Services. If the other party has ever received a s 32 of the Mental Health (Forensic Provisions) Act 1990 (NSW) (a discharge of a criminal offence on the basis of mental health) it may be worth requesting the court file from those proceedings to obtain any reports about their mental health that were tendered on their behalf.

10.224 If the allegations are made against your client, you should consider obtaining copies of their medical records directly. All health care providers are required to give patients copies of their medical records, with some exceptions. These can sometimes be obtained more quickly and cheaply than by issuing a subpoena. Seeing those records before you draft your client's affidavit will usually allow you to ensure that the affidavit address the important issues.

10.225 If allegations are to be made against your client, it is also worth considering obtaining a report from their treating psychologist, psychiatrist or GP. Ideally this would address any diagnoses, any current medications, their compliance with therapy and medication, any history of suicide ideation or attempts and whether the practitioner thinks that they are a risk to the child/ren.

Assistance

10.226 Separation is a very difficult time for many people. Depression, anxiety and other mental health issues are extremely common. Practitioners should encourage clients to speak to their GP if they need help. Their GP can refer them for psychological assistance if appropriate. You should tell clients about the availability of a 'mental health care plan', which provides for up to 12 Medicare-funded sessions with a psychologist per year.

10.227 You should also make clients aware that if relevant, the notes from their appointments with their GP and their psychologist may be subpoenaed and available to the other parties.

Expert reports

10.228 A formal diagnosis of a mental health disorder can only be made by a psychiatrist, a forensic psychologist or a clinical psychologist. Other psychologists, counsellors and social workers are generally not accepted to have the qualifications to make a formal diagnosis. If a mental health diagnosis is therefore a significant issue in a case, it will usually be necessary for a Ch 15 Expert Report to be prepared. Practitioners should ensure that the proposed expert has the required qualifications.

The involvement of child welfare authorities

10.229 The NSW Department of Family and Community Services (FACS) is responsible for the welfare of children within New South Wales. They can take action authorised under the Children and Young Persons (Care and Protection Act) 1998 (NSW), including removing children from parents. These actions can be authorised and reviewed in the Children's Court, a division of the NSW Local Court.

10.230 There are many cases in which FACS will have an interest to a varying extent in families that are also involved in proceedings under the FLA. Practitioners need to be aware of the interaction between the jurisdictions.

Intervention in Family Court proceedings

10.231 Under s 91B of the FLA, the court can request the Secretary of FACS to intervene in the proceedings.

10.232 In practice, in the majority of cases the secretary chooses not to intervene. Practitioners report that it can be difficult to predict the cases in which they will intervene. One major factor is whether there is a possibility that neither parent involved in the family law proceedings will be able to care for the child.

10.233 If the secretary chooses to be involved they will file a Notice of Intervention and become a party to the proceedings. As discussed below, the secretary has the power to begin proceedings in the Children's Court at any time. However, under a Memorandum of Understanding between the Family Law Courts and FACS, if proceedings have already commenced in a court exercising jurisdiction under the FLA, then FACS will be involved as a party in existing matter. However, it should be noted that FACS still has the right to begin proceedings in the Children's Court anyway and occasionally does so.

10.234 The NSW Crown Solicitors Office will represent the secretary in the proceedings, instructed by the FACS case worker assigned to the subject children. They may choose to support one party or to seek that the children are placed with a relative or in foster care.

The Children's Court can supersede jurisdiction

10.235 Section 69ZK makes clear that a court exercising jurisdiction under the FLA must not make an order in relation to a child/ren who is under the care (however described) of a person under a child welfare law, unless that order is

expressed to come into effect when the child/ren ceases to be in that care or the secretary consents.

10.236 The practical effect of this is that actions taken by FACS under a child welfare law, or orders made by the Children's Court, cannot be superseded by Family Court orders. Practitioners need to be aware that if there are orders in place made under a child welfare law, then the Family Court has no jurisdiction unless one of the two exceptions are met.

10.237 This can cause difficulties when parents wish to obtain orders through the Family Court, after Children's Court proceedings are over. For example, a parent may seek orders allowing them to obtain a passport for the child/ren, an order that would usually be sought in the Family Court. The parent cannot begin proceedings in the Children's Court to seek the same orders. In those circumstances, the practitioner should ensure that the consent of the secretary to seek those orders has been obtained before filing an application in the Family Court.

Chapter 11

Property

Property alteration orders

11.1 The FLA makes provisions for the division of the property of parties to a de facto relationship (as defined in s 4AA of the FLA) upon breakdown of that relationship or parties to a marriage upon application to the court.

11.2 Unless leave of the court is granted, property proceedings between parties to a marriage must be commenced within 12 months of a divorce order becoming final: s 44(3) of the FLA. In the case of a de facto relationship, the court must be satisfied as to the matters raised by s 90SB of the FLA and proceedings must be commenced within 2 years of the relationship ending: s 44(5) of the FLA.

11.3 The main objectives of the court in determining a property settlement under the FLA are to ‘finally determine the financial relationships between the parties to the marriage or de facto relationship and avoid further proceedings between them’: ss 81 and 90ST of the FLA.

11.4 The first question the court needs to determine in respect of any application for property alteration is whether or not it is just and equitable to make any order adjusting the existing legal and equitable interests of the parties in matrimonial property pursuant to s 79(2) of the FLA. The High Court decision of *Stanford and Stanford* [2012] HCA 52 confirms that there is no ‘community of property’ in Australia and re-emphasises the importance of the court only making orders under s 79 when it is just and equitable to do so.

11.5 Prior to *Stanford and Stanford* the ‘four step approach’ was generally applied in determining property alteration proceedings. The four step approach was neither rejected nor endorsed by the High Court in *Stanford and Stanford* and in the majority of cases it remains a valid and appropriate way to divide matrimonial property.

11.6 Keeping in mind that the court must always determine first, whether or not it is just and equitable to make any order at all, to adjust the legal and equitable interests of the parties the four step approach consists of:

1. identifying and valuing the assets, liabilities and financial resources of the parties;
2. identifying and assessing the contributions made by the parties (as defined in ss 79(4)(a)–(c) or 90SM(4)(a)–(c) of the FLA);
3. evaluating the matters raised by ss 75(2), 79(4)(d), (f) and (g) of the FLA (in the case of a marriage) or ss 90SF(3), 90SM(4)(d), (f) and (g) of the FLA (in the case of a de facto relationship), so far as they are relevant; and
4. the court being satisfied that, in all the circumstances of the case, it is just and equitable to make the orders: ss 79(2) or 90SM(3) of the FLA.

Each step of this process is considered in further detail below.

Identifying and valuing the assets, liabilities and financial resources of the parties

11.7 Property is defined under s 4(1) of the FLA as ‘property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion.’

11.8 Types of property include:

- real property;
- motor vehicles;
- investments such as shares;
- funds in bank accounts;
- jewellery;
- furniture and effects;
- trust and companies;
- interest in a partnership;
- life insurance policies
- licenses; and
- superannuation.

11.9 Types of liabilities may include:

- tax liabilities;
- credit card liabilities;
- home loans; and
- personal loans.

11.10 In order to properly ascertain what property each of the respective parties to a financial case has, there will need to be full and frank disclosure both by your client and the other side. Full and frank disclosure is essential in determining the assets, liabilities, superannuation and financial resources of each party.

11.11 Below is a list of the basic information you will need from each party to determine the asset pool. These assets will ultimately be listed in a balance sheet.

Assets

Asset	Details
Real Estate	<ul style="list-style-type: none">• Address(es)• Name of registered owner/s• Percentage of share• Value of share
Motor vehicles	<ul style="list-style-type: none">• Name of registered owner/s• Make• Model• Year made• Registration number• Value of share
Furniture and effects	<ul style="list-style-type: none">• Estimate of value• List of items of significant value
Funds in banks, building societies, credit unions or other financial institutions	<ul style="list-style-type: none">• Name and branch• Account name and number• Current balance

Asset	Details
Interest in any company/business	<ul style="list-style-type: none"> • Type of ownership, for example, sole trader, partnership, proprietary company/trust • Percentage of share • Number of shares (if applicable) • Value of share
Investments	<ul style="list-style-type: none"> • Type of investment • Number of shares • Value of shares
Life insurances policy	<ul style="list-style-type: none"> • Policy name and number • Type of policy • Value of policy
Interest in trust (may also be a financial resource only)	<ul style="list-style-type: none"> • Name of trust • Name of the appointor • Name of the trustee • Nature of the interest • Value of interest
Superannuation	<ul style="list-style-type: none"> • Name of the plan • Member number • Type of interest • Value of entitlement

Liabilities

Liability	Details
Mortgage	<ul style="list-style-type: none"> • Lender name • Name of borrower • Account number • Balance of loan • Share of liability • Minimum required repayments

Liability	Details
Credit and/or charge cards	<ul style="list-style-type: none"> • Name of card provider • Type of card • Cardholders' names • Card number • Balance owing • Card limit • Minimum required repayments
Personal liabilities	<ul style="list-style-type: none"> • Loan provider • Type of liability • Amount of liability • Terms of the loan • Minimum required repayments
Hire–purchase/lease agreements	<ul style="list-style-type: none"> • Name of lender • Terms of the agreement • Payout date • Balance outstanding
Income tax	<ul style="list-style-type: none"> • Amount of liability • Tax year accrued • Due date

11.12 This is not an exhaustive list; however, it is a good starting point. You should also ascertain from your client whether there has been any disposal of property in the last 12 months, or in the 12 months prior to separation, by either party. Any disposal of property must be disclosed.

11.13 Parties to a financial case have a general duty to comply with r 13.01 of the FLR and make ‘full and frank disclosure of all information relevant to the case, in a timely manner’. Both parties to a property dispute have an ongoing obligation to provide this information.

11.14 Some helpful cases in relation to identifying and valuing relevant property are:

- *In the Marriage of Duff* (1977) 3 Fam LR 11
- *In the Marriage of Zorbas* (1990) 14 Fam LR 226

- *Kenyon v Spry* (2008) FLC 93-288
- *In the Marriage of Ashton* (1986) FLC 91-777
- *Coventry and Coventry and Smith* (2004) FLC 93-184

Some helpful cases in relation to identifying liabilities are:

- *In the Marriage of Bilotto* (1995) 19 Fam LR 97
- *Rosati & Rosati* (1998) 23 Fam LR 146
- *Campbell v Kuskey* (1998) 22 Fam LR 674
- *Kowaliw & Kowaliw* (1981) FLC 91-092

Obligations of solicitors

11.15 Schedule 1 Pt 1(6) and Sch 1 Pt 2(6) of the FLR sets out the pre-action procedure obligations for family lawyers as discussed in Chapter 2 of this *Guide*.

11.16 A solicitor has a duty to inform a client of the duty of full and frank disclosure as well as the consequences of failing to fulfil this obligation, which may include:

- the court finding a party guilty of contempt for not disclosing the document;
- an order for your client to pay costs; and
- an order from the court to stay or dismiss all or part of the party's case.

Documents required to be disclosed

11.17 A party to a financial case must comply with r 13.04 of the FLR by making 'full and frank disclosure' of their 'financial circumstances', including:

- the party's earnings, including income that is paid or assigned to another party, person or legal entity;
- any vested or contingent interest in property;
- any vested or contingent interest in property owned by a legal entity that is fully or partially owned or controlled by a party;
- any income earned by a legal entity fully or partially owned or controlled by a party, including income that is paid or assigned to any other party, person or legal entity;
- the party's other financial resources;

- any trust:
 - of which the party is the appointor or trustee;
 - of which the party, the party's child/ren, spouse or de facto spouse is an eligible beneficiary as to capital or income;
 - of which a corporation is an eligible beneficiary as to capital or income if the party, or the party's child/ren, spouse or de facto spouse is a shareholder or director of the corporation;
 - over which the party has any direct or indirect power or control;
 - of which the party has the direct or indirect power to remove or appoint a trustee;
 - of which the party has the power (whether subject to the concurrence of another person or not) to amend the terms;
 - of which the party has the power to disapprove a proposed amendment of the terms or the appointment or removal of a trustee; or
 - over which a corporation has a power mentioned in any of subparas (iv)–(vii), if the party, the party's child/ren, spouse or de facto spouse is a director or shareholder of the corporation;
 - any disposal of property (whether by sale, transfer, assignment or gift) made by the party, a legal entity, a corporation or a trust that may affect, defeat or deplete a claim;
 - in the 12 months immediately before the separation of the parties; or
 - since the final separation of the parties; and
 - liabilities and contingent liabilities.

11.18 Documents provided to the other party should always be relevant to an issue in the case: r 13.07 of the FLR.

11.19 In order to obtain disclosure, the first step is always to write to the other party's solicitor requesting their client provide a specific list of documents. A party discharges their obligation for full and frank disclosure by provision of all documents requested.

11.20 In the event full disclosure has not been provided, there are other methods of obtaining information as to the property of both parties, including but not limited to:

- conducting searches on publically available information such as with Land and Property Information and ASIC;

- issuing a subpoena;
- request for answers to specific questions: r 13.26 of the FLR;
- issuing a Notice to Produce; and/or
- obtaining an order or direction at a court event.

11.21 Some helpful cases in respect of the principles of full and frank disclosure are:

- *Weir and Weir* (1993) FLC 92-338
- *Black and Kellner* (1992) FLC 92-287
- *Chang and Su* (2002) FLC 93-117
- *Tate and Tate* (2000) FLC 93-047

Valuations and expert evidence

11.22 If parties to a financial case are unable to agree on the value of their respective assets, then a valuer may need to be appointed to provide independent evidence as to value. Valuations can be undertaken of all forms of property such as real estate, businesses, trusts, jewellery, furniture and other more complex interests, such as employee share options and royalties and even interests in superannuation entitlements.

11.23 Valuations are prepared by qualified professional valuers who possess specialised knowledge of a particular subject matter. The rules governing the appointment of expert witnesses are covered by Pt 15.5 of the FLR and Div 15.2 of the FCCR. The court will generally require the appointment of a single expert witness to value items of property in dispute.

11.24 Single expert witnesses can be agreed to by both parties or can be appointed by the court. A single expert witness will need to be instructed by way of a joint letter of instruction signed by both parties' legal representatives. In the event there is a dispute as to the terms of the joint letter of instruction, the court may make orders as the terms of the valuer's engagement.

11.25 Some helpful cases in respect of valuations and expert evidence are:

- *Lenahan & Lenahan* (1987) FLC 92-814
- *Borriello & Borriello* (1989) FLC 92-049
- *Harrison & Harrison* (1996) FLC 92-682
- *Smith & Smith* (1991) FLC 92-261

- *Biltoft & Biltoft* (1995) FLC 92-614
- *Coghlan v Coghlan* (2005) FLC 93-220

Identifying and assessing the contributions

11.26 Sections 79(4)(a)–(c) and 90SM(4)(a)–(c) of the FLA set out the matters to be considered with respect to the parties' contributions. The main types of contribution that are taken into account are:

- direct financial contributions to the acquisition of any property of the parties or either of them (eg, 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 (eg, 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 (eg, one party paying the bills which enables the other to pay the mortgage);
- non-financial contributions (eg, one party carrying out homemaker duties which enables the other party to concentrate on business activities); and
- contributions made to the welfare of the family (eg, homemaking and parenting).

11.27 In making an order under s 79 of the FLA, the court will apply significant discretion into how the parties' contributions will be assessed and weighed against each other.

11.28 Contributions to the acquisition, conservation and improvement of property can be made by the parties in a number of ways and can include but are not limited to:

- initial contributions: see *Pierce & Pierce* (1999) FLC 92-844; *Spiteri v Spiteri* (2005) FLC 93-214;
- gifts from third parties including family members of the parties: see *Gosper & Gosper* (1987) FLC 91-818;
- inheritances: see *Bonnici & Bonnici* (1992) FLC 92-049;
- redundancy payments: see *Tomascetti & Tomasetti* (200) FLC 93-023;
- windfalls such as lottery winnings: see *Zyk & Zyk* (1995) FLC 92-644;
- waste of assets (for example, via gambling or drug use): see *Kowaliw & Kowaliw* (1981) FLC 92-092;

- damages payments for injury: see *Zubic & Zubic* (1995) FLC 92-609; *Aleksovski & Aleksovski* (1996) FLC 92-705;
- the presence of violence during the relationship: see *Kennon & Kennon* (1997) FLC 92-757;
- significant pre-relationship or post-separation contributions.

Evaluating 'future needs'

11.29 Sections 79(4)(d), (f) and (g) and 90SM(4)(d), (f) and (g) of the FLA require the court to take into account:

- the effect of proposed orders on the earning capacity of either party;
- any other orders made under the FLA affecting either party or the child/ren of the relationship; and
- the matters referred to in s 75(2) or s 90SF(3) so far as they are relevant.

11.30 Sections 75(2) and 90SF(3) require a number of matters to be taken into account, including:

- the 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 of the relationship;
- commitment necessary for a party to support himself or herself and any child/ren or other person the party has a duty to maintain;
- responsibility of either party to support another person;
- eligibility of a party to receive a pension or allowance from the government or from a superannuation fund inside or outside of Australia;
- a standard of living that is reasonable in all the circumstances;
- the need to protect a party who wants to continue their role as parent;
- financial circumstances relating to either party's cohabitation with another person;
- any child support payable;
- the terms of any binding financial agreement made between the parties; and
- any other fact or circumstance the court considers ought be taken into account.

11.31 The High Court in the *Mallet v Mallet* (1984) 156 CLR 605 said:

The objective of the section is not to equalise the financial strengths of the parties. It is to empower the court, following the dissolution of a marriage, to effect a redistribution of the property of the parties if it be just and equitable to do so.

11.32 The court has a wide discretion as to how much weight is placed on each relevant 'future needs' factor; however, each factor listed above must be considered.

11.33 Some helpful cases in assessing 'future needs' are:

- *Mallet v Mallet* (1984) FLC 91-507
- *Collins & Collins* (1990) FLC 92-149
- *Clauson & Clauson* (1995) FLC 92-595
- *W & W* (1997) FLC 92-723
- *DJL v JLM* (1998) FLC92-816
- *Best & Best* (1993) FLC 92-418
- *Abdo & Abdo* (1989) FLC 92-013
- *Black & Kellner* (1992) FLC 92-287
- *White & Tulloch v White* (1995) FLC 92-640
- *Kennon v Kennon* (1997) FLC 92-757
- *Waters & Jurek* (1995) FLC 92-635
- *Mitchell & Mitchell* (1995) FLC 92-601
- *Rosati & Rosati* (1998) FLC 92-804

Just and equitable

11.34 Following s 79(2) or s 90SM(3) of the FLA, the court must be satisfied that in all the circumstances of the case, it is just and equitable to make the orders sought. The court uses wide discretion to determine this question.

11.35 Some helpful cases in respect of determining what is just and equitable are:

- *Redman & Redman* (2013) FLC 93-563
- *Standford v Stanford* (2012) HCA 52
- *Bevan No 2* (2014) FamCAFC 19

Injunctions

11.36 The court has power to grant injunctions in relation to property pursuant to ss 114 and 90AF of the FLA. An injunction is an order preventing parties, bound by that injunction, from doing something or compelling a party to do something. The powers of the court as set out in ss 114 and 90AF are wide and may relate to third parties in certain circumstances.

11.37 A common injunction that may be sought in family law proceedings is one stopping a spouse from selling or further encumbering real property or a business owned by the parties, particularly if the real property or business are not in joint names but in the name of one spouse only. 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 of the FLA may be defeated unless such an injunction is granted. See *In the Marriage of Stowe* (1980) 6 Fam LR 757; (1981) FLC 91-027.

11.38 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 *In the Marriage of Martiniello* (1981) 7 Fam LR 299; (1981) FLC 91-050; *R v Dovey*; *Ex parte Ross* (1979) 141 CLR 386; 5 Fam LR 1; (1979) FLC 90-616;
- the balance of hardship and the balance of convenience between the parties: see *In the Marriage of Sieling* (1979) 4 Fam LR 713; (1979) FLC 90-627;
- any special interest that the applicant may have in a particular piece of property: see *In the Marriage of Stowe*, above;
- 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.

Mareva injunctions

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

11.40 The procedure for applying for a Mareva injunction is set out in r 14.05 of the 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.

11.41 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 and De Bry* (2006) FLC 93-293.

Anton Pillar orders

11.42 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.

11.43 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 r 14.04, 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 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. See *Talbot and Talbot* (1995) Fin 92-586 per Lindenmeyer J in relation to Anton Pillar orders.

Settlement documents

The difference between consent orders and financial agreements

11.44 Even when there is agreement between the parties as to the final division of matrimonial assets, it is important to advise your client that a formal agreement is always desirable to prevent future claims, to ensure the protection of assets accumulated post-separation and to ensure effective estate planning. When finalising property alteration there are two types of documents you can prepare to formalise the agreement between the parties, namely, Consent Orders made by the court or a Financial Agreement.

11.45 An understanding of the distinctions, advantages and disadvantages of Consent Orders and Financial Agreements is crucial to ensure that you are able to advise your client on the most appropriate method of drafting settlement documents.

11.46 Consent Orders are lodged with the court and considered by a registrar (in the event proceedings have not yet commenced) and will only be approved if a judicial officer is satisfied that the orders sought are just and equitable. The court will consider a detailed Application for Consent Orders, which lists the assets of the parties and the contributions of the parties, as well as the parties' incomes and the care of the children, before making a determination that the orders are 'just and equitable'.

11.47 On the other hand, Financial Agreements are not lodged with the court and do not need the court's approval to be binding on the parties. Binding Financial Agreements, in effect, oust the jurisdiction of the court by way of s 71A of the FLA, which provides that Pt VIII of the FLA does not apply to:

- financial matters to which a financial agreement that is binding on the parties to the agreement applies: or
- financial resources to which a financial agreement that is binding the parties to the agreement applies.

11.48 The definition of 'financial matters' in the FLA is:

- (a) in relation to the parties to a marriage — matters with respect to:
 - (i) the maintenance of one of the parties; or
 - (ii) the property of those parties or of either of them; or
 - (iii) the maintenance of children of the marriage; or

- (b) in relation to the parties to a de facto relationship — any or all of the following matters:
 - (i) the maintenance of one of the parties;
 - (ii) the distribution of the property of the parties or of either of them;
 - (iii) the distribution of any other financial resources of the parties or of either of them.

Financial Agreements are discussed in more detail later in this chapter.

Consent orders

Time to file orders

11.49 Consent Orders must be filed within 12 months of the divorce order taking effect or 2 years of the breakdown of a de facto relationship. Leave of court will be required to file for consent orders outside this time frame.

How to file consent orders

11.50 For consent orders, where no Initiating Application has been filed, you will need to file the following documents in the Family Court:

- an Application for Consent Orders (Family Law); and
- draft Consent Orders.

11.51 The Family Court website provides an Application for Consent Orders Kit, which is a useful guide in preparing the application: see <www.familycourt.gov.au/wps/wcm/connect/fcoaweb/forms-and-fees/court-forms/diy-kits/kit-diy-application-consent-orders>. In addition, the court has provided an Application for Consent Orders — Supplement which provides a pro forma consent orders to ensure you correctly draft the Minute of Consent Orders; see <www.familycourt.gov.au/wps/wcm/connect/fcoaweb/forms-and-fees/court-forms/form-topics/consent-orders/kit-diy-consent-orders-supplement>.

11.52 When executing the documents you must ensure the parties must sign each page of the Draft Consent Orders and the last page must be dated. Certified copies of the Consent Orders must be provided when lodged with the court.

Financial agreements

Types of financial agreements

11.53 There are a number of types of financial agreements, which are as follows:

- Financial Agreement made before marriage: s 90B of the FLA;
- Financial Agreement made during marriage: s 90C of the FLA;
- Financial Agreement made after divorce order: s 90D of the FLA;
- Financial Agreement before a de facto relationship: s 90UB of the FLA;
- Financial Agreement made during de facto relationship: s 90UC of the FLA;
- Financial Agreement made after de facto relationship has ceased: s 90UD of the FLA;
- Agreements made in non-referring states that become Pt VIIIAB financial agreements: s 90UE of the FLA;
- Termination Agreements: s 90J of the FLA;
- Termination Agreement for de facto financial agreement: s 90UL of the FLA.

11.54 Superannuation can be dealt with by way of Financial Agreement by the following provisions:

- Superannuation Agreement to be included in a Financial Agreement if about marriage: s 90MH of the FLA;
- Superannuation Agreement to be included in a Pt VIIIAB Financial Agreement if about a de facto relationship of the FLA: s 90MA of the FLA.

Formal requirements

11.55 As Binding Financial Agreements oust the jurisdiction of the courts, a practitioner drafting such agreements must ensure they are drafted carefully. There are a number of legislative requirements necessary to ensure a valid Binding Financial Agreement, which are ss 90B, 90C, 90D, 90DA, 90E, 90F and 90G of the FLA.

11.56 The relevant provisions for each type of financial agreement specify the requirement for the making of a financial agreement and are as follows:

- it must be in writing with respect to property, financial resources and/or maintenance of the parties; however, it does not have to include all;

- at the time of the making of the agreement the parties are not the spouse parties to any other binding agreement; and
- the agreement must be expressed to be made under ss 90B, 90C, 90D, 90UB, 90UC or 90UD of the FLA.

11.57 The requirements for a Financial Agreement to be binding are set out in ss 90G and 90UJ of the FLA as follows:

- the agreement is signed by all parties; and
- before signing the agreement, each party was provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party, and about the advantages and disadvantages, at the time the advice was provided, to that party of making the agreement; and
- either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in para (b) was provided to that party (whether or not the statement is annexed to the agreement); and
- a copy of the statement referred to in para (c) that was provided to the spouse party is given to the other spouse party or to a legal practitioner for the other spouse party; and
- the agreement has not been terminated or set aside by a court.

11.58 Sections 90G(1A) and 90UJ(1A) provide the court with the power to enforce a Financial Agreement that does not strictly comply with the requirements of s 90G(1)(b), (c) and (ca) on the application of a party. The court can make a declaration that the Financial Agreement is binding on the parties, if it is satisfied that it would be unjust and inequitable if the financial agreement were not binding; however, you should not rely on these 'saving provisions', and ensure you draft effective documents.

How to terminate financial agreements?

11.59 In the event that parties seek to terminate a financial agreement, they can do so pursuant to ss 90J or 90UL of the FLA by:

- including a provision to that effect in another financial agreement; or
- making a written agreement (a termination agreement) to that effect.

11.60 A Termination Agreement is binding on the parties if, and only if:

- the Termination Agreement is signed by all parties to the Pt VIIIAB Financial Agreement; and

- before signing the Termination Agreement, each spouse party was provided with independent legal advice from a legal practitioner about the effect of the Termination Agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the Termination Agreement; and
- either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in para (b) was provided to that party (whether or not the statement is annexed to the termination agreement); and
- a copy of the statement referred to in para (c) that was provided to a spouse party is given to the other spouse party or to a legal practitioner for the other spouse party; and
- the Termination Agreement has not been set aside by a court.

Setting aside financial agreements

11.61 Sections 90K and 90UMA of the FLA provide for the circumstances in which financial and termination agreements may be set aside. Financial Agreements may only be set aside if the court is satisfied that:

- the agreement was obtained by fraud (including non-disclosure of a material matter); or
- a 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; or
- a party (the agreement party) to the agreement entered into the agreement:
 - for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a de facto relationship with a spouse party; or
 - for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under s 90SM of the FLA, or a declaration under s 90SL of the FLA, in relation to the de facto relationship; or
 - with reckless disregard of those interests of that other person; or

- 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; or
- since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the marriage) and, as a result of the change, the child or, if the applicant has caring responsibility for the child (as defined in subs (2)), a party to the agreement will suffer hardship if the court does not set the agreement aside; or
- in respect of the making of a financial agreement — a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable; or
- a payment flag is operating under Pt VIIIB on a superannuation interest covered by the agreement and there is no reasonable likelihood that the operation of the flag will be terminated by a flag lifting agreement under that Part; or
- the agreement covers at least one superannuation interest that is an unsplitable interest for the purposes of Pt VIIIB.

Superannuation

11.62 Superannuation is treated as a type of property interest under the FLA. Part VIIIB of the FLA empowers the court to deal with superannuation interests of spouses.

11.63 Section 90MS of the FLA stipulates that, in proceedings for property settlement under s 79 of the FLA, a court may make orders in relation to superannuation interests of the parties. This applies whether the parties were married (s 90MC(1)) or in a de-facto relationship (s 90MC(2)).

Identifying the type of interest

11.64 When assessing superannuation, regard must first be had to the type of superannuation interest held. Identifying the type of superannuation interest held is an important first step, as different valuation methods apply to different interests.

11.65 Superannuation interests generally fall into one of the following categories:

- accumulated interest (the most common);
- 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.

Valuation

11.66 Section 90MT(2) of the FLA requires a court to value the interest in respect of which superannuation benefits are payable, before it orders that they be split in property settlement proceedings. The court must value the interest according to the mandatory methods prescribed by the Family Law (Superannuation) Regulations 2001 (Cth) (FLSR).

11.67 The FLSR provide methods for determining the value of different superannuation interests; however, not all methods will be appropriate for all superannuation interests. If the prescribed methods of valuation are not compatible with a particular interest, the FLSR allows the Attorney-General to approve methods to be used to determine the gross value of a superannuation interest.

11.68 In practise, the most common and straightforward starting point is for an 'eligible person', which includes a member and the spouse of a member, to 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
- superannuation form.

11.69 These forms are available on the Family Court and FCC websites. Typically, solicitors will complete the form on their client's behalf, before providing it to their client to sign and then sending it to the trustee of the superannuation fund.

Some trustees charge a fee to complete the form and you should make enquires of the fund directly in relation to those fees.

11.70 After receiving the signed forms, the trustee will provide you or your client with the requested information. The trustee is prohibited from disclosing to anyone other than the applicant (or you, as the applicant's solicitor) that the application has been made.

Superannuation splitting and flagging

11.71 Most superannuation entitlements can be split by an order of the FCC or Family Court or a Binding Financial Agreement. In addition to setting out the different methods of valuing superannuation interests, the FLSR also establishes the manner in which payments splits are to be effected.

11.72 The FLA enables the court to 'split' or 'flag' the superannuation interests of ex-spouses.

11.73 It is important to remember that, as prescribed by s 90MZD of the FLA, the trustee of the superannuation fund must be informed about any superannuation splitting orders being sought (eg, after parties have drafted agreed Consent Orders) so that the trustee has the opportunity to object. This is known as providing the trustee with 'procedural fairness'. The court cannot make any splitting or flagging order, which will be binding on the trustee, until the trustee has been provided with procedural fairness. The giving of notice can be satisfied by a letter addressed to the trustee of the superannuation fund which:

- advises that proceedings have been commenced;
- specifies the next return date;
- includes any draft Consent Orders or any Terms of Orders sought; and
- invites the trustee to indicate if it has any objection to the order being sought.

11.74 After the orders have been made, the trustee will need to be provided with a sealed copy of the orders. The party who is receiving the benefit of the superannuation split is typically responsible for providing the trustee with both the proposed orders and the sealed orders.

11.75 The most common types of splitting orders are:

- where the non-member spouse is entitled to be paid a base amount. These are generally the most common type of orders sought;
- where the non-member spouse is entitled to be paid a specific percentage of the splittable payment.

11.76 After a splitting order has been made, the non-member will typically roll-over or transfer moneys to an existing fund the non-member may have. Alternatively, and subject to individual requirements of each superannuation fund, the non-member will sometimes create a new interest in the member's superannuation interest, or receive a lump sum payment (only available where a condition of release, such as retirement or permanent incapacity, is satisfied).

11.77 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.

11.78 Flagging orders:

- prevent the trustee from paying any superannuation entitlements that are 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.

Chapter 12

Child Support

General principles

12.1 While child support matters are less commonly litigated on a daily basis in the Family Court and the FCC, that does not preclude clients from asking the question, ‘What child support am I entitled to?’, in the context of discussions between practitioner and client. The objects of the CSAA, as set out in s 4, guide us to know that the purpose of child support and the law governing it is ‘... to ensure that children receive a proper level of financial support from their parents’ and, further, the particular objects of the CSAA include:

- (a) that the level of financial support to be provided by parents for their children is determined according to their capacity to provide financial support and, in particular, that parents with a like capacity to provide financial support for their children should provide like amounts of financial support; and
- (b) that the level of financial support to be provided by parents for their children should be determined in accordance with the costs of the children; and
- (c) that persons who provide ongoing daily care for children should be able to have the level of financial support to be provided for the children readily determined without the need to resort to court proceedings; and
- (d) that children share in changes in the standard of living of both their parents, whether or not they are living with both or either of them; and
- (e) that Australia is in a position to give effect to its obligations under international agreements or arrangements relating to maintenance obligations arising from family relationship, parentage or marriage.

12.2 As stated, child support is not an isolated issue in the context of a family law dispute but, rather, closely linked with parenting and/or property disputes. The processes are more ‘administrative’ in nature than court-based and are administered by the Department of Human Services (Child Support). The administration of

child support is pursuant to Commonwealth legislation, primarily, the CSAA and the CSRCA. The CSR is responsible for the administration of both pieces of child support legislation at first instance, with respect to making decisions in response to an application for child support assessment. Child support legislation operates in connection with the FLA and with the relevant Rules and Regulations for courts that are vested with jurisdiction to hear such matters.

12.3 As stated, the key to navigating a child support matter or advising a client with child support questions is to know where to find the relevant information. To that end, there are a large number of useful and easy to navigate online resources that can assist a practitioner (and clients too should they wish to take queries into their own hands). These resources will be referenced within, where relevant. The most valuable and readily available resources for any practitioner include:

- Department of Human Services (Child Support) 'Calculator', available at <www.processing.csa.gov.au/estimator/About.aspx>.
- Australian Governments 'Child Support Guide', available at <www.guides.dss.gov.au/child-support-guide>.
- Child Support Hotline: 1800 004 351.
- Family Law Council (2008), *The Legal Practitioners Guide — Precedents for child support agreements and court orders*.

Proof of parentage

12.4 In matters relating to child support, it is first necessary to establish the relevant 'parentage' as required by the CSAA. This is the important first step in any child support matter, but particularly in circumstances where the parentage of a person may be in doubt or unknown.

12.5 Section 5 of the CSAA provides that a 'parent' for the purposes of child support includes (in addition to the biological mother and father):

- an adoptive parent of the child;
- when used in relation to a child born because of the carrying out of an artificial conception procedure, this means a person who is a parent of the child under s 60H of the FLA; and
- when used in relation to a child born because of a surrogacy arrangement, this includes a person who is a parent of the child under s 60HB of the FLA.

12.6 By reason of the above definition of parentage within the FLA, same-sex parents of children are also eligible to apply for child support.

Presumption of parentage

12.7 In certain situations, particularly when parentage is in doubt or disputed, a presumption of parentage applies as determined by s 29(2) of the CSAA.

12.8 Section 29(2) provides that the CSR is to be satisfied that a person is a parent of a child only if they are satisfied:

- (a) that the person is or was a party to a marriage and the child was born to the person, or the other party to the marriage, during the marriage; or
- (b) that the person's name is entered in a register of births or parentage information, kept under the law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction, as a parent of the child; or
- (c) that, whether before or after the commencement of this Act, a federal court, a court of a State or Territory or a court of a prescribed overseas jurisdiction has:
 - (i) found expressly that the person is a parent of the child; or(ii) made a finding that it could not have made unless the person was a parent of the child;and the finding has not been altered, set aside or reversed; or
- (d) that, whether before or after the commencement of CSA Act, the person has, under the law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction, executed an instrument acknowledging that the person is a parent of the child, and the instrument has not been annulled or otherwise set aside; or
- (e) that the child has been adopted by the person; or
- (f) that the person is a man and the child was born to a woman within 44 weeks after a purported marriage to which the man and the woman were parties was annulled; or
- (g) that the person is a man who was a party to a marriage to a woman and
 - (i) the parties to the marriage separated; and
 - (ii) after the parties to the marriage separated, they resumed cohabitation on one occasion; and
 - (iii) within 3 months after the resumption of cohabitation, they again separated and afterwards lived separately and apart; and
 - (iv) the child was born to the woman within 44 weeks after the period of cohabitation but after the dissolution of the marriage; or

- (h) that the person is a man and:
 - (i) the child was born to a woman who cohabited with the man at any time during the period beginning 44 weeks and ending 20 weeks before the birth; and
 - (ii) no marriage between the man and the woman subsisted during any part of the period of cohabitation; or
 - (i) that the person is a parent of the child under s 60H or s 60HB of the FLA.

12.9 The CSR holds a discretionary role in the weighing and considering the material before them for the purposes of administering an assessment of a child support application, including with respect to parentage. The CSR is not required to conduct any inquiries or investigations into these matters: s 29(1) of the CSAA. In the event of 'conflicting evidence' with respect to parentage presumptions, the CSR maintains the discretion to choose the 'more or most likely to be the correct presumption' which shall prevail: s 29(3) of the CSAA.

The Department of Human Services (Child Support)

How to apply for a child support assessment

12.10 Part 4 of the CSAA details the requirements and processes with respect to making an application for an administrative assessment of child support.

12.11 Section 23 of the CSAA provides that for an application to be 'properly made' it must comply with the following provisions:

- children in relation to whom applications may be made: s 24 of the CSAA;
- parents who may apply: s 25 of the CSAA;
- persons who may apply — non-parent carers: s 25A of the CSAA;
- formal requirements for applications: s 27 of the CSAA.

Child: s 24 of the CSAA
An application may be made to for an assessment for a child only if the child is: <ul style="list-style-type: none">• an eligible child;¹ and• under 18 years of age; and

1. See Child Support (Assessment) Act 1989 (Cth) ss 18–22; *Child Support Guide* at 2.1.2 definition of 'eligible child'.

- not a member of a couple; and
- meets the residence requirements, which in summary include that the child is:
 - present in Australia on the day which the application is made; and/or
 - an Australian citizen, or ordinarily resident in Australia, on that day;
 - UNLESS all of the following apply:
 - application is made for a parent to be assessed in respect of the costs of the child; and
 - the parent of the child is a resident of a reciprocating jurisdiction; and
 - the CSR has not determined under s 29A of the CSAA that child support is reasonably likely to be payable by the parent; or
 - BOTH of the following apply:
 - the application is made under s 25A of the CSAA by a non-parent carer; and
 - the non-parent carer is a resident of a reciprocating jurisdiction.

Parent: s 25 of the CSAA

A parent may apply for an assessment if:

- both parents are to be assessed in respect of the costs of the child; and
- the applicant parent is not living with the other parent as his or her partner on a genuine domestic basis (whether or not legally married to the other parent); and
- the applicant complies with any applicable requirements of s 26 of the CSAA (re joint care situations) and s 26A of the CSAA (re children cared for under child welfare laws); and
- if either parent is not a resident of Australia on the day on which the application is made (must meet requirements of s 29A and 29B of the CSAA).

Non-Parent Carers: s 25A of the CSAA

A non-parent carer may apply for an assessment if they:

- are an eligible carer of the child;² and
- are not living with either parent as the partner of that parent on a genuine domestic basis; and
- do not have joint care for the child with another person; and
- if they are caring for the child under a child welfare law, they are a relative of the child; and
- one of the following applies in respect of assessing the costs of the child:
 - the non-parent applies for both parents to be assessed; or
 - the non-parent applies against one parent to be assessed if:
 - one parent is not a resident of Australia or a reciprocating jurisdiction; or
 - the CSR is satisfied there are 'special circumstances' which warrant same; or
 - one parent is deceased.

12.12 Pursuant to ss 27 and 150A of the CSAA, the CSR can specify the manner in which an application can be made. Applications can presently be made by telephone (131 272), online at <www.humanservices.gov.au> and also in writing with the form to then be returned by mail, fax or in person at a Service Centre. For the purposes of an application, practitioners can advise their clients to prepare and provide the following information for themselves and the other party:

- basic contact details, including address;
- tax file number;
- annual income details;
- bank account details; and
- details of the child/ren including how often they care for the children.

2. See Child Support (Assessment) Act 1989 (Cth) s 7B for 'Meaning of eligible carer'.

The process

12.13 Once an application has been properly made, the CSR then makes the ‘assessment’ of child support by using the statutory formula contained in Pt 5 of the CSAA. In summary, the formula considers the income of each parent and the respective care percentage each parent has for the child/ren to determine the ‘costs of care’ or amount of child support payable.

The Department of Human Services (Child Support) summarises the ‘Basic Formula 8 Steps’ as follows:³

Step	Action	CSAA
1	Calculate each parent’s income. This is a parent’s adjusted taxable income minus a self-support amount and any relevant dependant allowance. A parent may be able to estimate their income.	s 43 s 45 s 46 s 41
2	Add both parents’ income together to get a combined child support income.	s 42
3	Calculate the income percentage of each parent by dividing each parent’s income by their combined total.	s 55B
4	Calculate each parent’s percentage of care.	s 48
5	Work out each parent’s cost percentage using the care and cost table.	s 55C
6	Subtract the cost percentage from the income percentage for each parent. The result is called the ‘child support percentage’. The result will determine if a parent pays or receives child support. If it is a negative percentage, that parent is assessed to receive child support because their share of the costs of raising the children is more than met by the amount of care they are providing. If it is a positive percentage, that parent is assessed to pay child support because they are not meeting their entire share of the costs of the child directly through care.	s 55D
7	If a positive percentage: work out the costs for each child based on the combined income total using the cost of children table.	s 55G s 55H

3. <www.humanservices.gov.au/customer/services/child-support/child-support-assessment>.

Step	Action	CSAA
8	Get the total amount of child support payable by multiplying the positive child support percentage by the costs of the child. This final figure is the amount of child support payable.	s 35

12.14 The Department of Human Services maintains up-to-date and easily accessible tables for information, including:

- cost and care tables, which provide a summary of what child support cost percentage a parent is liable to pay by reason of their child support care percentage (as determined by nights per year/fortnight); and
- cost of children tables for relevant age groups and mixed ages (which are the Male Total Average Weekly Earnings (MTAWE) tables provided by the Australian Bureau of Statistics).

12.15 Having said that, the department also provides a 'Child Support Calculator' which is useful to both practitioner and client alike. The child support calculator can provide an individual with a child support estimate based on the income of both parents, particulars of the children (age) and frequency of care. The child support calculator is particularly useful in providing clients with a simple illustration as to what child support they may be entitled to or liable to pay.

12.16 Similarly, the child support calculator is also useful in practice when providing clients with an indication as to what the 'assessed amount' of child support may be as opposed to an amount of periodic support over and above that for the purposes of a Binding Child Support Agreement or other forms of private agreement.

What happens after an administrative assessment is made?

12.17 Once an application for child support assessment has been accepted and an administrative assessment is made, the CSR must notify both the applicant and other parent in writing. In the event of a refusal, the CSR must provide reasons as to why the application was refused.

Change of assessment

12.18 An assessment of child support can be changed in a number of circumstances, including when the income of either party changes, care

arrangements change or a terminating event occurs: s 12 of the CSAA. In addition, a 'departure' from an assessment may be requested where 'special circumstances' exist. A form entitled 'Application to Change your Assessment — Special Circumstances' is available on the Department of Human Services website. Any decision to change an assessment must be 'just and equitable' or 'otherwise proper'. The 10 reasons why a CSR may consider changing the assessment include:

Reason	Description
1	high costs in enabling a parent to spend time with, or communicate with, the child/ren;
2	the special needs of the child/ren;
3	high costs of caring for, educating or training the child/ren in the manner expected by the parents;
4	income of the child/ren;
5	money, goods or property received by the child/ren, the payee or a third person
6	high costs of child care;
7	necessary commitments of self-support;
8	a parent's income, property, financial resources or earning capacity;
9	the duty to maintain any other child or person; and
10	responsibility of the parent to maintain a resident child/ren.

Objecting to a decision

12.19 Due to the administrative nature of child support, the process by which a parent or person would object to a child support decision begins internally at the department. The CSR may at any time amend an assessment pursuant to s 75 of the CSAA. This enabling provision provides that the purposes for which a CSR may amend an assessment include:

- correcting mistakes (whether or not made by the CSR);
- correcting the effect of a false or misleading statement;
- giving effect to the happening of a child support terminating event;
- giving effect to the happening of an event or change of circumstances that affects the annual rate at which child support is or was payable;

- giving effect to the acceptance of a child support agreement by the CSR; and
- giving effect to a decision or order of a court having jurisdiction under the CSAA.

12.20 Section 80(1) of the CSAA provides the type of decisions a parent or party to an assessment can object to. The objection must be made in writing and lodged within 28 days (90 days if the other parent resides in a reciprocating jurisdiction) of the parent receiving notice of the decision: s 81(2) of the CSAA. The objection can be allowed and the original decision amended or substituted for a fresh decision. Of course, the objection can also be disallowed.

Administrative review —Administrative Appeals Tribunal

12.21 In the event an objection is disallowed, the objection would then proceed through the usual channel of reviewing administrative decisions via the Administrative Appeals Tribunal (AAT) formerly, the Social Security Appeals Tribunal. An application must be made to the AAT within 28 days of receiving the CSR's decision with respect to the objection (or 90 days in the event a parent is located overseas). The AAT provides an initial 'first' review to most objection decisions. In the event a party does not agree with the outcome of their first review, they can request a second review with respect to the following decisions:

- a decision to refuse an application for an extension of time in which to apply for the AAT first review;
- a care percentage decision; or
- a decision to make, or not to make, a determination about the date of effect of a care percentage decision.

12.22 For further information in relation to the AAT, visit <www.aat.gov.au>.

The courts

12.23 The administrative nature and processes of child support sees only limited matters reach the courts. The court cannot make an order for maintenance of a child if an application could be made through the usual administrative process of lodging an application for assessment: s 66E of the CSAA. Having said that,

should a practitioner find themselves in either the FCC or the Family Court, it will more often than not be with respect to one of the following applications:

- an appeal from the AAT;
- seeking a declaration that a person be assessed or not be assessed in respect of the costs of the child/ren;
- if there are concurrent proceedings before the court;
- enforcement; and
- seeking to set aside a Child Support Agreement.

Appeals from the AAT

12.24 An appeal of an AAT decision must only be on a question of law, not fact.

Declaration that a person should be assessed in respect of the costs of a child: s 106A of the CSAA

12.25 A declaration sought pursuant to s 106A of the CSAA would usually be made in circumstances where an application for assessment is refused on the basis of being unable to establish parentage. As a result, the court would usually be asked to determine parentage pursuant to s 69W of the FLA. In the event the testing as to parentage returns positive, the court is then able to make a declaration pursuant to s 106A that the ‘parent’ should be assessed in respect of the costs of the child/ren.

12.26 An application seeking a s 106A declaration must be made within 56 days of the receipt of the CSR’s letter of refusal: r 25A.06 of the FCCR. In the event an application is not made within the required time frame, an applicant may seek leave to apply out of time pursuant to r 3.05 of the FCCR. Rule 25A.08 of the FCCR provides the evidence to be supplied in support of an application pursuant to s 106A of the CSAA.

Declaration that a person should not be assessed in respect of costs of a child: s 107A of the CSAA

12.27 A declaration pursuant to s 107A of the CSAA is, in effect, the opposite of that above, in that an applicant seeks a declaration that a person should not be assessed in respect of the costs of the child because they are not a parent of the child. Any funds paid pursuant to an assessment prior to a declaration may be recoverable under s 143 of the CSAA.

12.28 An application seeking a declaration pursuant to s 107A of the CSAA must be made within 56 days of the receipt of the notification of the successful application for assessment: r 25A.06 of the FCCR. In the event an application is not made within the required time frame, an applicant may seek leave to apply out of time pursuant to r 3.05 of the FCCR. Rule 25A.08 of the FCCR provides the evidence to be supplied in support of an application pursuant to s 107A.

Concurrent parenting proceedings in the Federal Circuit Court

12.29 Parents can make an application for child support matters to be dealt concurrently, if an application for Parenting Orders is currently on foot: s 116 of the CSAA. Orders that a court can make are contained in s 118 of the CSAA.

Other orders commonly sought of the courts
<ul style="list-style-type: none">• recovery of over-payments where no liability for child support existed (or it did previously, however, does not anymore): s 143 of the CSAA;• application for amendment of administrative assessment that is more than 18 months old: s 111 of the CSAA;• stay orders: s 111C of the CSRCA;• urgent maintenance orders: s 139 of the CSAA;• application for child support to be provided in a form other than periodic amounts or a lump sum: s 123 of the CSAA;• application for the court to set aside a Child Support Agreement or a Termination Agreement: s136 of the CSAA.

Private agreements

12.30 In keeping with the objects of the CSAA, it was intended that the child support legislation permit parents to make private arrangements for the financial support of their children. Clients often inform practitioners of an 'informal arrangement' they have with respect to child support, which can involve ad hoc payments by the payer to the payee in specific amounts or for specific purposes.

Child support agreements

12.31 On 1 July 2008, the Child Support Legislation Amendment (Reform of the Child Support Scheme — New Formula and Other Measures) Act 2006 (Cth)

came into effect and provided for two new forms of child support agreements, being Binding Child Support Agreements and Limited Child Support Agreements.

12.32 A particularly useful resource for the drafting of Child Support Agreements is the *Legal Practitioners Guide — Precedents for Child Support Agreements and Court Orders* (2008), published jointly by the Family Law Council, the Law Council of Australia (Family Law Section) and the CSA. There is also a Solicitor's Hotline, 1800 004 351 (Australian child support) and 1800 180 272 (international child support), which can assist practitioners with questions with respect to drafting, effect and enforceability.

Binding Child Support Agreements

12.33 Binding Child Support Agreements can set the amount of child support to be paid by one party to another or alter what would otherwise be payable pursuant to an assessment by the CSA. Binding Child Support Agreements must contain terms as provided in s 84 of the CSAA and include, but are not limited to:

- periodic amounts;
- non-periodic payment provisions (eg, school fees or private health insurance); and
- lump sum payment provisions (only available if an assessment is in force immediately before an application for acceptance of the agreement is made).

12.34 An important requirement of Binding Child Support Agreements is that legal advice must be provided to both parties before entering into the agreement: s 80C of the CSAA. A Statement of Independent Legal Advice must be signed by a legal practitioner for both parties, which certifies that the parties have been provided legal advice as to the effect of the agreement on their rights and the advantages and disadvantages to that party on entering into such an agreement.

12.35 Binding Child Support Agreements cannot be varied: s 80CA of the CSAA provides a Binding Child Support Agreement can only be terminated pursuant to s 80D of the CSAA by entering into a further agreement, whether that be a Termination Agreement or a new Binding Child Support Agreement. Only in very limited circumstances will a court set aside a Binding Child Support Agreement.

Limited Child Support Agreements

12.36 The main differences between a Binding Child Support Agreement and a Limited Child Support Agreement include (as contained in s 80E of the CSAA):

- An administrative assessment must be in place prior to the department accepting a Limited Child Support Agreement.
- The amount of support payable under a Limited Child Support Agreement must be at least the amount of the existing assessment.
- Legal advice is not required prior to entering into a Limited Child Support Agreement.
- The agreement can be terminated (s 80G of the CSAA) unilaterally after 3 years, in the event a notional assessment (the amount payable 'as assessed' if the agreement was not in place) changes more than 15%, by agreement between the parties or by court order.

12.37 Practitioners must advise their clients of the effect of Child Support Agreements on a party's entitlement to Family Tax Benefit Part A. The amount payable is determined by reference to the 'notional assessment' rather than any periodic amount payable pursuant to an agreement.

PRACTICAL TIP

- Practitioners and parties should be aware that an agreement is to be registered with the Department of Human Services within 28 days of the agreement being made. To avoid doubt, it is useful to draft into the agreement which party will retain the original/certified copy and attend to the registration of the agreement. For the purposes of registration, a certified copy is to be provided to the department with the 'Child Support Agreement — CS1666' form, accessible on the department's website.⁴
- In the event you, as a legal practitioner, are registering the agreement on behalf of your client, be sure to have your client complete the 'Representative Authority Form — CS3042', otherwise you may (more than likely will) have issues with being able to discuss your client's matter with the department.

4. <www.humanservices.gov.au/customer/forms/child-support-forms>.

Chapter 13

Maintenance

Spousal maintenance

General principles

13.1 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 spouse maintenance and the second spouse is unable to support themselves adequately. The purpose of spousal maintenance is to adjust for any disparity between the parties' income and earning capacities and their ability to support themselves. An application for spousal maintenance can be made independently or at the same time as an application for property orders.

13.2 Maintenance is not defined in the FLA although it is broadly defined in *Branchflower and Branchflower* (1980) FLC 90-857 as:

When maintenance is considered as a broad concept it is clear that it includes not only the means or income of the person concerned but also the purposes for which those means are required, such as food, shelter and clothing ... the provision of accommodation.

13.3 Spousal maintenance may include:

- periodic lump sum payments;
- a personal right to occupy a home; and
- the use of a car or chattels.

13.4 Due to the court's 'clean break principle' (s 81 of the FLA), the court is reluctant to make long-term final Spousal Maintenance Orders. Maintenance payments for a spouse will usually cease upon a specified date, a parties' remarriage, a party forming a de facto relationship, obtaining employment, death or upon

the death of the person making maintenance payments or if the order is interim, when final property orders are made.

13.5 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 them to re-enter the workforce. If the applicant seeks both property orders and spousal maintenance on a final basis, any final Spousal Maintenance Order will be considered after and in light of the property orders made by the court, after consideration of the four steps process (See **Ch 11** of this *Guide*). Often, as a result of the property orders, there is no longer a need for spousal maintenance.

When can an application be made

13.6 An application for spousal maintenance can be made during a marriage, however, it cannot be made during a de facto relationship. Any application for spousal maintenance must be made within 12 months of a Divorce Order or within 2 years of the end of de facto relationship without leave of the court.

13.7 Spousal Maintenance Orders can be made on an urgent or interim basis pending final division of property.

Steps to determine a maintenance claim

13.8 The court will consider the following matters when hearing an application for spousal maintenance, be it on an interim or final basis:

- a threshold finding under s 72(1) of the FLA (s 90SF(1) for de facto relationships);
- consideration of the matters in ss 74 and 75(2) of the FLA (ss 90SE(1) and 90SF(3) for de facto relationships);
- there is no fettering principle that a pre-separation standard of living must automatically be awarded where the respondent's means permit; and
- discretion should be exercised in accordance with s 74 of the FLA.

Step 1 — entitlement to maintenance

13.9 The 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 or physical or mental incapacity for employment; and
- any other adequate reason.

13.10 It is important to remember that the test is not whether a party needs maintenance, but whether they are able to support themselves. If the applicant is able to adequately support themselves by reason of their earning capacity, capital or other sources of income, the application will be dismissed.

13.11 Adequate is determined on a case by case basis. For a discussion of what ‘adequate’ means in the context of spousal maintenance see *Brown and Brown* (2007) FLC 93-316.

13.12 The respondent’s capacity to pay spousal maintenance is not merely assessed on income, but also on the property, financial resources and earning capacity. Practically, capacity to pay is often assessed by deducting the respondent’s weekly expenses from their income and considering any surplus. It is important to remember that the court will consider the parties’ respective expenses, not expenses relating to any child or children which are to be dealt with by child support (See Chapter 12 of this *Guide*).

Step 2 — the s 75(2) factors

13.13 Provided the threshold has been met in step 1, the court will then consider the matters in s 75(2) of the FLA.

Step 3 — the no fettering principle

13.14 Although the court will consider whether a party is able to adequately support themselves, ‘adequate’ means a level of support above subsistence level. However, there is no fettering principle that the maintenance must be such as to maintain a pre-separation standard of living, where the respondent’s means permit: see *In the Marriage of Bevan* (1995) FLC 92-600.

Step 4 — exercise the discretion

13.15 In accordance with s 74 of the FLA, the court should make an order for maintenance that is ‘proper’. The court’s power is of a discretionary nature and is very broad. The orders the court can make are set out in s 80(1) and (2) of the FLA (s 90SS(1) and (2) of the FLA for de facto relationships).

Interim spousal maintenance

13.16 The power to order interim spousal maintenance arises under ss 80(1)(h) and 90SS(1)(h) of the FLA.

13.17 While the above process will be applied by the court when considering an interim application, it is important to remember that the court's ability to determine factual disputes at the interim stage is significantly curtailed. The result of this is that the court is likely to err on the side of caution. In this regard, when considering the parties' surplus incomes in stage 1, it is not uncommon for the court to disregard or reduce certain alleged expenses. For example, the applicant's financial statement may claim that they spend \$50 per week on lottery tickets. The court may disregard that expense when considering the applicant's ability to adequately support themselves, on the basis that it appears unreasonable. Equally, the court may take a similar position with expenses claimed by the respondent when assessing their ability to pay any spousal maintenance.

Urgent spousal maintenance

13.18 The court has the power under ss 77 and 90SG of the FLA to order the payment of urgent spousal maintenance. The court is not required to undergo the detailed considerations that it would otherwise be required to do under s 72 of the FLA.

13.19 The court must be satisfied that a party is in immediate need of financial assistance but it is not practicable in the circumstances to determine the matter pursuant to s 72 of the FLA, by way of interim spousal maintenance. If the court were to make orders for urgent spousal maintenance, the orders are usually for a very limited period until the parties can file appropriate evidence.

13.20 It is important to remember:

- Urgent spousal maintenance is not the same as interim spousal maintenance.
- In most cases, it is more appropriate to apply for interim spousal maintenance: see *In the Marriage of Pritchard* (1982) 8 Fam LR 805.
- Unless the application is appropriately urgent, proceedings for maintenance should be conducted in the ordinary course: see *Ashton and Ashton* (1983) 8 Fam LR 675.
- Urgent spousal maintenance may be made ex parte. If orders are made on an ex parte basis, they are likely to be even more limited in compass to avoid serious injustice to the other party.

Adult child maintenance

13.21 Pursuant to s 66G of the FLA, the court may make such child maintenance orders as it thinks proper. Although there is no reference in the relevant sections to ‘adult’ child maintenance, given that an order for child maintenance must not be made if an application for child support could be properly made (s 66E of the FLA), the effect is that ss 66F–66N of the FLA generally relate to ‘adult’ child maintenance.

13.22 However, if the child is over the age of 18 years, there are further limitations on the ability of the court to order child maintenance. Section 66L of the FLA states that the court must not make a Child Maintenance Order in relation to a child who is over the age of 18 years, unless it is necessary:

- to enable the child to complete their education; or
- because the child has a mental or physical disability.

See *Re AM (Adult Child Maintenance)* (2006) 198 FLR 221 for further discussion.

13.23 Section 66H of the FLA sets out what the court must take into consideration in proceedings for a Child Maintenance Order which are:

- Consider the financial support necessary for the maintenance of the child — as set out in s 66J of the FLA.
- Determine the financial contribution, or respective contributions, towards the financial support necessary for the maintenance of the child of the parties to the proceedings — as set out in s 66K of the FLA.

13.24 The above considerations also refer to s 66B of the FLA, which states that the objects of these sections are to ensure that children receive a proper level of financial support from both their parents and that the parents share in the support of their children equitably.

13.25 The court can make orders for periodic payments or for a lump sum. However, s 66K(5) of the FLA requires the court to first consider a party’s capacity to pay a periodic payment before considering a lump sum payment or some other method.

THINGS TO REMEMBER

These applications are not made very frequently. One of the biggest issues in these applications relates to the difficulties in relation to ascertaining the needs of the child/ren. The needs of the child/ren cannot be assumed or determined by inference, actual evidence referable to the child in question is required: see *In the Marriage of Mee and Ferguson* (1986) 10 Fam LR 971.

Childbirth maintenance

13.26 If the parents of a child are not married, the father is liable to contribute to child bearing expenses. This section is most often used when the parties separate before the child is born or where the parties were never in an ongoing relationship. The relevant sections are found in ss 67B– 67G of the FLA.

13.27 Section 67B provides that a father is liable to contribute towards the maintenance and expenses of the mother for:

- the childbirth maintenance period;
- the mother's reasonable medical expenses in relation to the pregnancy and birth;
- if the mother dies as a result of the pregnancy, the funeral expenses; and
- if the child is stillborn or dies during childbirth, the child's funeral expenses.

13.28 Section 67C of the FLA outlines the matters that the court must take into account and include, inter alia:

- the parties' income, earning capacity, property and financial resources;
- the commitment of each party to support themselves and any other child or person whom they have a duty to maintain; and
- any special circumstances which, if not taken into account, would result in a particular injustice or undue hardship to any person.

13.29 Section 67D of the FLA sets out the types of orders the court can make in childbirth maintenance proceedings.

Timing of applications for childbirth maintenance

13.30 Section 67G of the FLA provides that a person can commence proceedings for child maintenance:

- at any time during the pregnancy of the mother; or
- after the birth of the child, but not later than 12 months after the birth except by leave of the court, which will not be granted unless the court is satisfied that a refusal to grant leave would cause hardship to the applicant, the child or another person.

Chapter 14

Divorce

14.1 Divorce applications should be filed in the FCC. Registrars are delegated the power to make divorce orders which are by consent or not otherwise opposed. A divorce can either be applied for jointly by the parties or solely by one party.

What is required for a divorce order to be made?

Grounds for divorce

14.2 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 of the application.

14.3 If the parties have separated, but continued living under the same roof, the court will require evidence from the parties to be satisfied that they have in fact separated. This can be achieved by the filing of an affidavit by your client and potentially a corroborating witness.

14.4 There is no single indicia of separation, but the court looks at the matter as a whole. Essentially, separation means that the parties no longer continue to share a married life.

14.5 The following are some general indicators of separation:

- the parties no longer undertake household duties for each other;
- the parties have told their family and friends about their separation;
- the parties have advised a government department, such as Centrelink, about their separation.

14.6 In some cases, if the parties resume cohabitation for a period of less than 3 months and then separate a second time, the original period of separation can be included. However, if the cohabitation goes beyond this, it will negate the previous period of separation.

Jurisdiction

14.7 The court has jurisdiction to make a Divorce Order in the event one of the parties:

- regards Australia as their home and intends to live indefinitely in Australia;
- is an Australian citizen or resident;
- is an Australia citizen by birth or descent;
- is an Australia citizen by grant of an Australia citizenship;
- ordinarily lives in Australia and has done so for 12 months immediately before filing for divorce.

Proper arrangements for children

14.8 In the event there are children of the marriage aged under 18 years at the time of the divorce hearing, the court must be satisfied before making a Divorce Order that proper arrangements, in all the circumstances, have been made for the care, welfare and development of the children or that there are circumstances by reason of which the Divorce Order should take effect, notwithstanding such arrangements have not been made.

14.9 The arrangements need not be perfect, but satisfactory in all the circumstances. Be sure that you are able to speak to the registrar about the facts of the case and why your client believes the arrangements are suitable. This is a basis for the court to refuse to grant the divorce, so make sure that you are prepared for any questions.

14.10 For the purposes of an application for a Divorce Order, a child of the marriage is a child (including an ex-nuptial child of either the husband or the wife, a child adopted by either of them or a child who is not a child of either of them) if the child was treated by the husband and wife as a child of their family immediately before the time when the parties separated.

Service

14.11 If the application for divorce is joint, there will be no issue around proving service. However, if the application is a sole application, the court must be satisfied that the respondent to the application is aware of the proceedings and has had a chance to respond, should they wish to. If they do not object to the divorce, there is nothing that they need to do.

14.12 In general, it is prudent to have the documents personally served on the respondent, however, if your client is satisfied that the respondent will sign and return the relevant documents to you, you can post the documents.

14.13 You must give the respondent sealed copies of the following:

- the Application for Divorce;
- any affidavits filed;
- a Marriage, Families and Separation brochure;
- an Acknowledgment of Service (Divorce) form.

14.14 In order to prove service, you will need to file an affidavit setting out the manner of service, being either by post or personal service. If the documents have been posted to the respondent or their legal representative, you must ensure that they return a signed copy of the Acknowledgment of Service (Divorce) form. You will then need to prepare an Affidavit of Service by Post (Divorce). If the documents have been served by a process server, ensure they provide the signed Acknowledgment of Service and prepare an Affidavit of Service by Hand (Divorce). You may need to have your client sign an Affidavit Proving Signature (Divorce).

14.15 The most convenient way to arrange service is to engage a process server. Be aware that the applicant cannot serve the respondent and there are the general rules about who can serve documents, such as, the person serving the documents must be over the age of 18 years.

14.16 The respondent must be served the application with sufficient time to respond, should they wish to. If they are residing in Australia, this is 28 days. If the respondent is not in Australia, they must be served the documents at least 42 days before the hearing. If this service period is not met, the court will stand the matter over on the return date.

14.17 There is a Divorce Service Kit which can be found on the FCC website <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/court-forms/diy-kits/kit-divorce-service>>.

If the parties have been married less than 2 years

14.18 If the parties were been married for less than 2 years, they must attend counselling before they can file an Application for Divorce. The 2 years is taken from the date of the marriage to the date of filing the application and keep in mind that there must also have been at least 12 months separation at the date of filing.

14.19 If the parties have been married less than 2 years, your client has the following options:

- attend counselling with the other party prior to filing the application;
- prepare and file an affidavit seeking the leave of the court to grant the divorce without the requirement for counselling (the affidavit will need to set out the special circumstances of the case which would enable the court to make the order, ie, there is a history of family violence); or
- wait until the 2 year period is satisfied.

Filing

14.20 Upon filing the Application for Divorce, the matter will be given a date. Keep in mind that the date you obtain will depend on the court's schedule.

14.21 There are a number of things that could arise delaying the granting of the divorce, so be careful not to give your client deadlines, as the hearing date will usually be a few months away.

Sole or joint application

14.22 Upon filing the application, the matter will be listed for a divorce hearing. In some circumstances, attendance may not be required at the divorce hearing. This will depend on whether there are children of the marriage and whether the application is sole or joint. If attendance is not required, this means that a registrar is able to make the orders in chambers without the necessity for appearances. If the application is:

- joint and there are no children of the marriage — attendance is not required;
- joint and there are children of the marriage under the age of 18 years — attendance is not required;
- sole and there are no children of the marriage — attendance is not required; and
- sole and there are children of the marriage under the age of 18 years, you must attend.

The hearing

14.23 If no attendance is required because the application is joint or because there are no children under the age of 18 years, then the Divorce Order can be

made in chambers by a registrar. If there are any impediments to the issue of the divorce, then requisitions will be sent to you.

14.24 If attendance is required, your client does not need to attend the divorce hearing if you are appearing on their behalf, but they may wish to in any event. Make sure that you know the facts of the matter, such as the separation date and names and dates of birth of children. Divorce hearings are run very quickly and there may be 20 matters listed in a one hour period, it is important you know your client's case so that you do not hold up the list.

14.25 The Divorce Order will take effect one (calendar) month and one day after the divorce hearing. You will then receive a sealed copy of the order from the court. If your client is thinking about remarriage, be sure to allow sufficient time to receive the sealed Divorce Order in the post.

Effect of divorce

14.26 From the date the divorce takes effect, there is a 12 month limitation period for filing interim or final property and/or spousal maintenance applications (there is no such limitation for parenting matters). Be aware that an application can be filed outside of this time frame with the leave of the court. Should this be necessary, it would be prudent to seek assistance from a more senior practitioner.

CHECKLIST	YES/NO
Have the parties been separated for 12 months?	
Will there be an issue about the separation date?	
Are there any children of the marriage? If so, are they under 18 years old?	
Was the marriage shorter than 2 years?	
Does your client have a copy of the marriage certificate, including a certified translation if a foreign Marriage Certificate?	
Was your client born overseas?	

TIP

You should discuss with your client the need to update his or her will once the divorce becomes final.

Chapter 15

Contravention and Enforcement

15.1 Application for the contravention and enforcement of orders can be filed in the Family Court or FCC or a court of summary jurisdiction.

Part VII Div 13A of the FLA deals with the consequences of failure to comply with orders and obligations that affect children. Part XIII (Sanctions for failure to comply with orders, and other obligations, that do not affect children) of the FLA applies only to contraventions of an order under FLA which are effectively those orders and agreements that do not fall under Div 13A.

15.2 Contravention Applications are used for an application alleging a breach of a parenting order under Pt VII Div 13A of the FLA or an order not affecting children, for example, a property order under Pt XIII of the FLA.

15.3 Certain summary proceedings, including enforcement of Financial and Parenting Orders and all contravention and contempt applications should be filed in the FCC rather than the Family Court, where there are no proceedings in respect of an associated matter pending in the Family Court and where filing in the FCC is available.

Contravention applications

Contravention proceedings under Div 13A of the FLA

15.4 Part VII Div 13A of the FLA deals with the consequences of failure to comply with orders and obligations that affect children. Division 13A applies only to the contravention of 'an order under [the FLA] affecting children': see s 4 of the FLA.

15.5 Contravention Applications are filed when one party alleges that 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.

15.6 Division 13A is structured as follows:

- 15.6.1 Subdivision A contains a simplified outline of the Division, provides for the application of the Division and defines 'contravened an order' and 'reasonable excuse': s 70NAC of the FLA.
- 15.6.2 Subdivision B confers power to vary a primary order (see s 4 of the FLA) in all contravention cases under Div 13A, whether or not a contravention is established.
- 15.6.3 Subdivision C sets out the powers of the court when an alleged contravention is 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. This is in addition to the power to vary under Subdiv B.
- 15.6.4 Subdivision D sets out the powers of the court when an alleged contravention is established and the respondent proves reasonable excuse. The court may order compensatory time, often referred to as 'make up' time, and may make a costs order. This is in addition to the power to vary under Subdiv B.
- 15.6.5 Subdivision E sets out the powers of the court for less serious contraventions without reasonable excuse. 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. This is in addition to the power to vary under Subdiv B.
- 15.6.6 Subdivision F sets out the powers of the court for more serious contraventions without reasonable excuse. 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. This is in addition to the power to vary under Subdiv B.

Before you file

15.7 Before filing a Contravention Application, the applicant should attempt to resolve the matter by writing to the other party or attending mediation. Consider the most cost-effective way of getting your client what they want. Keep in mind that in most cases the parties will need to maintain a relationship in parenting their child/ren and so think about the impact of commencing contravention proceedings will have on the parties.

15.8 Please note that s 60I of the FLA applies to contravention applications under Div 13A and the applicant must approach a FDR practitioner to attempt FDR with the other party. See Chapter 6 of this *Guide*.

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

15.9 Before filing a Contravention Application, you should also consider the result that you want to achieve. The remedies available from the court range from the enforcement of 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.

15.10 If your client really just wants to ensure the existing orders are complied with, rather than to 'punish' or impose a particular penalty on the respondent, then you should consider filing an Application in a Case seeking that the orders be enforced rather than contravention proceedings.

Material to be filed

15.11 The following documents need to be filed:

- a contravention application in the approved form;
- an affidavit: r 25B.02(2) of the FCCR; r 21.02(2) of FLR;
- a valid s 60I Certificate or Affidavit of Non-Filing of Family Dispute Resolution Certificate (if seeking an exemption from the FDR process). Note that s 60I Certificates are valid for 12 months from the latest FDR or attempted resolution: reg 26(1) of Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth).

15.12 There is currently no filing fee for Contravention Applications.

15.13 The document will need to be personally served on the respondent. 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.

15.14 Ensure that the application is correctly pleaded with each breach precisely set out. The respondent needs to know what case they are to answer and the court may dismiss the application if it is not correctly pleaded and should that occur, the applicant will likely be ordered to pay costs.

Contravention hearing procedure

15.15 The procedure at contravention hearings is similar in all courts (r 25B.04 of the FCCR; r 21.08 of the FLR) in that the court must do the following:

- 15.15.1 inform the respondent of the allegation (ie, of each alleged contravention); and
- 15.15.2 ask the respondent whether the respondent wishes to admit or deny the allegation; and
- 15.15.3 hear any evidence supporting the allegation (which may include cross-examination); and
- 15.15.4 ask the respondent to state the response to the allegation (whether any defence is raised, such as reasonable excuse); and
- 15.15.5 hear any evidence for the respondent (including any cross-examination); and
- 15.15.6 determine the case/proceeding.

15.16 As such, the judicial officer presiding over the contravention hearing will generally proceed as follows:

- 15.16.1 Establish precisely which order is alleged to have been breached.
- 15.16.2 Advise the applicant that they bear the onus of proving the facts to support the allegation that the respondent breached the order.
- 15.16.3 Request that the respondent stand while each allegation is read out. The respondent will be asked whether they admit or deny each breach.
- 15.16.4 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.

- 15.16.5 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.
- 15.16.6 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 they say about the alleged breaches, so that the applicant is not taken by surprise.
- 15.16.7 The respondent will then be cross-examined about their evidence.
- 15.16.8 Each party will make submissions about reasonable excuse.
- 15.16.9 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.
- 15.16.10 Orders will be made including orders in relation to penalty and costs.

15.17 For the orders that can be made by the court see ss 67X, 70NBA, 70NCB, 70NDB, 70NDC, 70NEB, 70NFB, 70NFE, 112AD, 112AH, 112AF and 112AP of the FLA.

15.18 If a respondent fails to attend court on the hearing date and there is proof that they were properly served with a Contravention Application, the court may determine the case in their absence, adjourn the application or issue a warrant to arrest the respondent. That said, it is very unlikely a court would issue an arrest warrant due to non-attendance in these circumstances, unless the applicant can prove there is a prima facie contravention, service has been complied with and the respondent had notice of the hearing date (should the hearing be listed on a day other than the first court date).

Standard and burden of proof

15.19 The applicant bears the onus of proof of all facts to prove the contravention. The standard of proof for the applicant is generally the civil standard of the balance of probabilities. In determining whether it is satisfied to the requisite standard, the court must take into account the matters under s 140(2) of the Evidence Act 1995 (Cth), in particular the gravity of the matters alleged.

15.20 The respondent bears the onus of proof of reasonable excuse: ss 70NDA(c), 70NEA(1)(c) and 70NFA(1)(c) of the FLA. The standard of proof of reasonable excuse is the civil standard: s 70NAF(1) and (2) of the FLA.

15.21 A court may only make an order in more serious contraventions under Subdiv F (ie, imposing a fine, a term of imprisonment, or a community service order, or imposing a fine for failure to comply with a community service order or an order for a bond), if satisfied beyond reasonable doubt that the grounds for making the order exist: s 70NAF of the FLA.

Elements of a contravention

15.22 The elements of a contravention that the applicant must prove are:

- the fact and terms of the order allegedly contravened;
- the respondent knew of the terms of the order at the time of the alleged contravention. (What amounts to sufficient proof of knowledge of the order is considered later);
- the orders were in force at the time of contravention;
- contrary to an order, the respondent did or failed to do what was required by that order: see ss 65M, 65N, 65NA, 65P of the FLA;
- the applicant did all things required under the orders to enable the respondent to comply, for example, attended changeover with the child/ren;
- support with admissible evidence to prove the facts.

15.23 Note that the affidavit must contain admissible evidence to prove the facts. Reciting the fact or allegation does not prove it.

15.24 If the applicant contends the contravention should be dealt with under Subdiv F of the FLA, the applicant will also need to show that there has been previous contravention proceedings, where a sanction or order was made or that the respondent has showed a serious disregard of their obligations under the order.

15.25 The applicant needs to take the court to the evidence supporting the requirements in s 70NAC of the FLA, which sets out the meaning of ‘contravened an order’ and requires the court to be satisfied the respondent has either intentionally failed to comply or has made no reasonable attempt to comply. As to the meaning of ‘reasonable attempt’ refer to the following case law: *Ackersley and Rialto* [2009] FamCA 817; *In the Marriage of Stevenson and Hughes* (1993) 16 Fam LR 443; (1993) FLC 92-363; [1993] FamCA 14; *In the Marriage of O’Brien* (1992) 114 FLR83; 16 Fam LR 273; (1993) FLC 92-396; *TVT and TLM* [2006]

FMCAfam 20; *WJP and TP* [2002] FMCAfam 315; and *Webber and Budd (No 2)* [2011] FamCA 539.

15.26 As defined under s 70NAE of the FLA, the applicant must establish that the respondent failed to comply with the orders and did so without a reasonable excuse.

15.27 Submissions should relate only to those breaches set out in the application, as the court will not consider breaches not in the application, even those which have allegedly occurred since filing.

Responding to a contravention application

15.28 There is no corresponding 'response' form in contravention proceedings, however, a respondent may file an application seeking a variation of the order that it is alleged has been breached. It is not a requirement that the respondent file an affidavit and, in fact, depending on the strength of the applicant's case, it may not be in the interests of the respondent to file an affidavit as the onus is on the applicant to prove the contravention.

15.29 A respondent has the following options when answering 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 of the FLA.

15.30 Note that a Parenting Plan may be a defence: s 70NBB of the FLA.

Reasonable excuse

15.31 The respondent should prepare an affidavit if intending to rely on reasonable excuse. If relying on reasonable excuse, the respondent must prove facts sufficient to make out a reasonable excuse for the contravention.

15.32 Section 70NAE of the FLA sets out the circumstances in which the court will excuse a contravention on the basis 'reasonable excuse'. This is not an exhaustive list but rather indicative of the type of circumstances. The section refers to a contravention caused by ignorance of obligations in circumstances, which ought to excuse the contravention or by a matter of necessity for an overriding reason with the contravention continuing for no longer than necessary.

15.33 As part of the reasonable excuse, there is an obligation on the respondent that the contravention should continue for no longer than necessary. This

means that there is a positive obligation to apply to vary or discharge an order where contravention has been ongoing, or the respondent intends to continue contravening the orders. The reasons for delay or not instituting proceedings to suspend or vary the order should be addressed in the respondent's material.

15.34 The following comment of Smithers J in the case of *In the Marriage of O'Brien* (1992) 16 Fam LR 273; [1993] FLC 92-397 at 80,045 is a good starting point when thinking about reasonable excuse:

... it seems to me that [the section] makes it clear that a reasonable excuse in respect of concern as to the welfare of the child, is limited to a belief, on reasonable grounds, that depriving a person of access pursuant to an order was necessary to protect the health or safety of a person. It is not a question as to whether in the view of the custodial parent, or in the view of the custodial parent on reasonable grounds, that the carrying out of the access order might not be in the best interests of the child. The question is whether it is necessary to protect the health or safety of a person, including the child.

15.35 Some common examples 'reasonable excuses' are as follows:

- The respondent contravened because they did not understand the obligations imposed by the order.
- 'The child did not want to go': See *Fooks v Clark* (2004) 32 Fam LR 149. 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.
- Contrary to the welfare of the child: the respondent genuinely 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: see *In the Marriage of O'Brien* (1992) 16 Fam LR 273; FLC 92-396.

15.36 As a respondent, it is also good practice to be prepared if a contravention is established and the respondent fails to prove a reasonable excuse.

Penalty and consequential orders

15.37 The orders available depend on the findings as to contravention, reasonable excuse, and whether a contravention involved a serious disregard of obligations under the order.

15.38 The Full Court explained the purpose of consequential orders made under Div 13A of the FLA and the relevant factors that the court is required to consider in *McClintock and Levier* (2009) FLC 93-401; (2009) 41 Fam LR 245; 233 FLR 179; [2009] FamCAFC 62.

15.39 For low level offences, you should focus on options which will prevent contraventions occurring in the future.

Subdivision B: Whether or not a contravention is proved

15.40 The court has power to vary the primary order on a Contravention Application under Div 13A, notwithstanding whether a contravention is proved or not: s 70NBA(1) of the FLA.

15.41 In deciding whether to vary an order, the court must take into account such of the matters referred to in s 70NAB(2) of the FLA as are relevant and the matters under s 70NBB of the FLA if relevant, in addition to regarding the child's best interests as the paramount consideration under s 60CA of the FLA.

15.42 Keep in mind that variations of parenting orders pursuant to s 70NBA are approached differently than to those orders for 'time lost' pursuant to s 70NEB(1)(b) of the FLA.

REMEMBER
The power of the court under Subdiv B of the FLA to vary the primary order is a power available to the court under Subdivs C–F as well.

Subdivision C: If contravention not proved

15.43 The court may make an order that the applicant pay some or all of the respondent's costs.

15.44 Under s 70 NCB of the FLA the court must consider making a costs order in circumstances where the applicant has previously brought contravention proceedings against the respondent and in those proceedings, either the applicant

failed to prove a contravention or proved a contravention, and the court took none of the specified actions on the contravention.

Subdivision D: If contravention proved and reasonable excuse proved

15.45 Under s 70 NDB of the FLA the court must consider making a compensatory time order (aka 'make up' time order) if the proved contravention resulted in the child/ren not spending time or living with a person. Of course, the court will not make such an order unless satisfied it is in the child's best interests.

15.46 If the court does not make a compensatory time order, the court may order the applicant to pay some or all of the respondent's costs. Again, the court must consider making a costs order in circumstances where the applicant has previously brought contravention proceedings against the respondent and in those proceedings either the applicant failed to prove a contravention or proved a contravention and the court made no relevant order (other than costs): s 70NDC of the FLA.

Subdivision E: If contravention proved, reasonable excuse not proved (less serious)

15.47 Under s70 NEA of the FLA, a contravention is taken to be 'less serious' if:

- 15.47.1 a court has not previously taken relevant action on a prior proved contravention of the same order and the current contravention did not involve behaviour showing a serious disregard of the orders; or
- 15.47.2 a court has previously taken relevant action on a prior proved contravention of the same order or the current contravention involved behaviour showing a serious disregard of obligations under the order, but the court is satisfied it is more appropriate to deal with the contravention as a less serious contravention.

15.48 The court may make any of the following orders:

- 15.48.1 attendance a post-separation parenting program (by both or either party);
- 15.48.2 an order that compensates a person for time the child did not spend or live with the person as a result of the contravention ('compensatory time' or 'time lost' order);
- 15.48.3 respondent to enter into a bond: subject to s 70NEC of the FLA;
- 15.48.4 require the respondent to compensate the person for expenses reasonably incurred as a result of the contravention;

- 15.48.5 adjourn the proceedings to allow a party to apply under Pt VII Div 6 to discharge, vary or suspend the current order or to revive an earlier order: and consider s 70NEB(c) of the FLA;
 - 15.48.6 a costs order against the respondent or, if no other order made, then a costs order against the applicant.
- 15.49** The court must consider making:
- 15.49.1 the court must consider making a compensatory time order if the proved contravention resulted in the child not spending time or living with a person. Of course, the court will not make such an order unless satisfied it is in the child's best interests: s 70NEB (4) and (5) of the FLA;
 - 15.49.2 the court must consider making a costs order in circumstances where the applicant has previously brought contravention proceedings against the respondent and in those proceedings, either the applicant failed to prove a contravention or proved a contravention and the court made no relevant order (other than costs): s 70NEB(7) of the FLA.

Subdivision F: If contravention proved, reasonable excuse not proved (more serious)

- 15.50** Under s 70NFB(1) of the FLA the court must:
- 15.50.1 order the respondent to pay all the applicant's costs unless satisfied it would not be in the child's best interests to make the order; and
 - 15.50.2 if an order is made to pay all the applicant's costs, consider making another order or orders under s70NFB(2) of the FLA; and
 - 15.50.3 if the court does not order the respondent to pay all the applicant's costs, make at least one of the other orders referred to in s 70NFB(2) of the FLA.
- 15.51** The orders referred to in s 70NFB(2) of the FLA are:
- 15.51.1 a community service order;
 - 15.51.2 the respondent to enter into a bond;
 - 15.51.3 a compensatory time order (subject to the child's best interests);
 - 15.51.4 a fine of up to 60 penalty units;
 - 15.51.5 a term of imprisonment of up to 12 months;

15.51.6 the respondent compensate the applicant for expenses incurred as a result of a contravention of a parenting order that resulted in the applicant not spending time or living with the child/ren;

15.51.7 the respondent pay all or some of the applicant's costs.

15.52 If the court makes an order referred to in s 70NFB(2) of the FLA, the court may also make any other order it considers necessary to ensure compliance with the contravened order: s 70NFB(7) of the FLA.

Contravention proceedings under Pt XIII A

15.53 Section 112AB, which falls under Part XIII A of the FLA (Sanctions for failure to comply with orders, and other obligations, that do not affect children), makes it clear that a contravention can occur both by those who are bound by orders or those who are not directly bound by them, but prevent compliance by a party or aid or abet a contravention by a party. Therefore, an application for enforcement may be brought against both a party to an order or any other person who has committed a contravention.

15.54 Part XIII A applies only to contraventions of 'an order under this Act' which are effectively those orders and agreements that do not fall under Div 13A of the FLA, ie, Parenting Orders.

15.55 Section 112AB of the FLA sets out the meaning of 'contravene an order':

- (1) A person shall be taken for the purposes of this Part to have contravened an order under this Act if, and only if:
 - (a) where the person is bound by the order — he or she has:
 - (i) intentionally failed to comply with the order; or
 - (ii) made no reasonable attempt to comply with the order; or
 - (b) in any other case — he or she has:
 - (i) intentionally prevented compliance with the order by a person who is bound by it; or
 - (ii) aided or abetted a contravention of the order by a person who is bound by it.

15.56 Section 112AC of the FLA sets out the meaning of 'reasonable excuse for contravening an order':

- (1) The circumstances in which a person may be taken to have had, for the purposes of this Part, a reasonable excuse for contravening an order

under this Act include, but are not limited to, the circumstances set out in subsection (2).

- (2) A person (in this subsection called the respondent) shall be taken to have had a reasonable excuse for contravening an order under this Act if:
 - (a) 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 on the person who was bound by it; and
 - (b) the court is satisfied that the respondent ought to be excused in respect of the contravention.

Contravention hearing procedure

15.57 The procedure, application, service and procedure, facts the applicant must prove and responding to a contravention mirror that set out above for contravention applications under Div 13A of the FLA as set out above.

15.58 If the respondent fails to attend court on the hearing date, the applicant may apply orally for a bench warrant for the respondent's arrest to be brought before the court to answer the application: r 25B.03 of the FCCR; rr 21.07 and 21.16 of the FLR. Note that the power to issue a warrant conferred by s 65Q of the FLA is not relevant to proceedings under Pt XIII A of the FLA, as contravention of the types of orders referred to in s 65Q can only be dealt with under Div 13A.

Standard and burden of proof

15.59 The standard of proof is the civil standard, although the court must take into account the matters under s 140(2) of the Evidence Act 1995 (Cth) and in particular the gravity of the matters alleged.

15.60 The applicant bears the onus of proof of all facts to prove the contravention.

Elements of a contravention

15.61 The elements of a contravention under Pt XIII A of the FLA are:

- the respondent has failed to do something required by an order, or has done something prohibited by an order;
- knowingly; and
- without reasonable excuse.

Reasonable excuse

15.62 A person can have a reasonable excuse for contravening an order. The two reasons by which a reasonable excuse is established are: s 112AC of the FLA:

- the respondent did not understand the obligations imposed by the order; or
- the court is satisfied that the respondent ought to be excused in respect of the contravention.

Penalty and consequential orders

15.63 Under s 112AD of the FLA, the sanctions that can be imposed for contravening an order are:

- requiring the respondent to enter into a bond (secured or unsecured), including a good behaviour bond: s 112AF of the FLA;
- imposing a sentence: s 112AG of the FLA;
- fining the person no more than 60 penalty units (as defined by s 4AA of the Crimes Act 1914 (Cth));
- imposing a prison sentence of no more than 12 months. A court will only impose a prison sentence where it is satisfied that it is the only method of enforcement appropriate in the circumstances. A person's sentence may come to an end when they enter into a bond or comply with an order as authorised by the court. A prison sentence, in respect of a contravention of a maintenance order, can only be imposed where the court is satisfied that the contravention was intentional or fraudulent: s 112AE of the FLA;
- for participating states or territories, a court can make alternative sentencing orders such as community service orders, work orders and periodic detention.

15.64 The court may also make such orders as it considers necessary to ensure compliance with the contravened order when making any of the above orders: s 112AD(4) of the FLA.

15.65 Where the sanction relates to the contravention of a maintenance order, the court may still impose the sanction, even if the respondent pays their outstanding liability before the matter comes to court.

Helpful cases

- *Ackersley and Rialto* [2009] FamCA 817;
- *Bainrot and Bainrot* (1976) FLC 90-003;
- *Best v Best* [2015] FamCA 55;
- *Elspeth, Mark John v Peter (Penalties and Costs)* (2007) FLC 93-341; (2008) 37 Fam LR 696; [2007] FamCA 1072;
- *Filipovic and Filipovic* (1977) FLC 90-266;
- *Fooks and Clark* (2004) FLC 93-183; (2004) 32 Fam LR 149; [2004] FamCA 212;
- *In the Marriage of Cavanough* (1980) FLC 90-851;
- *In the Marriage of Gaunt* (1978) FLC 90-468;
- *Irvin and Carr* [2007] FamCA 492;
- *Jets and Maker* [2010] FamCAFC 55;
- *McClintock and Levier* (2009) FLC 93-401; (2009) 41 Fam LR 245; 233 FLR 179; [2009] FamCAFC 62;
- *McLory and McLory* [2010] FamCA 305;
- *In the Marriage of O'Brien* (1992) 16 Fam LR 723; (1993) FLC 92-396; [1992] FamCA 52;
- *Sandler & Kerrington* (2007) FLC 93-323; [2007] FamCA 479;
- *Spencer and Verity* [2012] FamCAFA 210;
- *Stamp and Stamp* [2014] FCCA 1269;
- *In the Marriage of Stavros* (1984) 75 FLR 323; 9 Fam LR 1025; [1984] FLC 91-562;
- *Stevenson and Hughes* [1993] FLC 92-363; (1993) 112 FLR 415; 16 Fam LR 443; [1993] FamCA 14;
- *TVT and TLM* [2006] FMCAfam 20;
- *Webber and Budd (No 2)* [2011] FamCA 539;
- *WJP and TP* [2002] FMCAfam 315.

Enforcement applications

15.66 Section 105 of the FLA gives the courts the power generally to enforce a decree of a court having jurisdiction under the FLA. A 'decree' is a decree, order

or judgment (including an order dismissing an application or a refusal to make a decree or order): s 4 of the FLA.

15.67 Chapter 20 of the FLR (Enforcement of financial orders and obligations) provides for the enforcement of:

- (a) an obligation to pay money;
- (b) an obligation to sign a document under section 106A of the Act (see Part 20.7);
- (c) an order entitling a person to the possession of real property (see Part 20.7);
- (d) an order entitling a person to the transfer or delivery of personal property (see Part 20.7).

15.68 The enforcement of an obligation to pay money include orders, agreements and assessments including property orders, child support agreements or assessment, financial agreements, superannuation related orders, parenting plans, spousal maintenance agreements or orders and costs orders.

15.69 Under s 109A of the FLA, the court is given broad powers to make rules of court to enforce orders, including orders made under the CSRCA or the CSAA. Such rules are set out in Chs 20 and 21 of the FLR.

15.70 The powers of the court pursuant to ss 105(1) and 106A of the FLA are discretionary.

Family Court and Federal Circuit Court

15.71 The Family Court can only hear an application for enforcement when a decree, order or judgment of the Family Court or of another court that has been registered with the Family Court.

15.72 The FCC has the power to enforce an order made by another court if the order has been registered in accordance with the Family Law Regulations. See also registration and enforcement of overseas orders and agreements: s 105(2) of the FLA.

15.73 Some of the enforcement powers of the court include:

- making an order for seizure and sale of real or personal property, including under an Enforcement Warrant: see Pt 20.3 of the FLR;
- making an order for the attachment of earnings and debts, including under a Third Party Debt Notice: see Pt 20.4 of the FLR;

- making an order for sequestration of property: see Pt 20.5 of the FLR;
- making an order appointing a receiver (or a receiver and manager): see Pt 20.6 of the FLR;
- requiring a person to give further information or evidence or to produce documents;
- issuing warrant for arrest; and
- location and recovery orders.

Federal Circuit Court

15.74 Where a person refuses to give effect to a deed or instrument, the court can make an order requiring someone else to give effect to the deed or instrument in place of the defaulting party. Divisions 25B.2 and 20.00A of the FCCR and s 106A of the FLA give the court the authority to appoint an officer of the court, generally a registrar, or another person to execute a deed or instrument and to do all things necessary to give validity and operation to the deed or instrument, where it is otherwise required under a court order and a party has refused to do so. A deed or instrument executed under s 106A of the FLA will have the same force and validity as it had been executed by the party who was required to do so by the order: Div 20.00A of the FCCR

15.75 Section 109B of the FLA and r 25B.01 of the FCCR make it clear that the FCC can enforce orders made under Pt XIII A of the FLA.

Procedure

15.76 The proceedings can be commenced by filing:

- an Enforcement Warrant;
- a Third Party Debt Notice;
- an Application in a Case seeking an order for filing and service of financial statement or an order for production of documents; and
- an affidavit in support.

15.77 An affidavit in support should comply with the following rules (see r 20.06 of the FLR and rr 25B.02 and 25B.12 of the FCCR):

- states the facts necessary to enable the court to make the orders sought in the application;

- a copy of the orders/agreement/bond/undertaking that the applicant seeks to enforce;
- the name and address of the payee;
- the name and address of the payer;
- evidence that the respondent had knowledge of the orders and aware of the obligation to be enforced;
- details of any dispute about the amount of money owed;
- clearly outline the enforcement orders sought;
- the facts, including the total amount of money owed along with any interest, if applicable;
- the dates and amounts of any payments made;
- details of what action has already been taken to enforce the order;
- evidence in relation to the anticipated costs of applying for an enforcement order; and
- the amount claimed for costs, including costs of any proposed enforcement.

15.78 The affidavit may not be sworn any earlier than 2 days before it is filed with the court.

15.79 If an enforcement hearing date is set and a respondent fails to attend, the court can issue a warrant for their arrest to bring the respondent before the court or determine the proceedings or adjourn proceedings as it sees fit: r 25B.03 of the FCCR.

15.80 An enforcement order may be made with or without prior notice to the respondent.

15.81 The respondent is required to attend the hearing so as to produce any requested documents and answer questions asked of them. If a person does not comply with these requirements, they may be found to have committed an offence: r25B.20 of the FCCR

Obtaining information

15.82 The duty of disclosure as set out in Div 13.1.2 of the FLR applies to a party in an enforcement application: r 13.03 of the FLR.

15.83 The applicant may give a payer a written notice requiring the payer to complete and serve a financial statement in accordance with the approved form within 14 days after receiving the notice.

15.84 If requested, the court may make an order to obtain relevant financial information from the respondent, such as ordering the respondent to complete a financial statement. The process of obtaining financial information from the respondent can also be dealt in chambers by filing an Application in a Case and affidavit in support: see r 25B.16 of the FCCR and r 20.10 of the FLR

15.85 The respondent to an enforcement application has a number of obligations, including, at least 7 days before an enforcement hearing, the respondent must complete and serve on the applicant a financial statement: r 25B.18 of the FCCR and r 20.12 of the FLR.

Enforcing agreements

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

15.87 The Family Court has the power to enforce the provisions of a financial agreement provided the formal requirements for the agreement have been satisfied: ss 90G and 90UJ of the FLA.

15.88 When making an application to enforce a financial agreement, a party must first seek an order that the provisions of the agreements are valid. The validity and enforceability of the financial agreement is determined on the principles of law and equity. The financial agreement can then be enforced as if it were an order made by the court: ss 90KA and 90UN of the FLA; r 20.02 of the FLR.

15.89 Maintenance agreements made prior to 27 December 2000 are enforceable pursuant to s 88 of the FLA. Agreements made after that time are not enforceable under the Act: s 87(1A) of the FLA.

15.90 Under s 109A of the FLA, the FCC is given broad powers to make rules to enforce orders, including orders made under the CSRCA or the CSAA: see Pt 25B of the FCCR.

Enforcing payment of money

15.91 The methods for enforcing an obligation to pay money are set out in r 20.05 of the FLR and r 25B.11 of the FCCR, include:

- an order for the seizure and sale of property (including under an enforcement warrant);

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

Enforcement hearings

15.92 A payee may also, by filing an approved form or an Application in a Case and an affidavit that complies with r 20.06 of the FLR or r 25B.12 of the FCCR, require a payer (or if the payer is a corporation, then, an officer of the corporation) to attend an enforcement hearing.

15.93 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 or to answer specific questions: r 20.12 of the FLR and r 25B.18 of the FCCR.

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

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

15.95 At least 7 days before the enforcement hearing, the payer must complete a financial statement and serve it upon the payee.

15.96 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.

15.97 A monetary penalty (or even contempt of court) may be imposed upon a respondent who is served with enforcement proceedings but fails to

serve a financial statement, produce certain documents, fails to attend the enforcement hearing or attends but fails to answer questions to the satisfaction of the court.

Enforcement warrants

15.98 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. An 'enforcement officer' includes the sheriff or delegate of the sheriff, an officer of the court or a person appointed by the court.

15.99 To request the issue of an enforcement warrant by the court, you need to file an enforcement warrant (with a copy for service) and an affidavit complying with rr 20.06 and 20.16 of the FLR and r 25B.22 of the FCCR.

15.100 What to file:

- there is a specific form to be completed, namely, 'Enforcement Warrant- Sale and Seizure of Property': see r 25B.22 of the FCCR and r 20.16 of the FLR;
- an affidavit complying with rr 20.06 and 20.16 of the FLR or rr 25B.12 and 25.22 of the FCCR; and
- an undertaking to meet expenses of enforcement officer.

15.101 The enforcement warrant will be considered by a duty registrar.

15.102 Once the enforcement warrant is issued and returned it needs to be sent the enforcement officer.

15.103 The enforcement warrant remains in issue for 12 months from the date it was issued: r 20.17 of the FLR and r 25B.23 of the FCCR.

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

15.105 With respect to real property, evidence that the respondent is the registered owner, together with details of all encumbrances secured on title of the property should be provided, ie, a copy of the certificate of title. A fee will usually be required to be paid to the enforcement officer for warrants for the sale of real property.

15.106 With respect to personal property, you should provide relevant details to assist an enforcement officer with the collection of specific items.

Third party debt notice

15.107 A Third Party Debt Notice is a useful means to intercept money that would have otherwise been paid to the payer by re-directing money to the payee. For example, the payer's earnings.

15.108 Third Party Debt Notice relate to:

- money deposited in a financial institution that is payable to a payer on call or on notice;
- money payable to a payer by a third party on the date when the enforcement order is served on the third party; and
- earnings payable to a payer: r 20.30 of the FLR.

15.109 A payee may apply for a Third Party Debt Notice by filing three copies of the notice, together with an affidavit containing the following details: r 20.32(2) of the FLR:

- the name and address of the third party;
- details of the debt including the amount payable and costs incurred as a result of applying for the third party debt notice;
- evidence that monies are owed to the payer by a third party;
- if an order is sought in relation to the payer's earnings;
- details of the payer's earnings;
- details of the payer's living arrangements, including details of any dependents;
- the protected income rate;
- the amount sought to be deducted from the earnings; and
- any other information required to identify the payer.

15.110 Once a Third Party Debt Notice is issued it will remain in force until the total debt is paid or the notice is set aside: r 20.36 of the FLR

15.111 The payer must give notice to the payee, if they cease to be employed by the relevant third party. The payer must also give the court written notice. r 20.40 of the FLR

15.112 The third party who has been served with the notice may dispute the payer's ability to pay and it is an offence if they do not comply or treat an employee unfairly as a result of the said notice: r 20.37 of the FLR.

15.113 The Third Party Debt Notice and supporting affidavit must be served personally on both the payer and the third party debtor (along with a copy of the *Information for Third Party Debtors* brochure).

15.114 Registrars use delegated powers to make orders in relation to Third Party Debt Notices. The registrar usually considers these applications in chambers though can list the matter for hearing before a judicial officer.

Sequestration of property

15.115 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 and an affidavit which complies with rr 20.06 and 20.42 of the FLR.

15.116 The court may hear the application in chambers, in the absence of the parties, on the documents filed: r 20.42(4) of the FLR.

15.117 Prior to appointing a sequestrator, the court must be satisfied of the following: r 20.43 of the 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.

15.118 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 20.43 of the FLR.

Receivership

15.119 Part 20.6 of the FLR provides an avenue for relief with respect to disputed accounts submitted by receivers. The court has the power, among 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.

15.120 Receivership refers to court action that places property, usually an enterprise, or income in the hands of a receiver during litigation or for a period of time, so that the asset can be managed to retain its benefit. To have a receiver

appointed, a payee must file an Application in a Case and an affidavit which includes details of the proposed receiver and annexes the proposed receiver's consent to appointment: Pt 20.6 of the FLR.

15.121 Before making such an order, the court must have regard to the amount of debt, the amount likely to be retained by the receiver and the probable costs of the receiver. The court can authorise the receiver to do anything that the payer is authorised to do. A receiver may be required to provide accounts (which can also be inspected upon notice by a party) to ensure they are fulfilling their responsibilities in an acceptable manner. A receiver may be required to provide security to realise their appointment.

Section 106A: Execution of instrument by order of the court

15.122 Orders in respect of financial obligations will commonly contain a default provision which authorises a relevant officer of the court, usually a registrar, to sign documents on behalf of a party as necessary to give effect to an order of the court in the event that a party refuses or fails to do so: s 106A of the FLA.

15.123 It is advisable to include the default s 106A Order where there is an order which would require a party 'execute a deed or instrument'.

15.124 The court may make a s 106A Order when it considers such an order necessary as well as where a party refuses or neglects to sign.

15.125 Be aware of the limitations in this remedy.

Section 106B of the FLA

15.126 It may be necessary to rely upon s 106B of the FLA under which the court may set aside an instrument or disposition when it is of the view that the instrument or disposition is likely to defeat an anticipated or expected order.

See further Chapter 9 of this *Guide*.

Enforcement of parenting orders and contempt

15.127 Chapter 21 of the FLR applies to an order:

- to enforce a Parenting Order;
- under Pt VII Div 13A or Pt XIII A of the FLA; or
- that another person be punished for contempt of court.

Contempt

15.128 See Pt XIIIIB s 112AP of the FLA.

15.129 Most often contravention proceedings are brought rather than contempt proceedings when that relief is an option.

15.130 There is a prescribed form Application — Contempt supported by an affidavit.

15.131 Contempt proceedings can be brought when an order is contravened and where there has been a flagrant challenge to the courts authority. The applicant must prove all facts to the criminal standard of proof necessary to prove the contempt and to negate any apparent reasonable excuse.

15.132 In the case of contravention of an order involving a flagrant challenge to the authority of the court, the applicant must prove the matters referred to under Pt XIIIIA of the FLA contravention proceedings, above, as well as the facts to prove the contravention involved a flagrant challenge to the authority of the court.

15.133 Also see rule 21.04 of the FLR — Contempt in the Courtroom.

Helpful cases

- *Ramsey v Ramsey* [1983] FLC 91-301;(1983) 8 Fam LR 1005;
- *In the Marriage of Reid* (1978) FLC 90-529;
- *Rutherford and Marshall* [1999] FamCA 1299;
- *K & J* [2004] Fam CA 359;
- *In the Marriage of Mead* (2006) FLC 93-267;
- *Collins and Olsthoorn* (2005) FLC 93-216;
- *Hatton and Hatton* [2007] FamCA 551.

Chapter 16

International Aspects of Family Law

Forum issues

16.1 Appropriate jurisdiction or ‘forum’ is the first issue to address in any international family law matter. In some matters it may be obvious as to which jurisdiction to initiate or conduct proceedings. In others, it is not so simple and thereafter a ‘threshold’ determination is required as to whether Australia as opposed to another jurisdiction has the relevant jurisdiction to determine the matter and if it does, should that jurisdiction be exercised.

16.2 The High Court of Australia in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; 97 ALR 124 held that a party who has properly initiated proceedings in Australia has a prima facie right to have the proceedings determined by an Australian court unless Australia is the clearly inappropriate jurisdiction.

16.3 The relevant sections of the FLA providing the requirements to properly institute proceedings in Australia are, with respect to:

- divorce: s 39(3) and (4);
- matrimonial causes (property): s39;
- de facto property proceedings: s 39A; and
- parenting: s 69E.

16.4 Other factors which a court may consider in determining which is the appropriate forum to conduct a matter, include:

- whether the competing forums both have jurisdiction to determine the matter;

- citizenship and links of each party to jurisdiction;
- location of assets;
- living arrangements (current and future);
- concurrent proceedings, pending outcomes and/or existing orders of another jurisdiction;
- enforceability of Australian orders overseas and foreign orders in Australia; and
- advantages/disadvantages to the parties resulting from each forum.

16.5 Australian courts have the option to stay Australian proceedings in favour of proceedings continuing in an overseas jurisdiction and in the alternative, grant an anti-suit injunction to restrain a party from commencing or continuing proceedings in another jurisdiction. Where a matter has already been dealt with and finally determined, the doctrine of *res judicata* is an option available to estop the other party from proceeding with the same cause of action in another forum.

16.6 In matters where jurisdiction is a live issue, it is advised to obtain family law advice from a practitioner in (or a practitioner familiar with) the relevant overseas jurisdiction. To that end, the International Academy of Matrimonial Lawyers website <www.iaml.org> provides a 'Find a Lawyer' search for specialist family lawyers in other international jurisdictions. This is particularly important given that no two jurisdictions of family law are the same, which can affect the principles which are applied in conducting a family law matter and, of course, the outcome.

Marriage and divorce

16.7 Part VA of the Marriage Act 1961 (Cth) (MA) provides for the recognition of foreign marriages. Australia does recognise foreign marriages that do not fall within the definition of marriage as provided by the MA, that definition being 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'. In addition, marriages that are valid pursuant to other requirements of the MA are also recognised: s 88D of the MA. However, s 88EA of the MA provides that a union between a man and another man or a woman and another woman must not be recognised as a marriage in Australia.

16.8 With respect to divorce, s 104 of the FLA provides the circumstances in which a divorce granted overseas will be recognised in Australia.

Relocation and recovery

16.9 The Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention) was concluded on the 25 October 1980 and is a source of international private law that is binding upon and applies between states that have signed and ratified the Convention (contracting states). The Hague Convention applies when child/ren are wrongfully removed from and otherwise retained in a country other than their home country. The Hague Convention only applies to child/ren under 16 years of age. Article 6 of the Hague Convention provides that:

The removal or the retention of a child is to be considered wrongful where –

- (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

16.10 In practice, if a situation arises whereby an application must be made pursuant to the Hague Convention to bring about the return of a child/ren, a party (or practitioner on their behalf) must contact the Central Authority in Australia, who will then bring the application on behalf of that party, ie, the child's place of habitual residence. The Attorney General's website <www.ag.gov.au/childabduction> provides many useful resources for practitioners and parties alike with respect to making and requirements of an application pursuant to the Hague Convention. It is also useful in practice, should you have a client who is concerned with the other parent or a family member wanting to travel overseas, to identify whether the Hague Convention is in force between Australia and the relevant overseas country. In addition, you can also flag the option of applying for an Airport Watch List Order.

16.11 Refer also to the Hague Regulations as to the application of the Hague Convention in Australia.

16.12 There are also relevant defences available to the parent who moved.

Child support

16.13 As previously discussed in Chapter 12 of this *Guide*, the highly administrative nature of child support means there are now limited circumstances

in which the court deals with child support matters. These circumstances also extend to include international child support and child maintenance matters.

16.14 The jurisdiction of the CSR to deal with child support issues lies in the CSA, CSRCA and the Child Support (Registration and Collection) Regulations 1988 (Cth). Particularly, with respect to international child support, the jurisdiction depends on whether the relevant overseas country is a 'reciprocating jurisdiction' as contained in Sch 2 of the Family Law Regulations 1984 (Cth). In the event an overseas jurisdiction is a reciprocating jurisdiction, the CSR can 'register' certain 'overseas maintenance liabilities' including but not limited to a court order, an agreement or a maintenance assessment issued by an administrative authority: ss 4 and 18A CSRCA. The circumstances in which a payer or payee can apply to register the liability are included in s 25 of the CSRCA. A registered maintenance liability is then a debt due to the Commonwealth and is enforceable by the CSR: s 30 of the CSRCA.

16.15 The CSR however, cannot accept provisional overseas maintenance orders or US Petitions: reg 28C of the Family Law Regulations.

16.16 The Family Court retains jurisdiction for the following matters:

- maintenance orders and agreements that cannot be registered under the Child Support (Registration and Collection) Regulations 1988; and
- provisional overseas maintenance orders.

Enforcement of overseas orders

16.17 Enforcement of orders, whether made in Australia to be enforced overseas or made overseas to be enforced in Australia, is another consideration and question that may be asked of practitioners in dealing with an international family law matter.

16.18 Orders made pursuant to the FLA are made in personam, which means they require a person to do certain things to give effect to the orders. Section 31(2) of the FLA enables the court to make orders with respect to persons or things located outside Australia and the Territories. However, enforcement difficulties may arise pursuant to the 'Mozambique Rule', which provides authority that only the country where land is situated can enforce an order for possession of, or title to, the land: *British South Africa Co v Companhia de Mozambique* [1893] AC 602. Therefore, in matters of enforcement, considerations would include the location of the subject matter of the order, the relevant overseas jurisdiction and

their respective enforcement measures, in addition to the form of the order, ie, in personam or in rem.

16.19 In relation to parenting orders, reg 23 of the Family Law Regulations provides that a 'custody order' made in an overseas jurisdiction, which is a prescribed jurisdiction (Sch 1A of the Family Law Regulations) is registrable. This is administered through the International Family Law Section of the Australian Attorney-General's Department. The alternative is to draft and file 'mirror orders' with the Family Court or court otherwise vested with its jurisdiction.

USEFUL RESOURCES

- Australian Government, Attorney-General's Department 'International Family Law and Children' <www.ag.gov.au>
- The Hague Conference on International Private Law's website provides a list of contracting states Central Authorities, which provides jurisdiction-specific information on family law processes <www.hcch.net/index_en.php?act=conventions.authorities&cid=24>

Chapter 17

Surrogacy

An Application for a parentage order

17.1 The power to make laws in relation to surrogacy is provided to each state or territory in Australia. In New South Wales, this is under the Surrogacy Act 2010 (NSW) (the Surrogacy Act). The final legal step involved in the surrogacy process is to apply for a Parentage Order. This can only occur once the child has been born. Section 14 of the Surrogacy Act enables the ‘intended parents’ to apply to the NSW Supreme Court (the Supreme Court) for a Parentage Order. An intended parent is a person to whom it is agreed the parentage of a child is to be transferred under a surrogacy agreement. Section 12 of the Surrogacy Act explains that the purpose of a Parentage Order is to transfer the parentage of the child from the birth parents to the intended parents.

How is an application made in New South Wales?

17.2 The application for a Parentage Order needs to be made not less than 30 days and not more than 6 months after the child’s birth.

17.3 The following documents must be filed at the Supreme Court:

- a summons seeking a parentage order;
- a joint (if applicable) affidavit from the intended parent/s that sets out how the pre-conditions under the Surrogacy Act have been met;
- a joint (if applicable) affidavit from the birth parent/s that sets out how the pre-conditions under the Surrogacy Act have been met, and stating that they agree to the parentage of the child being transferred to the intended parent/s; and
- an Independent Counsellor’s Report that sets out whether or not the proposed parentage order is in the best interests of the child.

What pre-conditions need to be met?

17.4 Before the Supreme Court is able to make a Parentage Order, they must be satisfied that certain pre-conditions have been met by the parties.

17.5 The mandatory pre-conditions are set out in ss 21–38 of the Surrogacy Act and are as follows:

- the court must have regard to the best interests of the child;
- the surrogacy arrangement must be altruistic and not a commercial agreement;
- the surrogacy arrangement must have been made pre-conception;
- the intended parent/s need to be a single person or member of a couple;
- the child must be under 18 years of age at the time the application is made;
- the birth mother must have been at least 25 years old when she entered into the surrogacy arrangement;
- the intended parents must have been at least 18 years old when they entered into the surrogacy arrangement;
- the court must be satisfied that there is a medical or social need for the surrogacy arrangement;
- the birth mother must consent to the making of the Parentage Order unless the court is satisfied that the birth mother has died or lost capacity to give consent, or the birth mother cannot be located after reasonable endeavours have been made to locate her;
- the intended parent/s must be resident in New South Wales at the time of the hearing;
- the child must be living with the intended parent/s at the time of the hearing;
- the surrogacy arrangement must be in writing, signed by the birth parent/s and the intended parent/s;
- the intended parent/s and the birth parent/s must have received counselling from a qualified counsellor about the surrogacy arrangement and its social and psychological implications before entering into the surrogacy arrangement;
- the birth parent/s must have received additional counselling from a qualified counsellor about the surrogacy arrangement and its social and psychological implications after the birth of the child and before consenting to the parentage order;

- independent legal advice must have been obtained by the intended parent/s and the surrogate parent/s before entering into the surrogacy arrangement, preferably in writing);
- all information about the surrogacy arrangement must have been provided to the Director General of the Department of Health for entry in the central register; and
- the birth of the child must have been registered at Births, Deaths and Marriages in New South Wales.

Effect of parentage order

17.6 Pursuant to s 39 of the Surrogacy Act, upon the making of the Parentage Order in relation to a child, the child becomes a child of the intended parents and stops being a child of the birth parents. This means that the intended parents will have the same parental responsibility of the child as the birth parents did prior to the parentage order being made.

17.7 The child's Birth Certificate will also be re-issued to name the intended parents as the child's parents.

Childs' right to access birth information

17.8 A person who is the child of a surrogacy arrangement and who has had a parentage order made in their interest, is entitled to seek the following information upon attaining the age of 18:

- their original Birth Certificate; and
- their full birth record.

17.9 If the person is less than 18 years of age, they may only access their birth information with the consent of the person/s who have parental responsibility for them. This information is set out in s 55 of the Surrogacy Act. To access this information, a written application must be submitted to the Registrar of Births, Deaths and Marriages.

Prohibition of commercial surrogacy arrangements

17.10 It is prohibited in New South Wales for parties to enter into a commercial surrogacy arrangement either in Australia or overseas. Parties can be prosecuted for entering into any commercial surrogacy arrangement.

Chapter 18

Appeals and Reviews

Reviews

18.1 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 pursuant to ss 26C and 37A(9) of the FLA. The relevant rules in respect of filing an application for review are set out under Pt 18.2 of the FLA and Div 20.2 of the FCCR.

18.2 An application for review leads to the rehearing of the whole matter, ie, the application proceeds by way of a hearing de novo which is a fresh hearing. See also comments of Watts J in *Kassis v Kassis* [2014] FamCA 1067 regarding procedure.

Time limits

18.3 The relevant time limits for a review of an order are set out in r 20.01 of the FCCR or r 18.08 of the FLR which are set out below:

Item	Order	Time within which application must be made
1	Order made by a Judicial Registrar exercising a power delegated under rules 18.02 and 18.03 and sub rule 18.05(1)	within 28 days after the Judicial Registrar makes the order
2	Order made by a Registrar exercising a power mentioned in sub rule 18.05(1)	within 28 days after the Registrar makes the order
3	Order made by a Judicial Registrar or Registrar exercising a power delegated under sub rule 18.05(2)	within 7 days after the Judicial Registrar or Registrar makes the order

Item	Order	Time within which application must be made
4	Order made by a Judicial Registrar, Registrar or Deputy Registrar exercising a power delegated under rule 18.06	within 7 days after the Judicial Registrar, Registrar or Deputy Registrar makes the order
5	Order made by a Judicial Registrar, Registrar or Deputy Registrar in a bankruptcy case	within 21 days after the Judicial Registrar, Registrar or Deputy Registrar

18.4 For any other order or decision made, a party must apply within 28 days of the order or decision. 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.

Evidence

18.5 The court may receive any of the following as evidence at the hearing (r 18.10 of the FLR; r 20.03 of the FCCR):

- 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.

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

DOCUMENTS TO FILE

In the Family Court

- an Application in a Case;
- 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.

In the Federal Circuit Court

- An application for Review

An Application for Review filed in the FCC must be listed as soon as possible and, unless impracticable to do so, within 14 days after the date of filing (r 20.02 of the FCCR).

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 (r 18.09 of the FLR).

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.

Appeals

Appeal from a court of summary jurisdiction

18.7 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.

18.8 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 or decisions made 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.

18.9 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.

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

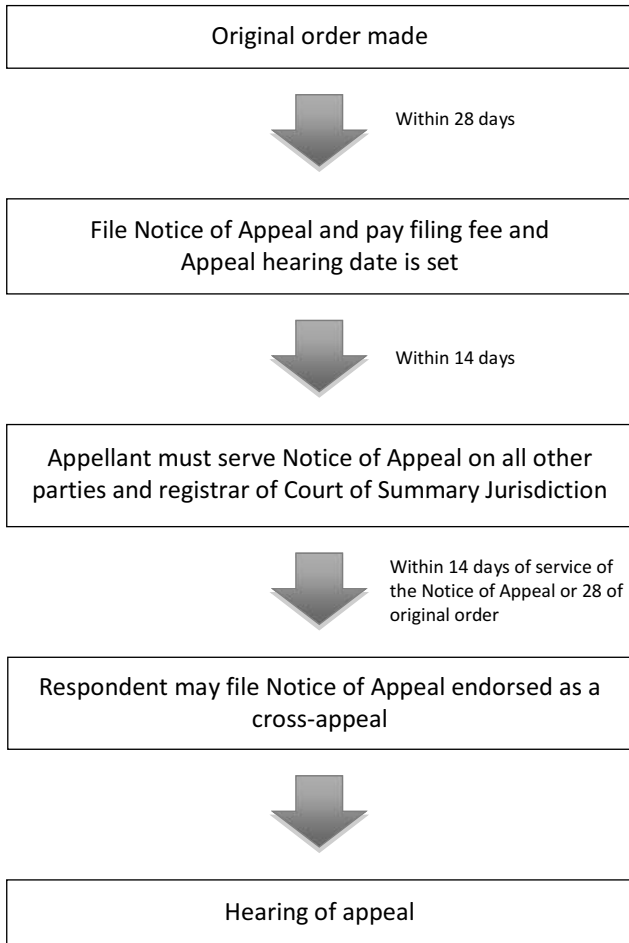
18.11 A notice of appeal must be filed within 28 days of the original order or as otherwise directed by a judge.

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

18.13 Any party can appeal as of right, including:

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

18.14 The main steps in an appeal from a court of summary jurisdiction are as follows:



Appeal from FCC and Family Court

18.15 An appeal from the FCC is to be heard by the Full Court of the Family Court unless the chief justice considers that is appropriate for a single judge to hear the appeal: s 94AAA of the FLA.

18.16 Appeals from the Family Court will be heard by the Full Court of the Family Court: s 94 of the FLA.

18.17 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 FCC;
- 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.

18.18 A party can appeal to the Family Court as of right from:

- any final decree; and
- any interlocutory decree in relation to a child welfare matter.

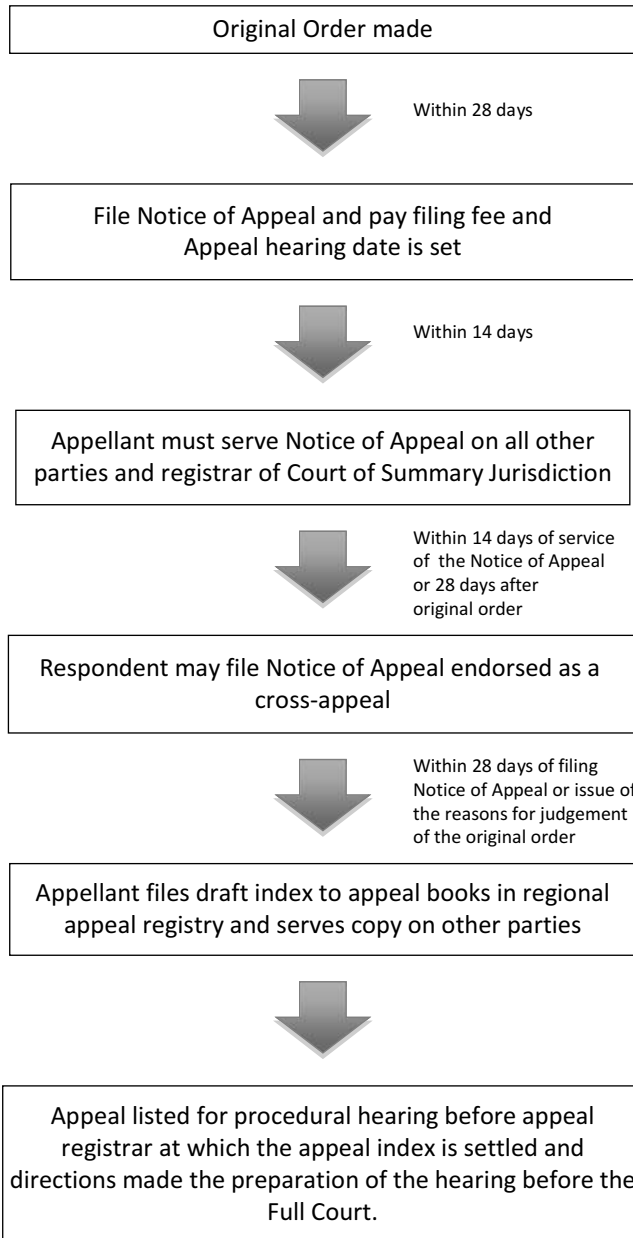
18.19 A party will need leave to appeal by the Full Court, of a single judge in respect of any 'prescribed' decree defined in reg 15A of the Family Law Regulations as 'an interlocutory decree (other than in relation to a child welfare matter)'. Prescribed decrees defined in reg 15A of the Family Law Regulations include:

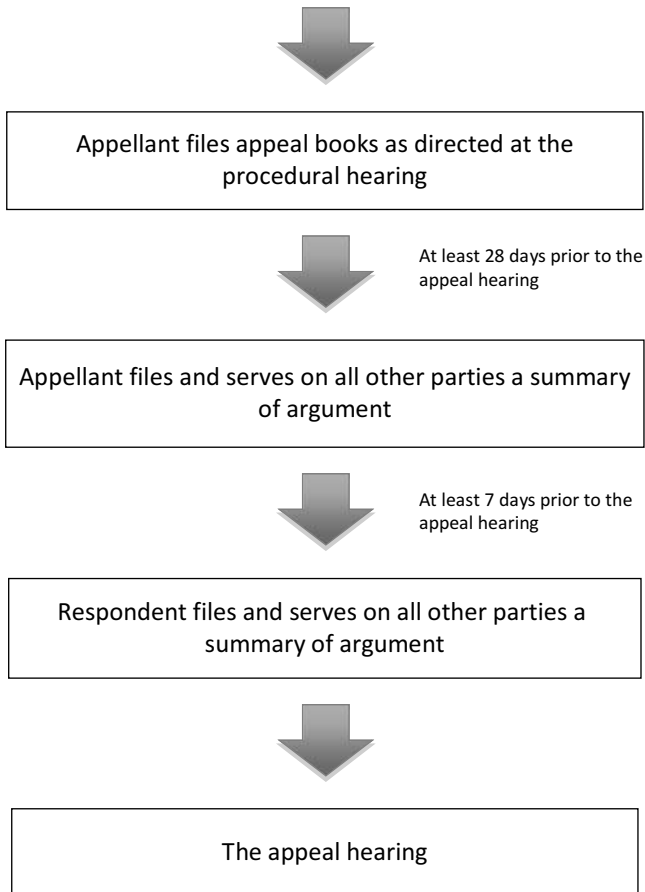
- (a) an interlocutory decree, other than a decree in relation to a child welfare matter; or
- (b) an order under s102PE, s 102QF or s 102QG of the FLA.

How to file an appeal

18.20 Chapter 22 of the FLR sets out the practice and procedure governing the appeal process. An appellant must file a Notice of Appeal attaching a copy of the original order within 28 days after the date of that 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.

Chapter 18: Appeals and Reviews





18.21 In the event an appeal from a decision of a FCC judge is to be heard by a single judge of the Family Court then at the directions hearing before the appeal registrar as to whether or not appeal book are required, a timetable for the filing of any documents if required including a summary of argument.

Appeal by way of rehearing

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

18.23 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.

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

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

18.26 Appeals from the FCC, 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.

Grounds of appeal

18.27 An appeal to the Full Court requires the establishment of some error or miscarriage of justice in the proceedings appealed from which include:

- 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.

Appeals to the High Court

18.28 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 19

Costs

19.1 The Family Court and the FCC have rules relating to practice and procedure of advising clients in relation to costs and also with the making of costs orders in each court. The FLR only apply to the Family Court unless a judge of the FCC orders otherwise.

In the Family Court

Lawyers' obligations

19.2 Lawyers have a duty to keep clients informed about costs at each stage of a matter by way of a Costs' Notice pursuant to r 19.04 of the FLR. A Costs' Notice must include:

- the party's actual costs, both paid and owing, up to and including the court event;
- the estimated future costs of the party up to and including each future court event;
- any expenses paid or payable to an expert witness or, if those expenses are not known, an estimate of the expenses; and
- for financial cases the Costs' Notice must also include the source of funds from which the legal fees have been paid or are to be paid unless the court orders otherwise.

19.3 You must provide to your client a Costs' Notice at the following events:

- conciliation conference;
- the first day of trial; and
- any other court events that the court orders.

19.4 At each court event a party must provide to the other party and to the court a copy of the Costs' Notice.

19.5 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 the estimated future costs to complete the case in order for the client to properly consider the offer to settle.

Costs orders

19.6 The general principle under s 117(1) of the FLA is that each party shall bear their own costs. This is subject to a number of exceptions listed within that section which gives the court a discretion to make a costs order where it considers there are circumstances that justify it making the order.

19.7 Section 118 of the FLA also provides the court with power to make an order for costs against a party if satisfied that the proceedings are frivolous or vexatious.

19.8 Reasons the court may exercise its discretion to make a costs order could include:

- failure to comply with the relevant Rules or an order;
- failure to comply with a pre-action procedure;
- improper or unreasonable conduct; or
- undue delay or default.

19.9 Costs orders may be made in favour of or against:

- a party to the proceedings;
- an ICL: see ss 117(2) and (3) of the FLA;
- a non-party (in exceptional circumstances); and/or
- a lawyer (in exceptional circumstances).

19.10 The court will have regard to the matters set out in s 117(2A) of the FLA when considering an exercise of its discretion to make an order for costs.

19.11 A party seeking costs must give notice to the person against whom the cost order is sought and the court must give each party a reasonable opportunity to be heard in relation to the costs application.

19.12 Costs orders may be made at any stage of the proceedings and historically the Family Court regulated cost matters originating in its jurisdiction. However, such applications must now be filed in the Supreme Court which is the correct jurisdiction for cost assessment and the entry of judgments based on unpaid cost orders.

In the Federal Circuit Court

19.13 Part 21 of the FCCR deals with the issue of costs in the FCC. The FCC has its own scale of costs, set out in Sch 1 of the FCCR.

19.14 The main aspects of the costs' provisions of the FCCR are as follows:

- On application, the court may order the applicant to give security for the respondent's costs of the proceedings: r 21.01(1) of the FCCR.
- A party may apply for a costs order at any stage in a proceeding, within 28 days after a final order is made or within any further time allowed by the court: r 21.02(1) of the FCCR.
- The court may specify the maximum costs that may be recovered on a party/party basis and may later vary that amount in certain circumstances: r 21.03(1) and (3) of the FCCR.
- If costs of a motion, application or other proceeding are reserved, they will follow the event unless otherwise ordered: r 21.04 of the FCCR.
- If proceedings are transferred from the Family Court or from the Federal Court to the FCC and the court from which the proceeding were transferred has not made an order for costs, then the FCC may make an order for costs including costs incurred before the transfer: r 21.05(2) of the FCCR.
- A costs order may be made against a lawyer if they personally, or by their employee or agent, cause cost to be incurred or thrown away as a result of undue delay, negligence, improper conduct, other misconduct or default. Default may include failure to prepare or provide documents or information or any other act necessary for the hearing to proceed, including non-attendance at the hearing: r 21.07(1) and (2) of the FCCR.
- A lawyer must be given a reasonable opportunity to be heard before a court can make a cost order against that lawyer: r 21.07(5) of the FCCR.
- Unless otherwise ordered, interest is payable on outstanding costs: r 21.08 of the FCCR.
- Unless otherwise ordered, a party entitled to costs in proceedings, to which the Bankruptcy Act 1966 (Cth) does not apply, is entitled to costs in accordance with Sch 1 of the FCCR and disbursements properly incurred: r 21.10 of the FCCR.
- The expense of an expert report or a witness attending a hearing will be a disbursement properly incurred if the report or attendance and associated cost is reasonable or is approved by the court: rr 21.12 and 21.13 of the FCCR.

Types of costs orders

Party-party costs

19.15 Party-party costs are the more common form of costs orders that are made. They represent the loss or expense incurred by one party to litigation in connection with that litigation. Party-party costs are limited to those properly, necessarily or reasonably incurred for the attainment of justice and do not include all of the costs your client has incurred.

Solicitor/client costs

19.16 Solicitor/client costs are those which include all of the costs which are payable to the lawyer by the client in accordance with the costs agreement. They are also known as indemnity costs. Indemnity costs orders are not easily made, however indemnity costs orders might properly be awarded in circumstances where:

- it appears that an action has been commenced or continued in circumstances where a party properly advised should have known that he or she had no chance of success;
- a party has made allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;
- a party has engaged in particular misconduct in the course of the proceedings causing loss of time to the court and other parties;
- a party has made allegations which ought never to have been made or the undue prolongation of the case by groundless contentions; or
- there was an imprudent refusal of an offer of compromise.

19.17 Neither the Family Court nor the FCC regulates costs' arrangements between solicitors and clients. Clients have to rely on the particular state's costs' assessment system to resolve cost disputes. On 1 July 2015, the Legal Profession Uniform Law 2014 (NSW) came into effect and replaced the Legal Professions Act 2004 (NSW) for the regulation of the legal profession including the obligations of practitioners in relation to costs' agreements, cost disclosure and trust accounts.

Disputing an itemised costs account

19.18 The FLR set out the practice and procedure for claiming and disputing the amount of costs awarded under Pt 19.6 of the FLR. The process is as follows:

- Following the making of an order for costs a party awarded costs must provide the other party with an itemised costs' account of the costs claimed within 28 days of the end of the case: r 19.21 of the FLR.
- In the event the amount of costs claimed is disputed, the party disputing the amount, or part of it, must serve of the party entitled to costs a Notice Disputing Itemised Costs' Account: r 19.23 of the FLR.
- The parties must then make a reasonable attempt to resolve the dispute: r 19.24(2) of the FLR.;
- In the event the parties cannot resolve the dispute as to the amount of costs, either party may file the Itemised Costs' Account together with the Notice Disputing the Itemised Costs' Account within 42 days.
- The registrar will list the matter at least 21 days after filing for either:
 - a settlement conference;
 - a preliminary conference; or
 - an assessment conference.
- A party who filed the Notice Disputing the Itemised Costs' Account must inform the other party of the listing date not less than 14 days before the court event.
- At the end of an assessment hearing the registrar must make a costs assessment order and give a copy to each party.

Interim costs order

19.19 The court has the power to make an interim costs order which provides for one party to provide funds to allow the other party to conduct the proceedings. This is not just limited to financial cases.

TERMINOLOGY

Term	Description
Associate	<ul style="list-style-type: none"> All judges are assisted by at least one associate, who assists the judge in the exercise of their judicial function and in running chambers and court. Associates can be easily identified as they will often wear gowns in court. In the Family Court each judge will have an associate and be assisted, as necessary, from a pool of legal associates for research and writing purposes. A court officer will run court, swear in witnesses. In the FCC, each judge has an associate and a deputy associate to assist with managing their docket, research, running court and the like.
Casetrack	<ul style="list-style-type: none"> You may sometimes hear judges refer to 'Casetrack' which is the court's electronic file management system.
Case Assessment Conference	<ul style="list-style-type: none"> The first major event parties attend if they are seeking financial orders in the Family Court only. CAC dates are typically set by the registry's filing clerk at the time of filing an Initiating Application. It is conducted by a registrar in chambers. Both parties and their solicitors (if applicable) attend. It is an opportunity for both parties to outline their case. The registrar will assess the main issues and facts of the case, recommend other services that may help settle the dispute and make further directions to progress the matter.

Term	Description
Child Dispute Conference	<ul style="list-style-type: none"> • A CDC is a meeting between a family consultant and the parties. The main purpose of the CDC is to conduct an assessment of the family situation. • It is ordered by the court, pursuant to s 11F of the FLA. • Only the parties attend — lawyers and child/ren are not permitted. • The CDC assists the court in understanding the issues in dispute and focuses on what the child/ren need.
Child Inclusive Conference	<ul style="list-style-type: none"> • A CIC is a meeting between the parties, the child/ren and the family consultant. • It is ordered by the court pursuant to s 11F of the FLA. • The main purpose of the CIC is to assist the court in understanding the family situation, and particularly the child/ren's experience and views. • Only the parties and the child/ren attend the CIC — lawyers are not included.
Chambers	<ul style="list-style-type: none"> • Chambers can either refer to: <ul style="list-style-type: none"> — a judge or registrar's office; or — the office of a barrister.
Commonwealth Courts Portal or CommCourts Portal	<ul style="list-style-type: none"> • The Commonwealth Courts Portal allows parties and solicitors to view their matters before the court online. • The portal will show adjourned dates, documents filed, the name of the judicial officer. • You can also file court documents electronically through the portal.

Term	Description
Consent Orders	<ul style="list-style-type: none"> • Written agreement between parties in relation to parenting and/or financial matters that is approved by a court. • Once made, consent orders are legally enforceable and have the same effect as if they had been made by a judge. • Can also be referred to as minutes of order, terms of settlement.
Counsel	<ul style="list-style-type: none"> • Counsel is a term that is used interchangeably with 'barrister'.
Court Officer	<ul style="list-style-type: none"> • Court officers assist Family Court judges in running court on that day. They usually wear court uniforms whereas associates wear gowns.
Client Service Officer	<ul style="list-style-type: none"> • A client service officer (or CSO) works in the registry and acts as a filing clerk. They also are able to assist in general enquiries relating to practice and procedure.
Family Consultant	<ul style="list-style-type: none"> • A family consultant is a psychologist and/or social worker employed by the court. • They are appointed by order of the court, either pursuant to s 11F or s 62G of the FLA. • Family consultants conduct CDCs and CICs. They may also be asked to prepare Family Reports for the court or make orders for a party to attend a family consultant after Parenting Orders have been made, in order to help a party comply with parenting orders. • Communication with family consultants is not confidential and may be used in court.

Term	Description
Family Dispute Resolution	<ul style="list-style-type: none"> • FDR is a blanket term for services available to assist parties resolve parenting and property matters. • FDR services are provided by a range of individuals and both public and private organisations, including social workers, psychologists, Family Relationship Centres, Legal Aid, community organisations and private mediators.
Family Report	<ul style="list-style-type: none"> • Family Reports are prepared by family consultants. • They are ordered by the court in some parenting matters and aid the court in its decision-making process. • Before preparing the report, the family consultant will meet with each party in order to determine all the issues in dispute between the parties and assess each party's respective capacity to parent their child/ren.
Full Court	<ul style="list-style-type: none"> • The Full Court hears all appeals. • The Full Court is generally comprised of three judges, however, it may be constituted by only one. • Judges who sit on the Full Court are judges of the appeal division of the Family Court.
Independent Children's Lawyer	<ul style="list-style-type: none"> • Commonly referred to as an ICL, a lawyer who represents the best interests of the child/ren. This does not mean that they are the child's lawyer. • An ICL is appointed by the court in certain parenting disputes, either of its own volition or upon application by one of the parties.

Term	Description
	<ul style="list-style-type: none"> • ICLs will either be Legal Aid solicitors or solicitors working in private practice who have been accepted to the Legal Aid ICL panel. • ICLs are typically appointed in circumstances where there is a high level of conflict between the parties, there are allegations of abuse, violence or neglect, mental health issues on behalf of the parties or where there are complex issues.
Interim Orders	<ul style="list-style-type: none"> • Interim orders are essentially 'short-term' orders that are sometimes made before final orders. • Interim orders will stay in place until other orders or final orders are made. • You cannot file an application for interim orders unless there is an application for final orders on foot.
Judge	<ul style="list-style-type: none"> • A judicial officer in the FCC.
Justice	<ul style="list-style-type: none"> • A judicial officer in the Family Court.
Magellan Program	<ul style="list-style-type: none"> • Refers to the Family Court division that deals with cases that involve serious allegations of child abuse. • When a Notice of Child Abuse, Family Violence or Risk of Family Violence (Form 4) is filed in parenting proceedings, containing allegations of sexual abuse it is referred to the Family Court Magellan Registry. • The aim of the Magellan program is to 'fast-track' serious matters in order to protect vulnerable children.
Minute of Order	<ul style="list-style-type: none"> • A document prepared prior to a court event, which sets out the orders you ask the court to make.

Term	Description
Parenting Plan	<ul style="list-style-type: none"> • A written agreement made jointly by the parties that sets out the parenting arrangements for the child/ren. • Parties can make a plan themselves or seek assistance from a mediator. • Unlike Parenting Orders made by a court, parenting plans are not legally binding.
Practice Directions	<ul style="list-style-type: none"> • Procedural guidelines issued by judges of both the Family Court and FCC, respectively. • Directions are issued by judges in order to complement existing legislation and rules. Directions will often include subject matter such as proper case management.
Registrar	<ul style="list-style-type: none"> • Registrars are court solicitors. They are typically highly-experienced family law solicitors. • Registrars have quasi-judicial powers. They are responsible for signing off on consent orders and conducting case assessment conferences and conciliation conferences. • Registrars also sit and hear all Divorce Applications in the FCC and hear all Return of Subpoenas Applications in the Family Court.
Single Expert Valuer	<ul style="list-style-type: none"> • If parties are unable to agree on the value of an asset/s, then they may agree to jointly appoint a single expert. • The single expert will prepare a report in relation to the valuation issue. • Single experts are typically appointed to value assets and financial resources including real estate, business interests, unvested shares, options and so on. • Note that different rules apply in the Family Court and FCC in respect of single expert valuers.

Term	Description
Standing a matter over	<ul style="list-style-type: none"> • This is another way of saying that the matter has been adjourned to another date.
Standing a matter down/ Stood in the list	<ul style="list-style-type: none"> • If a matter is in court and it is 'stood in the list', it means that the matter will not be dealt with immediately but will be called back before the court later that day. It should not be confused with 'standing a matter over' which is an adjournment to a future date. • A matter may be stood in the list if a party or their solicitor asks the judge some time to speak to the other side, request instructions from their client or to draft interim or final orders etc.
Typescript	<ul style="list-style-type: none"> • When parties agree to orders at court and ask the court to make the orders by consent, the presiding judge will often ask that a 'typescript' of the handwritten document be prepared and emailed to their associate. • The typescript is simply a typed document of the written agreement, taking up any handwritten amendments agreed to by the parties. • The typescript is sent to the judge's chambers in Word format. • The associate will then attach the typescript to the court's orders to be stamped with the court's seal, before being sent out to the parties. • Sometimes judges direct that a 'certified typescript' be sent to chambers. This requires the solicitor to sign a certification clause at the end of the document to the effect that the contents of the document are a true and correct copy of the original. As a signature is required, a scanned PDF of the entire document will need to be forwarded to chambers along with the Word format. • Typescripts are sometimes referred to as 'engrossed order' or 'engrossed minute'.

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