TELL US WHAT YOU WANT, WHAT YOU REALLY, REALLY WANT

A caveat. I have not covered specialised applications in this paper, such as child support, surrogacy, what we used to call Anton Piller or ex parte applications. My focus has been on the stock standard: property and parenting.

Apologies to the Spice Girls, but this is the essence of appearing in court on the first return date in Covid-19.

I also apologise in advance for the table for documents that need to be filed, served or provided, but with the plethora of sources, I thought it best to set these out. You will appreciate that it does not cover every situation. It is a daunting list.

It has always been the case that you should have a case plan and case theory. Too many times I have seen applications brought where there is seemingly little thinking about the end result. At the conclusion of the matter, what outcome does your client seek? Is that outcome sustainable as a matter of law? Is it a reasonable outcome?

In order to get to that outcome, these steps need to be undertaken methodically:

1. Before applying to the court.

2. The first application to the court.

3. The notice of risk/financial statement/ questionnaires and statements of genuine steps.

4. Gathering the evidence.

The Court's core principles

The Court has set out its core principles in its *Central Practice Direction*. These should be considered at every step, both pre-action and during any proceedings:

> *"**Core principle 1 – Risk***
>
> *3.2 The prioritisation of the safety of children, vulnerable parties and litigants, as well as the early and ongoing identification and appropriate handling of issues of risk, including allegations of family violence, are essential elements of all case management.*

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Core principle 2 – Parties', lawyers' and the Court's obligations and overarching purpose

3.3 The overarching purpose to be achieved is to facilitate the just resolution of disputes:

a. according to law; and

b. as quickly, inexpensively and efficiently as possible

3.4 The overarching purpose includes the following objectives:

a. the just determination of all proceedings before the Court;

b. the efficient use of the judicial and administrative resources available for the purposes of the Court;

c. the efficient disposal of the Court's overall caseload;

d. the disposal of all proceedings in a timely manner;

e. the resolution of disputes at a cost and by a process that is proportionate to the importance and complexity of the issues in dispute.

3.5 This Central Practice Direction and the Family Law Rules must be interpreted and applied in the way that best promotes the Court's overarching purpose and prioritises the best interests of children.

Core principle 3 – Efficient and effective use of resources

3.6 The Court's judicial, registrar and Court Child Expert resources are to be allocated and used efficiently to achieve the overarching purpose in the context of ensuring the appropriate handling of risks wherever they are identified as issues in proceedings.

Core principle 4 – Approach to case management

3.7 Effective case management of all cases relies on:

a. a consistent approach to the case management of like cases;

b. early triaging of matters to an appropriate case pathway, including assessment of risk; and

*c. the prioritisation of both internal and external Dispute Resolution, including private mediation, Family Dispute Resolution (**FDR**), Conciliation Conferences and arbitration in property disputes for as many appropriate cases as possible.*

Core principle 5 – Importance of Dispute Resolution

3.8 The Court encourages the use of Dispute Resolution procedures. Before commencing an action, unless it is unsafe to do so, parties are expected to make a genuine attempt to resolve their dispute, including by complying with the requirements and obligations of section 60I of the Family Law Act and the pre-action procedures as set out in Schedule 1 to the Family Law Rules. Subject to an exception applying, the Court must not hear an application for parenting orders unless a section 60I certificate has been filed.

3.9 After the commencement of an action, parties are expected to:

> *a. be proactive in identifying the appropriate time, and the appropriate way, in which they can participate in Dispute Resolution, either by agreement or by court order; and*
>
> *b. be prepared to make and consider reasonable offers of settlement at any stage of the proceedings. Failure to do so may have costs consequences.*

Core principle 6 – Non-compliance

3.10 Non-compliance with orders, Practice Directions, the Family Law Rules or the obligations imposed on parties and their lawyers to conduct proceedings in a manner consistent with the overarching purpose will be taken seriously by the Court. Noncompliance may lead to serious consequences for parties and for their lawyers including, if relevant, liberty being granted to the compliant party to proceed on an undefended basis, and/or costs orders being awarded against parties and/or their lawyers.

3.11 If, at any time during the course of proceedings, the Court considers that a party or their legal representatives have pursued or defended an Application, Response or Reply without legal foundation and/or other than in good faith or without making a reasonable and genuine attempt to resolve the issue(s) in dispute where safe to do so, the Court may:

> *a. refer the Application, Response or Reply to a judicial officer for consideration of dismissal or determination on an undefended basis;*
>
> *b. dismiss the Application, Response or Reply;*
>
> *c. dismiss all or part of the case;*
>
> *d. set aside a step taken or an order made;*
>
> *e. prohibit a party from taking a further step in the case until the occurrence of a specified event;*
>
> *f. determine the Application, Response and/or Reply on an undefended basis;*

g. adjourn the Application, Response and/or Reply to allow a party to file affidavit evidence; and/or

h. make such other orders as are appropriate, including orders for costs, which may include an order for costs against a party's legal representatives.

Core principle 7 – Lawyers' obligations about costs

3.12 Parties and their lawyers are expected to take a sensible and pragmatic approach to litigation, and to incur only such costs as are fair, reasonable and proportionate to the issues that are genuinely in dispute. Lawyers are expected to act consistently with costs estimates provided to their clients, and regularly inform their clients and the Court of the actual costs they have incurred and are likely to incur (see Part 12.3 of the Family Law Rules).

Core principle 8 – Identifying and narrowing issues in dispute

3.13 Issues in the case are to be narrowed to those issues genuinely in dispute. In particular:

a. all parties are required to make full and frank disclosure to assist the Court in the determination of the dispute or the parties in the resolution of the dispute;

b. applications should only be brought before the Court if they are reasonably justified on the material available;

c. it is expected that parties will negotiate both prior to, and at Court, in order to reach agreement about as many of the issues in dispute as possible and procedural directions required before having the matter heard;

d. when appropriate, a single expert or an assessor should be engaged to assist the parties and the Court to resolve disputes; and

e. costs consequences may flow if parties unreasonably seek to reopen issues already resolved or unreasonably agitate issues.

Core principle 9 – Preparation for hearings

3.14 Parties and their lawyers are to be familiar with the specific issues in the case and be fully prepared for court events and the final hearing in a timely manner. Parties must provide the Court with a considered and informed estimate of the expected hearing time, the number of witnesses and the specific issues to be decided.

Core principle 10 – Efficient and timely disposition of cases

3.15 The Court will act effectively and efficiently in achieving the prompt and fair disposition of pending cases, with judgments being delivered as soon as reasonably practicable after the

receipt of final submissions. Where permitted by legislation, short form reasons may be utilised in appropriate cases to facilitate the expeditious delivery of judgments." (emphasis added)

Pre-action procedures

If you are not familiar with the pre-action procedures under the Federal Circuit and Family Court of Australia (Family Law) Rules 2021, you need to be. Your client cannot file proceedings under the Act unless there is compliance or exemption. Rules 4.01to 4.04 provide:

"(1) Subject to subrules (2) and (3), before starting a proceeding, each prospective party to the proceeding must comply with the pre-action procedures. Note: The pre-action procedures are set out in Schedule 1.

(2) Compliance with subrule (1) is not necessary if:

(a) the proceeding is an application for divorce only; or

(b) the proceeding is an application relating to nullity or validity of marriage only; or

(c) the proceeding is a child support application or appeal; or

(d) the proceeding involves a court's jurisdiction in bankruptcy under section 35 or 35B of the Bankruptcy Act; or

(e) the court is satisfied that, in the circumstances, it was not appropriate for a party to comply with the pre-action procedures.

(3) For the purposes of paragraph (2)(e), circumstances include the following:

(a) for a parenting proceeding—the proceeding involves allegations of child abuse or family violence, or of a risk of child abuse or family violence;

(b) for a property proceeding—the proceeding involves allegations of family violence, or of a risk of family violence;

(c) the application is urgent;

(d) the applicant would be unduly prejudiced;

(e) there has been a previous application in the same cause of action in the 12 months immediately before the start of the proceeding.

(4) A person who starts a proceeding by making an application for final orders, or a respondent to an application for final orders, must indicate in the Genuine Steps Certificate filed with the application or response either:

(a) that the person has complied with the pre-action procedures; or

(b) the factual basis on which the court should be satisfied that it was not appropriate for the person to comply with the required pre-action procedures.

(5) A person who is legally represented must comply with subrule (4) through the person's legal representative.

Note 1:The court publishes a brochure setting out the pre-action procedures for financial proceedings and parenting proceedings.

Note 2: Subsections 60I(7) to (12) of the Family Law Act provide for attendance at family dispute resolution before applying for a parenting order in relation to a child.

4.02 Requirement to file family dispute resolution certificate with application for aparenting order

(1) A person who starts a proceeding by making an application for an order under Part VII of the Family Law Act, such as a parenting order, must file with the application:

(a) a certificate given to the applicant by a family dispute resolution practitioner under subsection 60I(8) of the Family Law Act; or

(b) if no certificate is required because paragraphs 60I(9)(b), (c), (d), (e) or (f) of the Family Law Act applies

[COMMENT: A reminder:
s.60I(9)(b): allegations of abuse or family violence
s.60I(9)(c): contraventions alleged within 12 months of orders being made
s.60I(9)(d): urgency
s.60I(9)(e): one or more parties unable to attend FDR
s.60I(9)(f): as per the regulations, the relevant one being that an FDRP considers that FDR is not suitable: reg. 25(4) Family Law (Family Dispute Resolution Practitioner) Regulations 2008 (Cth)]

—an affidavit in a form approved by the Chief Executive Officer unless another affidavit filed in the proceedings sets out the factual basis of the exception claimed.

(2) An applicant in proceedings referred to in subsection 100(1) of the Assessment Act or subsection 105(1) of the Registration Act is not required to file in the court a certificate given to the applicant by a family dispute resolution practitioner under subsection 60I(8) of the Family Law Act.

4.03 Requirements before seeking an interlocutory order

(1) Before filing an application seeking an interlocutory order, a party must make a reasonable and genuine attempt to settle the issue to which the application relates.

(2) Compliance with subrule (1) is not necessary if:

(a) compliance will cause undue delay or expense; or

(b) the application would be unduly prejudiced; or

(c) the application is urgent; or

(d) there are circumstances in which an application is necessary (for example, if there is an allegation of child abuse, family violence or fraud).

(3) A person who makes an application for an interlocutory order must indicate, in the affidavit filed with the application, either:

(a) that the person has made a reasonable and genuine attempt to settle the issue to which the application relates; or

(b) which exception in subrule (2) applies to the application and the factual basis for the exception claimed.

(4) A person who is legally represented must comply with subrule (3) through the person's legal representative.

4.04 Consequences of failure to comply with rules 4.01 to 4.03

(1) If:

(a) a person makes an application for a final order without complying with the pre-action procedures; and

(b) the court considers that no exception in subrule 4.01(2) applied to the application; the court may stay the application, on its own initiative or on the application of the respondent, until the applicant complies with the pre-action procedures.

(2) The court may take into account a party's failure to comply with rule 4.01, 4.02 or 4.03 when considering whether to make an order as to costs.

(3) The court may take into account the involvement of a legal practitioner in a party's failure to comply with rule 4.01, 4.02 or 4.03 when considering whether to make an order as to costs.

Note: Rules 12.15-12.16 relate to the making of costs orders against lawyers." (Emphasis added)

It has been suggested that the likelihood of costs orders being made against practitioners is low, because the Court has always had that power. I do not accept that argument. While we are all

struggling to cope with the new system, the Court will likely give some latitude. However, the fact that it is being highlighted in such clear terms that costs orders can be made against practitioners speaks to me loud and clear that there is now a higher likelihood that costs orders will be made personally against practitioners. As time moves on, and we are expected to be familiar with the changes, I would anticipate that the chances of costs orders being made against practitioners will increase.

You should expect the utmost scrutiny from the Court about why you have not filed on time (or at all).

Beware of these words from the Central Practice Direction:

> *"1.3 The Court takes the overarching purpose enshrined in the FCFCOA Act seriously. Parties and their lawyers are expected to fully comply with that statutory obligation in all cases without exception, regardless of the complexity of the case or the issues in dispute, subject only to ensuring the safety of parties and children. This co-operation requires (and the Court expects) that the parties and their lawyers think about the best way to conduct their cases in accordance with the overarching purpose. The parties and their lawyers can expect that the Court will engage with them in a dialogue to achieve the overarching purpose.*
>
> *1.4 The Court expects parties and their lawyers to have in mind, at all times, the cost of each step in the proceedings and whether it is necessary, and to avoid unnecessary process-driven costs and unjustified use of court resources. In everything they do, parties and lawyers are expected to approach proceedings in a manner directed towards identifying the issues in dispute and ascertaining the most efficient, including cost efficient, method of resolution or determination. This includes giving proper consideration to identifying the issues in dispute, complying with their obligation to provide full and frank disclosure in a timely manner (see Part 6.1 of the Federal Circuit and Family Court of Australia (Family Law) Rules 2021 (Cth) (**the Family Law Rules**)), engaging in productive and resolution-focused communication with other parties, making appropriate admissions and pressing only issues of genuine significance. Ambit claims should be avoided and aggressive and unnecessarily adversarial conduct will not be tolerated. At all stages in the proceedings, parties must avoid filing evidence that is unnecessarily lengthy or only of limited relevance to the issues genuinely in dispute. Parties should limit the number of witnesses they rely on to those necessary to prove or disprove those issues truly requiring determination."*

I have set below the whole of Schedule 1, with comments by me. I have highlighted portions of the Schedule. I have not repeated comments under parenting proceedings when I have covered the same issue under financial proceedings. It has been said to me that following the new Rules, "***there has been a tendency of practitioners to try to skewer each other as to whether the other side has undertaken genuine steps***". One would expect that if that is the case, that practitioners will continue to try and skewer their opponent, albeit hopefully restricted in the manner in which they communicate, as anticipated by the Schedule (highlighted portions in yellow, and my comments with other material in blue):

> ***"Schedule 1—Pre-action procedures***
>
> *Note 1: See rule 1.05 (definition of **pre-action procedures**).*

Note 2: Part 1 of this Schedule sets out the pre-action procedures for financial proceedings. Part 2 of this Schedule sets out the pre-action procedures for parenting proceedings. If a proceeding involves both financial and parenting matters, both Parts must be complied with.

Part 1—Financial proceedings

1 General

(1) Each prospective party to a proceeding in the Federal Circuit and Family Court of Australia must make a genuine effort to resolve the dispute before filing an application to start proceedings by following the pre-action procedures outlined in clause 3 of this Part.

(2) There may be serious consequences for non-compliance with the pre-action procedures, including costs penalties or a stay of proceedings pending compliance.

(3) The circumstances in which the court may accept that it was not possible or appropriate for a party to follow the pre-action procedures are outlined in subrule 4.01(2).

(4) The objectives of the pre-action procedures are as follows:

> *(a) to encourage early and full disclosure in appropriate proceedings by the exchange of information and documents about the prospective proceeding;*
>
> *(b) to provide parties with a process to avoid legal action by reaching a settlement of the dispute before starting a proceeding;*
>
> *(c) to provide parties with a procedure to resolve the proceeding quickly and limit costs;*
>
> *(d) to ensure the efficient management of proceedings in the court, if proceedings become necessary;*
>
> *(e) to encourage parties, if proceedings become necessary, to seek only those orders that are reasonably achievable on the evidence;*
>
> *(f) to give effect to the overarching purpose of the family law practice and procedure provisions as provided by section 67 of the Federal Circuit and Family Court of Australia Act 2021.*
>
> *[* ***COMMENT****: A reminder, section 67 provides*:
>
> *(1) The overarching purpose of the family law practice and procedure provisions is to facilitate the just resolution of disputes*:
>
> *(a) according to law; and*

(b) as quickly, inexpensively and efficiently as possible.

Note 1: See also paragraphs 5(a) and (b).

Note 2: The Federal Circuit and Family Court of Australia (Division 1) must give effect to principles in the Family Law Act 1975 when exercising jurisdiction in relation to proceedings under that Act.

(2) Without limiting subsection (1), the overarching purpose includes the following objectives:

(a) the just determination of all proceedings before the Federal Circuit and Family Court of Australia (Division 1);

(b) the efficient use of the judicial and administrative resources available for the purposes of the Court;

(c) the efficient disposal of the Court's overall caseload;

(d) the disposal of all proceedings in a timely manner;

(e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

(3) The family law practice and procedure provisions must be interpreted and applied, and any power conferred or duty imposed by them (including the power to make Rules of Court) must be exercised or carried out, in the way that best promotes the overarching purpose.

*(4) The **family law practice and procedure provisions** are the following, so far as they apply in relation to civil proceedings:*

(a) the Rules of Court;

(b) any other provision made by or under this Act, or any other Act, with respect to the practice and procedure of the Federal Circuit and Family Court of Australia (Division 1)." (Emphasis added)]

(5) At all stages during the pre-action procedures and, if a proceeding is started,during the conduct of the proceedings, the parties must have regard to the following:

(a) the best interests of any child, including the need to protect and safeguard the child against risk or harm;

(b) facilitating a meaningful relationship between a parent and the child, if appropriate, and the benefits of effective co-parenting;

(c) 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;

(d) the best way of exploring options for settlement, identifying the issues as soon as possible, and seeking resolution of them;

(e) the need to avoid protracted, unnecessary, hostile and inflammatory exchanges;

(f) the impact of correspondence on the intended reader (in particular, on the parties);

(g) the need to seek only orders that are reasonably achievable on the evidence and that are consistent with the current law;

(h) the principle of proportionality and the need to control costs because it is unacceptable for the costs of any proceeding to be disproportionate to the financial value of the subject matter of the dispute;

(i) the duty to make full and frank disclosure of all material facts, documents and other information relevant to the dispute.

Note The duty of disclosure extends to the requirement to disclose any significant changes (see clause 4 of this Part).

[COMMENT: I have highlighted those paragraphs where practitioners may have more control, and therefore have more risk in a costs order being made against them at some stage.]

(6) Parties must not:

(a) use the pre-action procedures for an improper purpose (for example, to harass the other party or cause unnecessary cost or delay); or

(b) in correspondence, raise irrelevant issues or issues that may cause the other party to adopt an entrenched, polarised or hostile position.

[COMMENT: Again, these might be used to skewer the other party and their lawyer, including as to costs.]

(7) The court expects parties to take a sensible and responsible approach to the pre-action procedures.

[COMMENT: How often will these words- sensible and responsible approach be used

as a shield in correspondence (or submissions), such as "Our client is seeking to take a sensible and responsible approach to seeking to resolve this dispute", and conversely as a sword: " Your client is taking neither a sensible nor a responsible approach in her offer."?]

(8) The parties are not expected to continue to follow the pre-action procedures if it is not safe to do so, or if reasonable attempts to follow the pre-action procedures have not achieved a satisfactory solution.

(9) At the time of filing an application to start a proceeding or a response to that application, a party must file a Genuine Steps Certificate outlining:

(a) both:

(i) the party's compliance with the pre-action procedures; and

(ii) the genuine steps taken by the party to resolve the dispute; or

(b) the basis of any claim for an exemption from compliance with either or both the requirements referred to in subparagraphs (a)(i) and (ii).

2 Compliance

(1) The court regards the requirements set out in these pre-action procedures as the standard and appropriate approach for a person to take before filing an application in a court.

[COMMENT: Code for- if you are trying something else, you had better be on solid ground in justifying it to the court.]

(2) If a proceeding is subsequently started, the court may consider whether these requirements have been met and, if not, any consequences for non-compliance.

[COMMENT: Dismissal, adjournment, costs orders against the party or practitioner, for example.]

(3) The court may take into account compliance and non-compliance with the pre-action procedures when it is making orders about case management and considering orders for costs (see subrule 1.33(2) and paragraphs 1.34(2)(b) and 12.15(1)(b)).

[COMMENT: More of the same.]

(4) Unreasonable non-compliance may result in the court staying the proceeding pending compliance, or ordering the non-complying party to pay all or part of the costs of the other party or parties in the proceeding.

[COMMENT: For those who do not understand the import of the previous paragraphs, more of the

same.]

(5) In situations of non-compliance, the court may ensure that the complying party is in no worse position than the party would have been in had the pre-action procedures been complied with.

Note: Examples of non-compliance with the pre-action procedures include the following:

(a) not sending a written notice of proposed application;

(b) not providing sufficient information or documents to the other party;

(c) not following a procedure required by the procedures;

(d) not responding appropriately within the nominated time to the written notice of proposed application;

(e) not responding appropriately within a reasonable time to any reasonable request for information, documents or other requirement of the procedures.

[COMMENT: Code for- make sure you and your clients comply.]

3 Pre-action procedures

(1) A person who is considering filing an application to start a proceeding must, before filing the application, and only if it is safe to do so:

(a) give a copy of these pre-action procedures to the other prospective parties to the proceeding; and

(b) make inquiries about the dispute resolution services available; and

(c) invite the other parties to participate in dispute resolution with an identified person or organisation or other person or organisation to be agreed.

[COMMENT: Woe betide a practitioner who can't explain why they have not done so.]

(2) To the extent that it is safe to do so, each prospective party must:

(a) cooperate for the purpose of agreeing on an appropriate dispute resolution service; and

(b) make a genuine effort to resolve the dispute by participating in dispute resolution.

[COMMENT: I love the former, as it puts an obligation on a practitioner to try and reach

agreement on who is to conduct the mediation, or other dispute resolution, for example, a roundtable meeting of the parties and their lawyers, collaborative approach, or arbitration. There is no definition of dispute resolution service in the Rules. Instead, there is a definition of dispute resolution in rule 1.05: "dispute resolution, includes a mediation and a conference (including a conciliation conference)."]

(3) If the prospective parties reach agreement, they may arrange to formalise the agreement by filing an Application for Consent Orders.

(4) Before filing an application, the proposed applicant must give to the other party (the proposed respondent) written notice (notice of intention to start a proceeding) of the proposed applicant's intention to start a proceeding if:

(a) there is no appropriate dispute resolution service available to the parties; or

(b) a party fails or refuses to participate in dispute resolution; or

(c) the parties are unable to reach agreement by dispute resolution.

[COMMENT: Again, woe betide the practitioner who has not done so.]

(5) A notice of intention to start a proceeding must set out:

(a) the issues in dispute; and

(b) the orders to be sought if proceedings are started; and

(c) a genuine offer to resolve the issues; and

(d) a time (the nominated time) that is at least 14 days after the date of the notice within which the proposed respondent must reply to the notice.

[COMMENT: It would seem that this is a without prejudice offer, but with a prescribed structure. Whether or not a subsequent costs order is made in favour of the party making the offer may depend on whether there has been compliance with this.]

(6) The proposed respondent must, within the nominated time, reply in writing to the notice under subclause (4), stating whether the offer is accepted and, if not, setting out:

(a) the issues in dispute; and

(b) the orders to be sought if proceedings are started; and

(c) a genuine counter-offer to resolve the issues; and

(d) a time that is at least 14 days after the date of the proposed respondent's reply within which the proposed applicant must reply.

[COMMENT: Again, woe betide a respondent who has not responded, or an applicant who fails to respond to the reply.]

(7) It is expected that a person will not start a proceeding by filing an application in a court unless:

(a) the proposed respondent does not respond to a notice of intention to start a proceeding; or

(b) agreement between the proposed parties is unable to be reached after a reasonable attempt to settle by correspondence under this clause.

[COMMENT: In other words, litigation as the option of last resort.]

4 Disclosure and exchange of correspondence

(1) Parties to a proceeding have a duty to make full and frank disclosure of all information relevant to the issues in dispute in a timely manner (see rule 6.01).

(2) As soon as practicable on learning of the dispute and in the course of exchanging correspondence under clause 3 of this Part, parties must exchange the following:

(a) a schedule of assets, income and liabilities;

(b) a list of documents in the party's possession or control that are relevant to the dispute;

(c) a copy of any document required by the other party, identified by reference to the list of documents.

[COMMENT: The requirement to prepare the balance sheet is wonderful, forcing the parties to take a position on what they agree on- early in the dispute, not months later, both as to the asset and its value. This then enables each party to make a value judgment early on as to what the dispute is really about, and how much it might cost them. This is also front ending the costs onto the parties before they go anywhere near a court. Those of us who used to prepare affidavits of documents will recall how much might be spent in that process. The court is expecting this to occur before the matter gets anywhere near the court. Failure to disclose by the other party has been the bane of many family lawyers, including me, for as long as I can remember. While this measure will not cure the issue, it will give a stick to a party to use at court on the first occasion about a failure by the other side to disclose- with some definition, rather than the generic approach to disclosure which was the norm with the Federal Circuit Court.]

(3) Parties must refer to the Financial Statement and rule 6.06 of these Rules as a guide for the information to provide and documents to exchange.

[COMMENT: As a starting point, rule 6.06(3) provides:

> *"(3) Without limiting subrule (1)[as to the obligation as to disclosure] , a party to a financial proceeding must make full and frank disclosure of the party's financial circumstances, including the following:*
>
> > *(a) the party's earnings, including income that is paid or assigned to another party, person or legal entity;*
> >
> > *(b) any vested or contingent interest in property;*
> >
> > *(c) any vested or contingent interest in property owned by a legal entity that is fully or partially owned or controlled by a party;*
> >
> > *(d) 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;*
> >
> > *(e) the party's other financial resources;*
> >
> > *(f) any trust:*
> >
> > > *(i) of which the party is the appointor or trustee; or*
> > >
> > > *(ii) of which the party, the party's child, spouse or de facto spouse is an eligible beneficiary as to capital or income; or*
> > >
> > > *(iii) of which a corporation is an eligible beneficiary as to capital or income if the party, or the party's child, spouse or de facto spouse is a shareholder or director of the corporation; or*
> > >
> > > *(iv) over which the party has any direct or indirect power or control; or*
> > >
> > > *(v) of which the party has the direct or indirect power to remove or appoint a trustee; or*
> > >
> > > *(vi) of which the party has the power (whether subject to the concurrence of another person or not) to amend the terms; or*
> > >
> > > *(vii) of which the party has the power to disapprove a proposed amendment of the terms or the appointment or removal of a trustee; or*

(viii) over which a corporation has a power referred to in any of subparagraphs (iv) to (vii), if the party, the party's child, spouse or de facto spouse is a director or shareholder of the corporation."

(4) The documents that the court considers appropriate to include in the list of documents and to exchange include:

(a) in financial proceedings (other than an application for maintenance only)—those listed in subrule 6.06(8); and

[COMMENT: Rule 6.06(8) provides:

(8) Without limiting subrule (1), unless the court otherwise orders, a party (the first party) who is required by this rule to file a Financial Statement (other than a respondent to an application for maintenance only) must, before the first court date, serve on each other party who has an address for service in the proceeding the following documents:

(a) a copy of the party's 3 most recent taxation returns;

(b) a copy of the party's 3 most recent taxation assessments;

(c) if the first party is a member of a superannuation plan:

(i) the completed superannuation information form for any superannuation interest of the party (unless it has already been filed or exchanged); and

(ii) for a self-managed superannuation fund—the trust deed and a copy of the 3 most recent financial statements for the fund;

(d) if the party has an Australian Business Number—a copy of the last 4 business activity statements lodged;

(e) if there is a partnership, trust or company (other than a public company) in which the party has an interest—a copy of the 3 most recent financial statements and the last 4 business activity statements lodged by the partnership, trust or company."

Evidently, if disclosure has been done well before the proceedings have been commenced, these would have been provided to the other side then. If they have been provided then, there is no reason that they have to be provided again after the proceedings have started, as 6.06(10) makes plain:

"(10) This rule does not require a party to be served with a document that has already been provided to the party."]

(b) in an application for maintenance only—those listed in rule 6.06(9).

[COMMENT: Rule 6.06(9) provides:

"(9) Without limiting subrule (1), a respondent to an application for maintenance only must bring to the court on the first court date the following documents:

(a) a copy of the respondent's taxation return for the most recent financial year;

(b) a copy of the respondent's taxation assessment for the most recent financial year;

(c) copies of the respondent's bank records for the 12 months immediately before the date when the application was filed;

(d) the respondent's most recent pay slip;

(e) if the respondent has an Australian Business Number—a copy of the last 4 business activity statements lodged;

(f) any document in the respondent's possession, custody or control that may assist the court in determining the income, needs and financial resources of the respondent."

(5) It is reasonable to require a party who is unable to produce a document for inspection to provide a written authority addressed to a third party authorising the third party to provide a copy of the document in question to the other party, if this is practicable.

[COMMENT: This is to remove the dog chewed the homework excuse: "I don't have that bank statement/tax return." It is usually preferable from the client's point of view for the client to authorise the supply of the documents and information to you, so that you can disclose to the other side, rather than an authority to the other side so that they can obtain that information direct.]

(6) Parties must agree to a reasonable place and time for the documents to be inspected and copied at the cost of the person requesting the copies.

[COMMENT: Most of the time these days documents are sent electronically between solicitors, as PDF, either by email or some other means, such as a Dropbox link. I can't remember the last time I had to engage in an inspection at the other law firm. In a recent parenting matter my clients disclosed in excess of 500 documents. The other side also had hundreds of documents. They were all electronic, and were disclosed by email or via a link:

Audio recordings	M4a files
Financial statements and correspondence	PDF
Screenshots of text messages	JPG or PNG
Screenshots of social media posts	JPG or PNG]

Note: The court will refer to Chapter 6 of these Rules as a guide for what is regarded as reasonable conduct by the parties in making these arrangements.

(7) Parties must not use a document disclosed by another party for a purpose other than the resolution or determination of the dispute to which the disclosure of the document relates, unless an exception applies under subrule 6.04(2).

[COMMENT: Rule 6.04 makes explicit what was the implied undertaking as to the use of documents. If there are negotiations between the parties about parenting matters for example, and documents are then disclosed, those documents cannot be used (without other steps requiring the production of those documents) in other proceedings between the parties, for example the obtaining of a protection order. It would also seem that it makes it difficult to disclose documents to a shadow expert, for example, unless the exception in r. 6.04(2)(c) applies.

Rule 6.04 provides:

> *"(1) A person who inspects or copies a document, in relation to a proceeding, under these Rules or an order:*
>
> > *(a) must use the document for the purpose of the proceeding only; and*
> >
> > *(b) must not otherwise disclose the contents of the document, or give a copy of it, to any other person without the court's permission.*
>
> *(2) However:*
>
> > *(a) a solicitor may disclose the contents of the document or give a copy of the document to the solicitor's client or counsel; and*
> >
> > *(b) a client may disclose the contents of the document or give a copy of the document to the client's solicitor or counsel; and*
> >
> > *(c) this rule does not affect the right of a party to use a document or to disclose its contents if that party has a common interest in the document with the party who has possession or control of the document."]*

(8) Documents produced by a person to another person in compliance with the pre-action procedures are taken to have been produced on the basis of an undertaking from the party receiving the documents that the documents will be used for the purpose of the proceeding only.

(9) Parties must bear in mind that an object of the pre-action procedures is to control costs and, if possible, resolve the dispute quickly.

(10) Parties must also file an undertaking as to disclosure that states that the party is aware of the ongoing duty of disclosure and has complied with this duty, to the best of the party's knowledge and ability, before the first court date (see rule 6.02).

[COMMENT: It is uncertain whether the Court has delegated power in the Rules to provide for a civil penalty: cf. Harrington v Lowe [1996] HCA 8; (1996) 190 CLR 311, 324-325; 341-342; Nyoni v Murphy [2018] FCAFC 75 at [34]. In any event, you do not want your client to be the one to test the law on the point. Rules 6.02 and 6.03 provide:

"6.02 Undertaking by party

(1) A party (but not an independent children's lawyer) must file a written notice:

(a) stating that the party:

(i) has read Parts 6.1 and 6.2 of these Rules; and

(ii) is aware of the party's duty to the court and each other party (including any independent children's lawyer) to give full and frank disclosure of all information relevant to the issues in the proceeding, in a timely manner; and

(b) undertaking to the court that, to the best of the party's knowledge and ability, the party has complied with, and will continue to comply with, the duty of disclosure; and

(c) acknowledging that a breach of the undertaking may be a contempt of court.

(2) A party commits an offence if the party makes a statement or signs an undertaking the party knows, or should reasonably have known, is false or misleading in a material particular.

Penalty: 50 penalty units.
Note: Subrule (2) is in addition to the court's powers under section 112AP of the Family Law Act relating to contempt and the court's power to make an order for costs.

(3) If the court makes an order against a party under section 112AP of the Family Law Act in respect of a false or misleading statement referred to in subrule (2), the party must

not be charged with an offence against subrule (2) in respect of that statement.

(4) A notice under subrule (1) must be in accordance with the approved form and must be filed before the first court date, unless the court otherwise orders

6.03 Duty of disclosure—documents

The duty of disclosure applies to each document that:

(a) is or has been in the possession, or under the control, of the party disclosing the document; and

(b) is relevant to an issue in the proceeding.

Note: In particular types of proceedings, practice directions may specify the documents that must be disclosed in those proceedings. See also rules 6.05 and 6.06."

5 Expert witnesses

(1) There are strict rules about instructing and obtaining reports from an expert witness (see Part 7.1 of these Rules).

(2) In summary:

(a) an expert witness must be instructed in writing and must be fully informed of the obligations as an expert witness (see rule 7.13); and

(b) parties should obtain expert evidence only in relation to a significant issue in dispute; and

(c) if practicable, parties should agree to obtain a report from a single expert witness instructed by both parties (see rule 7.03); and

(d) the court must grant permission to a party to adduce evidence from another expert witness on the same issue (see rule 7.08).

6 Lawyers' obligations

(1) Lawyers must, as early as practicable:

(a) advise clients of ways of resolving the dispute without starting legal action; and

(b) advise clients of their duty to make full and frank disclosure, and of the possible consequences of breaching that duty; and

(c) endeavour to reach a solution by settlement rather than start or continue legal action, subject to this being in the best interests of the client and any child; and

(d) notify the client if, in the lawyer's opinion, it is in the client's best interests to accept a compromise or settlement that, in the lawyer's opinion, is a reasonable one; and

(e) in cases of unexpected delay, explain the delay and whether or not the client may assist to resolve the delay; and

(f) advise clients of the estimated costs of legal action (see rule 12.05); and

(g) advise clients about the factors that may affect the court in considering costs orders; and

(h) give clients documents prepared by the court about:

(i) the legal aid services and dispute resolution services available to them; and

(ii) the legal and social effects and the possible consequences for children of proposed litigation; and

(iii) actively discourage clients from making ambit claims or seeking orders that the evidence and established principles, including recent case law, indicate is not reasonably achievable.

[COMMENT: This paragraph screams out that you must document each and every one of these steps in correspondence to your client. It is best to have precedent letters that capture each and every one of these steps, rather than leaving it to chance. How often have we had to meet ambit claims, for example, the parties who have cohabited for 5 years, of similar age, earning capacity and health, where one brought in all of the property, but the other seeks a 50% division? Once a grossly inflated claim is filed, it is hard to disabuse that party that it is an ambit claim. To protect yourself and your client, I would strongly urge you to get advice from counsel before you file as to your client's likely prospects. In doing so, you have protected your client and yourself.]

Rule 12.05 provides:

"12.05 Duty to inform about costs

(1) If an offer to settle is made during a property proceeding, the lawyer for each party must tell the party who the lawyer represents:

(a) the party's actual costs, both paid and owing, up to the date of the offer to settle; and

(b) the estimated future costs to finalise the proceeding; to enable the party to estimate the amount the party will receive if the proceeding is settled in accordance with the offer to settle, after taking into account costs.

(2) In this rule:
lawyer does not include counsel instructed by another lawyer."

(2) The court recognises that the pre-action procedures cannot override a lawyer's duty to the lawyer's client.

(3) It is accepted that it is sometimes difficult to comply with a pre-action procedure because a client may refuse to take advice; however, a lawyer has a duty as an officer of the court and must not mislead the court.

(4) On application, the court may make an order for costs against a lawyer if the lawyer has failed to comply with pre-action procedures (see rule 12.15).

[COMMENT: Rule 12.15 provides:
"12.15 Costs order against lawyer

(1) The court may make an order for costs against a lawyer if the lawyer, or an employee or agent of the lawyer, has caused costs to be incurred by a party or another person, or to be thrown away, because of:

(a) a failure to comply with these Rules or an order; or

(b) a failure to comply with a pre-action procedure; or

(c) improper or unreasonable conduct; or

(d) undue delay or default.

(2) A lawyer may be in default if a hearing may not proceed conveniently because the lawyer has unreasonably failed:

(a) to attend, or send another person to attend, the hearing; or

(b) to file, lodge or deliver a document as required; or

(c) to prepare any proper evidence or information; or

(d) to do any other act necessary for the hearing to proceed.

(3) An order under subrule (1) may be made on the initiative of the court, or on application by a party to the proceeding or by another person who has incurred the costs or costs thrown away.

(4) An order under subrule (1) may include an order that the lawyer.

(a) not charge the lawyer's client for work specified in the order; or

(b) repay money that the client has already paid towards those costs;

or

(c) repay to the client any costs that the client has been ordered to pay to another party or another person; or

(d) pay the costs of a party; or

(e) repay another person's costs found to be incurred or wasted

(5) If a client wishes not to disclose a fact or document that is relevant to the proceeding, a lawyer has an obligation to take the appropriate action; that is, to cease acting for the client."

I do not accept the commentary that the Court will be reluctant to visit costs upon lawyers. In my view the fact that this is stated in the Rules so clearly makes it plain to me that costs orders against lawyers will be more common. Time will tell.]

Part 2—Parenting proceedings

1 General

(1) Each prospective party to a proceeding in the Federal Circuit and Family Court of Australia is required to make a genuine effort to resolve the dispute before filing an application to start proceedings by following the pre-action procedures outlined in clause 3 of this Part. This accords with section 60I of the Family Law Act 1975.

(2) There may be serious consequences for non-compliance with the pre-action procedures, including costs penalties or a stay of proceedings pending compliance.

(3) The circumstances in which the court may accept that it was not possible or appropriate for a party to follow the pre-action procedures are outlined in subrule 4.01(2).

(4) The objectives of the pre-action procedures are as follows:

> *(a) to encourage early and full disclosure in appropriate proceedings by the exchange of information and documents about the prospective proceeding;*
>
> *[COMMENT: While there has always been an obligation of disclosure, it has been unclear as to the obligation of disclosure before proceedings commence. This makes it clear. Too often, disclosure in parenting proceedings has been inadequate. Parties often engage in voluminous communications between each other- such as email, app, text, Facebook Messenger, and too often engage in social media posts that are relevant, for example on Instagram or Facebook. These documents are disclosed too rarely. The costs burden of disclosure can be considerable.]*
>
> *(b) to provide parties with a process to avoid legal action by reaching a settlement of the dispute before starting a proceeding;*
>
> *(c) to provide parties with a procedure to resolve the proceeding quickly and limit costs;*
>
> *(d) to ensure the efficient management of proceedings in the court, if proceedings become necessary;*
>
> *(e) to encourage parties, if proceedings become necessary, to seek only those orders that are reasonably achievable on the evidence;*
>
> *(f) to give effect to the overarching purpose of the family law practice and procedure provisions as provided by section 67 of the Federal Circuit and Family Court of Australia Act 2021.*

(5) At all stages during the pre-action procedures and, if a proceeding is started, during the

conduct of the proceedings, the parties must have regard to the following:

(a) the best interests of any child, including the need to protect and safeguard them against risk or harm;

(b) facilitating a meaningful relationship between a parent and the child, if appropriate, and the benefits of effective co-parenting;

(c) 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;

(d) the impact of parenting applications that may be motivated by intentions other than the best interests of the child;

(e) the best way of exploring options for settlement, identifying the issues as soon as possible, and seeking resolution of them;

(f) the need to avoid protracted, unnecessary, hostile and inflammatory exchanges;

(g) the impact of correspondence on the intended reader (in particular, on the parties);

(h) the need to seek only orders that are reasonably achievable on the evidence and that are consistent with the current law;

(i) the duty to make full and frank disclosure of all material facts, documents and other information relevant to the dispute.

Note: The duty of disclosure extends to the requirement to disclose any significant changes (see clause 4 of this Part).

(6) Parties must not:

(a) use the pre-action procedures for an improper purpose (for example, to harass the other party or to cause unnecessary cost or delay); or

(b) in correspondence, raise irrelevant issues or issues that may cause the other party to adopt an entrenched, polarised or hostile position.

(7) The court expects parties to take a sensible and responsible approach to the pre-action procedures.

(8) The parties are not expected to continue to follow the pre-action procedures if it is not safe to do so, or if reasonable attempts to follow the pre-action procedures have not achieved a satisfactory solution.

(9) At the time an application to start a proceeding is filed:

(a) each party must file a Genuine Steps Certificate outlining:

(i) the party's compliance with the pre-action procedures and the genuine steps taken by them to resolve the dispute; or

(ii) the basis of any claim for an exemption from compliance with either or both the matters referred to in subparagraph (i); and

(b) the applicant must file a certificate by a family dispute resolution practitioner in accordance with subsection 60I(8) of the Family Law Act 1975, unless an exception applies under subsection 60I(9) of that Act

2 Compliance

(1) The court regards the requirements set out in these pre-action procedures as the standard and appropriate approach for a person to take before filing an application in a court.

(2) If a proceeding is subsequently started, the court may consider whether these requirements have been met and, if not, any consequences.

(3) The court may take into account compliance and non-compliance with the pre-action procedures when it is making orders about case management and considering orders for costs (see subrule 1.33(2) and paragraphs 1.34(2)(b) and 12.15(1)(b)).

(4) Unreasonable non-compliance may result in the court staying the proceeding pending compliance, or ordering the non-complying party to pay all or part of the costs of the other party or parties in the proceeding.

(5) In situations of non-compliance, the court may ensure that the complying party is in no worse position than the party would have been in had the pre-action procedures been complied with.

Note: Examples of non-compliance with the pre-action procedures include the following:

(a) not sending a written notice of proposed application;

(b) not providing sufficient information or documents to the other party;

(c) not following a procedure required by the procedures;

(d) not responding appropriately within the nominated time to the written notice of proposed application;

(e) not responding appropriately within a reasonable time to any reasonable request for information, documents or other requirement of the procedures.

3 Pre-action procedures

(1) A person who is considering filing an application to start a proceeding must, before filing the application and only if it is safe to do so:

(a) give a copy of these pre-action procedures to the other prospective parties to the proceeding; and

(b) make inquiries about the family dispute resolution services available; and

(c) invite the other parties to participate in family dispute resolution with an identified person or organisation or other person or organisation to be agreed.

(2) To the extent that it is safe to do so, each prospective party must:

(a) cooperate for the purpose of agreeing on an appropriate family dispute resolution service; and

(b) make a genuine effort to resolve the dispute by participating in family dispute resolution (see section 60I of the Family Law Act 1975).

[COMMENT: Paragraph (a) is a significant change. Too often when a party is seeking to obtain a s.60I certificate or a FDRP who is perceived to be favourable to that party, there is an insistence that the party use that FDRP. Pressure is then applied to the respondent party to agree, failing which a s.60I certificate will issue. This paragraph may result in somewhat less pressure on that party to agree then and there to that FDRP, but instead come to an agreement between the parties as to who the FDRP is to be.]

(3) If the prospective parties reach agreement, they may arrange to formalise the agreement by filing an Application for Consent Orders.

(4) Before filing an application, the proposed applicant must give to the other party (the ***proposed respondent****) written notice (****notice of intention to start a proceeding****) of the proposed applicant's intention to start a proceeding if:*

(a) there is no appropriate family dispute resolution service available to the parties; or

(b) a party fails or refuses to participate in family dispute resolution; or

(c) the parties are unable to reach agreement by family dispute resolution.

(5) A notice of intention to start a proceeding must set out:

(a) the issues in dispute; and

(b) the orders to be sought if a proceeding is started; and

(c) a genuine offer to resolve the issues; and

*(d) a time (the **nominated time**) that is at least 14 days after the date of the notice within which the proposed respondent is required to reply to the notice.*

(6) The proposed respondent must, within the nominated time, reply in writing to the notice under subclause (4), stating whether the offer is accepted and, if not, setting out:

(a) the issues in dispute; and

(b) the orders to be sought if a proceeding is started; and

(c) a genuine counter-offer to resolve the issues; and

(d) the time that is at least 14 days after the date of the proposed respondent's reply within which the proposed applicant must reply.

(7) It is expected that a party will not start a proceeding by filing an application in a court unless:

(a) the proposed respondent does not respond to a notice of intention to start a proceeding; or

(b) agreement between the proposed parties is unable to be reached after a reasonable attempt to settle by correspondence under this clause.

[COMMENT: To be without prejudice communications, the offer must be a genuine one. In the old case of Hutchings and Clarke [1993] FamCA 22; (1993) FLC92-373; 16 Fam LR 452, a conversation between the parents was held admissible, when the husband said that he would agree to the wife having custody, if she dropped any child support claim against him, but see: Danford & Manville [2020] FamCA 177 where Hogan J was of the view that Hutchings & Clarke, a pre-Evidence Act case, was not binding.]

4 Disclosure and exchange of correspondence

(1) Parties to a proceeding have a duty to make full and frank disclosure of all information relevant to the issues in dispute in a timely manner (see rule 6.01).

> *[COMMENT: Rule 6.05 provides:*
>
> *"(1) The duty of disclosure applies to a parenting proceeding.*
>
> *(2) Documents that may contain information relevant to a parenting proceeding may include, among other documents:*
>
> > *(a) criminal records of a party; and*
> >
> > *(b) documents filed in intervention order proceedings concerning a party; and*
> >
> > *(c) medical reports about a child or party; and*
> >
> > *(d) school reports."*
>
> *These are examples. Each of these should be checked with all clients as a matter of course.]*

(2) As soon as practicable on learning of the dispute and in the course of exchanging correspondence under clause 3 of this Part, parties must exchange copies of documents in their possession or control relevant to an issue in dispute (for example, medical reports, school reports, letters, drawings, photographs).

(3) Parties should refer to subrule 6.05(2) which lists relevant documents that must be disclosed in parenting proceedings.

(4) Parties must not use a document disclosed by another party for a purpose other than the resolution or determination of the dispute to which the disclosure of the document relates, unless an exception applies under subrule 6.04(2).

(5) Documents produced by a person to another person in compliance with the pre-action procedures are taken to have been produced on the basis of an undertaking from the party receiving the documents that the documents will be used for the purpose of the proceeding only.

(6) Parties must also file an undertaking as to disclosure that states that the party is aware of the ongoing duty of disclosure and has complied with this duty, to the best of the party's knowledge and ability, before the first court date (see rule 6.02).

5 Expert witnesses

(1) There are strict rules about instructing and obtaining reports from an expert witness (see Part 7.1).

(2) In summary:

> *(a) an expert witness must be instructed in writing and must be fully informed of the obligations as an expert witness (see rule 7.13); and*
>
> *(b) parties should obtain expert evidence only in relation to a significant issue in dispute; and*
>
> *(c) if practicable, parties should agree to obtain a report from a single expert witness instructed by both parties (see rule 7.03); and*
>
> *(d) the court must grant permission to a party to adduce evidence from another expert witness on the same issue (see rule 7.08).*

6 Lawyers' obligations

(1) Lawyers must, as early as practicable:

> *(a) advise clients of ways of resolving the dispute without starting legal action; and*
>
> *(b) advise clients of their duty to make full and frank disclosure, and of the possible consequences of breaching that duty; and*
>
> *(c) endeavour to reach a solution by settlement rather than start or continue legal action, subject to this being in the best interests of the client and any child; and*
>
> *(d) notify the client if, in the lawyer's opinion, it is in the client's best interests to accept a compromise or settlement that, in the lawyer's opinion, is a reasonable one; and*
>
> *(e) in cases of unexpected delay, explain the delay and whether or not the client may assist to resolve the delay; and*
>
> *(f) advise clients of the estimated costs of legal action (see rule 12.05); and*
>
> *(g) advise clients about the factors that may affect the court in considering costs orders; and*
>
> *(h) give clients documents prepared by the court about:*
>
> > *(i) the legal aid services and family dispute resolution services available to them; and*

(ii) the legal and social effects and the possible consequences for children of proposed litigation; and

(iii) actively discourage clients from making ambit claims or seeking orders that the evidence and established principles, including recent case law, indicate is not reasonably achievable.

(2) The court recognises that the pre-action procedures cannot override a lawyer's duty to the lawyer's client.

(3) It is accepted that it is sometimes difficult to comply with a pre-action procedure because a client may refuse to take advice; however, a lawyer has a duty as an officer of the court and must not mislead the court.

(4) On application, the court may make an order for costs against a lawyer if the lawyer has failed to comply with pre-action procedures (see rule 12.15).

(5) If a client wishes not to disclose a fact or document that is relevant to the proceeding, a lawyer has an obligation to take the appropriate action; that is, to cease acting for the client."

Obtaining a family report before court?

In parenting matters there may be benefit in obtaining a family report upfront. The obvious benefits are that it can short circuit the dispute, resulting in a quick resolution, but at the least a considerable narrowing of the issues.

There may be tactical reasons not to seek a family report before court, for example:

- Cost
- Delay in obtaining a report
- Status quo favours the party
- Rice and Asplund issues.

If the parties have the means (and indeed if one of the parties has the means on the basis that the cost of the report will be considered to be shared later), then thought ought to be given in the appropriate case to obtain a private family report rather than going to court. After all, if there are points of disagreement between the parties in which they need guidance from someone independent, (where mediation either hasn't worked or has been unavailable), then obtaining a family report can be a very helpful solution. Too often the progress of a matter seems to be to obtain a section 60I certificate and then to file. This then puts the parties (and worse, their children) stuck in limbo and in conflict for up to several years. Obtaining a private family report upfront may result in them not having to go to court at all.

I have seen a number of cases where obtaining the report early was extremely helpful. Even if it didn't finally resolve the matter, it resulted in a great narrowing of the issues.

FILING THE APPLICATION

The Court has put in place many more steps before you file. The Court has now set out the application that is required to be filed in Table 2.1: The forms required to be filed, served or provided are:

Table 2.1—Approved forms

Item	Kind of application	Application in the approved form to be filed
1	Application seeking final orders (other than a consent order or a divorce), for example: (a) property settlement; (b) parenting (including in relation to a child born under a surrogacy arrangement); (c) maintenance; (d) child support; (e) medical procedure; (f) nullity; (g) declaration as to validity of marriage, divorce or annulment; (h) order relating to a passport	Initiating Application (Family Law)
2	Interlocutory orders sought at the same time as an application for final orders is made	Initiating Application (Family Law)
3	Interlocutory orders sought after an application for final orders is made	Application in a Proceeding
4	Enforcement of a financial obligation or parenting order	Application—Enforcement
5	Divorce	Application for Divorce
6	Consent order when there is no current proceeding	Application for Consent Orders
7	Contravention of an order under Division 13A of Part VII of the Family Law Act affecting children	Application—Contravention
8	Contravention of an order under Part XIIIA of the Family Law Act not affecting children	Application—Contravention
9	Failure to comply with a bond entered into in accordance with the Family Law Act	Application—Contravention
10	Contempt of court	Application—Contempt
11	Review of an order of a Judicial Registrar	Application for Review

The forms required to be filed, served or provided are:

Application at commencement	Form- at commencement	Form- to keep updated	Rule (in bold) (or section, CPD or practice direction)
Property	Initiating Application Family Law)		2.01(1); 2.6 Family Law Practice Direction Financial Proceedings
	If urgent, affidavit and letter accordingly		2.10, 2.11 Family Law Practice Direction – financial proceedings
	No affidavit if interlocutory orders are not sought		8.13; 2.8 Family Law Practice Direction – financial proceedings
	Central Practice Direction provide to client and to be served on unrepresented party		1.8 CPD
	Immediately serve super trustee if super split is sought- with application, response or reply		1.15(a); 4.1 Family Law Practice Direction – financial proceedings
	On an interlocutory application, identify and serve person who may have an interest in the property sought to be valued, etc.		5.17
	Respondent: response to be filed within 28 days of service, response in a proceeding (where applicable), if seeking orders- not less than 3 days before the hearing		2.18(2), 5.05(1), 2.31
	Any relevant family iolence order including an interim order, failing which a specified undertaking to do so		1.05, 2.10, s 4 FLA; 2.6,3.3 Family Law Practice Direction Financial Proceedings
		ASAP, any relevant family violence order, including an interim order or variation, failing which a specified undertaking (though unnecessary to do so if the other side have filed it)	1.05, 2.10, s 4 FLA; 2.6, 3.3 Family Law Practice Direction Financial Proceedings

	Genuine steps certificate compliance with pre-action procedures, or exemption		4.01, 4.03 for interlocutory application, 4.2, 5.7(b)(i) CPD; 1.7, 2.6, 3.3 Family Law Practice Direction Financial Proceedings
	An affidavit on an interlocutory application no later than 2 business days before the hearing, no greater than 25 pp and 10 annexures, but if served with an application, not less than 3 days before the hearing		2.31, 5.04(1), 5.07, 5.08; 2.6, 3.3 Family Law Practice Direction Financial Proceedings Respondent: 5.05(2), 5.07, 5.08; 2.6, 3.3 Family Law Practice Direction Financial Proceedings
	If the party's affidavit does not state their address, this must be provided to the court by email		8.15(2)
	An affidavit in reply only if a new cause of action is sought by the respondent, and is opposed to the orders sought by the applicant no greater than 25pp and 10 annexures		5.06, 5.07, 5.08
	Financial statement (or if unable to properly disclose, then an affidavit)		6.06(5)(a), 6.06; 2.6, 3.3 Family Law Practice Direction Financial Proceedings
	Financial questionnaire		6.06(5)(b); 2.6, 3.3 Family Law Practice Direction Financial Proceedings
		If financial circumstances change- within 21 days a new financial statement or at most 300 word affidavit	6.06(7)
	Undertaking as to disclosure		6.02; 2.6, 3.3 Family Law Practice DirectionFinancial Proceedings
		After filing, seek that a list of documents be provided within 21 days, and attend to inspection	6.09, s.176(1)FCFCOA Act 2021

		After filing, seek answers up to 20 specific questions- within 21 days or after list of documents if due(whichever is the latter)	6.22, 6.22(4), 6.23(1), s.176 FCFCOA Act 221
	Up to 5 subpoenas on an interlocutory application, served 10 days before hearing, returnable 3 days before hearing	State how many have already issued	6.27(3), (5), 6.29
	Before the first court date, if not already provided, serve on any party with an address for service with: • 3 most recent tax returns • 3 most recent tax assessments • SIFT, or trust deed and 3 most recent financial statements for SMSF • If there is an ABN, 4 most recent BAS • 3 most recent financial statements and 4 most recent BAS for any partnership, trust or company		6.06(8), 6.06(10)
		Not less than one day before each court event provide to client and file and serve costs notice, including the source of funds (with some exception for legally aided clients)	12.06, 12.06(4), 12.06(6); 5.7(b)(ii) CPD
	By the first court date: provide to the Court and the other parties signed statement indicating whether they are in receipt of legal aid funding, and if not, providing particulars of their income, expenses and any other circumstance relevant to their ability to contribute to the cost of any necessary expert report(s) and/or private Dispute Resolution event(s) (if not privately funding expert report/DR event)		5.8, 5.9 CPD

	Two business days before interim hearing- send the Associate a minute of order and case outline document (interim hearing)		5.18CPD
Parenting	Initiating Application (Family Law)		2.01(1), see also 2.5 Family Law Practice Direction – parenting proceedings
	Marriage, Families and Separation- provide to client and to be served		2.28, s.12F FLA
	If urgent, affidavit and letter accordingly		2.9, 2.10 Family Law Practice Direction – parenting proceedings
	No affidavit if interlocutory orders are not sought		8.13; 2.7 Family Law Practice Direction – parenting proceedings
	Central Practice Direction provide to client and to be served on unrepresented party		1.8 CPD
	Check that the necessary parties have been named as a respondent: (a)the parents of the child; (b) any other person in whose favour a parenting order is currently in force in relation to the child; (c) any other person with whom the child lives and who is responsible for the care, welfare and development of the child; (d) if a State child order is currently in place in relation to the child— the prescribed child welfare authority.		3.02

	Check- if it concerns the Christmas school holidays, it MUST be filed before 4pm on the second Friday in November		5.03(2), 2.23(4)
	Notice of Child Abuse, Family Violence or Risk		2.04(1), 2.5, 3.3 Family Law Practice Direction – parenting proceedings
	An affidavit supporting the allegations in the Notice of Child Abuse, Family iolence or Risk, but not needed when filing an application for consent orders.		2.04(2), (3)
		A change in circumstances as to risk issues- a new Notice and affidavit is required.	2.06
	Any relevant family violence order including an interim order, failing which a specified undertaking to do so		1.05, 2.10, s 4 FLA, 2.5, 3.3 Family Law Practice Direction – parenting proceedings
		ASAP, any relevant family violence order, including an interim order or variation, failing which a specified undertaking (though unnecessary to do so if the other side have filed it)	1.05, 2.10, s 4 FLA, 2.5, 3.3 Family Law Practice Direction – parenting proceedings
	Genuine steps certificate compliance with pre-action procedures, or exemption		4.01, 4.03 as to interlocutory application, 4.2, 5.7(b)(i) CPD, 2.5, 3.3 Family Law Practice Direction – parenting proceedings
	Parenting questionnaire		8.09, 2.5, 3.3 Family Law Practice Direction – parenting proceedings
	s.60I certificate +affidavit- nonfiling of FDR certificate (unless otherwise set out in another affidavit)		4.02(1)(a), 4.02(1)(b); 2.5, 3.3 Family Law Practice Direction – parenting proceedings

	An affidavit on an interlocutory application- and not greater than 2 business days before the hearing, no greater than 25 pp and 10 annexures		5.04(1), 5.07, 2.5 Family Law Practice Direction - parenting proceedings Respondent: 5.05(2), 5.07, 5.08; 2.5 Family Law Practice Direction – parenting proceedings
	An affidavit in reply only if a new cause of action is sought by the respondent, and is opposed to the orders sought by the applicant - and not greater than 2 business days before the hearing, no greater than 25 pp and 10 annexures		5.06, 5.07, 5.08
	Undertaking as to disclosure		6.02; 2.5 Family Law Practice Direction – parenting proceedings
		After filing, seek that a list of documents be provided within 21 days, and attend to inspection	6.09, s.176 FCFCOA Act 2021
		After filing, seek answers up to 20 specific questions- within 21 days or after list of documents if due(whichever is the latter)	6.22, 6.22(4), 6.23(1), s.176 FCFCOA Act 2021
	Up to 5 subpoenas on an interlocutory application, served 10 days before hearing, returnable 3 days before hearing	State how many have already issued	6.27(3), (5), 6.29
		Not less than one day efore each court event provide to client and file and serve costs notice (with some exception for legally aided clients)	**12.06, 12.06(4)**; 5.7(b)(ii) CPD

	By the first court date: provide to the Court and the other parties signed statement indicating whether they are in receipt of leal aid funding, and if not, providing particulars of their income, expenses and any other circumstance relevant to their ability to contribute to the cost of any necessary expert report(s) and/or private Dispute Resolution event(s) (if not privately funding expert report/DR event)		5.8, 5.9 CPD
	Two business days before interim hearing- send the Associate a minute of order and case outline document (interim hearing)		5.18CPD

Beware the specified circumstances of default in rule 10.26:

"(1) For the purposes of rule 10.27, an applicant is in default if the applicant fails to:

(a) comply with an order of the court in the proceeding; or

(b) file and serve a document required under these Rules; or

(c) produce a document as required by Division 6.2.2; or

(d) do any act required to be done by these Rules; or

(e) prosecute the proceeding with due diligence.

(2) For the purposes of rule 10.27, a respondent is in default if the respondent fails to:

(a) give an address for service before the time for the respondent to give an address has expired; or

(b) file a response before the time for the respondent to file a response has expired; or

(c) comply with an order of the court in the proceeding; or

(d) file and serve a document required under these Rules; or

(e) produce a document as required by Division 6.2.2; or

(f) do any act required to be done by these Rules; or

(g) defend the proceeding with due diligence; or

(h) prosecute with due diligence any application the respondent has made in the proceeding."

Financial questionnaire

Not being a sworn document, nor an application, this document is not a document to be strictly considered by the Court on at least an interlocutory application. However, this document is not one that should be ignored. This document, like the financial statement, should be approached with great care. It requires the setting out of your client's case as to contributions. It would be wise to proof your client before they put their name to this document. Otherwise, this document may come to bite them- either on an interlocutory or final hearing.

If your client's position changes substantially, it may be wise to file a new one, consistent with your client's disclosure obligations. It would be wise to set out the amendments clearly. There does not appear to be any regulation of how these can be amended: see rules 2.50-2.54.

Parenting questionnaire

The same comments apply as relevant to this questionnaire. This should be prepared carefully by you on behalf of your client, and not left to chance. The same comments apply- if there is a significant change in circumstance, your client should consider filing a new one, showing the amendments.

Genuine Steps Certificate

Again, great care should be undertaken in the preparation of this document. Don't leave it to chance.

In my view the greater prescribed steps increase risk for family lawyers. Each required step must be addressed carefully

Your application will be necessarily filed in Division 2. It will only end up in Division 1 (the old Family Court) if the Chief Justice transfers it: ss 50,51 *Federal Circuit and Family Court of Australia Act 202*1 (Cth).

As the Court has said consistently, and as we have seen with the employment of large numbers of registrars, the Court is seeking to triage matters. This is made plain in the Central Practice Direction:

"Triage and assessment

4.8 A case filed in the Court may, at any time, be reviewed by the National Assessment Team for consideration of:

> *a. whether the matter is one of a small number of cases of a specialist type which may be appropriate for immediate allocation to Division 1 of the Court (such as matters suitable for the Magellan List or applications within the exclusive jurisdiction of Division 1 of the Court);*
>
> *b. the suitability of the matter for inclusion in a specialist list;*
>
> *c. any special procedures required as a result of risk associated with family violence;*
>
> *d. whether all pre-action procedures have been complied with; and*
>
> *e. whether, in a parenting proceeding, the requirements of section 60I of the Family Law Act have been complied with, noting that if an Initiating Application or a Response to Initiating Application which introduces parenting issues is filed without either a certificate issued pursuant to subsection 60I(8) or an affidavit setting out the factual basis of the exception claimed under subsection 60I(9), the Court must stay the application until such time as the applicant complies with the requirements of section 60I: see subsections 60I(7) and 60I(10).*

Allocation between divisions

4.9 The appropriate Division of the Court for the hearing of a matter will be considered:

> *a. as part of the initial triage and assessment process at the First Court Event, at which a small number of specialist cases which necessitate immediate transfer to Division 1 may be transferred;*
>
> *b. at the Compliance and Readiness Hearing, at which the most appropriate Division for final determination of the matter will be considered, having regard to the issues remaining in dispute; and*
>
> *c. at such other time as may be considered appropriate by the Court.*

4.10 Any matter in relation to which Division 1 of the Court holds exclusive jurisdiction shall be transferred to that Division upon filing without the need for an application seeking transfer to be filed by any party to the proceedings. This includes matters involving:

> *a. an exercise of jurisdiction pursuant to section 1337C of the Corporations Act 2001 (Cth); or*

b. an application pursuant to the Family Law (Child Abduction Convention) Regulations 1986 (Cth).

4.11 Determination of the appropriate Division for the hearing of a matter will be made at the Court's discretion, having regard to:

a. the Family Law Act and the Family Law Rules;

b. any assessment made by the Court's National Assessment Team; and

c. any submissions made by or on behalf of one or more of the parties.

4.12 The factors relevant to the assessment of the appropriate Division for the hearing of a matter shall include:

a. the complexity of the legal, factual or jurisdictional issues involved;

b. whether the case involves international issues;

c. whether the case involves multiple parties;

d. whether the case involves multiple expert witnesses;

e. whether the case is likely to involve questions of general importance to the development of family law jurisprudence;

f. the likely length of the case;

g. the respective workload of each Division;

h. the impact on litigants of the matter being transferred;

i. any circumstances that require the matter to be referred to a specialist list;

j. in relation to a parenting proceeding, whether the case involves serious criminal conduct;

k. in relation to a financial proceeding, whether the case involves:

i. complex asset structures;

ii. complex valuation issues;

iii. complex taxation or like issues;

iv. bankruptcy or insolvency; and/or

v. the interests of an estate.

4.13 Unless otherwise ordered, a matter transferred between Divisions will retain the same priority as it had in the Division from which it was transferred."

The Central Practice Direction sets out what is expected to occur on the first date in court (and interim hearing):

"5.10 The primary purposes of the First Court Event are:

a. to ascertain whether any orders or directions can be made by consent;

b. to ascertain whether the parties have complied with the pre-action procedures and made a genuine attempt to resolve the issues in dispute unless it is unsafe to do so, and if not, to make provision for them to do so prior to the proceeding progressing further;

c. to identify the issues in dispute between the parties and the steps required to resolve them;

d. to consider whether an Interim Hearing is required;

e. to consider whether the matter is suitable for court-based Dispute Resolution, having regard to the means and resources of the parties, or alternatively, whether it is suitable for referral to external dispute resolution (or, with the consent of the parties, arbitration);

f. to consider whether the matter is one that requires individual case management;

g. to consider whether any application before the Court is of such urgency or exceptional circumstances that it requires immediate transfer to a Judge or Senior Judicial Registrar; and

h. to make such orders and directions as are necessary (including but not limited to orders for future listings, the preparation of expert reports, the issuing of subpoenas and the exchange of documents) to facilitate the future progression of the proceeding in a manner consistent with the overarching purpose.

5.11 In parenting cases, the Court will consider whether:

a. an Independent Children's Lawyer should be appointed; and

b. a written or oral report from a social scientist, psychologist, psychiatrist or other appropriately qualified expert is necessary and/or likely to promote the resolution or determination of the proceeding in accordance with the overarching purpose.

5.12 In financial cases, the Court will consider:

a. an appropriate timetable for the exchange of any outstanding documents;

b. whether a single expert report is necessary and/or likely to promote the resolution or determination of the proceeding in accordance with the overarching purpose; and

c. subject to the consent of the parties, the suitability of the matter for arbitration.

5.13 Unless an exceptional circumstance exists, orders and directions will be made at the First Court Event to prepare the matter for Dispute Resolution by requiring the parties to identify the issues in dispute, and the evidence bearing on those issues, in sufficient detail to facilitate the conduct of meaningful Dispute Resolution without undue costs.

5.14 Where a matter is referred for external Dispute Resolution, directions will also be made at the First Court Date giving the matter a date for a Compliance and Readiness Hearing and making any necessary associated directions. Where matters resolve prior to the Compliance and Readiness Hearing date, consent orders should be submitted to the Judicial Registrar who presided over the First Court Event for consideration in chambers.

Interim Hearing

"5.15 Other than in the case of urgency or exceptional circumstances, an application for interim orders contained within an Initiating Application or a Response to Initiating Application will be listed on a date before a Senior Judicial Registrar or, where necessary or appropriate in the circumstances of the case, a Judge, after the First Court Event.

5.16 An Interim Hearing will usually be listed prior to Dispute Resolution taking place, however, in the interests of case management, the Court may, where appropriate, defer, until after Dispute Resolution has been completed, any interlocutory application which appears to the Court to be unnecessary to decide prior to Dispute Resolution. Parties are encouraged to keep interlocutory applications to a minimum.

5.17 Where practicable and in circumstances where it does not cause undue delay, an Interim Hearing will be listed for a date after receipt of any expert reports, subpoenaed documents and responses from child protection agencies which are likely to assist with the determination of the interlocutory issues in dispute. The applicant (or if applicable, the applicant's lawyer) must ensure that all expert reports which are relevant to the issues to be determined at the Interim Hearing are filed and served no later than 7 days prior to the hearing.

5.18 No less than 2 business days prior to the Interim Hearing, the parties must forward to the Associate of the Judge or Senior Judicial Registrar before whom the matter is listed:

a. a minute setting out the precise terms of orders sought at the hearing; and

b. a Case Outline document in the approved form setting out the party's major contentions in relation to the issues to be determined at the Interim Hearing and a list of documents to be relied upon at the Interim Hearing (such list to be limited to documents which are relevant to the particular issues to be determined at that hearing).

5.19 Parties and their lawyers must ensure that all interlocutory applications are ready to proceed on the date of the Interim Hearing. It should not be assumed that adjournment applications made on the day of the hearing will be granted or that multiple Interim Hearing dates will be provided. Costs consequences may flow from attendance for Interim Hearings in the absence of proper preparation and readiness to proceed.

5.20 In order to reduce delay and enhance the efficiency of hearings, parties are requested to inform the Court of instances where they do not require the delivery of formal reasons in relation to procedural and/or other interlocutory decisions."

Evidently, if you consider that your client's application is a Division 1 case, not a Division 2 case, then put the evidence before the Court that clearly demonstrates that.

In property cases, you should set out with particularity (as best you can) as to the precise property that your client is seeking – and any machinery orders that will enable your client to get there. This makes the job considerably easier for the court.

Rule 4.02 of the old FCCA Rules said it best:

"An application must precisely and briefly state the orders sought …"

The same applies to parenting matters. The more precise you are, the easier it is for the court to understand what your client wants. However, what is the level of conflict between the parties? The old rule essentially goes that the less conflict the shorter the orders and the more conflict the longer the orders.

Nothing annoys judges more than not setting out precisely what you are after. There is one thing that annoys them just as much and that is when the court is met with a plethora of interim or interlocutory orders sought by a party. This is particularly the case (although not isolated to them) when a party is self-represented. Recently I had the misfortune of sitting on the phone listening to a judge recounting where a self-represented litigant had in a property matter sought 43 separate orders – and had sought further orders in a parenting matter. Somehow all those orders sought were to be dealt with on a duty list day.

On an interim basis, if you focus on what your client really really wants, then the chances of that matter being heard rather than put off to another day is much higher. Therefore, the chances your client being successful at court are higher.

Some Reminders of the Pressures of the Duty List

The duty list is not new. Nor are pressures on the duty list new. What is new from the response to the pandemic is that the pressures on judicial officers (and therefore parties) in the duty list are increased. In the words of one judge recently, "*Coronavirus has led to great disruptions in the courts*." We all know that matters are being delayed, sometimes for a very long period. You must make that first appearance count as much as you can.

A history lesson. "*Congestions in the Court's lists is one factor resulting in delays and that is regrettable. Another factor may be the readiness of parties to bring repeated unnecessary interim and interlocutory applications which clog the lists. Interim applications for custody are not to be encouraged. Not only do they place unnecessary emotional and financial strains on the parties and in many cases unnecessary emotional strains on the children, but they also tend to prevent the parties … attempting to resolve their differences affecting the welfare of children. Where is not possible for the parties to result those differences, such applications delay the final hearing of the contested custody application.*": *Calento & Calento* [1980] FamCA 36; (1980) FLC 90-847; (1980) 6 FamLR 35 at [11].

The two hour rule (which was to include reading material) and an absence of cross-examination was formalised in C & C [1995] FamCA 156; [1996] FLC 92-651:

> *"If the Court could not and did not place limits on the time taken in interlocutory proceedings and made by which they are conducted, its workload would mean that many other litigants would suffer serious injustice by reason of increased delays. Further, there must also be concern for litigants themselves in these circumstances, where lengthy hearings of interlocutory matters are both expensive and emotionally draining and do not lead to a final determination of the issues between them … this approach to interlocutory matters and to interim custody proceedings in particular [i.e. the two hour rule with no cross-examination] is not confined to the Court's Brisbane Registry … but is a wide-spread approach throughout the Court and one that we consider should be encouraged if the Court is to efficiently conduct its business and that of its litigants. This is not to say that there cannot be deviations from it in circumstances thought appropriate by the judge or other judicial officer hearing the matter, but is an approach that, as a general rule, should be followed."*

The court in C & C agreed with the comments of Kirby P and respectfully adopted them in *Byron v Southern Star Group Pty Ltd* (1995) 13 ACLC 301 at [302] (citations removed):

> *"The tension between safeguarding 'the demands of justice' and observing the 'policy' that there must be an end to litigation is as ancient as formal systems of justice. Every Judge is duty bound to do justice. This usually requires the hearing of the evidence and submissions of those parties who wish to be heard and a determination of the controversy on the merits.*

> *But there must be rules. In recent years, it has increasingly been recognised that justice requires consideration not only for the interests of the parties before the court but also parties whose hearing has been displaced or delayed by the case before the court. Justice in the modern connotation, may extend to the community's interest in the efficient and timely disposal of litigation which sustains the community's faith in its judicial institutions. The contemporary approach to court administration has, in the language of the high court, 'introduced another element into the equation or, more accurately, has put another consideration into the scale'."*

The court went on to say:

> *"We would add that in Australia at least, while the judge always retains the discretion to permit the calling of evidence and cross-examination on interlocutory hearings, as a general rule this should not be permitted.*
>
> *This Court has finite resources and a limited number of judicial officers coupled with an ever-increasing workload. If it was required to embark upon lengthy examinations of interlocutory issues such as interim custody, important though they may be to the parties, this would inevitably lead to an ability to provide hearings of final determinations of issues of custody and property within a reasonable time. In addition, other persons requiring a determination of these and similar issues would be impossibly inconvenienced."*

More recently, the court in *Goode and Goode* [2006] FamCAFC 1346; (2006) FLC 93-286 approved at least some of the principles emanating from the pre amendment decision in *Cowling and Cowling* [1998] FamCA 19; (1998) FLC 92-801:

> *"68. In our view, some of the comments of the full court in paragraph 18 (of Cowling) are still apposite. For example, the procedure for making interim parenting orders will continue to be an abridged process where the scope of the enquiry is 'significantly curtailed'. Where the court cannot make findings of fact it should not be drawn into issues of fact or matters relating to the merits of the substantive case where findings are not possible. The Court also looks to the less contentious matters, such as the agreed facts and issues not in dispute and would have regard to the care arrangements prior to separation, the current circumstances of the parties and their children, and the parties' respective proposals for the future."*

> *"80. In interim hearings, where the evidence remains untested, disputed facts cannot be the subject of definitive findings, but simply because material facts have been put in issue does not mean the contested evidence must or should be ignored, since such evidence may have a significant bearing upon the determination of orders which promote the children's best interests (Salah and Salah (2016) FLC 93-713 at [35]-[45]; Eaby and Speelman [2015] FamCAFC 104; (2015) FLC 93-654 at [18]-[19]). Despite the limitations which constrain findings at interim hearings, aside from those 'couched with great circumspection', certain provisions within Part VII of the Act directed judges to consider risks which are pertinent to the welfare of children and their carers (for example: ss60B(1)(b), 60CC(2)(b), 60CC(3)(j), 60CC(3)(k) and 60CG). It would constitute an error of law to ignore the statutory mandate.*

> *81. Naturally, the concept of risk encompasses the possibility of harm, not just the probability (M v M (1998) 166 CLR 69). The primary judge was conscious of the need to evaluate the available evidence to determine whether or not it capably vindicated the submissions made by both the father and ICL that the mother poses a tangible risk of psychological harm to the children. Her Honour's finding that the evidence did do so was appropriately circumspect and does not foreclose the issue being revisited at final trial, when the evidence will be properly tested. Her Honour was obliged to resolve the issue at an interlocutory stage, albeit provisionally rather than definitively, because it underpinned the parties' contest over the children's residence."*

The *Rules* make plain that interlocutory hearings are limited to two hours and ordinarily cross-examination will not occur: rule 5.19.

Cimorelli & Wenlack [2020] FamCAFC 58

In E*aby & Speelman [2015] FamCAFC 104; (2015) FLC 93-654* the Full Court observed about Goode in disputed facts and interim hearings at [18] "*that does not mean that merely because the facts are in dispute the evidence on the topic must be disregarded, and the case determined solely by reference to the agreed facts." That court went on to say, "that findings and disputed interim proceedings should be couched with great circumspection*".

In SS v AH [2010] FamCAFC 13 the majority (Boland and Thackray JJ) said at [100]:

> *"Apart from relying upon the uncontroversial or agreed facts, a judge will sometimes have little alternative than to weigh the probabilities of competing claims and the likely impact on children in the event that a controversial assertion is acted upon or rejected. It is not always feasible when dealing with the immediate welfare of children simply to ignore an assertion because its accuracy has been put in issue."*

In *Lim and Zong* [2020] FamCAFC 20, the court considered the allegations by the mother of domestic violence. The trial court had found, noting that the court could not at that point make findings on the disputed allegations continued and said: "*In circumstances of conjecture given no other evidence. The presumption of equal shared [parental] responsibility is still applicable.*"

The Full Court said:

> *"His Honour's comment 'given no other evidence' suggests that his Honour required corroboration or objective support for the mother's allegation in proof of them. To so suggest is an error. Family violence often takes place in private in circumstances where no corroboration is available.*
>
> *Further, his Honour's erroneous treatment of the issue is further demonstrated … where he repeats, again incorrectly, that findings cannot be made as to whether either party perpetrated family violence at an interim stage given conflicted evidence and said: 'the civil standard of proof is met by neither'.*

> *His Honour's reference to the civil standard of proof is not only incorrect by entirely inapt in the context of, as he had said, disputed allegations of significant family violence raised in interim proceedings.*
>
> *His Honour was in error in, in effect, failing to pay any heed to allegations which he had earlier regarded as 'significant' and in failing to consider those allegations in the context of an interim hearing.": Salah and Salah (2016) FLC 93-713 at [42]-[45].*

The Court in *Lim and Zong* said:

> *"[33] As was made clear by the Full Court in Salah, whilst the limitations of an interim hearing precluded judge from making concluded findings of fact on disputed issues and untested evidence, s60CG of the Act – the requirement to consider the **risk** of family violence – is not constrained in its operation despite that inability."*

GATHERING NEW EVIDENCE

The court relies on evidence, not assertions. Recently I have seen in cases where parties are legally represented some basic steps not being followed:

1. When allegations of domestic violence have been asserted, they have not always been particularised.

2. It has been unclear to me after reading court documents whether in fact there is a current protection order, when it is to expire and what are its terms. Annexing a copy of the current protection order would solve that problem and provide clarity to the court as well as reducing the risk that the parenting order and the protection order would clash. The procedure now makes plain that every current protection order ought to be before the Court. If orders are made monthly on a temporary basis, the obligation is to file and serve each of them. Subpoenas have not always been sought. In one recent serious matter in which I was appointed as independent children's lawyer, the court had made an order for time with the father to be supervised but had not had the benefit of any subpoenaed documents. In another matter, the court on the first return date ordered the father have no time with the child. I had subsequently been appointed as independent children's lawyer. I first read the mother's material (as she was the applicant) which caused me great concern as there were very serious allegations against the father indeed. I then read the father's material which made certain admissions about domestic violence – but was directed at the mother and appeared to be quite a different relationship altogether. The next document I saw was an outline of submissions of the mother's counsel from the first appearance. This in turn referred to material produced by police in which various serious allegations of violence were made concerning third parties as well as the mother. In the words of the family report writer, reading that subpoenaed material was quite distressing.

In property matters setting out the balance sheet at the date of commencement and a balance sheet at the date of separation (or at the date of the swearing of the affidavit where appropriate – is also very

helpful). It might be considered that this does not need to be done, in light of the property questionnaire. I don't agree. In my view the affidavit should succinctly set this out. The affidavit can be read as a matter of course. The questionnaire is not in evidence before the court unless it is tendered.

Affidavits

Always be aware of rule 8.13:

"A party may file an affidavit without the leave of the court only if a provision of the Rules or an order of the court allows the affidavit to be filed in that way."

Rules 8.15 and 8.16 set out the general requirements for affidavits:

> ***"8.15 Requirements for affidavits***
>
> *(1) An affidavit must:*
>
> > *(a) be divided into consecutively numbered paragraphs, with each paragraph being, as far as possible, confined to a distinct part of the subject matter; and*
> >
> > *(b) state, at the beginning of the first page:*
> >
> > > *(i) the file number of the proceeding for which the affidavit is sworn (or affirmed); and*
> > >
> > > *(ii) the full name of the party on whose behalf the affidavit is filed; and*
> > >
> > > *(iii) the full name of the deponent; and*
> > >
> > > *(iv) the full residential address of the deponent, unless disclosing this address would compromise the deponent's safety; and*
> >
> > *(c) have a statement at the end specifying:*
> >
> > > *(i) the name of the witness before whom the affidavit is sworn (or affirmed) and signed; and*
> > >
> > > *(ii) the date when, and the place where, the affidavit is sworn (or affirmed) and signed; and*
> >
> > *(d) bear the name of the person who prepared the affidavit.*
> >
> > *Note 1: An affidavit must also comply with the requirements for documents in rule 2.14.*

Note 2: A professional witness may provide a business address in place of a residential address.

(2) If, in a parenting proceeding:

(a) the deponent of an affidavit is a party; and

(b) the affidavit does not disclose the deponent's address; and

(c) the deponent's address has not already been provided to the court; the deponent's address must be provided to the court by email and the address must not be disclosed other than in accordance with an order of the court.

(3) A document that is to be used in conjunction with an affidavit:

(a) must be identified in the affidavit; and

(b) must be filed as an annexure or an exhibit to the affidavit; and

(c) must be paginated; and

(d) must bear a statement signed by the person before whom the affidavit is made identifying it as the particular annexure or exhibit referred to in the affidavit; and

(e) must not be accepted as evidence in the proceeding unless and until it is tendered in evidence at the hearing of the application and accepted into evidence by the court.

(4) A document annexed or exhibited to an affidavit must be served with the affidavit.

8.16 Making an affidavit

(1) An affidavit must be:

(a) confined to facts about the issues in dispute; and

(b) confined to admissible evidence; and

(c) sworn or affirmed by the deponent, in the presence of a witness; and

(d) signed at the bottom of each page by the deponent and the witness; and

(e) filed after it is sworn or affirmed.

(2) Any insertion in, erasure or other alteration of, an affidavit must be initialled by the deponent and the witness.

(3) A reference to a date (other than the name of a month), number or amount of money must be written in figures."

Rule 8.18 states what should be obvious:

"(1) Subject to section 69ZT of the Family Law Act, the court may order material to be struck out of an affidavit at any stage in a proceeding if the material:

(a) is inadmissible, unnecessary, irrelevant, prolix, scandalous or argumentative; or

(b) contains opinions of persons not qualified to give them.

Note: Section 69ZT of the Family Law Act provides that some provisions of the Evidence Act 1995 do not apply to child related proceedings except in certain circumstances.

(2) Unless the court otherwise directs, any costs caused by the material struck out must be paid by the party who filed the affidavit."

In respect of (2) the costs might be visited upon the lawyer.

TELL US WHAT YOU WANT, WHAT YOU REALLY REALLY WANT

It is important before going to court to narrow the issues. Judges have difficulty hearing practitioners.

A feature about phone hearings is having to remain on the line and listening to other matters. Sadly, the advocacy abilities of some lawyers is woeful. They were clearly failing in their duties to their clients, the court and the administration of justice. Old school advocacy is very useful:

1. Read the matter.

2. Prepare a thorough chronology (setting out three columns: Date; Event/Allegation; Source. In a property matter, if there isn't a balance sheet that has been agreed upon, prepare a balance sheet comparing the difference in property and values attributed by each of the parties – so that you have a clear handle of the property pool.

3. Take care to properly prepare the financial statement and any notice of risk. These documents are critically important. A notice of risk is not a statement of evidence but it might be used as a prior inconsistent statement or a prior consistent statement. It is used of course for alerting the court and for alerting relevant authorities. It should be thorough.

Similarly, the preparation of a financial statement should be thorough and not slapped together – preparing a financial statement properly takes time and skill and should not be left to chance. After you have read the matter again, work out precisely what your client wants on the first date.

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TELEVISION EDUCATION NETWORK FIRST RETURNS DATES IN FAMILY: MAXIMISING RETURNS FROM THE GET GO

Contested matters over the phone or on Teams are difficult. Your case outline and minute of orders sought should make life easier for you and the Judicial Registrar. The Judicial Registrar may have trouble hearing you. In one recent occasion, the judge complained that – five times that day – someone had put the call on hold with the result that the hold music had taken over, necessitating everyone to hang up and re-start. Not surprisingly the judge was cranky. This was despite the fact that all and sundry had been told not to do that.

After you receive the minute of order or case outline from the other side you may discover in fact that you are in agreement about many matters. Pick up the phone. Call the other side. See what you can do to sort it.

Often the first court appearance is a management exercise. The more that you have thought about what needs to be done and the more that you have come up with a possible solution for the court – the easier it is for the court to move the matter through as quickly as possible, reducing costs and rancour for your clients (and particularly stress for their children). When you are an advocate before the court there are always three audiences:

1. The judicial officer – the person you want to convince to make orders sought by your client.

2. Your client and any cheer squad

3. The opposing party and their legal representation.

How you address the court on that first occasion impacts on how quickly the matter might be able to be resolved and at what expense and stress for your client as well as that of the other party (and the stress for their children).

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