Family Law Rules 2004 2003 No. 375

EXPLANATORY STATEMENT

Statutory Rules 2003 No. 375

Issued by the authority of the Judges of the Family Court of Australia

FAMILY LAW RULES 2004

Section 123 of the *Family Law Act 1975* (*the Act*) provides that the Judges of the Family Court of Australia, or a majority of them, may make Rules of Court providing for the practice and procedure to be followed in the Family Court and other courts exercising jurisdiction under the Act.

Section 123(2) of the Act provides that Sections 48, 48A, 48B, 49 and 50 of the *Acts Interpretation Act 1901* apply in relation to the Rules of Court as if reference in those sections to regulations were references to Rules of Court.

The present Family Law Rules came into operation on 2 January 1985. They have been regularly reviewed and amended since that date. Family Law Rules 1984 will be replaced completely by Family Law Rules 2004.

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DICTIONARY

EXPLANATORY GUIDE

INTRODUCTION

How the Rules are organised

The Rules are divided into chapters, each chapter dealing with a particular topic. A *chapter* may be divided into *parts*, and a *part* into *divisions* and a *division* into subdivisions. An individual *rule* may be divided into *subrules*, a *subrule* into *paragraphs* and a *paragraph* into *subparagraphs*.

The *chapters* are numbered with numbers running from 1 to 25.

Each *part* is numbered with numbers running from 1 preceded by the *chapter* number and a full stop. *Divisions* are numbered with numbers running from 1, preceded by the *part* number and a full stop. The sequence of a part or division number is not necessarily continuous.

Individual rules are numbered with a number consisting of the *chapter* number they are in, followed by a 1, 2 or 3-digit number (for example 1.01 in Chapter 1 or 18.01 in Chapter 18). Some rules contain tables. A numbered paragraph within the table is referred to as a subrule or a paragraph eg

2.02: Documents to be filed with applications

(1) : A person filing an application mentioned in an item in the following table must file with the application, a document mentioned in the item.

: **Table 2.2 documents to be filed with application**

Item	Application	Documents to be filed with application
1	Applications for final orders (Form 1)	the marriage certificate or divorce or nullity order relating to the application

Item 1 in the table at Rule 2.02 is referred to as Paragraph (1) of Subrule 2.02(1) or 2.02(1)(1).

How the chapters relate to each other

Each chapter deals with a particular subject or area of the court process. Each of those chapters is drafted to be as self-contained as possible, for example, all rules that apply to a divorce are all together in Chapter 3.

However, many of the chapters are interrelated and there are some general chapters which apply to all applications and must be read with all other chapters for example Chapter 1 Introduction and Chapter 24 Documents, Filing and Registry.

If a particular part or division does not apply to a particular application or procedure, that will be stated.

General philosophy behind revised Rules

* update and modernise the structure, language, forms and processes

* increase the audience's understanding of the purpose of rules of court, and the reason why the court manages cases in the way that it does

* increase user's understanding of the rules and forms

* increase the relevance and usefulness of the rules and forms

* improve processes, where applicable, to increase access to justice

* address issues of non compliance with rules and procedural orders

* inform the audience (including judges, other judicial officers, lawyers, clients and staff) for example in recognition that many people are unaware of many unwritten rules and practices

* adopt modern drafting practices, including adopting the approach taken in modern rules of court

* ensure rules and forms are electronically compatible

* address specific areas in urgent need of review such as experts, disclosure

* aim for uniformity of rules and forms with all courts exercising jurisdiction in family law.

Some of the main concepts underlying the revised Rules include:

* parties should be encouraged to resolve disputes before they start a case;

* parties should be fully informed about costs, the processes available, the consequences of non-compliance, and the likely timetable of events;

* court events should be conducted and disposed of in a manner, at a cost, and within a time scale which is appropriate, taking into account the issues involved and the means of the parties;

* wherever possible parties must be encouraged to identify issues in dispute and those agreed;

* only such discovery should take place and only such evidence should be before the court, as is necessary for the just and appropriate disposal of the proceedings and the evidence should be in a form which is most appropriate in all circumstances.

Consultation

The court has consulted extensively in the period leading up to the introduction of these Rules. The process itself commenced with the Future Directions Committee in 1998. That committee published its report in 2000. In the Forward of the report at page 6 the Chief Justice says

" This report reflects the results of various research and structural projects undertaken both inside and outside the court. It also reflects the thoughtful contributions made by judges and staff of the court, users of the court and organisations and individuals having an interest in the improvement of the court services"

The rules revision project commenced in July 2001 and the working party began the consultation process through a representative steering committee in September 2001. Public consultation took place for 8 months in 2003 from February 2003 to October 2003. The first draft was published on the court's web site and a hard copy sent to identified interest groups and organisations. A significant number of submissions were received on the first published draft and the majority of the recommendations were accepted and written into the final draft. The second draft was published for final comment in September 2003. In addition the court conducted a number of other related projects in which significant independent consultation took place including the review of costs and the Discussion Paper on Expert Witnesses in the Family Court. The submissions received as a result of these projects were also taken into account in the final version of the Rules.

CHAPTER 1 - Introduction

Part 1.1: Preliminary

Rule 1.01: Name of Rules

The Family Law Rules 2004 replace the Family Law Rules 1984 (the FLR 1984) as from the date of commencement. At the same time the Family Law Repeal Rules 2004 will repeal the Family Law Rules 1984. The latter Rules will be sent to the Judges for signing prior to the commencement of The Family Law Rules 2004.

Rule 1.02: Commencement

The Rules commence on 29 March 2004**.** There is no transition period and no period of grace. The next step in a pending case is to be taken in accordance with the revised rules. Judicial officers will exercise their discretion to order otherwise if this would create an unjust or unfair result in a given case.

Rule 1.03: Rules in Chapter 1 prevail

The principles in this chapter underpin the interpretation and application of the balance of the Rules. It sets out the general powers of the court, and other matters that apply to the Rules, the

Court, or cases generally. The Rules in this chapter override all other provisions in the Rules if there is a conflict.

Part 1.2: Main Purpose

Overview

The Rules in this Part have no equivalent in the FLR 1984. The initiatives stem from recommendations made in the Future Directions Committee Report (published in July 2000) and the 89th ALRC report "Managing Justice: a review of the federal civil justice system". It sets the benchmark for everyone within the court system as to how the Rules are to operate and be applied. It is one of the measures in the revised Rules aimed at improving access to justice and encouraging compliance.

In the final report by Lord Woolf "Access to Justice" in July 1996, it was said that, ultimately, the purpose of rules of court "is to guide the court and the litigants towards the just resolution of a case". Rules of Court contain detailed directions for the steps which must be taken. The effectiveness of those steps "depends upon the spirit in which they are carried out". That, in turn, "depends upon an understanding of the fundamental purpose of the Rules and of the underlying system of procedure."

The provisions are not intended to affect the law derived from established principles set out in relevant legislation and case law. Nor are they intended to fetter the Court's discretion.

Rule 1.04: Main purpose of Rules

This rule sets out the approach and spirit with which decisions are to be made when applying or interpreting the Rules and when exercising any power under the Rules.

Rule 1.05: Pre-action procedure

Under the pre-action procedure, each prospective party to a case is required to make a genuine effort to resolve the dispute before starting a case by:

* participating in primary dispute resolution, such as negotiation, conciliation, mediation, arbitration and counselling;

* exchanging a notice of Intention to Claim and exploring options for settlement by correspondence; and

* complying, as far as practicable, with the Duty of Disclosure.

The Rule provides that there are some limited cases where it would not be appropriate for the Court to insist on parties complying with the pre-action procedures.

One of the objects behind pre-action procedures is to discourage a combative adversarial approach, which can and does increase costs. They are aimed at encouraging parties to cooperate, make appropriate disclosure, behave reasonably, and make an early offer of settlement and negotiate sensibly to try to avoid litigation. The Family Law Council's guidelines for conduct by lawyers support this approach to litigation.

.Pre-action procedures

"...should result in many hopeless cases being abandoned and many cases of merit either being settled or reduced to a state where they can be resolved by litigation much more cheaply and rapidly than present." (Lord Woolf)

The procedure is not to be seen as a prelude to inevitable litigation, nor is it to be followed slavishly to a person's detriment.

If a case is subsequently started, the Court may consider whether or not these requirements have been met, and if not, what the consequences should be (if any).

The Rules include incentives to comply with the pre-action procedures including costs for non-compliance see Rules 1.10(2) (d) and 11.03 (2) (b), 19.08, 19.10.

The UK experience with its Pre action protocols is that "the culture has undoubtedly changed" and the main objectives of the protocols are being met, namely:

* better communication between parties prior to action;

* better exchange of information;

* earlier investigation by respondents;

* improved opportunities for settlement.

The profession thought the protocols establish clear ground rules on how to formulate and respond to claims, focus minds on key issues at an early stage, and encourage greater openness to smooth the way to settlement.

The pre-action procedures apply in parenting and financial cases and are set out in Schedule 1. The contents of the schedule have been reproduced in a brochure for easy distribution as well as published on the court's web-site. Once introduced, the operation and effectiveness of the procedures will be monitored and if necessary the provisions modified to ensure they achieve their aim.

The court's intake staff will not be expected to monitor compliance or non-compliance with the pre-action procedures, this will be a matter for the judicial officer, where relevant, during the case.

Rule 1.06: Promoting the main purpose

This rule codifies the factors to which the Court already has regard when managing a case. The inclusion of this rule ensures the users of the rules will be fully informed about these important principles and the way they are applied in practice.

Rule 1.07: Achieving the main purpose

This rule builds on rules 1.04 and 1.06 and sets out factors the Court considers when applying or interpreting the Rules, in any given case, to ensure that the case is resolved in a just and timely way at lowest possible cost to parties and the Court. It is expected that the factor of proportionality will increase in importance in case management under the revised rules.

Rule 1.08: Responsibility of parties and lawyers in achieving the main purpose

This rule originated as a result of recommendations by the Future Directions Committee and the 89th ALRC Report. It requires the parties and lawyers to help the Court achieve the main purpose. It is aimed at assisting access to justice and encouraging compliance. In setting a standard for lawyers practising in the Court, the rule recognises that particular skills and a particular approach is required by advocates in family law disputes because of the nature of the issues.

One of the important impacts of Part 1.2 and this rule in particular is that a party or lawyer may not have breached a particular rule or order but they may nevertheless be frustrating the main purpose of the Rules. These rules emphasise that the court will control oppressive or unreasonable behaviour which does not infringe any specific rule or order but which is still clearly against the principles set out in this Part.

Part 1.3: Court's powers in all cases

Overview

The Rules in this Part are those that apply generally in all cases and are included in the introductory chapter to avoid unnecessary repetition. They represent a significant change to the drafting style in the FLR 1984 and are crucial to the interpretation of the Rules as a whole.

Rule 1.09: Procedural orders in cases of doubt or difficulty

This rule confirms that the Rules are not an exhaustive code and that the Court has the power to control its own practice and procedures. (See O4 r2 FLR 1984)

Rule 1.10: Court may make orders

Instead of drafting the Rules from the perspective of the Court i.e. "the Court may order", the Rules have been drafted from the perspective of the client i.e. "a party may apply". Therefore this rule confirms that the Court has the power to make an order in relation to any matter set out in the Rules either on application or of its own initiative even if there is no application. This avoids constantly repeating throughout the Rules:

"the Court may order that .....";

"the Court may, on application, or on its own initiative order that ....."

Subrule (2) avoids repeating the phrase *"upon such terms and conditions"* throughout the Rules.

Rule 1.11: Court may set aside or vary order

The inclusion of this rule as a general rule avoids the need to repeat in each rule that it applies, that the Court may vary or set aside an order including procedural orders and orders of the more substantive kind such as a stay order.

Rule 1.12: Court may dispense with rules

Subrule (1). This rule is a general rule inserted to avoid the need to continually repeat the phrase *"unless otherwise ordered"* wherever that is applicable. This is a significant rule because it codifies the principle that even where a rule is framed in mandatory terms the court retains a discretion to order otherwise, even though the rule itself does not specifically say this.

Subrule (2) was formerly O4 r1 (FLR 1984).

Subrule (3) is informative as to the factors that will be taken into account by the Court when considering whether to exercise the discretion to dispense with a rule.

Rule 1.13: Judicial officer hearing an application

If a rule provides that an application is to be listed to be heard by a certain judicial officer and that judicial officer is not available, the application can be listed before another person with jurisdiction for example rules 16.08(2) and 22.12. It avoids the need to continually repeat the phrase *"or another judicial officer"* throughout the Rules.

Rule 1.14: Shortening or extension of time

Subrules (1) and (2) are the equivalent of O3r3 (FLR 1984).

Subrule (3) places the defaulting party on notice that the Court may order him or her to pay the costs of the default.

Rule 1.15: Time for compliance

This is a general rule to provide that if there is no time prescribed in a rule for an act to be done then the act must be done as soon as practicable. This avoids the need to continually repeat the phrase *"as soon as practicable*" throughout the Rules wherever it applies.

Part 1.4: Other preliminary matters

Rule 1.16: Definitions - the dictionary

This rule introduces the Dictionary which contains terms which are defined for the purposes of the Rules. The Dictionary is a part of the Rules and has the same force at law as the Rules themselves (see s. 4(3) of the Family Law Act). The Dictionary itself is at the end of the Rules.

Rule 1.17: Notes and Examples

Notes in the text and the Explanatory Guide are not part of the Rules even though they appear with the text of the Rules. They are intended only to help in the use of the Rules. However, if the text of the Rules is ambiguous or unclear, Commonwealth law allows a Court to use the notes or the Guide to help it work out what the text means. (For more information, see the Commonwealth *Acts Interpretation Act 1901*, section 15AB.)

Rule 1.18: Sittings

This rule was formerly O6 r1 (FLR 1984). It confirms the responsibilities vested in the Chief Justice by ss 21B, 27 and 38A of the Act.

Rule 1.19: Permission to record court event

This is a new rule aimed at informing those that use the Court that they must not record by electronic or mechanical means any of the events which take place, including mediation, conferences or hearings without the permission of the Court.

Rule 1.20: Publishing lists of cases

This rule is similar to former O39 (FLR 1984). It provides what information can be published in relation to a case (as an allowable exception under s 121 of the Family Law Act).

Rule 1.21: Calculating time

This rule sets out the parameters for working out the day by which a party must comply with a rule or order.

CHAPTER 2 - Starting a case

Overview

This Chapter lays the groundwork for the balance of the Rules. It sets out how a case is started and what application is used for different types of case. There is only one application form to start a case for final orders, other than a divorce. There are a total of 4 other applications under the revised Rules compared to 13 under the FLR 1984. The chapter also brings into the one location

* all rules relating to documents to be filed with an application;

* all rules implementing legislative provisions requiring specific notice to be given in certain applications.

Part 2.1: Applications

Rule 2.01: Which application to file

This rule sets out what application form is used for the various types of case.

Rule 2.02: Documents to be filed with applications

This rule sets out, in the one easy to locate place, what documents must be filed with certain applications. No change to existing practice.

Part 2.2: Brochures

Rule 2.03: Preparation and distribution of brochures

This rule sets out the types of case and the method by which the brochures prepared by the Court in compliance with ss. 17, 19J(2) and 62H of the Act are to be given to different people and by whom. No change to existing practice.

Part 2.4: Notification in certain cases

Rule 2.04: Notice of Child Abuse (s 67Z of the Act)

This rule was O23A rr 1 and 2 in the FLR 1984. It implements the requirement in the Act that parties are required to inform the Court if a party believes a child has been abused or is at risk of abuse.

The new Form 4 Notice of Child Abuse or Risk of Abuse replaces the former Form 66.

A copy of this notice must be given to the appropriate child welfare department and the Court must take it into account in the management of the case. Apart from the change to the form there is no change to existing practice.

Rule 2.05: Family violence Order

This rule requires a party to file a relevant family violence order or details of it as soon as possible. The Court needs to be aware of this for the comfort and security of participants in court events; so that it can be taken into account as appropriate in the management of the case and for the purposes of Part VII Division 11 of the Act.

Rule 2.06: Notification of proceeds of crime order or forfeiture application

Sections 79B and 90M of the Act require that after a property settlement case or spousal maintenance case has started, a party must notify the Court if they become aware that there is a proceeds of crime order or forfeiture application covering any of their property. It is mandatory for the Court to stay an application if the property of the parties to a marriage is the subject of a proceeds of crime order or forfeiture application.

This rule provides that the notice must be given as soon as possible and must be accompanied by a sealed copy of the proceeds of crime order or forfeiture application.

No change to existing practice.

Rule 2.07: Proceeds of crime

This rule sets out the documents that must be filed when the DPP or a party applies for a stay of a case under section 79C or 90N of the Act or for the stay to be lifted under section 79D or 90P of the Act.

No change to existing practice.

CHAPTER 3 - Divorce

Overview

This chapter sets out in the one location most of the rules relating to an application for divorce. However it must be read in conjunction with:

* Chapter 1 (Introduction) which sets out the philosophy of the Rules which apply to these applications;

* Chapter 2 (Starting a case) which provides that a Form 3 is to be filed to make an application for a divorce;

* Chapter 7 (Service) which sets out the procedure which applies to service of the application;

* Chapter 8 (Address for service and right of appearance); and

* Chapter 24 (Documents, filing and Registry) which sets out the rules in relation to the filing of the application.

The Rules use the term divorce order instead of "decree nisi".

Part 3.1Application for Divorce

Rule 3.01: Fixing of hearing date

The time from date of filing to date of hearing remains the same as under the FLR 1984, namely 28 days for joint applications, 42 days if the respondent lives in Australia and 56 days if the respondent lives overseas.

Apart from the form change there is no change to existing practice.

Rule 3.02: Amendment of Form 3

This rule provides a process and time limit for a divorce application to be amended.

Rule 3.03: Discontinuance of Form 3

A divorce application may be discontinued by an applicant filing and serving a Notice of Discontinuance at least 7 days before the hearing.

After this time the applicant will have to seek the permission of the Court on the day of the hearing. The Court, if satisfied that the respondent is aware of the applicant's intention to discontinue the application, would ordinarily allow the application to be discontinued or alternatively would adjourn the application and order the applicant to give notice to the respondent. No change to existing practice.

Part 3.2 : Response

Rule 3.04: Response

This rule provides that a respondent who wishes to oppose the divorce may file a response and it provides the time within which this must be done. Subrule (2) provides that if a response is filed, the parties must attend the hearing. Respondents are not permitted to use a Response to simply reply to the allegations if the divorce is not opposed.

Rule 3.05: Objection to jurisdiction

This rule provides that a respondent who wishes to oppose the jurisdiction of the Court must do so in the general response form - Form 3A. A discrete form for this has been omitted. The rule overcomes any common law principle to the effect that a respondent is deemed to submit to the jurisdiction of the Court by filing a response. If the respondent does object to jurisdiction, that issue must be determined first.

If this issue is raised in a response, when the application comes on for hearing before a deputy registrar, it will be adjourned to a judicial registrar or judge for hearing.

Rule 3.06: Response out of time

This rule was formerly O7 r11 (FLR 1984)

Rule 3.07: Affidavit to reply to Form 3

If a respondent wants to respond to the application but does not oppose the divorce they can file an affidavit, ask the applicant to amend the application or appear on the hearing day.

Part 3.3: Attendance at hearing

Rule 3.08: Attendance at hearing

An applicant with children of the marriage under the age of 18 must attend the hearing but may, by request in writing, seek permission to attend by electronic communication**.** Each Registry has a process to deal with these requests.

Subrule (2) sets out the consequences of failure to attend.

Part 3.4: Hearing in absence of parties

Rule 3.09: Seeking a hearing in absence of the parties

This rule was formerly O7 r14 (6) (FLR 1984). An applicant for a divorce, where there are no children of the marriage under the age of 18 years, may ask the court to hear the divorce in the absence of the parties (by completing Part A on the Form 3). The Court acts on this request unless the respondent objects**.**

No change to existing practice

Rule 3.10: Hearing in absence of parties - joint application

This rule was formerly O7 r14 (6) (FLR 1984) and does not change existing practice. An application in which both parties are applicants can be heard in their absence if they both seek this (by completing Part A on the Form 3). The Court will act on this request unless it is not satisfied about the arrangements for the children, in which case the application would be adjourned and the parties given notice that they are required to appear.

No change to existing practice.

Rule 3.11: Request not to hear case in parties' absence

This rule provides that a respondent who does object to the divorce being heard in the absence of the parties, may file and serve notice to that effect, in which case the court must then require the parties to appear.

There is no prescribed form for this notice.

Part 3.5: Events affecting divorce order

Rule 3.12: Application for rescission of divorce order

This provides the procedure for a person to apply to set aside the divorce order, before it becomes final, under s 57 (parties reconciled) or s 58 (miscarriage of justice). An application is made in Form 2 supported by affidavit and is listed before a registrar, judicial registrar or a judge urgently prior to the divorce becoming final. If ss 57 or 58 do not apply and a party wishes to object to the divorce order, a notice of appeal must be filed.

No change to existing practice.

Rule 3.13: Death of a party

Section 55(4) provides that a divorce does not become final if a party dies beforehand. This rule puts in place a mechanism for a party to inform the Court if a party dies so that the Court can stop the issue of the divorce order.

No change to existing practice.

CHAPTER 4 - Application for Final Orders (Form 1)

Overview

Rule 2.01 (1) provides what Form 1 is used for. It is the application used to make an application for property orders, parenting orders and all other applications seeking final orders. This Chapter sets out the process from date of filing of the Form 1. Part 2 sets out special processes for specific applications.

The chapter must be read in conjunction with:

* Chapter 1 (Introduction) which sets out the philosophy of the Rules which apply to these applications;

* Chapter 2 (Starting a case) which provides that a Form 3 is to be filed to make an application for a divorce;

* Chapter 7 (Service) which sets out the procedure which applies to service of the application;

* Chapter 8 (Address for service and right of appearance); and

* Chapter 24 (Documents, filing and Registry) which sets out the rules in relation to the filing of the application.

Rule 4.01: Contents of application

Subrule 1 requires an applicant to include all of the orders sought in all subject matters in the same application. This fits with r11.10 (2) which requires that a party who wishes to add any new cause of action after the application is filed must amend the application or response. The reason for this requirement is the convenience and cost saving benefits of resolving all disputes together.

The exceptions are applications for a nullity, a declaration of validity or a special medical procedure. As these must be listed for hearing on the first court date and do not require case management, Subrule (2) provides these must be set out in a discrete Form 1.

No change to existing practice. Casetrack changes will enable more than one Form 1 to be filed.

Rule 4.02: Filing Affidavits

A party must not file an affidavit with a Form 1 unless the application:

* raises a cross-vesting issue;

* is for a medical procedure;

* is a maintenance application involving a step- parent see rule 4.16;

* is for child support;

* seeks annulment or validity of marriage, divorce or annulment;

* relates to a passport.

Rule 4.03: First court date

When a Form 1 is filed it must be listed for a first court date at 28 days. Generally, where practicable, the first court date for an application for property settlement, child support, maintenance and parenting orders will be a Case Assessment Conference. The Court is developing the criteria for determining what cases should not be allocated a Case Conference and allocated a procedural hearing instead having regard to various factors including resources. Some specific applications listed in Part 4.2 such as medical procedure, annulment or validity of marriage or divorce and orders relating to a passport will be listed directly for hearing.

If a Form 2 is filed at the same time as a Form 1 both applications must be listed for the same date, which may be a Case Assessment Conference. However, if the Form 2 is listed for a hearing, the Form 1 will be listed for procedural orders on the same date before the same judicial officer. As appropriate the judicial officer may decide to transfer the case to a deputy registrar to conduct a Case Conference or make procedural orders.

Part 4.2: Specific applications

Division 4.2.1: General

Rule 4.04: Machinery provision

General provisions apply

Rule 4.05: Application by Attorney General for transfer of case

This rule was formerly O31A r3 (4) and O41 r9 (3) (FLR 1984) and is a machinery provision which prevents the Attorney General from becoming a party by virtue only of the operation of Rule 6.01, if the only involvement of the Attorney General is to transfer a case to another court under the Cross vesting legislation or Corporations Act.

No change to existing practice.

Division 4.2.2: Cross-vesting

Rule 4.06: Cross-vesting matters

Since the decision of *Re Wakim ex parte McNally* (1999) 198 CLR 511, the cross-vesting legislation has been amended see for example, s 5 Jurisdiction of Courts Cross Vesting Act (C'W) and the equivalent provisions in the State legislation. Hence the Rules about this have been retained in the new Rules. This rule sets out the process for a party wishing to rely on a cross-vesting law to follow, both when starting a case and after the case has started.

Rule 4.07: Transfer of case

An application to transfer a case to another court under the cross-vesting law must be made on a Form 2 with an affidavit and would be listed for hearing before a judge (28 day return date**).** Under Rule 1.10 the Court may order the transfer of a case on its own initiative.

No change to existing practice.

Division 4.2.3: Medical Procedure

The majority of this Division is based on the existing guidelines for these applications set out in " A question of the right treatment: The Family Court and special medical procedures for children, an introductory guide" by Susan Brady and Donna Cooper published by the Court in 1996. There is no change to existing practice.

Rule 4.08: Application for medical procedure

An application for a special medical procedure is made on a Form 1. This rule sets out who may make the application and who must be joined as a party. This is wide enough to include the relevant state welfare department and a medical practitioner.

Rule 4.09: Evidence supporting application

This rule codifies the factors identified in *Re Marion* (No. 2) (1992) FLC 92-293 as the factors the Court would need to consider in determining an application for a medical procedure. The evidence would ordinarily be included in an affidavit filed with the application but in urgent cases may be given orally with the permission of the Court.

Rule 4.10: Service of application

The application and any documents filed with it must be served on the parties to the application, any child representative and the prescribed child welfare authority**.**

Rule 4.11: Fixing of hearing date

An application for medical procedures must be listed for an urgent hearing date before a judge.

Rule 4.12: Procedure on first court date

This rule provides some flexibility for the judge to manage the case as appropriate in the circumstances. If the parties are ready, the application will be heard on the first court date, otherwise the judge may adjourn it and make orders as to the future conduct of the case (including service on other persons, filing of further affidavits, and the appointment of a child representative or case guardian).

Division 4.2.4 : Maintenance

Rule 4.13: Information to respondent

This rule requires an applicant seeking maintenance to serve a prescribed brochure on the respondent with the application. This brochure sets out the process for these applications.

No change to existing practice.

Rule 4.14: Procedure on first court date

An application for maintenance is made in a Form 1 and the process for listing this is set out in Part 4.1. Under this rule a Case Assessment Conference is conducted by a deputy registrar on the first court date of the application if practicable. If it is a maintenance only application and it does not settle the deputy registrar may transfer it to the Federal Magistrates Court or in appropriate cases list it for hearing and make orders about the filing of affidavits and the preparation for the hearing. If the maintenance issue is joined with other issues, the application will proceed along the normal case management pathway. In some cases, if appropriate, the maintenance application can be directed to be heard as a separate and discrete issue.

Rule 4.15: Evidence to be provided

To assist the process of disclosure and facilitate a settlement, both parties are required by this rule to bring documents in relation to their financial circumstances with them on the first court date and subsequent hearing. Parties should consider these documents before the conference or procedural hearing commences.

Rule 4.16: Application for step-parent to maintain

This rule was formerly O11 r3A (FLR 1984) and is aimed at ensuring that the eligible carer of children receives notice if the person liable to pay child support attempts to enter into a financial arrangement (by way of court order) which would impact on the latter's capacity to pay child support.

Rule 4.17: Maintenance orders

This rule provides the information which should be included in an order**.**

No change to existing practice.

Division 4.2.5: Child support

Rule 4.18: Application of Division

This rule specifies the sections of the child support legislation under which an application can be made under this subdivision. It excludes appeals under the child support legislation from a court order which must be brought by way of Notice of Appeal (Form 20 under chapter 22).

An application under this Division is made on a Form 1 and is to be supported by an affidavit setting out some of the information which was formerly in Forms 63 and 64 of the FLR 1984**.**

Rule 4.19: Documents to be filed with Child Support applications and appeals

The table in this rule sets out what documents are to be filed with child support applications and appeals. These include an affidavit and any documents lodged with, or received from, the Child Support Agency relevant to the case. This rule is phrased this way because, given the Child Support Agency's practice, each party will only have a summary of the other party's document (ie the applicant will have a summary of the response provided by the Child Support Agency and the respondent will have a summary of the objection rather than a copy of the actual objection.)

The prescribed child support brochure more specifically sets out the documents required - this enables the rule to remain general without the need for amendments each time requirements

change. A ready reckoner has been prepared for staff setting out specifically all of the documents that a client will need to file with a child support application or appeal.

No change to existing practice.

Rule 4.20: Application under s 95(6) Assessment Act

A person seeking a variation of a child support agreement under s 95(6) of the Assessment Act must first register the agreement. (see r23.01)

No change to existing practice.

Rule 4.21: Time limits for filing certain applications and appeals (Assessment Act)

An application under the sections of the Assessment Act specified in this rule must be filed within 28 days of the applicant receiving the notice/decision of the child support registrar**.** A person can apply for an extension of this time limit by filing a Form 2 and an affidavit.

No change to existing practice.

Rule 4.22: Time limit for appeal under Registration Act

An application under section 88 of the Registration Act must be filed within 28 days of the applicant receiving the notice/decision of the child support registrar**.** A person can apply for an extension of this time limit by filing a Form 2 and an affidavit.

No change to existing practice.

Rule 4.23: Service of application or appeal

A child support application or appeal must be served on all parties to the application, the Child Support Agency and, if not already a party, the eligible carer of the child.

Subrule (2) requires the applicant in applications under sections 98, 116, 129 and 123 of the Assessment Act, to serve a prescribed brochure on the respondent. This brochure sets out the process for these applications.

No change to existing practice

Rule 4.24: Service by Child Support Registrar

Under this rule any document served by the child support registrar under the Child Support legislation is treated as served on a certain date so that the time limit for the filing of any application or appeal can be calculated. The Court can make a finding and order otherwise.

Rule 4.25: Procedure on first court date

A child support application/appeal is brought on a Form 1 and the process for listing this is set out in Part 4.1. Under this rule the application will be listed before a deputy registrar on the first court date. If an application is under ss. 98,116,123 or 129 Assessment Act it will be given a Case Assessment Conference if practicable. Otherwise it will be given a procedural hearing. If it is a child support only application and it does not settle on the first court date the deputy registrar will transfer it to the Federal Magistrates Court, or in appropriate cases, list it for

hearing and make orders about preparation for the hearing. If it is joined with other applications it proceeds along the normal case management pathway, but if appropriate, the child support application can be directed to be heard as a separate and discrete issue earlier.

Rule 4.26: Evidence to be provided

To assist the process of disclosure and facilitate a settlement, both parties in an application under sections 98, 116, 129 and 123 of the Assessment Act, are required, by this rule, to bring documents in relation to their financial circumstances with them on the first court date and subsequent hearing. Parties should consider these documents before a conference or procedural hearing commences.

Division 4.2.6: Nullity and declaration of validity

Rule 4.27: Application

This rule specifies what this division applies to. There is no discrete application form for these applications. They must be made in a Form 1.

Rule 4.28: Fixing of hearing date

An application will be listed for hearing by a judge or judicial registrar on its first court date (if the respondent is in Australia - at least 42 days after filing; if the respondent is outside Australia - at least 56 days after filing).

Rule 4.29: Affidavit to be filed with application

This rule provides that an affidavit must be filed with an application under this division and sets out what must be addressed in that affidavit**.**

Division 4.2.7: Application relating to passport

Rule 4.30 and 4.31: Application relating to a passport

This rule provides the process for a party to bring an application relating to a passport under for example s67ZD of the Act (Form 1 and an affidavit).

There is also power under ss 68B and 114 of the Act to make orders as follows:

* An Order for the surrender of a child's passport

(alone or with interim or final parenting orders eg order restraining the removal of a child from the country)

* An Order for the issue of a child's passport without a parent's consent

(alone or with interim or final parenting orders eg approval to travel overseas as part of a relocation case)

Section 7A of the Passports Act 1938 establishes conditions precedent to the issue of a child's passport, one of which is that in the absence of a parent's consent, a court has permitted the issue of the passport see para (2)(b). The court's power to permit this arises under the FLA, as either an injunction or a parenting order (or perhaps an order about the welfare of a child).

When there are no other orders sought in the application, it will be listed for hearing by a Judge or Judicial Registrar. Otherwise, if the application also includes a prayer for relief in another cause of action such as a parenting order, it would be listed for a case assessment conference (unless an urgent order was sought in a Form 2.)

CHAPTER 5 - Applications in a Case (Form 2)

Overview

This chapter sets out the general process and requirements for all applications which are the equivalent of the former Form 8.

The chapter must be read in conjunction with:

* Chapter 1 (Introduction) which sets out the philosophy of the Rules which apply to these applications;

* Chapter 2 (Starting a case) which provides that a Form 3 is to be filed to make an application for a divorce;

* Chapter 7 (Service) which sets out the procedure which applies to service of the application;

* Chapter 8 (Address for service and right of appearance); and

* Chapter 24 (Documents, filing and Registry) which sets out the rules in relation to the filing of the application.

Part 5.1: General

Rule 5.01: Applications in a case

This rule and the note under it sets out exhaustively the applications which can be made in an Application in a case (Form 2). It is used for applications formerly known as interlocutory including interim, procedural, an application in a case where a final order has been made and the order sought is incidental to that eg costs, enforcement, recovery or location orders, applications ancillary to an application for final orders such as "leave to proceed" or an extension of time to file an application. Some rules specifically provide for an application to made in a Form 2, for example review of a Registrars decision, others simply allow an application and provide no form because this rule applies to mandate the Form 2.

Rule 5.02: Evidence in applications in a case

An applicant must file an affidavit with a Form 2, unless it is an application for the review of a decision of a judicial registrar or registrar.

Rule 5.03: Procedure before filing

This rule follows the approach taken in r1.05 and requires parties to attempt to resolve the dispute before bringing an application. The Court may impose costs if this is not done. Subrule (2) sets out the circumstances where Subrule (1) does not apply.

Court staff will not be required to monitor this; it is a matter for the judicial officer to consider in appropriate cases.

Rule 5.04: Restrictions in relation to applications

Subrule (1) provides that a party must have an outstanding Application for Final Orders in a subject matter before that party can seek an interim order in that subject matter. This subrule does not apply to a Child Representative.

Subrule (2) provides that there must be a pending application in a case before an application for a procedural order can be made unless the Rules provide otherwise eg leave to proceed out of time, application for appointment of a case guardian for proposed applicant, applications by non parties (Rules 20.28 and 20.39). Also see Rules 14.04, 14.05, 19.08, 19.16 which have the effect of allowing a Form 2 to be filed even though there is no pending Form 1.

No change to existing procedure.

Rule 5.05: Fixing a hearing date and case assessment conference

The general rule is that a Form 2 is to be listed 28 days after the form is filed for either a

* hearing

* procedural hearing or

* Case Assessment Conference

There are exceptions to this time limit in Subrules (2) and (3).

Subrule (3) ties the listing of a Form 2 to the listing of any other related application so that there is only one first court date for all pending applications. A party may ask that a Form 2 be listed urgently but this will only be permitted in exceptional circumstances which are to be set out in an affidavit. Research undertaken by the Mercury Project Committee indicates an unacceptably high number of applications which were short listed were adjourned on the first court date.

Whether a case is listed for a hearing, procedural hearing or hearing will depend on the nature of the application. Guidelines are proposed in relation to interim applications, as some of these will be listed for hearing and others for Case Assessment Conference. A ready reckoner will be available to staff to assist with this.

Rule 5.06: Attendance by electronic communication

This rule sets out the procedure for a party to request permission to attend a hearing, make a submission, or give or adduce evidence from a witness by electronic communication on the return date of a Form 2 application. This is to be a request in writing, rather than by application, and should set out specified facts including advice as to the other party's attitude to the request. This request is to be referred, where possible, to the judicial officer before whom the Form 2 is listed.

Rule 5.07: Attendance of party or witness in prison

This rule applies to events in a Form 2 application where a party is a prisoner or if a party wishes to adduce evidence from a witness who is a prisoner. The prisoner is required to attend by

telephone or video link unless the Court orders otherwise. The reasons for this rule include convenience, cost and security. To seek permission for a prisoner to personally attend a written request must be sent in seven days before the date of the event. This will be referred to the judicial officer before whom the Form 2 is listed. A business procedure has been developed to ensure this is handled appropriately, for example, information is to be obtained about the facilities available at the prison, who will be present with the prisoner, any matter that might interfere with the hearing, and any technical requirements.

Part 5.2: Hearing - Interim and procedural applications

Rule 5.08: Interim orders - matters to be considered

This rule is new and has the purpose of helping clients understand the factors that the court will have regard to, in exercising its discretion whether, as a matter of practice and procedure, it will entertain an interim application. The available resources in the Family Court of Australia make it desirable that the number of applications for interim orders be substantially reduced. The rule does not affect the substantive law as to the principles to be applied by a judicial officer in an interim determination.

Rule 5.09: Admissibility of affidavit

Subrule (1) was formerly O30 r2A (1B) (FLR 1984) and limits the evidence put before the Court on interim and procedural applications but it is subject to the court ordering otherwise. It is in line with decisions such as *C and C* (1996) FLC 92-651 which recognise the need of the Court to place some limitation on time spent on interim proceedings so that the Court can make the best use of available resources.

Subrule (2) converts Practice Direction 1/1998 into a Rule. The pro-forma affidavit is compulsory in all interim parenting applications and it has been substantially revised by the Forms committee. The affidavit is available on the web-site and at Registries.

Rule 5.10: Hearing time

This rule was formerly O30 r2A (1C) (FLR 1984) and limits cross examination and the duration of interim and procedural hearings to two hours subject to an order otherwise. See *C and C* (1996) FLC 92-651. It must be read with rule 15.21 which limits the number of subpoenas that can be issued for an interim hearing.

Rule 5.11: Party's failure to attend

This rule codifies the law as to what the Court may order on a failure of a party to attend.

No change to existing practice.

Part 5.3: Applications without notice

Rule 5.12: Applications without notice

This rule adopts existing O12 (FLR 1984) and the specific guidelines published by the Court on 16 October 2001 in relation to the requirements for making an "ex parte" application. It is to confirm that applications without notice should only be entertained in exceptional circumstances.

Rule 5.13: Necessary procedural orders

This rule provides information for the audience as to the procedural orders that will normally be made on an Application Without Notice to ensure the case is appropriately managed after an order is made without notice to the respondent.

Part 5.4: Hearings in the absence of the parties

Rules 5.14 to 5.17

The process is intended to be similar to the process which currently exists in divorce applications. It only applies to interim and procedural applications. It is contemplated that it will be used for the more narrow procedural applications and by parties in regional centres. The FMC has a similar provision at r15.03. The process is:

* A party applying for an interim or procedural order can, in the Form 2, ask for the Court to determine the application in the absence of the parties. The respondent can object to this in writing and the parties will then need to attend on the first court date.

* Even if the parties agree, the Court may decide that it is inappropriate to hear the application in the absence of the parties. If so, the application may need to be adjourned and the parties given notice to attend.

* If the hearing is to take place in the absence of the parties, r5.17 sets out the documents which must be filed. At least two days before the hearing, the party must file a draft of the orders sought, a list of documents to be read by the Court and a supporting submission. The submissions are to be no more than five pages long.

Rule 5.18: Administrative postponement of hearings

This rule codifies the existing process in this respect set out in Paragraph 3.2 Case Management Directions ("CMD")

CHAPTER 6 - PARTIES

Part 6.1 : General

Rule 6.01: Parties

This rule provides who falls within the description of the term "party."

No change to existing practice.

Rule 6.02: Necessary Parties

Subrule (1) is intended to provide information to clients about who to join in the case. This is subject to the limitation that the dispute with those persons must be within the court's jurisdiction (including accrued jurisdiction).

Subrules (2) and (3) are an extension of former O15 r1 (FLR 1984) to ensure that all persons contemplated by the Act are joined in cases seeking parenting orders. This has been drafted to highlight those who may need to be joined in a case involving parties from certain cultures such as the Australian Aboriginal culture.

Part 6.2: Adding and removing a party

Rule 6.03: Adding a party

This rule provides the procedure to add a party to a case. When the case is started a person becomes a party if named in the application or response. If a party wishes to add another person as a party after they have filed their application or response they are required to amend the application or response (as applicable).

No change to existing practice.

Rule 6.04: Removing a party

A party can apply for an order that a person be removed as a party by filing a Form 2 and an affidavit**.** The application would be listed for hearing before a deputy registrar, registrar, judicial registrar or judge on the next available date for procedural hearings.

No change to existing practice.

Rule 6.05: Intervention by person seeking to become a party

A person who is not a party can apply for an order joining them as a party by filing a Form 2 and an affidavit**.** The application will be listed for hearing before a deputy registrar, registrar, judicial registrar or judge on the next available date for procedural hearings.

No change to existing practice

Rule 6.06: Intervention by person entitled to intervene

This rule provides a procedure for persons who are entitled as of right under a legislative provision (eg ss91 and 92A Family Law Act, 78A Judiciary Act) to become a party in a case**.** That person files a Form 5 and an affidavit and automatically becomes a party to the case. If the Form 5 is filed after the first court date, the case will be listed for a procedural hearing.

Rule 6.07: Notice of constitutional matter

This rule is slightly different to its predecessor (O31C - FLR 1984). It imposes the obligation on the parties to decide whether the case raises a constitutional issue which is both a genuine and live issue. (see Burchett J in *Narain v Parnell* (1986) 9 FCR 479 at 486 - 489.) If so they are to give notice under s 78B of the Judiciary Act 1903 to the relevant Attorney General/s, so that the Attorney General can then choose to intervene in the case.

In comparison to the former rule there is no prescribed form for the notice to be given.

Part 6.3: Case Guardian

Rule 6.08: Conducting a case with a case guardian

The term "case guardian" is the equivalent of next friend, guardian ad litem , litigation friend or litigation guardian. This term is considered to be more user friendly than the others.

A child and a person with a disability (affecting their ability to conduct the case - see full definition in dictionary) must have a case guardian for the case. The effect of this is that before filing an application or response or continuing with the conduct of a case, an application must be made in Form 2 for the appointment of a case guardian. A case would not be a nullity if started

without a case guardian but once the irregularity was identified the court require a case guardian to be appointed, if appropriate.

If the application seeks the appointment of a case guardian so that a case can be started on behalf of another person, the Form 2 can be filed, even though there is no Form 1 pending (refer r 5.04(3) (b)).

No change to existing practice

Rule 6.09: Who may be a case guardian

This rule extends the former O15 r14 (2) (FLR 1984) to also require that a person who wishes to be a case guardian must be an adult and able to conduct the case fairly and competently. It follows that the court may dismiss a case guardian who does not meet these criteria.

There is no prescribed form for a person to consent to act ascase guardian. A written consent is to be attached to the affidavit filed with the application for appointment.

Rule 6.10: Appointment, replacement and removal of case guardian

Any application in relation to the case guardian must be by Form 2 and affidavit. The Form 2 will be listed for hearing on the next available procedural hearing date before a registrar, judicial registrar or judge.

No change to existing practice**.**

Rule 6.11: Attorney General may appoint a case guardian

This rule allows a person (appointed by the Attorney General as a case guardian of a person for a particular case) to become a case guardian automatically without court order, by filing a consent to that effect and a Notice of Address for service. The consent would need to have attached proof of the appointment.

No change to existing practice.

Rule 6.12: Notice of becoming case guardian

Once a person is appointed as a case guardian, that person must give notice to the other parties and the child representative. There is no prescribed form for this but in practical terms this would ordinarily be by service of the Notice of Address for Service. If necessary, a case guardian or one of the other parties, could ask for the case to be listed for further procedural orders in relation to the conduct of the case.

No change to existing practice.

Rule 6.13: Conduct of case by case guardian

This new rule informs people as to the role and responsibilities of a case guardian**.**

Subrule (1) includes a duty requiring a case guardian to satisfy the court that final or interim orders sought by consent are in the best interests of the child or person under a disability. This does not apply to procedural orders.

Due to r1.12, the Court retains the discretion to dispense with this requirement.

Subrule (2) makes it clear that the duty of disclosure in a case applies to both the person needing a case guardian as well as the case guardian in relation to documents in that persons possession or control relating to a relevant issue in the case.

Rule 6.14: Costs of case guardian

This rule was formerly O15 r19 (FLR 1984)

No change to existing practice.

Part 6.4: Progress of case after death or bankruptcy

Rule 6.15: Death of party

This rule was formerly O15 r 8 (FLR 1984) and enables the Court to consider the appropriate future conduct of the case if a party dies.

No change to existing practice.

Rule 6.16: Bankruptcy of party

This is a new rule to ensure the Trustee of the Bankrupt's estate receives notice of any relevant property or enforcement application and to provide a procedure for listing the case for case management.

CHAPTER 7 - Service

Part 7.1

Overview

This part applies generally to all cases**.** The Forms Committee has prepared a new Affidavit of Service, a new Acknowledgment of Service and a Service Kit for distribution. The Affidavit of Proof of Signature has been omitted, but intake staff will have a uniform draft precedent to hand to clients for use and this will also be on the website.

Rule 7.01: Service

This is a general rule providing for two types of service - "special"(which was formerly known as "personal") and "ordinary". Due to the nature of the documents required to be served by special service[1], the thing that distinguishes it from ordinary service is that with special service the court has to be satisfied that the document has actually come to the notice of the person served.

Rule 7.02: Court's discretion regarding service

This was formerly O18 r13 and O18 r18 (FLR 1984) which have been combined and redrafted and confirms that even if service is not according to the Rules or an order, the court has a discretion to be satisfied about service.

Rule 7.03: Service of documents

This table sets out for use as a ready reckoner, the method of service for various documents.

Rule 7.04: Service of filed documents

This rule includes what was formerly O 18 r5 (FLR 1984) and adds some additional information. It is a general rule setting out the requirements for all cases and forms in relation to service so that it is unnecessary to repeat *"and serve"* throughout the Rules**.** It specifies what must be served, who must be served, the time for service and the effect of non-compliance with that time.

Part 7.2: Special Service

Rule 7.05: Special Service

The essence of this rule is that for special service to be effective, the person served must actually receive the document or have received actual notice of it. There are only 2 basic methods of special service:

- by hand

- by post or electronic means, provided the person served acknowledges receipt of the document served.

Rule 7.06: Special Service by hand

This rule was formerly O18 r6 (FLR 1984).

Rule 7.07: Special service by post or electronic communication

This rule provides for service by post or electronic communication, but is subject to the qualification that this means of service can only be proven if the respondent acknowledges service, appears or responds to the application.

Rules 7.08 to 7.11: Special service on lawyer, person with disability, prisoner, corporation

These rules set out special requirements in relation to special service in the identified situations.

Part 7.3: Ordinary Service

Rule 7.12: Ordinary Service

This rule was formerly O18 r9 (FLR 1984). Ordinary service applies in the main to documents filed after the initial application, and there are a number of ways provided for this type of service. There is no substantive change to the law.

Part 7.4: Proof of service

Rule 7.13: Proof of service

This rule sets out how a person proves service of an application.

Rule 7.14: Proof of special service

To prove special service there must be proof that the person served actually received the document or notice of it. Where service is by post or electronic communication this may be done by attaching an acknowledgment of service signed by the respondent to the affidavit of service.

If the documents are served on the respondent by e-mail, the applicant would have to advise the respondent to print off the acknowledgment, sign it and send it to the applicant to enable the applicant to identify the signature.

The requirement that the witness to the signature on the Affidavit of Service must also sign the annexure marking on the Acknowledgment of Service has been omitted. (r 15.12(2))

Rule 7.15: Evidence of identity

This rule provides that evidence of identity may be given in two ways - by the admission of the person served or by identification by another person. There is no change to substantive law.

Part 7.5: Other matters about service

Rule 7.16: Service by electronic communication

This rule sets out special practical requirements for service by fax and e-mail to ensure, among other things, that the recipient is informed of the purpose of the transmission and the sender.

Rule 7.17: When service is taken to be effected

This rule is partly former O18 r12 (FLR 1984) and is extended to cover service by electronic communication and is an aide in relation to proof of service.

Rule 7.18: Dispensing with service and service on conditions

This rule was formerly O18 r17 (FLR 1984). There is no change to substantive law.

Part 7.6: Service in non convention country

Rules 7.19 and 7.20

This is a new Part providing a process for service overseas in a non-convention country. (See sections 31(2); 123 (1) (b) Family Law Act 1975.) Service in a convention country is dealt with by Regulation 12 Family Law Regulations.

CHAPTER 8 - Right to be heard and address for service

Part 8.1 Right to be heard and representation

Rule 8.01: Right to be heard

This rule was formerly O4 r7 (FLR 1984), but has changed the existing rule to allow a corporation to be represented by an officer of the corporation.

Rule 8.02: Child representative

This rule provides that a party may apply for the appointment or removal of a child representative by filing a Form 2 and an affidavit. The Court may also allow an oral application and may make such an order on its own initiative at any of the Court events.

If an application is filed, it would be listed for hearing on the next available procedural hearing date before a deputy registrar.

Subrule (3) is new and sets out the rights and responsibilities of a person appointed as a child representative. The Court has recently published Guidelines in relation to child representatives developed after consultation with various interest groups. These guidelines are available on the court's website and from Family Court of Australia Registries.

Subrule (3) (c) and (d) and Subrule (4) have been inserted to make it clear to other parties that whilst the child representative is not a party at law, they have the same rights and responsibilities of a party and must be served with all documents.

Subrule (5) has been inserted to eliminate the current uncertainty as to when the representation ceases but only applies unless the court orders otherwise. A child representative appointment remains effective for any appeal but the child representative may choose not to participate.

Rule 8.03: Lawyer - conflicting interests

This rule was formerly O37 r2 (FLR 1984)

No change to existing practice.

Rule 8.04: Lawyer ceasing to act

This rule introduces a more simple process for a lawyer to cease acting for a client.

Subrule (1) provides that the lawyer must serve the client with a notice to that effect (Form 9) and then file that notice (after 7 days). The client is entitled to receive 7 days notice under the Rule, to enable alternate arrangements to be made. In addition, the existing practice of seeking the Court's permission to withdraw remains unchanged.

Subrule (2) provides that when a lawyer ceases to act, until the client files a Notice of address for service, the client's last known residential address is to taken to be their address for service.

Part 8.2: Address for service

Rule 8.05: Address for service

This rule provides that a party who wishes to be heard must have filed a Notice of Address for Service which can be set out in the application or response or in a Form 8. The address must be a place within Australia to which documents can be delivered, and may include an address for receiving an electronic communication. The Court will retain a discretion to hear a person who has not filed a Notice of Address for Service in exceptional circumstances.

Rule 8.06: Change of address for service

This was formerly O18 r3 (FLR 1984), and requires a party to file a Form 8 when their Address for Service changes.

No change to existing practice.

CHAPTER 9 - Response and Reply

Overview

This chapter brings all relevant rules about responding to an application into the one chapter. It is logically placed after the chapters on service and address for service and right of appearance.

The same Form (Form 1A) is used to respond to all applications for final orders, so discrete forms for a response such as Forms 12B and the response to the Form 63 are omitted. There is no discrete form and process for an objection to the court's jurisdiction.

The rules in this chapter do not provide for documents to be filed "and served" as r7.04 provides that any document filed must be served. r1.13 requires that a step required by the Rules must be taken as soon as practicable, however in this chapter there are a number of rules which provide specific time limits which override the general rule.

Part 9.1: Response to Form 1

Rule 9.01: Response to Form 1

This rule provides that a Form 1A is to be used to respond to a Form 1. Subrules (2) and (3) provide what must and may be included in the Form. A party cannot ask for an order about certain issues such as a special medical procedure in the Form 1A (see Subrule (4)) These can only be included in a Form 1 as they must be dealt with as a discrete application and listed for hearing as soon as possible (ie not mixed with other issues which follow the case management pathway).

If orders are sought in a new subject matter in the Form 1A, the Form 1A is treated as an application for the purposes of the Rules and any documents required to be filed with an application must be filed with the Form 1A (unless they are already on the file eg. Marriage Certificate).

Rule 9.02: Filing an affidavit with Form 1A

The general rule is that an affidavit cannot be filed with a Form 1A. However, there are exceptions to this, if:

* the Form 1A is an application i.e. orders are sought in a new subject matter and the Rules require an affidavit to be filed with an application for an order in that subject matter eg a Child Support Application; or

* the respondent is responding to a Form 1 with which an affidavit was filed eg a response to a medical procedure application, child support application, nullity or declaration of validity, relation to a passport.

Rule 9.03: Response objecting to jurisdiction

A respondent wishing to oppose the application on the basis that the Court does not have jurisdiction, is required to include that in the Form 1A. There is no discrete form for this. (The Form 14 in the FLR 1984 is omitted). The rule is intended to overcome the general law to the effect that a respondent is taken to accede to the jurisdiction of the court by filing a Response.

If such a response is raised, this issue will be listed for determination (from the first court date) before the case proceeds along the normal case management pathway.

Part 9.2: Reply to Form 1A

Rule 9.04: Reply to Form 1A

A Reply (Form 1B) is used by an applicant to respond to a Form 1A in which a new subject matter is raised.

The applicant may file an affidavit with a Reply only where:

* the respondent has raised a new cause of action in a Response; and

* that cause of action is one of those under Part 4.2 which require an affidavit to be filed.

The applicant must not to file an affidavit with a Reply if there is no new cause of action raised in the Response.

Part 9.3: Response to Form 2

Rule 9.05: Response to Form 2

A response to an application in a case (Form 2A) is used to respond to an application in a case (Form 2).

Rule 9.06: Affidavit filed with Response

The respondent must file an affidavit with a Form 2A. This does not apply to a respondent to an application to review a decision of a judicial registrar or registrar

Rule 9.07: Affidavit in reply to Form 2A

There is no prescribed form to Reply to a Form 2A, but an applicant may file a responding affidavit to reply to an affidavit filed with a Form 2A in which a new subject matter is raised.

Part 9.4: Filing and Service

Rule 9.08: Time for filing and service

Any response to an application must be filed and served at least seven days before the first court date. This rule applies to Forms 1A and 2A and applies whether the application is listed for a first court date at 28 days or sooner.

Any Reply must be filed as soon as possible after the response is received.

All affidavits, whether by the applicant in reply to a Form 2A under r9.07, or a respondent, must be filed at least two days before the hearing of an interim application. This rule was inserted at the request of the Rules Revision Committee Steering Committee to avoid parties attempting to file substantial affidavit material on the morning of a hearing.

Note that r11.02 provides that a step taken after the time provided in the Rules will be of no effect, so any response or reply filed after the time provided in this rule will be of no effect unless permission is granted by the Court to extend that time.

CHAPTER 10 - Ending a case without a trial

Part 10.1: Offer to settle

This applies to all applications, cross applications and appeals.

Part 10.1 has two Divisions (10.1.1 and 10.1.2)

Division 10.1.1: General

This division applies to all offers of settlement and provides for:

(a): how an offer is made (Rule 10.01);

(b): that an offer is without prejudice unless it states it is open and must not be mentioned in the documents filed (Rule 10.02);

(c): how an offer is withdrawn (Rule 10.03);

(d): how to accept an offer (Rule 10.04); and

(e) counter offers (Rule 10.05).

A Form 60 must be used to make an offer and is served on the other party. It does not have to be filed but if it is filed, it must be kept on a separate file, as is the current practice. An offer is withdrawn by written notice. There is no prescribed form for this. The written notice must also be retained on the separate file.

If an offer is accepted, the parties file a Consent Order to finalise the case.

Division 10.1.2 (Rules 10.06 and 10.07)

Applies only to property cases and provides that an offer of settlement must be made within 28 days of a conciliation conference. This period, can be extended by the deputy registrar at the Conciliation Conference, in an appropriate case. A party who withdraws an offer must simultaneously make a further offer under this Division.

Parties must be encouraged to make offers "with teeth". It is an important way of promoting settlement if a party can see that there are adverse financial consequences for them if they unreasonably refuse to settle. The Court will use its power relating to costs to discourage unreasonable behaviour.

Part 10.2: Discontinuing a case

Rule 10.10: Application of part (definition)

This part applies to all applications, responses and appeals**,** to all or some of the orders sought in a document and a costs dispute.

Rule 10.11: Discontinuing a case

A party discontinues a case by filing a Form 10. Permission is needed to discontinue in some circumstances in divorce and property applications. Subrule (3) codifies the law that discontinuance by one party does not discontinue the case of the other party. Subrule (5) enables a person to apply to stay the other party's case if costs are not paid.

Part 10.3: Summary orders and separate decisions

Rule 10.12: Application for summary orders

This application (Form 2 and affidavit) claiming that there is no case to answer may be brought after the Response has been filed. This would be listed before the judicial officer with jurisdiction to hear the application. The orders the Court might make on the application are set out in r10.14 and the general powers of case management in Chapter 11 would also apply.

It is considered that this process should only be used when the respondent has no realistic prospect of success. Unmeritorious applications for summary judgment will be discouraged, as they are in the civil jurisdictions, by awarding costs.

Rule 10.13: Application for separate decision

This rule allows for the disposal of a case more quickly if it is determined that a decision on an issue will resolve the case and eliminate the need for a trial on all issues. An example might be an agreement at a Conciliation Conference that the determination of a valuation issue or an issue of law such as under s 79A would finalise the case.

Rule10.14: Orders court may make

Sets out the orders the Court may make on the application and the general powers of case management in Chapter 11 would also apply.

Part 10.4: Consent Orders

This Part repeats most of the provisions of O14 of the FLR 1984.

Rule 10.15: How to apply for a consent order

This rule provides how to apply for a Consent Order both where there is a case pending and when there is no case pending. The Form 11 replaces the Form 12A (FLR 1984) and has been updated by the Forms Committee. Subrule (2) sets out the requirements for a draft consent order (known in some registries as "minute of order"). Whilst the rule indicates that a party must sign the draft consent order note that r24.01 (4) provides a lawyer may sign a document on behalf of a client.

Subrules (3) and (4) set out the applications which cannot be made in a Form 11 and must be made in a Form 1 for referral to a judge for consideration.

Rule 10.16: Order for superannuation interest

This rule provides the process for procedural fairness to be given to a trustee of a superannuation interest before a Consent Order is referred to the Court for consideration.

Rule 10.17: Dealing with a Consent Order

This rule repeats and combines O14 r 6 and 8 (FLR 1984) and provides the Court may make the orders, dismiss the application or seek further information.

Rule 10.18: Lapsing of respondent's consent

This rule was formerly O14 r5 (FLR 1984) and places an arbitrary time limit on a party's consent to the application. This is to minimise the risk of one party filing the application many months after agreement is reached at which time the other party may no longer consent to the order but be unaware that the application is being filed.

CHAPTER 11 - Case Management

The emphasis throughout this Chapter is on the timely and efficient management of cases through the Court.

Rule 11.01: Court's powers of case management

This sets out a comprehensive list of powers that the Court may invoke at any stage of a case to manage it appropriately. All the powers are in one easy to find place instead of being repeated throughout the Rules and Case Management Directions. It does not create new powers and the list does not purport to be exhaustive.

Rule 11.02: Failure to comply with legislative provision or order

Overview

This rule and r11.03 are two of the significant rules in the Court's drive to create a different culture in relation to compliance with procedural requirements in the Family Court.

"By tradition, the conduct of litigation in common-law jurisdictions is adversarial. Without effective judicial control, the adversarial process is likely to encourage an adversarial culture and to generate into an environment in which the litigation process is too often seen as a battlefield where no rules apply. In this environment, questions of expense, delay, compromise and fairness may have only low priority. The consequence is that expense is often excessive, disproportionate and unpredictable and delay is frequently unreasonable. It can be argued that the existing Rules and Practice Directions contain the solution to these problems, if litigation was conducted in accordance with them, but the present system does not ensure this. Rules are flouted on a vast scale. Timetables are largely ignored. Requirements are complied with when convenient or in the interest of one of the parties but not otherwise. Non-defaulters are discouraged from bringing applications to enforce compliance because of the delay and cost of bringing these applications before the Court.

Orders for costs, although important, cannot provide a complete solution.

Applications for costs orders are expensive. Orders for costs are often made after the damage is done. Parties may accept an order for costs as a price worth paying for the delay and inconvenience caused to the other party. Case management itself and sanctions must play a part in suppressing misbehaviour." (Lord Woolf : Access to Justice Report (July 1996))

Lord Woolf recommended that to address these problems:

(1) the rules of court themselves should specify what will happen where there has been a breach;

(2) all directions orders should include an automatic sanction for non-compliance;

(3) the onus should be on the party in default to seek relief from the sanction, not on the other party to apply to enforce the sanction;

(4) the inclusion of sanctions in the Rules should not be allowed to generate a subculture of additional litigation;

(5) sanctions need to be sufficiently powerful to prevent game playing and oppressive behaviour;

(6) the primary object of sanctions must be prevention not punishment.

These recommendations have been adopted in the Family Law Rules 2004.

Subrule (1) has the effect of reversing the onus by requiring a party in default to apply for permission to take a procedural step after a time allowed. Subrule (2) sets out the Court's powers of case management when there has been non compliance and the Court may order these things on application or of its own initiative.

The consequence imposed must be:

1. relevant and proportionate to the breach;

2. appropriate to the seriousness of the breach;

3. responsive to the particular breach, for example refusing to allow a person to rely on an affidavit filed out of time.

Rule 11.03: Relief from order

Under this rule a party may, by Form 2 or if allowed by the Court, orally at an event, seek an order relieving them of the consequences of non-compliance. The Court retains a broad discretion to relieve a party of the requirement to comply with the Rules or procedural orders and Subrule (2) helps the parties direct their mind to the factors the Court will consider on an application under Subrule (1).

Considerations include whether the breach was intentional, whether there has been substantial compliance with other requirements and whether there is a good explanation for the breach.

Rule 11.04: Frivolous and vexatious cases

This rule provides a process to enable the court to:

- dismiss a case;

- order that a party not start or continue with an application.

These orders can be made on an application and of the Court's own initiative without the need for an application by one of the parties where:

- there has been a series of frivolous or vexatious applications by a person; or
- an application is frivolous or vexatious or an abuse of process.

The court relies on its power to control its practice and procedure for this rule. It is intended to be in addition to its power under s.118 of the Act.

Rule 11.05: Application for permission to start a case where a person is declared vexatious

This rule was formerly O40 r7 (FLR 1984) and does not change the existing procedure. Initially the application is without notice to the other party. If the court decides the application may have merit, the applicant must give the respondent notice of the application, before the court hears the application.

Rule 11.06: Dismissal for want of prosecution

This provides a procedure for dismissing a case for want of prosecution, which is a new concept for Family Law which should assist the Court to ensure matters are dealt with in a timely fashion and help provide certainty for the parties.

Such an order can be made on application or of the Court's own initiative (provided a party has had notice) if a party has not taken a step in the case for over twelve months. This is subject to the Court ordering otherwise.

The court is unlikely to dismiss a case for want of prosecution where the delay of over twelve months is caused solely by delays in the court system.

Part 11.2: Limiting issues

Rules 11.07 and 11.08: Request to admit and notice disputing fact or document

These rules provide a process for parties to require and make admissions in a case both in relation to facts and documents and is designed to reduce cost and delay by helping parties to identify the real issues. The process is similar to that provided in the former O22 (FLR 1984).

Rule 11.09: Withdrawing an admission

This rule provides that a party who makes an admission and subsequently wishes to withdraw that admission, must have the Court's permission and may be ordered to pay costs thrown away as a result.

Division 11.2.2: Amendment of applications

Rule 11.10: Amendment by a party or court order

Any amendment in a case started by a Form 1 or Form 1A must be made within 28 days of the Conciliation Conference or mediation. This restriction is to ensure that an amendment is not made at the last minute after the case has moved from the resolution phase of the process into the determination phase. However, a party can seek permission to amend at a subsequent time.

Subrule (2) was formerly O8 r5 (FLR 1984) and requires a party to amend an existing application or response rather than file a fresh application.

Rule 11.11: Time limit for amendment

Sets out the timing for an amendment where permission has been given.

Rule 11.12: Amending a document

Sets out the procedure for amendment.

Rule 11.13: Response to amended document

Sets out the process to respond to an amended document. This is the same as the former O9 r11 (FLR 1984).

Rule 11.14: Disallowance of amendment

The Court retains the discretion to set aside an amendment if for example it is a frivolous or vexatious claim or an amendment made when permission of the Court was required and was not obtained.

Division 11.2.3: Small Claims

Rule 11.15: Small claims

This Division is included for those cases which are deemed appropriate to remain in the Family Court (rather than transfer to the FMC) and is aimed at keeping the procedure simple to minimise cost and resources in cases of a very narrow ambit.

This rule is not intended to encourage small claims but to provide a process which is proportionate for that small percentage of cases in which it would be appropriate for example, where all issues have resolved but one.

Part 11.3: Venue

This Part combines all rules about the venue for the hearing or trial of a case.

Rule 11.16: Case in Chambers

This rule is a combination of former O4 rr 8, 9 and 10 (FLR 1984) with some amendment to the wording. There is no change to existing practice.

Division 11.3.2: Transferring a case

Rules 11.17 to 11.19

These rules relate to the transfer of a case either between courts or registries. The factors the Court may take into account are set out and expand slightly on former O27 r 3 (FLR 1984). The application would be made by Form 2 or, with permission, orally. The Court retains the discretion to transfer a case to another venue of its own initiative see r1.10.

Rule 11.20: Transfer of Court file

This provides for a case to be listed for a procedural hearing when transferred to the Court.

CHAPTER 12 - Court events

Part 12.1

Rule 12.01: Application of Chapter 12

This chapter sets out the process in the resolution phase of an Application for final orders (Form 1) (such as property or parenting applications), excluding specific applications seeking a medical procedure, maintenance only, child support only, nullity, declaration of validity, or orders relating to a passport under Division 4.2.7. (The procedure for these is in Part 4.2)

The chapter must be read in conjunction with:

Chapter 4 - process from filing to first court date

Chapter 16 - process for trial

Part 12.2: Court Events - Resolution Phase

Rule 12.02: Property case - exchange of documents prior to first court event

This rule requires parties to exchange specified documents prior to the first court event i.e. a Case Assessment Conference or procedural hearing in a property case. Given the requirement to exchange documents under the pre-action procedures, in many cases the parties will already have complied with this requirement well before the conference. The documents required are those formerly set out in O17 r4 and O24 r2 of FLR 1984 and Annexure B to the Case Management Directions but the requirements have been expanded to also target more complicated financial cases. In some cases all of these documents may not be available or relevant, and the court's general discretion to dispense with the rules would be applied.

Rule 12.03: Case Assessment Conference

On the first court date, parties will ordinarily attend a Case Assessment Conference with a deputy registrar, if practicable. Subrule (2) sets out the purpose of these events. If the case does not settle at the conference, procedural orders will be made for the future conduct of the case at the procedural hearing.

The approach to be taken by deputy registrars is addressed in the Case Management Manual and is based on guidelines and best practice models developed and published by the Principal Registrar.

There is no change to existing practice.

Rule 12.04: Procedural hearing

This event was called the Directions Hearing in the FLR 1984. After the procedural hearing depending on the nature of the case it will proceed to:

- the next case management event i.e. mediation or Conciliation Conference;

- hearing if an interim application;

- hearing if a Child Support Only Application or Maintenance Only Application which is not transferred to the Federal Magistrates Court (FMC);

- trial if a small claim which is not transferred to the FMC.

A deputy registrar has the power to make appropriate procedural orders for the management of the case including the discretion to order the exchange of any specific documents sought by a party and an order about expert evidence. (See Rules 11.01, 12.05 (2) (d) and 13.22(4). See also Rule 18.06).

Rule 12.05: Exchange of documents prior to Conciliation Conference

This rule requires parties to exchange specified documents prior to the Conciliation Conference. The documents required are those formerly set out in O17 r4, and O24 r2 of FLR 1984, and Annexure B to the Case Management Directions but the requirements are targeted at more complicated financial cases. In addition to these documents, a party may, at the procedural hearing, be ordered to provide the other party with copies of specific documents under r13.22(4).

To assist parties to concentrate on the relevant issues at the conference they must exchange a conciliation conference document which sets out the assets, liabilities and offers of settlement. The document will be approved by the Principal Registrar. This must also be lodged with the Court for the deputy registrar conducting the conference. This is an existing requirement. Section 131 Evidence Act 1995 (C'W) applies to the admissibility of this document. The document is returned to the parties at the conclusion of the conference.

Rule 12.06: Conciliation Conference

This rule is a revised version of O24 r1 (FLR 1984). There is no change to existing procedure.

Part 12.3: Court events - Determination Phase

These events are those introduced by the Case Management Directions (CMD) introduced by PD 2/2002.

Rule 12.07: Trial notice

This rule provides for the issue of a trial notice (setting out the orders to be complied with to prepare the case for a hearing) after the final resolution event and allows for the differences among Registries. The standard orders made in a trial notice are not changed by the Rules.

Rule 12.08: Compliance Certificate

This rule repeats the requirements in paragraph 6.4.1 of the CMD in relation to a Compliance Certificate being required from all parties before a Pre-Trial Conference. The Compliance Certificate for use by lawyers and self represented parties are attachments C and D to CMD.

Rule 12.09: Non-compliance

This rule repeats the requirements in paragraph 6.4.1 of the CMD in relation to cancellation of a conference if there has not been substantial compliance with the orders made in the trial notice. Subrule (2) provides that on the cancellation of a conference the case will be listed for further management.

Subrule (3) provides the court may dismiss the case for want of prosecution if parties have not remedied the problems within twelve weeks. The discretion is not likely to be exercised where the delay is caused solely by court processes.

Rule 12.10: Conduct of Pre-Trial Conference

This rule sets out what occurs at a Pre-Trial Conference which does not change the existing practice.

Part 12.4: Attendance at court events

Rule 12.11: Party's attendance

This rule makes it compulsory for a party and the party's lawyer, if any, to attend all Court events referred to in this chapter.

Rule 12.12: Request to attend by electronic communication.

This rule provides a party may, by a written request, seek to attend an event by electronic communication. The rule provides the process and what must be addressed in the letter. Subrule (4) is the standard provision which requires a prisoner to attend by telephone unless the court orders otherwise.

Rule 12.13: Failure to attend

This rule sets out the court's powers in the event of a party failing to attend an event. There is no change to existing practice.

Part 12.5: Adjournment and postponement of court events

Rules 12.14 to 12.16

This part makes the distinction between postponement of an event (which is to put off or delay the event before the event occurs, usually by an administrative act) and adjournment of an event (which is to put off or delay an event once it has started, usually by order). The procedure has not changed. The parties may apply to postpone any event administratively provided there is consent. Requests for adjournment of an event in the resolution phase are more likely to be granted than a request for the adjournment of an event in the determination phase.

CHAPTER 13 - Disclosure

Overview

This chapter amounts to a major reform in the concept of discovery and follows the lead of the UK and Queensland. It is to be read in conjunction with the principles in Chapter 1, and is intended to bring about a fundamental shift in the attitude to this fundamental area of litigation.

Criticisms of the existing process include:

* parties are largely in their opponent's hands as to the adequacy of discovery;

* the costs and delay associated with discovery;

* the use of discovery as a tactical weapon;

* the typical reluctance of parties to discover documents and take the obligation solemnly throughout the course of proceedings;

* the use of discovery as a "fishing expedition";

* the "over-discovery" that arises from:

* the "any matter in question" test laid down in The Compagnie Financiere du Pacifique v. The Peruvian Guano Company (1882) 11 Q.B.D.55;

* lawyers' fears of an action by disappointed clients for professional negligence associated with the Peruvian Guano test;

* lack of specificity about the facts and issues that are agreed and that are in contention;

* increased facility of use of documentary rather than oral communication made possible by technology;

* the production of particular records (eg payslips, cheque stubs, exact and unmarked copies of original documents) which, while in existence give rise to costs associated with discovery, inspection, and copying which are usually disproportionate to their forensic value.

The Chapter codifies the concept of a duty of disclosure, requires parties to certify that they are aware of the duty and have complied with it, and confirms that there are significant consequences for failure to comply. To keep in mind the aim of proportionality and the need to concentrate on the issues in dispute and proving only those, it requires parties to concentrate on the disclosure relevant only to those issues.

The "litigation tool" of complete disclosure is an expensive process and is therefore still timed to commence only after the final resolution event. The purpose of this is that, at that stage, the parties should be in a position to know what issues need to be proven and they can therefore concentrate on obtaining disclosure relevant to those issues (Rule 13.07).

This is an important difference between the revised Rules and the FLR 1984. The court's expectation will be that parties will not go on a "fishing expedition" or apply for a general order but will direct their mind to the higher standard and consider what is directly relevant to the disputed issues.

The Rules themselves require parties in financial cases to exchange significant documentation in the resolution phase. In addition the deputy registrar will have the discretion to order that certain specified documents be provided if satisfied that this is necessary to enable the parties to resolve the case at the conciliation conference (see r 13.22(4)).

Part 13.1: Disclosure between parties

This Part applies to all cases at all times.

Rule 13.01: General duty of disclosure

This rule sets out the general duty of disclosure and provides that it applies from pre-action procedures to the finalisation of the case.

This rule reinforces these principles:

(a) the duty applies in all cases;

(b) the duty applies to the disclosure of information and documents;

(c) it is a duty which the Court regards as very important and will scrutinise and enforce;

(d) it is a continuing duty starting with the pre-action procedure.

The importance of the duty of disclosure is emphasised in the Rules by the introduction of the following:

1. the parties are required to read the duty of disclosure before swearing the affidavit in the Form 1 and Form 1A;

2. the parties are required to acknowledge the duty of disclosure and give an undertaking as to their compliance with it at a certain stage of a case. Breach of this undertaking may be punishable as a contravention of a parenting order under the Act (section s 112AA (c) and 70 NB (c)) and may amount to contempt of court; and

3. Rule 13.14 which is intended to send a clear message that the Court will take a serious view of non-compliance with the duty of disclosure and the Rules.

Division 13.1.2: Duty of disclosure - financial cases

Rule 13.02: Purpose of Division

The duty applies to all parties in financial cases except for third parties (parties who are not husband or wife) unless their financial circumstances are relevant to the issues. Example parties such as the Child Support Registrar or DCT would not be subject to the duty of disclosure under this Division, but are subject to the general duty of disclosure of documents relevant to the issues.

Rule 13.03: Definition

Extends the duty of disclosure of financial circumstances to parties in enforcement proceedings.

Rule 13.04: Full and frank disclosure

This rule was formerly O17 r3 (FLR 1984) which has been extended to ensure it is contemporary, relevant and useful in relation to complicated financial structures as well as not so complicated arrangements.

Rule 13.05: Financial Statement (Form 13)

This rule is the former O17 r2 (FLR 1984) requiring a Form 13 Financial Statement (formerly Form 17. The new Form 13 has been developed by the Forms Committee) in all financial cases and allowing an affidavit to be filed where further information is needed to fully discharge the duty of disclosure.

Rule 13.06: Amendment of Financial Statement

This rule is similar to former O17 r5 (FLR 1984) and provides how to amend a Form 13 however, it also provides a Form 13 must be amended when there is a significant change prior to certain events such as a conference or trial.

Part 13.2: Duty of disclosure - documents

This Part is broken into two divisions -

1. general ; and

2. disclosure in certain cases**.**

Division 13.2.1 General

This Division sets out the rules which apply in all cases and they are not restricted to any particular phase of a case.

Rule 13.07: Duty of disclosure - documents

This rule imposes a duty on a party to disclose documents in the party's possession or control that are "directly relevant" to an issue. Gone are the days where the Court will allow "general discovery" ie "an order that a party produce all documents in the party's possession or control relating to the issues in dispute."

This follows the lead taken in the United Kingdom and Queensland in eliminating the extremely wide test established by *The Compagnie Financiere du Pacifique v. The Peruvian Guano Company* (1882) 11 QBD 55 which required discovery of documents which may (not must) either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. " *The results of this test was to make virtually unlimited the range of potentially relevant (discoverable) documents which parties were obliged to review and list forcing the other party to read, against the knowledge that only a handful of such documents would affect the outcome of the case. It is a monumentally inefficient and costly process."* (Lord Woolf :Access to Justice Final Report 1996)

The requirement to disclose "directly relevant" documents will introduce a higher standard of assessment in the sifting and examination of a client's documents. This will oblige parties and lawyers to focus attention at an early stage upon the real issues in dispute and the documentary evidence that goes directly to those issues.

Rules 13.08 to 13.11 Production and inspection of documents

These rules set out when a party is entitled as of right to demand to inspect or obtain a copy of a document and how to arrange inspection of documents falling within this category, and costs of inspection.

Rule 13.12 Documents that need not be produced

A valid claim of privilege against disclosure is still protected.

Rule 13.13 Objection to disclosure

Such a claim is to be made by affidavit by an individual knowing the facts giving rise to the claim and must be filed and served within the time set for delivery of copies of documents to other

parties. This would then be the evidence for any arguments about this issue, should a party subsequently bring an application for an order about disclosure under Division 13.2.2 or 13.2.3.

Rule 13.14: Consequences of non-disclosure.

This rule provides the orders that the Court may make if a party does not comply with the duty of disclosure. This is in addition to the orders the court may make on an application under Divisions 13.2.2 and 13.2.3.

Rule 13.15: Undertaking by party

A significant change to existing practice is the requirement for all parties to acknowledge an awareness of the duty of disclosure in the Form 1 and Form 1A. Also under these Rules a party must sign a notice acknowledging an awareness of the duty of disclosure and undertaking that they have complied with and will continue to comply with the duty. Breach of an undertaking may be punishable as a contravention of a parenting order under the Act (section s 112AA (c) and 70 NB (c)), and may be contempt of Court.

A false statement in an undertaking may be an offence (subrule 2).

Whilst this undertaking is not a prescribed form the court will have forms which comply with subrule (4) available on the web-site and at Registries for use.

Rule 13.16: Time for filing undertaking

Provides when the parties must file the notice and undertaking referred to in rule 13.15.

Division 13.2.2: Disclosure of documents - certain cases

Rules 13.17 and 13.18

These rules set out the disclosure rules that apply to applications for divorce, nullity, validity, maintenance only, child support only, applications in a case, contravention and contempt applications and small claims.

In these cases the parties:

* must comply with the general duty of disclosure;

* must comply with any of the specific rules requiring disclosure for example the general duty of disclosure in 13.01 and the requirement to produce or exchange documents prior to events in rules 4.15 and 4.26;

* may at any time apply for specific orders for the disclosure of documents.

Division 13.2.3: Disclosure of documents - applications for final orders

Rules 13.19 to 13.21

These rules set out the disclosure rules that apply to all applications for final orders except applications for nullity, validity, maintenance only, child support only. This process (steps 1 to 6) is in addition to the requirements in Rules 4.15, 4.26, 12.02, 12.05 and any specific orders for the disclosure of documents that may be made by the court.

Under this Division the process, in general terms, is as follows:

1. after the final resolution event, a party may request the other party to provide a list of documents they have in their possession or custody which fall within the duty of disclosure (13.20 (1)) i.e. not an affidavit of documents;

2. the other party must, within 21 days, provide a list of documents to which the duty of disclosure relates (13.20 (2));

3. the first party can seek to inspect the documents in order to decide what copies they would like or simply ask for copies of the documents. If copies are sought these must be provided within 14 days(13.20(3)and(4));

4. if there are too many documents, inspection can be arranged and copies of documents can then be required (13.21);

5. if an objection is taken to disclosure or there is non compliance - a party can apply for an order (13.22).

The effect of these provisions is that the expensive litigation tool of disclosure is limited to the Determination Phase. However, the deputy registrar will have the discretion to order that certain specified documents be provided, prior to a Conciliation Conference, if satisfied that this is necessary to enable the parties to resolve the case at the conference. (Subrule 13.22(4)). This coupled with the various rules which require significant exchange of documents in financial cases should enable parties to be fully prepared and apprised of relevant facts for the Resolution Phase.

Rule 13.22: Application for order for disclosure

This rule sets out the process for an application, when an application can be made and the matters the Court will consider on that application.

There will no longer be "general" or "fishing expedition" orders made. The rules overriding the decision in *Jones v Monte Video Gas Co* 5 Q.B.D. 556 (that the affidavit of discovery was conclusive and could not be challenged either by cross-examination of the deponent or by a contentious counter-affidavit) remain. For example, the Court has the power to order a party to disclose a document or a class of documents.

Rule 13.23: Costs of compliance

This rule sets out the costs orders the Court might make if a party establishes that the duty of disclosure would be oppressive.

Rule 13.24: Electronic disclosure

This rule provides for disclosure by electronic communication. (Guidelines for this are to be published by the Chief Justice in amendments and on attachments to CMD in the near future).

Part 13.3: Answers to specific questions

Rules 13.25 - 13.28

In all applications for final orders except applications for divorce, nullity, validity, maintenance only and child support only a party may, after the final resolution event, deliver to the other party a request for the party to answer specific questions. If a party fails to co-operate the other party can seek an order (rule 13.28)

The Rules are similar to former O19 (FLR 1984) with some limitations imposed in line with the overall thrust of the rules to keep in mind the issue of proportionality and cost.

Part 13.4: Information from non - parties

Division 13.4.1: Employment information

Rules 13.29 and 13.30

These rules were formerly O40 r3 (FLR 1984) and apply in all financial cases (property, maintenance and child support) to enable a party to obtain information from the other party's employer (by agreement or upon order) about the other party's earnings.

Division 13.4.2: Non-party production of documents

Rules 13.31 to 13.42

This Division sets out the process for a party to obtain copies of documents from a non-party. It is similar to the process introduced in the Queensland Uniform Civil Procedures Code.

The process is aimed at speeding up the process and making it more convenient and less costly for parties by keeping the procedure out of the court system unless there is an objection to the production of documents. It should also minimise the number of subpoenas to produce documents requested.

The process is as follows.

1.: When a party decides that they want to obtain documents from a non-party such as a Bank, the party completes and serves a Form 12 on the other parties to the case and any other person affected by the Notice, such as a joint account holder (Rule 13.34).

2.: Not less than seven days after service on the other parties (step 1) the party can serve the non-party with the Form 12 (Rule 13.33).

3.: If another party or other person affected objects to the non-party producing a copy of the documents required by the Form 12 to the first party, he/she is required to give notice of the objection to the first party and the non- party within seven days (Rule 13.39).

4.: If a party or another person affected or the non-party object to the Form 12, the effect of the Form 12 is stayed and the non-party does not need to comply (Rule 13.40).

5. If there is no objection, the non-party must, within seven days of receiving the Form 12, comply with it or object to compliance with it (Rule 13.35 and 13.36).

6. If the non-party complies, the party is entitled to copies of documents inspected upon payment of reasonable costs (Rules 13.37 and 13.38). Any other party would be entitled to require the party who obtains documents from a non-party by this method, to produce the document for inspection under r13.08, or alternatively the general duty of disclosure.

7.: If a person objects to the Form 12 or if the non-party does not comply with it when there has been no objection, the party requesting the documents can then apply to the Court for an order (Rules 13.41 and 13.42).

It is anticipated that the Form 12 process will replace the subpoena to produce documents process as the method used to obtain a copy of third-party documents prior to a trial. The restrictions in relation to the issuing of a subpoena to produce documents remain ie they cannot be issued until after the final resolution event. There is no such restriction on the Form 12.

CHAPTER 14 - Procedural orders in property cases

Rules 14.01 and 14.02 General orders about property

These rules provide a process for parties to investigate, preserve, and value property which is the subject of a case with or without the other party's cooperation. It mainly repeats the provisions of former O21 (FLR 1984) but is extended by 14.01 (3).

Rule 14.03 Inspection

Provides a process for a party to arrange a "view" of property.

Rule 14.04: Anton Pillar orders

Provides a process to seek an Anton Pillar order and gives clear guidelines to clients as to what the Court will require to be addressed on such an application.

Rule 14.05: Mareva orders

Ppprovides a process to seek a Mareva Injunction and gives clear guidelines to clients as to what the Court will require to be addressed on such an application.

Rule 14.06 Splitting or flagging orders

Updates the requirements in former O18 r8A (FLR 1984) and provides a process for providing procedural fairness to the trustee of a superannuation fund under section 90MZD of the Act, in relation to orders sought at trial. It changes the existing procedure so that notice is required just prior to the trial rather than when the application is first filed.

CHAPTER 15 - Evidence

Part 15.1: Children

Rule 15.01: Restriction on Child's evidence

Under s 100B of the Act, a party cannot adduce the evidence of a child without the permission of the court. This rule provides a process for a party to seek that permission and provides that if permission is given the options available as to how that evidence is best given. The rule follows the lead taken by Queensland (s21A (2) (d) Evidence Act 1997) and New South Wales in this area by attempting to minimise the trauma experienced by children when giving evidence.

Rule 15.02: Interviewing a child

This rule is former O23 r4 (FLR 1984) revised having regard to the comments of the Chief Justice in *Given ZN and YH and the child's representative* HB 1336/1997 - 10 May 2002. The court retains the discretion to order otherwise.

Rule 15.03: Family Reports

This rule provides a process for a party to apply for a family report in an application for final orders and codifies the recommendations made by the Short Form Family Report Committee convened by Justice Sally Brown. It also contains the provisions of former O25 r5(1) and 5(2) (FLR 1984) revised.

Rule 15.04: Family Reports where consent parenting order sought - non-parent

This rule was formerly O25 r5 (1A) (FLR 1984).

Part 15.2: Affidavits

Rule 15.05: Evidence in chief by affidavit

This rule was formerly O30 r2 (FLR 1984) and provides that evidence in chief is to be by affidavit unless a witness refuses to swear an affidavit and the Court gives leave for oral evidence to be given.

Rule 15.06: Reliance on affidavits

This rule combines a number of former rules from O30 and O16 (FLR 1984) to control the filing of affidavits. An affidavit must comply with the rules, must only be filed when allowed by the Rules and may only be relied upon in relation to the application for which it was filed. No change to existing practice.

Rule 15.07: Filing an affidavit

This provides the affidavits to be filed for a trial and was formerly O30 r2(2) (FLR 1984). No change to existing practice except that a party can no longer incorporate by reference parts of previous affidavits. They must file a completely new affidavit for trial and may only rely on one for each witness. The former provision allowing incorporation of parts of previous affidavits by reference was abused to such an extent that a decision has been made to remove it from the revised rules.

Rule 15.08: Form of affidavit

This rule sets out the requirements for the format of an affidavit. The prescribed form (Form 16) for the affidavit is omitted but this rule and r 24.01 prescribe the requirements for an affidavit and a precedent will be available to clients on the web-site and at Family Court of Australia Registries. An affidavit should not be handwritten.

Rule 15.09: Making an affidavit

This rule provides requirements in relation to the content of an affidavit. There is no change to the existing law.

Rule 15.10: Affidavit of illiterate or blind person

This rule is revised former O16 r3 (FLR 1984) and prescribes how an affidavit is to be sworn by a person who is blind, illiterate, unable to sign or unable to understand English**.** No change to existing practice.

Rule 15.11: Affidavit outside Australia

This rule provides that an affidavit made outside Australia will comply if it accords with the Rules or the law of the place where it is made**.** No change to existing practice.

Rule 15.12: Documents attached

This rule provides for documents referred to in an affidavit to be attached (annexed) to it. No change to existing practice. (Note the exception for an attachment to an affidavit of service - subrule 15.12(2)).

Rule 15.13: Striking objectionable material from affidavit

This rule was formerly O16 r9 (FLR 1984). No change to existing practice.

Rule 15.14: Notice to attend for cross examination

This rule revises and expands on the former O16 r10. It inserts a time by which a party must be given notice that a deponent is required and provides that the Court may order costs if a person is required to attend and then is not called or their evidence is of little evidentiary value. It is aimed at having parties consider carefully whether a witness is required given the inconvenience and cost that the witness is put to in attending.

Rule 15.15: Deponents attendance and expenses

This rule was formerly O16 r11 (fLR 1984).

Part 15.3: Subpoenas

Overview

This Part revises former O28 (FLR 1984) and adopts a number of recommendations of the Harmonisation Committee. The subpoena form (Form 14) has been amended in accordance with the new Forms design, and to provide a Part F to be used in the new process for production of documents.

Division 15.3.1: General

Rule 15.16: Interpretation

This is a machinery provision

Rule 15.17: Issuing a subpoena

This is a revised rule about how to issue a subpoena. There is a revised Subpoena Form (Form 14). No major change to existing practice.

Rule 15.18: Subpoena not to issue in certain circumstances

A subpoena was formerly known as a witness summons - it is a demand made by the Court that a person appear in court and failure to obey the demand results in significant consequences. A subpoena is not like other documents which are filed at the request of a party. The Court maintains control over whether to issue a subpoena.

The requirement that a subpoena sought by a Self Represented litigant must be referred to a Deputy Registrar is to prevent the abuse of the process. The indiscriminate and inappropriate use of this process has in the past lead to significant and unnecessary cost being incurred by third parties.

As lawyers are officers of the court, there is no similar process but the court is able to take appropriate action against a lawyer (as officers of the court) if it is satisfied that there has been an abuse of the process.

Rule 15.19: Time for issuing a subpoena

Traditionally subpoenas were not issued before a case was listed for hearing or trial. A party in an application for a final order is still unable to ask for a subpoena to be issued until after the trial notice has issued. This is to prevent the use of subpoenas for disclosure instead of the disclosure rules.

Under Subrule (1) (and r15.17 (5)), once a trial notice has issued, a party can seek the issue of a subpoena returnable prior to the trial date to ensure time set aside for a trial is used for that purpose.

Subrule (2) provides that for all other applications a subpoena may be issued once a hearing or trial date has been allocated.

Rule 15.20: Amendment of subpoena

This rule provides how to amend a subpoena.

Rule 15.21: Limit on number of subpoenas

In this rule the Court has followed the practice of the FMC. A party is unable to seek the issue of more than three subpoenas to adduce evidence at the hearing of an interim application or the summary hearing of an application for maintenance only or child support only. It is necessary to balance the proportionality issue and the resources of the Court against the right to a just hearing. The Court retains the discretion to allow more than three subpoenas in appropriate cases. Subrule (2) provides that a child representative may request the issue of more than 3 subpoenas to produce documents for the hearing of an interim application.

Rule 15.22: Service

A subpoena must be served personally by hand on a named person. This is so the court can be satisfied that service has been effected if called upon to issue a warrant for non attendance.

Rule 15.23: Conduct money and witness fees

This rule provides that conduct money must be paid when a subpoena is served. It provides what must be paid and is to be read with Schedule 4 Conduct Money and Witness Fees.

Rule 15.24: When compliance not required

These rules, based on the draft Harmonisation Committee draft rules, make it clearer to people when they do and do not have to comply with a subpoena. This information will also be set out in a brochure served with a subpoena.

Rule 15.25: Discharge of subpoena obligation

This rule sets out when a party's obligation to comply with a subpoena is discharged.

Rule 15.26: Objection to subpoena

This rule combines the former O28 rr 7 and 19. Whilst it makes the process clearer, there is no change to existing practice. It provides that a party who wishes to object to a subpoena or make another application in relation to a subpoena, must appear.

Division 15.3.2: Production of documents and access by parties

Overview

There are a number of changes to existing practice for subpoenas to produce documents introduced by this Division. Under the revised Rules, as is the practice now, a person can comply with a subpoena to produce documents by either:

1. Producing the documents to the Registry two days before the return date; or

2. Appearing on the return date and producing them.

One difference is that there is a new process introduced by r15.30 which provides that where documents are produced and there is no objection to a party inspecting or copying them, the parties and the child representative (if any) are entitled to inspect them without seeking the permission of the court. The aim of the new procedure is to reduce the cases in the subpoena list to those in which there is an objection to the production or copying of documents. If successfully used this process should have a positive impact on resources. There are strict conditions as to when the procedure applies and a business process has been developed to ensure it is managed appropriately in Registries.

The process is as follows:

1.: When a party wishes to subpoena documents and there is at least 21 days until the return date of the subpoena - the party files and serves a Form 14 on the named person and the other parties to the case. It must be filed and served at least 21 days before the

2.: If the named person complies with the subpoena by producing the documents to the court, this must be done at least seven days before the return date on the subpoena for the process to apply.

3.: If the named person or a party objects (to the production, inspection or copying of the documents by any person) they are required to give notice of the objection to the court and the parties and the named person not less than ten days prior to the return date (by using the notice Part F provided for this purpose in the Form 14).

4.: If a person objects (to the production, inspection or copying), the person objecting and the party who requested the subpoena must appear on the return date of the subpoena for the

dispute to be determined. This will also be the case if there is non-compliance with the subpoena or the time limits within Rules 15.28 or 15.30 have not been complied with.

5.: If however there is no objection to the subpoena seven days prior to its return date, the parties are automatically entitled to inspect and copy the documents. The subpoena will then be removed from the subpoenas list for that day and on contacting the court, parties will be advised that they can inspect in accordance with r15.30.

This process is in addition to the existing process where a party can appear on the return date of the subpoena to seek permission to inspect. However it is expected that those organisations which receive subpoenas regularly from the Court may find this process convenient to use for non-controversial matters.

Rule 15.27 Application of Division

Machinery and definition provisions

Rule 15.28: Service of subpoena for production

This rule provides that a subpoena must be served at least seven days before its return date on the named person and the other parties. It also introduces the requirement of service of a subpoena brochure.

If a party wishes to serve a subpoena within the 7 day limit this is only possible with the leave of the court, which is the same as the existing procedure.

Rule 15.29: Compliance with subpoena to produce documents

This rule provides a person may comply with a subpoena to produce by producing the original documents or by producing copies attached to an affidavit, on the court date or beforehand to the Registry. Subrule (3) requires the named person to indicate whether the documents can be destroyed rather than returned.

Rules 15.30 and 15.31: Right to inspect and copy and objection process

These are the rules which set up the process for automatic inspection and copying of the documents described in the overview. There is a new requirement that the party at whose request the subpoena was issued must file an affidavit of service so that the court staff can be satisfied that all relevant people have received notice of the subpoena.

Rule 15.32: Permission to inspect

This rule provides that unless the automatic right to inspect and copy applies then a person needs to obtain permission to inspect documents under a subpoena.

Rule 15.33: Claim for privilege

This rule is new and based on a similar provision in Federal Court Rules.

Rule 15.34: Production of document from another court

This codifies existing practice and is inserted so that self-represented parties are aware of the process.

Rule 15.35: Return of documents produced

This is a new rule inserted to overcome the mounting problem the Court has in storing documents which are subpoenaed. A named person is required to indicate whether the documents are to be returned or may be destroyed when delivering the documents to the Registry Manager (Subrule 15.29(3)). This rule sets out the timing of the return or destruction of the documents. The brochure which has been prepared for service on the named person, includes a tear off section which the person can use for this notification.

Division 15.3.3 : Non compliance with subpoena

Rule 15.36: Non compliance

This rule was formerly O28 r8 (FLR 1984).

Part 15.4: Assessors

Overview

In Admiralty proceedings, particularly those involving issues of navigation the function of the assessor is to advise the court on seamanship or other nautical matters within the assessor's expertise.

An assessor must be an expert, specially qualified in the subject matter in which he or she is appointed. The assessor's function is to assist and advise the court on the technical questions or issues arising. Despite any advice or assistance that the Court may receive from an assessor, the sole responsibility for the ultimate decision in the case remains with the judge. Judges are not bound by an assessor's advice.

In Ahmed v Governing Body of the University of Oxford [2003] 1 All ER 915 , Lord Justice Waller said :

"The court has a wide discretion as to the role to be played by an assessor. They may have an evidential function (in which event disclosure to the parties of what the assessor was asked and his response will be the normal rule) or they may be more involved in assisting the judge to evaluate the evidence i.e. their function is to assist in the decision-making process (in which event disclosure to the parties will not be the normal rule and only occur if fairness demands it)."

This Part is a revision of O30 B rr1 to 3 (FLR 1984) having regard to the provisions in relation to assessors in other courts. It is envisaged that assessors would be of assistance to the Court in, for example, cases involving cultural issues.

Rule 15.37 Application of Part

This rule is a machinery provision.

Rule 15.38: Appointing an assessor

This rule provides the procedure to apply for the appointment of an assessor, and that the Court may make an appointment of its own initiative with notice to the parties.

Rule 15.39 Assessors report

This rule sets out what has traditionally been the role of an assessor i.e. to prepare a report which is not binding on the court.

Rule 15.40: Remuneration of assessor

This rule sets out the orders the court may make in relation to the remuneration of an assessor.

Part 15.5: Expert evidence

Overview

Reasons argued for need for reform of expert's rules

* Partisanship/lack of objectivity

* Experts exceeding their area of expertise

* Need for more clarity of evidence

* Cost and delay

These problems are being addressed in the Rules of Court of other contemporary jurisdictions by working on the "*basic premise that an expert's function is to assist the court and there should be no expert evidence unless it will help the court and not more than 1 expert in any one specialty unless this is necessary for some real purpose*"

In Part 15.5 the court adopts this approach to a certain extent by emphasising that in a given case the court will control:

* the issues on which it requires expert evidence,

* the nature of the evidence it requires on that issue ; and

* the way in which expert evidence is placed before the court.

The factors in Part 1.2 (rr 1.4, 1.06, 1.07) such as cost and proportionality will be strictly applied in considering what orders to make under this Part. At each court event, the court will, as a part of its case management of a case, prompt parties to consider whether expert's evidence is necessary on a significant issue and the prospect of limiting that evidence to a single expert witness.

The significant features of the Part are:

1. There are only 2 types of expert:

(a) An expert appointed by a party - adversarial; and

(b) A single expert agreed to by the parties or ordered by the court either upon application or of its own motion.

There is no separate category of "court expert" - this is covered by the definition of single expert

2. Parties are encouraged to agree on and appoint a single expert;

3. Parties who appoint a single expert do not require the permission of the court to tender a report or adduce evidence from that single expert;

4. Parties who do not appoint a single expert and seek to tender a report or adduce evidence from their own adversarial experts must apply to the court for permission to do so;

5. The court may allow parties to instruct their own adversarial experts or more than one expert on an issue where this is warranted to ensure a fair trial.

6. The court may of its own motion or upon hearing an application by parties seeking permission to tender evidence or a report from their own adversarial experts order the appointment of a single expert, such person to be agreed by the parties or selected by the court;

7. If parties appoint a single expert or the court orders the appointment of a single expert, neither party may tender a report or adduce evidence from another expert : without court permission;

8. The Part sets out the duties, rights and responsibilities of experts and confirms that experts are witnesses and that their overriding duty is to the court. It sets out: best practice standards and is aimed at facilitating communications between experts and those instructing them;

9. There is an increased emphasis on disclosure. The rules are directed at ensuring that the parties are candid and make full and frank disclosure. This should help the party instructing the expert and the expert to focus on the issues and improve quality and integrity of the report leading. This should help narrow the issues and enhance the chances of settlement;

10. The consequences of non-compliance with the rules by parties and experts are set out;

11. There are expanded provisions about conferences of experts and evidence from more than 1 expert;

12. It is intended that the process of obtaining a written report and enabling parties to ask the expert questions before the trial will help narrow the issues and reduce the amount of time the expert will be required to give evidence thus saving time at trial and costs.

13. Part 15.5 and Schedule 5 replace Practice Direction 2/2003 "Guidelines for expert witnesses and those instructing them in proceedings in the Family Court of Australia".

Division 15.5.1: General Rules relating to obtaining reports from experts

Rule 15.41: Application of Part 15.5

The requirements in Part 15.5 do not apply to the evidence of an expert called to give evidence about that person's earlier involvement (in a treating or advisory capacity) with a party or child i.e. where the expert was a treating medical professional retained for a purpose other than the case. The reason for this is that such an expert, if called to give evidence, would be called to give evidence of fact rather than opinion. However if that expert is then instructed to give an opinion (prepare a report) for the purposes of the case, the Part will apply because the expert will then fall within the definition of expert witness.

Rule 15.42: Purpose of Part 15.5

This rule sets out the principles to which the Court should have regard when making an order about an expert. It must be read with Part 1.2.

Rule 15.43: Definitions

This rule defines terms for the purposes of the Part. Court counsellors and mediators (including those appointed under Regulation 8 Family Law Regulations) are not included in the definition as they are appointed by the Court by the application of different principles under the Act and are not subject to the restrictions imposed by this Part. Similarly, a treating expert who has not been instructed for the purposes of the case, is not bound by the provisions in this Part (see rule 15.41)

Division 15.5.2: Single expert witness

Overview

One of the strategies employed in these new rules to overcome the identified problems of partisanship, lack of clarity of evidence and excessive cost is to encourage parties to consider at an early stage whether expert evidence is necessary and if so whether that evidence can be given by a single expert witness.

One of the reasons leading to this approach is the difficulty that modern courts have in deciding between two completely contrary opinions in complex and abstruse problems

"in many cases a judge being unable to fully understand the expert evidence because of its complexity may be compelled to decide between competent opinions on some wholly artificial basis....." [2]

Experience in the UK is that since the introduction of similar rules in the Uniform Civil Procedure Rules 1999, parties, in most cases, instruct a single expert witness and that:

* single experts are more impartial;

* single experts see their duty as being to the Court;

* the process saves time and money;

* single experts assist in levelling the playing field between parties with unequal resources;

* single experts increase the prospect of settlement.

It is about controlling admissible evidence to that which is necessary to assist the court to determine a relevant issue. In appropriate cases the Court will allow parties to instruct an adversarial expert.

In relation to the suggestion that sole expert witnesses interfere with a party's fundamental adversarial rights Justice de Jersey says *" It is however difficult to conceive that confining the evidence on a point to that of a sole expert, where the parties*

* *have a say in his or her identity,*

* *have the full capacity to instruct the witness*

* *are not restrained from privately engaging an advising expert*

* *retain the full capacity to test the evidence in court*

could infringe" that right*.... ....*

" ...and the judge may feel greater confidence, not only in accepting the opinion of the expert, but in seeking the expert's help in better understanding the questions in issue and the opinions on those questions...."

Rule 15.44: Single expert appointed by parties

This Rule provides that where parties agree that expert evidence is necessary on a significant issue and appoint a single expert witness, they do not need permission to tender the report of that expert (under rule 15.51).

Rule 15.45: Order for single expert witness

The Court may order, on application or of its own initiative, parties to obtain a report from a single expert witness. This rule sets out what the court may take into account in deciding whether to so order.

Rule 15.46: Orders the Court may make

This rule lists a variety of orders the court might make to appropriately manage the appointment of a single expert and to enable an expert to properly carry out the expert's role.

Rule 15.47: Single expert's fees

The parties are equally responsible for the fees of a single expert. The expert is not required to do the work until paid or the fees secured.

This rule (as are all of the Rules) is subject to an order otherwise.

Rule 15.48 : Single expert's report

A single expert must prepare a written report. This rule provides who the report must be given to and who is responsible for filing it.

Rule 15.49: Appointing another expert witness

This rule prohibits a party from tendering a report from a further expert witness, without the permission of the Court. Subrule (2) sets out the principles which the Court will consider when determining whether to allow evidence from a further expert.

Rule 15.50: Cross-examination of a single expert witness

A single expert witness must be given at least fourteen days notice if the witness is required to attend for cross-examination. Subrule (2) must be read with the Division 15.5.6: Questions to single expert witness.

Division 15.5.3 : Permission for expert's evidence

Rule 15.51: Permission to adduce evidence from expert

A party must obtain permission from the court to tender a report or call evidence from an expert (but not if it is a single expert see 15.44 (2) and 15.45 (4)). A child representative must obtain permission to tender a report or call evidence from more than one expert on a particular issue.

The rule does not have the effect of restricting expert evidence as a whole, but is a provision assisting the Court to consider in an individual case whether the evidence should be allowed having regard to the main purpose of the rules and the main purpose of expert evidence. (See Section 135 of the Evidence Act (C'W)). The court will consider whether expert evidence is necessary on the issue and if so who should give that evidence. It does not prevent a party from obtaining advice on technical aspects from their own expert.

Rule 15.52: Application for permission

A formal application for permission to tender a report or adduce evidence from an expert witness is made in Form 2, supported by affidavit. However the issue of the need for an expert witness will be considered as a part of the case management of a case at each court event and may be dealt with on an oral application or on the court's own initiative in appropriate cases.

Subrule (2) sets out the factors which must be set out in the affidavit.

Subrule (3) provides the factors which the court will take into account when considering what order to make.

The factors listed in the rule are educative and to direct the discretion of the court. It will be a matter for the Court when applying these principles and those in Part 1.2, to an individual case to determine the appropriateness of the order sought (for example: will the evidence progress the case and what procedure should be followed to ensure proportionality).

Division 15.5.4: Instructions and disclosure of expert's report

Rule 15.53: Application of Division 15.5.4

The strict requirements for instructing an expert and obtaining a written report from an expert do not apply to a document obtained in relation to the value of property for the purposes of a procedural hearing or case assessment conference or conciliation conference. This would include market appraisals of property such as a home, cars or furniture.

Rule 15.54: Instructions to expert witness

This rule details mandatory requirements in relation to instructions to an expert witness. This includes a summary of the instructions to the expert witness to ensure transparency and to assist the court to properly assess the value of the report.

Rule 15.55: Mandatory disclosure of expert's report

An expert's report obtained in a parenting case must be provided to all other parties. Any legal professional privilege attached to this report is expressly overridden by Subrule (4). The court considers this to be essential and in the best interests of children. It is aimed at:

* reducing the over interviewing of children,

* ensuring full disclosure of matters affecting children,

* reducing the issues between the parties.

Rule 15.56: Mandatory provision of information about fees

This rule requires complete disclosure of any fees or other benefits received by an expert. This is a requirement adopted from the South Australian Supreme Court Guidelines for Expert Witnesses.

This rule is to monitor any arrangements which could be said to lead to bias on the part of a witness such as a contingency fee arrangement or a fee disproportionate to the work involved.

Rule 15.57: Application for provision of information

A party can apply for an order that another party provide information to an expert to enable a report to be prepared.

It is anticipated this provision may be useful to obtain technical or other expertise from an in-house expert or information about complicated financial structures created by a party's expert. This is aimed at assisting the other party's expert to understand the facts to reduce the time and money spent on unnecessary research before forming a view.

Rule 15.58: Failure to disclose report

This rule provides that a party who fails to disclose an expert's report may not use that report at trial.

This is not a new concept. A party intending to rely on the evidence of an expert is required to file and serve that person's affidavit under the existing rules.

Division 15.5.5: Expert's duties and rights

Rule 15.59: Expert witness - duty to the court

This rule provides that an expert has a duty to help the Court with matters that are within the expert's knowledge and capability and that this duty prevails over the expert's obligations to the person instructing the expert or paying the expert's fees and expenses. Subrule (3) sets out what the duty involves and subrule (4) provides when the duty starts.

This provision emphasises an expert's independence and impartiality, the need for an expert to be objective on matters within his/her expertise and the need to set out all material facts including those which may deter from the expert's opinion and those which do not support the case of the party instructing the expert.

Rule 15.60: Expert witness - right to seek orders

An expert can ask the Court to make procedural orders to assist the expert to carry out his or her functions as an expert. This might be where the expert's duty to the Court conflicts with the instructions or the expert's professional responsibilities or where the instructions are inappropriate or inadequate. It may assist a single expert where there are conflicting instructions

from opposing parties, or where the expert believes the brief is outside his or her expertise or where the expert believes it would be inappropriate to release a report to a party for some reason. Such direct access to the court emphasises the expert's independence.

Rule 15.61: Expert witness's evidence in chief

This rule provides that the expert's evidence in chief comprises the report and any amendments to that report and any answers to questions under r15.66 (4).

This provision is educative, it does not change the law. Permission from the court is needed for the expert to give oral evidence.

Rule 15.62: Form of expert's report

This rule provides that an expert's report must be in writing and must address a number of specific requirements in relation to the report. The report must be attached to an affidavit in which the expert swears to his/her compliance with the rules and acknowledges the duty to the Court.

Rule 15.63: Contents of expert's report

This rule specifies what must be addressed in the report.

One of the objectives of this rule is to include all of the information that will ensure the evidence is of assistance to the court. It aims at ensuring a "cards on the table approach", including preventing the suppression of relevant opinions or facts which do not support the case of the person instructing the witness

Rule 15.64: Consequences of non-compliance

This rule provides that non-compliance by a party or an expert with a rule or an order may result in an order including that

* an expert attend the court to explain;

* a party not rely on an expert's evidence.

Division 15.5.6: Questions to single expert witness

Rules 15.65 to 15.67

Prior to the hearing or trial, a party may put written questions to a single expert for the purposes of clarification of the expert's report. This division sets out the process and the requirements in relation to the questions and answers and the costs. The answers will be treated as a part of the expert's evidence. The benefits foreshadowed as a result of this process are:

* the narrowing of the issues about which the expert might be required to give evidence at trial therefore saving time and costs at trial;

* assisting a party to determine whether an application should be made to adduce evidence from an adversarial expert witness.

An expert or the other party can object to the questions if they are onerous or otherwise fall outside what the provisions allow.

Division 15.5.7: Evidence from two or more experts

Rule 15.68: Application of division

This is a machinery provision.

Rule 15.69: Conference of experts

The Court may direct a conference of experts to identify issues and to reach agreement where possible.

This is supplemented by the provisions in Schedule 5. These conferences should assist parties to narrow the issues if not reach agreement.

Rule 15.70: Conduct of trial with experts

This rule revises O30A r9(2) which encourages the concept of "hot tubs" - more than one expert to give evidence at same time and sets out the way a court may decide to conduct a trial with an expert.

One addition to the existing rule, is the ability of an expert to clarify their evidence for the judge. This was inserted after consultation with experts who believe that sometimes due to the adversarial way in which the trial has been conducted, the expert has been unable to properly communicate his or her evidence.

Part 15.6 Other matters about evidence

15.71 : Court may call evidence

This rule was formerly O30 r 5 (FLR 1984).

15.72 : Order for examination of witness

This rule was formerly O30 r 6 (FLR 1984).

15.73 : Letters of request - Foreign Evidence Act 1994

This rule was formerly O30 r 7 (FLR 1984).

15.74: Hearsay evidence - section 67 Evidence Act

This rule was formerly O30 r 2AC (FLR 1984) except the prescribed form for use with this rule has been omitted.

15.75: Transcript receivable in evidence

This rule was formerly O30 r 4 (FLR 1984).

15.76 : Notice to produce

This rule was formerly O22 r 6 (FLR 1984) which has been revised to provide a time limit for the notice to be given.

CHAPTER 16 - Trial

Rule 16.01: Expedited trial

This rule codifies the process set out in paragraph 7.5 of the CMD for an application for an expedited trial.

Rule 16.02: Trial information

This rule sets out the updated practice in relation to what were formerly known as trial plans as set out in Paragraph 6.8 CMD.

Rule 16.03: Notice in relation to evidence

This rule requires parties to advise each other in relation to admissions and objections to affidavits and documents prior to the trial in a timely way. (See paragraphs 6.11 and 6.12 CMD.)

Rules 16.04 and 16.05: Trial management

These rules set out some of the Court's powers to manage a trial (amalgamation of paragraph 6 CMD, and former O30 r1D (FLR 1984)).

Rule 16.06: Sequence of evidence

This rule is former rule O30 1B (FLR 1984) and is subject to a decision of the trial judge.

Rule 16.07: Opening and closing addresses

This rule is former O30 1C and is subject to a decision of the trial judge.

Rule 16.08: Attendance at trial - electronic communication

This rule sets out the process for a party to apply to attend, make a submission or adduce evidence from a witness at a trial by electronic communication. The party must make an application in Form 2 unless an oral application is referred to a judicial officer from the Pre-Trial Conference. An affidavit must be filed addressing the issues in Subrule (3).

Rule 16.09: Foreign evidence by electronic communication

This rule sets out the extra requirements in relation to an application under r16.08 where the application involves a party or witness from overseas**.**

Rule 16.10: Exhibits

This is partly former O32 r9 (FLR 1984) but includes a new provision imposing a positive obligation on parties to remove exhibits after the case is finished in order to reduce the documents the Court is required to store. It is to be read with r15. 35.

Rule 16.11: Party's failure to attend trial

No change to the existing practice see paragraph 3.5 of the Case Management Directions (CMD).

Rule 16.12: Vacating trial date

No change to the existing practice see paragraph 6.13 CMD.

CHAPTER 17 - Orders

Overview

This chapter brings all relevant rules about Orders into the one chapter. It is logically placed after the chapter on trials. The term "order" is used instead of "decree" to modernise the language. Order is defined as "includes decree, declaration or judgment."

A number of rules from Family Law Rules 1984 (the FLR 1984) have not been included in the revised Rules because they are administrative in nature, for example, who is to sign an order or a bond; an order is sealed when it is issued; reasons for decision can be published after order made; Court to send copy of order to child support registrar. The practice to be followed in relation to these matters is set out in the Court's internal case management manual.

The following prescribed "order or decree" forms have been omitted from these rules.

* an undertaking (Form 41A), omitted as unnecessary in line with the aim to reduce the number of prescribed forms in the Rules - a form of undertaking will be available at Court registries and on the court's web-site;

* an order varying a Division 11 contact order (Form 23A). The court will produce an order which complies with the relevant section therefore this form was omitted in line with the aim to reduce the number of prescribed forms;

* a decree of nullity (Form 40), omitted as the Court will produce this document it will be provided for in the Court's internal manual;

* Recovery Order (Form 34), omitted as the Court will produce this document it will be provided for in the Court's internal manual.

Rule 17.01: When an order is made

This new rule states when an order is made and from when it takes effect and was inserted to overcome the problems highlighted by cases such as *Caruthers* (1996) FLC 92-707, *Blamey* (1994) 122 FLR 377 and *Wandin Springs v Wagner* (1991) VR 496. The rule also provides that each party is entitled to a copy of an order, once it is issued.

Rule 17.02: Errors in record of orders

This rule enables an order to be amended if there is an obvious error such as a typing mistake and includes the slip rule from the former O31 r6 (FLR 1984).

Rule 17.03: Rate of interest

This rule sets out what interest is to be applied on an amount owing under an order or agreement. It is the same rate as in the former O40 R 1 as at the date of signing of the Rules and will be updated annually by reference to the Reserve Bank interest rate plus 5%.

Rule 17.04: Order for payment of money

This rule provides that a person who is ordered to pay money and who is not present or represented by a lawyer when the order is made or the order is made in chambers must be served with a copy of the order to ensure that the person is aware of the obligation except for an order made by consent.

Rule 17.05: Order for payment of fine

This rule specifies when and where a fine is to be paid.

CHAPTER 18 - Judicial Registrars, Registrars and Deputy Registrars

Rule 18.01: Exercise of powers and functions

This rule confirms that a power delegated to a deputy registrar can be exercised by a registrar, judicial registrar or judge, and so on. Subrule (3) repeats the provisions of former O36 r6 and O36A r4 (FLR 1984).

Division 18.1.2: Delegation to judicial registrars

Rules 18.02 and 18.03

These rules set out the powers of the Court that are delegated to the judicial registrars. The only change to the existing delegations is the increase in the jurisdiction limit to $2 million .

Division 18.1.3: Delegation of powers to registrars and deputy registrars

Rule 18.04 : Application of Division 18.1.3

This rule describes the registrars to whom the powers are delegated in this chapter, which limits the delegations to lawyers employed as Registrars by the Family Court of Australia.

Rule 18.05: Delegations to Registrars

This rule set out the powers of the Court that are delegated to registrars.

Table 18.2 sets out the powers under the Act and Regulations which are delegated

Table 18.3 sets out the powers under the Rules which are delegated

The delegations to Registrars which are in addition to the delegations in the FLR 1984 are:

Power	**Rule**
Stay of a later case following discontinuance and unpaid costs.	10.11(5)
Order as consequence of a party's failure to disclose a document as requested under the Rules in proceedings heard and determined by Registrar.	13.14
Power to make an order in relation to the appointment of an assessor	Part 15.4
Determine a claim by a person claiming to be effected by an enforcement warrant	Div 20.3.2
Order in relation to a Third Party Debt Notice	20.37
Power to make an order in relation to a warrant for arrest in a case within a Registrar's jurisdiction	Part 21.4

Rule 18.06: Delegations to Deputy Registrars

This rule sets out the powers of the Court that are delegated to deputy registrars.

Table 18.4 sets out the powers under the Act and Regulations which are delegated

Table 18.5 sets out the powers under the Rules which are delegated.

The delegations to deputy registrars which are in addition to the delegations in the FLR 1984 are:

Power	**Section/Rule**
Administrative enforcement of financial obligations:	
Power to enforce an order in relation to a financial matter [for Chapter 20 delegations].	Section 109A
Power to grant an injunction in relation to an obligation to be enforced under Chapter 20.	Section 114
Processes aiding enforcement - order a debtor to file Form 13 Financial Statement.	20.10
Issue Enforcement Warrant	Div 20.3.1
Issue Third Party Debt Notice	20.32 and 20.40(4)
Family Law Regulations:	
Practice and procedure if Act, Regulations and Rules not adequately provide or if party not comply.	Reg 5 and subregs 4(1) and 6(1)(a)
Other Rules	
Remove a party to a case.	6.04
Exercise Court's powers in relation to case management.	11.01 except items 3(d) and 3(k) of Table 11.1
Order a case to be determined as a small claim.	11.15
Disclosure	Chapter 13 (except 13.14)
Order for inspection or valuation of property.	14.01 except (2) and (5)
Permit a subpoena to be served on a child.	15.22(2)
Subpoenas - set aside, inspect and copy.	15.26 and 15.32
Power to make an order in relation to the appointment of an expert and expert evidence	Part 15.5

Part 18.2: Review of Decisions

Rule 18.07 Application of Part 18.2

This relates to reviews of orders of judicial registrars, registrars and deputy registrars but not appeal registrars (this is dealt with in Rule 22.53).

Rule 18.08: Review of order

A party applies to review an order made by a judicial registrar, registrar or deputy registrar by filing a Form 2. The time limits for a review are the same as in O36A rule 5.

Rule 18.09: Stay

This rule repeats former O36A r7 (3A) (FLR 1984).

Rule 18.10: Power of Court on review

This rule repeats former O36A r7 (FLR 1984).

CHAPTER 19 - Costs

Overview

Since early 2001 there has been considerable discussion within the Court and in consultation with State and Territory Professional and Regulatory bodies and the profession about the possible options for the regulation of costs of cases started in the Court.

The three main issues have been whether the court should

* Move to an event based scale

* Retain control over lawyer and client costs

* Retain a costs dispute process

Under Chapter 19, the Family Court of Australia will maintain its role in the regulation of party/party costs and lawyer/client costs. The quantum of costs is to continue to be determined by reference to an itemised scale of fees. In the case of lawyer/client costs the Court is retaining the role of determining whether a costs agreement is fair and reasonable.

The taxation of costs process is retained and, unlike other federal jurisdictions, will continue to be available for lawyer and client costs as well as party and party costs.

A number of the recommendations of the Standing Committee of Attorneys General (SCAG) under the National Profession Project, have been adopted in Chapter 19.

There are a number of terminology changes including

Old term	**New term**
Taxing officer	Registrar
Pre-taxation conference	Settlement conference
Taxation	Assessment hearing
Certificate of taxation	Costs assessment order
Bill of costs	Itemised costs account

Part 19.1: General

Rule 19.01: Application of Chapter 19

This chapter, like the existing Rules, applies to party and party costs and lawyer and client costs.

Rule 19.02: Interest on outstanding costs

Interest is payable at the same rate as that payable on outstanding orders under r17.03.

Rule 19.03: and 19.04: Duty to inform about costs

This rule sets out the situations in which a lawyer must advise their client as to costs. As recommended by the SCAG report, it extends the requirements of disclosure required by the

existing rules, to ensure that the client is fully informed about costs and in an effort to encourage them to act responsibly and cooperatively in the conduct of the case.

Part 19. 2: Security for costs

Rules 19.05 to 19.07

This Part provides the process to apply for security for costs, the matters the Court will take into account on such an application and the orders the Court may make.

Part 19.3: Costs orders

Rule 19.08 : Costs orders

An application for costs may be made orally or by Form 2. Subrule (2) provides the time limit for such an application. There is no change to the substantive law set out in FLR 1984.

Rule 19.09: Costs Orders for cases in other courts

This Rule was formerly O38 r33 (FLR 1984).

Rule 19.10: Costs orders against lawyers

This rule incorporates the provisions of O38 r34 and r 35 (FLR 1984) and codifies substantive law set out in cases such as *Myers v Elman* [1940] AC 282; *Edwards and Edwards* [1958] P 235; *Gardiner and Gardiner* (1977) FLC pp90-304; *Jachimowicz and Jachimowicz* (1986) FLC pp91-702; *Collins and Collins* (1985) FLC pp91-603.

Rule 19.11: Notice of costs order

This rule provides for procedural fairness to be afforded to a person before an order for costs is made against the person. Subrule (2) requires a lawyer to inform their client if an order for costs is made including the reasons why the order was made.

Part 19. 4: Lawyer and client costs

Rule 19.12: Costs not to be charged

This rule combines the former O38 r10 and r 21 (FLR 1984) and provides that a lawyer cannot charge for certain work and cannot contract out of this prohibition.

However subrule (3) provides for an exception on written instructions from a client once certain conditions are satisfied.

Rule 19.13: Steps before costs recovery

This is former O38 r37 (FLR 1984) and restrains a lawyer from suing for fees when a costs dispute remains unresolved**.**

Rule 19.14: Costs agreements

This is a new rule based on a combination of former Division 5 of O38 (FLR 1984) and recommendations in the SCAG report setting out requirements for costs agreements**.** The rule is included to aim for uniformity in this area in a national court. The provisions are similar to those applicable in most State jurisdictions.

Rule 19.15: Notice about costs agreement

This Rule was formerly O38 r26(4) (FLR 1984).

Rule 19.16: Validity and effect of costs agreement

This Rule was formerly O38 r27 (FLR 1984). An application in relation to a costs agreement is made in a Form 2.

Rule 19.17: Setting aside costs agreement

This codifies substantive law.

Part 19. 5: Calculation of costs

Rule 19.18: Lawyer and client costs

This Rule was formerly O38 r28 (FLR 1984) and provides that if there is a costs agreement the amount a lawyer may charge is to be calculated under the agreement otherwise according to the scale of costs.

Rule 19.19: Party and Party costs

This Rule was formerly Division 6 of O38 (FLR 1984)**.**

Part 19.6: Dispute process

Action	**Time limit**
A client who receives an account that claims a lump sum and wants to dispute the account, must ask the lawyer for an itemised costs account. (**Rule 19.20)**	Within 28 days of receiving the account.
This is drafted widely enough to enable a client to dispute only part of an account such as counsel's fees so that only that part needs to be itemised and to proceed through the dispute process.	
The lawyer must serve the itemised costs account.(**Rule 19.21)**	Within 28 days of receiving such a request.
There is no prescribed form for the itemised cost account but the rule is specific as to its content and must be complied with. An example will be available at Registries and on the court's web-site.	
The client must inform the lawyer of the dispute in relation to the itemised costs account by serving a Notice Disputing Costs (Form 15) on the lawyer (**Rule 19.23).**	Within 28 days of receiving the itemised costs account
This Notice (as does the existing Form 57) requires the client to specify the item to which objection is taken, set out the reason for the objection and the amount offered for it. (**Rule 19.22)**	
The parties must attempt to resolve the dispute including where	Period of 42 days allowed.

appropriate submitting the dispute to a costs assessor (**Rule 19.24(2)).**	
If the dispute is not resolved, either party can ask the Court to rule on the dispute by filing the Form 15 and the itemised costs account **(Rule 19.24(3).**	Not later than 42 days after the date of service of the Form 15.
Rule **19.25** provides for the amendment of these documents.	
When the Form 15 and the itemised costs account are filed the Court will fix a date for: * a settlement conference; * a preliminary assessment; or * an assessment hearing (**Rule 19.26).**	Date allocated before Registrar will be within 21 days of filing of the Form 15.
The dispute will ordinarily be listed for a settlement conference on the first court date.	
Rule 19.27 requires the respondent to be given 14 days notice of the first court event.	
At a Settlement Conference the registrar must: * give the parties an opportunity to agree about the amount for which a costs assessment order should be issued; or * identify the issues in dispute. Both parties must attend a settlement conference. The settlement conference will be the same as the existing Pre-Taxation Conferences which have proved very useful under the current rules.	Date fixed by the Court.
If the dispute is not settled the registrar will make procedural orders for the management of the costs dispute (**Rule 19.28**). It will then be listed for a preliminary assessment or assessment hearing.	
Preliminary assessment Rule 19.29 The parties do not attend. * The registrar calculates the amount (the ***preliminary assessment amount***) for which, if the costs were to be assessed, the costs assessment order would be likely to be made. * The parties are notified of the preliminary assessment amount. * Either of them may object to the preliminary assessment amount by lodging a written notice of objection and paying into the Court 5% of the total amount objected to in the itemised account. (**Rule 19.30)**	Date fixed by the Court * within 21 days after receiving notice of the preliminary assessment (see r19. 30).

* The costs dispute will then be listed for an assessment hearing.(**Rule 19.32**)

* If neither party objects to the preliminary assessment amount, the Registrar will make a cost assessment order for the amount of the preliminary assessment amount. (**Rule 19.31**)

Assessment hearing Rule 19.32 Date fixed by court

This is the same event as what is currently known as a taxation hearing former O38 r47 (FLR 1984). The function of an assessment hearing is not to undertake an independent assessment of the charges but to determine disputed items.

Rule 19.33: Powers of Registrar

This was formerly O38 r48 (FLR 1984). Paragraph (h) was inserted as a result of SCAG recommendation 11.6.

Rule 19.34: Assessment Principles

This rule combines a number of former rules in O38 (FLR 1984) including rules 49, 51, 52, and 54. It does not change substantive law.

Rule 19.35: Allowance for matters not specified

This rule combines a number of former rules in O38 (FLR 1984) including Rules 9 and 53 and Subrule (2) expands the factors to be considered.

Rule 19.36: Neglect or delay before Registrar

This was formerly O38 r56 (FLR 1984).

Rule 19.37: Default costs assessment order

This was formerly O38 r45 (FLR 1984).

Rule 19.38: Setting aside a costs assessment order

This rule allows a party to apply in Form 2 to set aside a costs assessment order where it has been issued

* by default under Rule 19.37; or

* as a result of a failure to object to a preliminary assessment amount under Rule 19.31.

If the costs assessment order is set aside, the dispute will then be listed for an assessment hearing.

Part 19.7 : Specific Costs matters

Rule 19.39: Application of Part 19.7

So far as this Part applies to lawyer and client costs, this Part does not apply if there is a valid costs agreement between a lawyer and a client.

Rule 19.40: Costs in court of summary jurisdiction

This rule provides that a lawyer may only charge 80% of the scale for work done in a case conducted in a court of summary jurisdiction or a small claim.

Rule 19.41: Charge for each page

Subrule (1) was formerly O38 rule 11(1) (FLR 1984)

Subrule (2) is new and provides that when charging, for example, for preparing a document a lawyer cannot charge for preparing words that are part of a Form in Schedule 2 or a document in a form approved by the Principal Registrar.

Rule 19.42: Proportion of costs

This Rule requires that a lawyer may only charge a proportion of the amount allowed in the scale if the lawyer has only done a proportion of the work i.e. if a 15 minute attendance by a lawyer the appropriate charge would be a quarter of the hourly rate.

Rule 19.43: Costs for reading

: If it is reasonable for a lawyer to read more than 50 pages for a case, the amount to be charged under Item 104 in Schedule 3 is at the discretion of the registrar, and may be less than the amount allowed per page in the scale.

Rule 19.44: Postage within Australia

This Rule was formerly O38 r12 (FLR 1984).

Rule 19.45: Waiting and travelling time

This rule was formerly O38 r17 (FLR 1984) except it replaces the time spent with distances travelled. The effect is that a lawyer is not entitled to charge for time travelling if they are more than 100 kilometres from the court because in this case the appointment of a town agent may be more appropriate.

Rule 19.46: Agent's fees

This Rule was formerly O38 r18 (FLR 1984).

Rule 19.47: Expenses for attendance by witness

: This Rule was formerly O38 r19 (FLR 1984).

Rule 19.48: Expenses payable to expert witness

: This Rule was formerly O38 r20 (FLR 1984).

Rule 19.49: Costs of cases not started together

: This Rule was formerly O 38 r15 (FLR 1984).

Rule 19.50: Certificate as to counsel

This Rule was formerly O38 r25 (FLR 1984).

Rule 19.51: Lawyer as counsel - party and party costs

This rule applies to the payment of counsel's fees in a party and party costs dispute and is the same as O38 r23 (FLR 1984) except for the additional requirement that counsel must be present and render substantial assistance in the conduct of the case.

Rule 19.52: Lawyer as counsel - assessment of fees

This rule applies to the payment of counsel's fees in party and party costs dispute and sets out fees recoverable in various situations including:

* where more than one counsel is briefed (whether the second counsel is junior or senior);

* refresher fee;

* reading fee.

Rule 19.53: Lawyer as counsel - lawyer and client costs

This rule applies to the payment of counsel's fees in a lawyer and client costs dispute and is the same as former O38 rr 13 and 24 (FLR 1984).

Part 19.8: Review of assessment

Rule 19.54: Application for review

: A party may apply to review the decision of a registrar at an assessment hearing (under r19.32) by filing Form 2 and an affidavit.

Rule 19.55 : Time for filing an application for review

An application for review must be filed within fourteen days after the costs assessment order is made.

Rule 19.56: Hearing of application

: This rule combines former O38 rr 60, 62, 63 and 64 (FLR 1984). It does not change substantive law

CHAPTER 20 - Enforcement of Financial Obligations

Overview

A substantial part of this chapter is based on the review of the court's enforcement rules by Justices Smithers and O'Rourke. The most significant initiative is the ability of a party to enforce a financial obligation by an Enforcement Warrant (Warrant of Execution) or Third Party Debt

Notice (Garnishee order) without having to make an application for a further order. The new process for these will allow a Deputy Registrar to consider these applications ex-parte in chambers.

Part 20.1: General

Rule 20.01: Enforceable obligations

This rule was formerly O33 r2 (FLR 1984). There is no change to existing law.

Rule 20.02: When an agreement may be enforced

This provides that if a party seeks to enforce an agreement there must first be an order to the effect that the agreement is valid and enforceable (see O33 r 2(1) (d) and (ha) (FLR 1984).

Rule 20.03: When child support liability may be enforced

This rule was formerly contained in O33 r3(9) (FLR 1984). It places an obligation on a party seeking to enforce a child support assessment to seek judgment for the amount owed first before asking for the enforcement of the order. The application for judgement and the application for an enforcement order could be included in the same Form 2. This rule does not apply to a child support liability arising by way of an order.

Rule 20.04: Who may enforce an obligation

This rule was formerly contained in O33 r2(6), (7), and (8) (FLR 1984). No change to existing practice.

Rule 20.05: Enforcing an obligation to pay money

This rule provides for the existing four methods of enforcement i.e. warrant of execution (now known as an enforcement warrant), garnishee order (now know as a third party debt notice), receivership and sequestration.

Rule 20.06: Affidavit to be filed with application

This expands O33 r3(1A) of the FLR 1984 which provided that an "*affidavit must contain evidence in support of the request made in the affidavit*", by now referring to a detailed list of requirements for an affidavit in support of an enforcement order. This follows the civil jurisdictions which provide an affidavit for judgment creditors to complete.

Rule 20.07: General powers of court on enforcement

This sets out the general powers of the Court in relation to an enforcement application, and groups the powers under one sub-heading making for quick and easy reference. There is no substantive change to the law.

Rule 20.08: Enforcement Order

This rule sets out what must be set out in an enforcement order.

Rule 20.09: Discharging, suspending or varying enforcement order

A party may apply to discharge vary or suspend an enforcement order by filing a Form 2 and an affidavit.

Part 20.2: Information for aiding enforcement

Division 20.2.1 : Processes for aiding enforcement

Rule 20.10: Processes for obtaining financial information

This Part provides a procedure for a person owed money to obtain information about the payee's financial position before seeking an enforcement order. A payee can:

* request the payer to serve them with a Form 13 (Rule 20.10 (1)(a); or

* apply to the court to force a payer to file a Form 13 and disclose specified documents (Rule 20.10(1)(b)). This replaces the existing Form 45 process (FLR 1984).

Division 20.2.2: Enforcement hearings

Rule 20.11: Enforcement hearings

A payee may seek that a payer attend an enforcement hearing (previously known as an oral examination) by filing a Form 2. This application is listed for hearing at least 28 days after the date of filing. The requirement in the FLR 1984, for a Registrar to be satisfied that a debt was due and owing before issuing a summons, has been omitted. A payee may specify what documents the payer is required to bring with him or her to court.

At the conclusion of the enforcement hearing the court may make any of the orders set out in rule 20.08**.**

Rule 20.12: Obligations of payer

This Rule details what a *payer* must do in response to an application fixing an enforcement hearing including the filing and service of a Form 13 and the prior production of any documents required to be produced.

The Division introduces a new brochure which must be served on the respondent, so that the payer is informed of his or her obligations.

Rule 20.13: Subpoena to witness

This rule provides that a person can be subpoenaed to give evidence at an enforcement hearing.

Rule 20.14: Failure concerning financial statement

This rule set out the offences for failure to comply with this Division which can result in a penalty of up to 50 penalty units.

Part 20.3 - Enforcement Warrants - seizure & sale of property

Division: 20.3.1 - General

This Division sets out the process for obtaining a warrant, execution of the warrant, including the rights and responsibilities of an enforcement officer, and the effect of the warrant itself. It includes the requirements for the valid advertisement of a sale of property seized pursuant to an enforcement warrant.

A major change is the introduction of the process for the issue of a warrant by deputy registrars in chambers, by an administrative process rather than by application .

Rule 20.15: Definition

Defines affected person and enforcement officer for this Part.

Rule 20.16: Request for enforcement warrant (Form 16)

This rule sets out the process to apply for a warrant which includes filing an affidavit and a draft of the Enforcement Warrant**.**

Rule 20.17: Validity and renewal of warrant

Enforcement Warrants are valid for 12 months and they can be renewed.

Rule 20.18: Enforcement officer's rights and responsibilities

This Rule sets out the powers and obligations of the person charged with acting upon the enforcement warrant. It is envisaged that an enforcement officer would be a delegate of the Marshal, such as the bailiff/sheriff of local courts.

Rule 20.19: Request for procedural orders

An enforcement officer may ask the Court for orders to facilitate the enforcement process.

Rule 20.20: Effect of enforcement warrant

This rule sets out how long an enforcement warrant remains in force and what must happen if the payer pays the total amount owed.

Rule 20.21: Advertising before sale

This rule sets out the requirements that an enforcement officer must follow in relation to advertising before selling the property under an enforcement warrant.

Rule 20.22: Result of sale notice

After a sale of property under an enforcement warrant, the enforcement officer must provide details to the Registry Manager of the result.

Rule 20.23: Payee's responsibilities

Under this rule, the payee must notify the payer that the warrant has been registered against the payer's real property, and that it is intended to sell the property. The payee must also notify the enforcement officer of certain information in relation to the real property before the enforcement officer can proceed to sell.

Rule 20.24: Orders for real property

This rule sets out the procedural orders that may be sought to facilitate the enforcement warrant.

Division 20.3.2: Claims by person affected by enforcement warrant

This Division provides how a person affected by an enforcement warrant may seek relief and sets out the possible orders that a Court can grant at a hearing of an application. It will provide a helpful guide to people where there has previously been none.

Rule 20.25: Notice of Claim

A person affected by the seizure of property under an enforcement warrant who objects to this, may give notice under this rule to the enforcement officer.

Rule 20.26: Payee to admit or dispute claim

The enforcement officer must give a copy of the objection from an affected person to the payee, who under this rule, is obliged to either admit or dispute that claim within seven days.

Rule 20.27: Admitting claim

This rule sets out the action to be taken by the enforcement officer if the payee admits the affected person's claim.

Rule 20.28: Denial or no response to claim

If the payee does not respond to the affected person's claim, or denies it, an application may be made in Form 2 for a determination of the claim.

Rule 20.29: Hearing of application

This rule sets out what orders the Court may make on the hearing of an application to determine a claim by a person claiming to be affected by an enforcement warrant.

Part 20.4: Third Party Debt Notice

This Part of the proposed rules sets out the procedure for enforcing a debt by the issue of a third party debt notice (formerly known as garnishment) previously dealt with in O33 r4 (FLR 1984). A major change from the existing process is the introduction of the process for the issue of the notice by deputy registrars in chambers.

Rule 20.30 and 20.31: Application of Part 20.4

These rules set out what funds can be the subject of third party debt notice.

Rule 20.32: Request for third party debt notice

This rule sets out how a person can apply for the issue of a third party debt notice to enforce a financial obligation. It requires the filing of an affidavit (which must comply with r 20.06 and Subrule (2)) and a Third Party Debt Notice (Form 17). Upon the filing of these documents, the case will be referred to a deputy registrar to issue the Form 17.

Rule 20.33: Service of third party debt notice

The rule introduces the requirement for the service of a pro-forma brochure on those affected by the notice. The brochure details the obligations of third party debtors under the Notice.

Rule 20.34: Effect of third party debt notice

Once a Form 17 is served, the third party debtor must not pay the amount attached by the Form 17 except in accordance with the Form 17. There is a seven day period of delay to enable a person to object to the notice under Rule 20.37.

Rule 20.35: Employer's obligations

This rule sets out what an employer (third party debtor) must do to comply with a Form 17.

Rule 20.36: Duration of third party debt notice

A notice continues in force until the total amount owed is paid, or it is set aside.

Rule 20.37: Response to third party debt notice

This rule sets out how a third party debtor may apply to dispute liability under the notice, or to obtain directions in relation to the notice. It also sets out that an application may be heard in chambers in the absence of the parties, and the orders the court may make when determining an objection.

Rule 20.38: Discharge of Notice

When the third party debtor pays an amount under a third party debt notice, the debt due to the payer is discharged to the extent of the payment.

Rule 20.39: Claim by affected person

A person claiming to be entitled to the debt, attached under a third party debt notice, may file a Form 2.

Rule 20.40: Cessation of employment

This rule sets out the process which applies if the payer leaves the employment of a third party debtor.

Rule 20.41: Compliance with third party debt notice

This rule creates certain offences in relation to third party debt notices which repeat the provisions of O33 r3(9) (FLR 1984).

Part 20.5: Sequestration of Property

Rules 20.42 to 20.45.

This Part contains most of the detail and content of former O33 r6 of the FLR 1984, but expands on its predecessor and creates a more user-friendly piece of legislation by setting out a

convenient list of what information one must provide to a Court when seeking an order for sequestration.

Part 20.6: Receivership

Rules 20.46 to 20.52

This Part contains the former O33 r7 (FLR 1984) but provides more detail bringing it into line with the rules in contemporary civil jurisdictions.

Part 20.7: Enforcement of other obligations

Rules 20.53 to 20.56

This Part provides a process for enforcement of obligations other than those which are enforceable under the rest of this Chapter or Chapter 21 for example execution of documents (Rule 20.53 (a)), possession of property (Rule 20.54); delivery of possession (Rule 20.55) and seizure and detention of property (Rule 20.56).

Part 20.8: Other provisions about enforcement

This Part contains general procedural provisions which apply to enforcement - service of the order (Rule 20.57), enforcement against a non party (Rule 20.59) and a certificate as to amount under a maintenance order (Rule 20.58).

CHAPTER 21 - Enforcement of Parenting Orders, Contravention of Orders and Contempt

Overview

The summary of the chapter sets out the philosophy behind the drafting of this chapter and is aimed at encouraging parties to consider whether the result they want is enforcement or punishment. The rules encourage the use of the Form 2 application instead of the Form 18 or 19 where the applicant seeks to enforce an order and "put the matter back on track". The approach is that followed in the Newcastle Registry of civil enforcement and would be used to seek enforcement where the applicant does not seek to have the respondent sanctioned but seeks a solution to a one off problem. It is a process which should be used where an order has not been complied with or is unable to be complied with and the order needs to be varied to remedy a problem. It is not intended to be used as a process to obtain a quick trial for what is essentially an application to vary an order due to significant change in circumstances.

Rule 21.01: Application of Part

This rule specifies the cases to which the chapter applies.

Rule 21.02: How to apply for an order

Subrule (1) sets out in a Table what Form to use for what application.

Subrule (2) details the necessary requirements for the affidavit and includes some information that was formerly in the Form 47.

Subrule (3) is to assist the court to determine the stage of enforcement that applies and is to elicit evidence needed in this respect.

Rule 21.03: Application by Marshal

This was formerly O 35 r3 (1) (b) (FLR 1984). The Court has power on its own initiative to bring proceedings for contempt.

"The court must be able to enforce its own orders. If an applicant fails to appear or wishes to discontinue an application, the court may still proceed with the application for contempt if there is a particularly serious affront to the court's authority or a failure to proceed would be contrary to the interests of the children." [see 35th ALRC Report *Contempt and McJarrow and McJarrow (No.2)* (1980) FLC 90-913.]

Rule 21.04: Contempt in the court room

This rule was formerly O35 r9 (FLR 1984) and addresses what was previously termed "contempt in the face of the Court". This process is in addition to the process for contempt by filing an application in Form 2 (as provided in rule 21.02).

Rule 21.05 : Hearing date

A Form 2 filed under this chapter will be listed for hearing as close as practicable to 14 days after filing.

Rule 21.06 : Response to an application

The rules confirm that a respondent to a contempt application is not required to file an affidavit in response .

Rule 21.07 : Failure to attend

This rule codifies existing practice.

Rule 21.08 : Procedure at hearing

This rules revises former O35 Rules 12, 13 and 14 (FLR 1984).

Part 21.2: Parenting orders - compliance

Rules 21.09 and 21.10

These rules revise the provisions of O35 Rules 15, 16, and 17 (FLR 1984) and are based on the amendments to ss 70 NIA of the Act by FLAA 2003.

Part 21.3: Location and recovery orders

Rules 21.11 to 21.15

This Part sets out the procedure for applications for Location and Recovery Orders, replacing former O34 Division 1 of the FLR 1984. A party applies by filing a Form 2 and an affidavit and the application will be listed for hearing within 14 days from filing, or as practicable. The

duration of recovery orders is not included as FLAA 2003 amended section 67W (1) to provide this.

Rule 21.15 is a new provision inserted to alleviate some of the practical problems which currently occur in practice with the interpretation or execution of these orders.

Part 21.4: Warrants

Rules 21.16 to 21.20

Part 21.4 revises former O34 Divisions 2 and 3 of the FLR 1984, but expands the FLR 1984 (particularly see r. 21.19) to include provisions from the Act in relation to other powers of arrest, for consistency. The Part provides who can apply, how to apply, how the warrant is executed, its duration and provides the procedure on arrest. It is aimed particularly at providing a guide to other courts on how to manage these cases when the court before whom the respondent is brought is not the court which issued the warrant.

CHAPTER 22 - Appeals

Overview

This chapter adopts the majority of the recommendations made by Justice Ellis after his study of the appellate procedures in the superior courts in the USA and UK which were introduced into the FLR 1984 in mid 2003.

The amendments take into account contemporary practice and procedure in appeals in the courts of other countries and remove some of the problems in the existing procedure. The amendments also codify the different process for FMC appeals heard by the Full Court compared to those heard by a single judge.

Whilst the chapter sets out the majority of the provisions applicable to appeals it must be read in conjunction with

* Chapter 1 (Introduction) which sets out the philosophy of the Rules which apply to these applications;

* Chapter 7 (Service) which sets out the procedure which applies to service of the application;

* Chapter 8 (Address for service and right of appearance); and

* Chapter 24 (Documents, filing and Registry) which sets out the rules in relation to the filing of the application.

Process for appeals to the Full Court

The process for appeals to the Full Court has changed significantly and is set out in Part 22.3. The steps in the new process are:

1. Notice of Appeal (Form 20) filed

2. Pre-argument statement to be filed by appellant

3. Directions hearing/settlement conference

4. Transcript to be obtained by appellant

5. Appeal Books to be filed

6. Hearing date to be allocated

The revised Rules adopt the majority of the major changes to the appeals procedures introduced by Rules amendments in 2003 as follows:-

* No steps are taken by the Court to progress an appeal until the pre-argument statement is filed. If no pre-argument statement is filed then the appeal does not proceed further.

* The first court date will ordinarily be before a judge not an appeal registrar. The judge will settle the contents of the appeal books and impose time limits for filing of documents and applications.

* On the first court date the judge may hold a settlement conference before hearing any applications and making any directions.

* The judge may in some circumstances adjourn a conference or procedural hearing to an appeal registrar.

* The role of an appeals registrar (not regional appeals registrar) is reduced - e.g. appointment to settle appeal papers has been abolished.

* An application can be made for a conference or hearing including the appeal hearing itself to be conducted by electronic communication.

* A hearing date is not allocated until the regional appeals registrar is satisfied that the appeal is ready to proceed.

Process for FMC appeals

The process for appeals from FMC is set out in Part 22.4:

1. Form 20 filed

2. Form 20 is referred to the Chief Justice (or delegate) to consider whether it is appropriate for the jurisdiction in relation to the appeal to be exercised by a single judge.

3. If Full Court is to hear the appeal the procedure in Part 22.3 applies

4. If a single judge is to hear the appeal

4.1 A judge is appointed to hear the appeal;

4.2 A procedural hearing is held (judge may hold a settlement conference prior to making necessary orders) (judge may make procedural orders in chambers);

4.3 Appellant obtains transcript and Reasons for Judgment;

4.4 Appellant to arrange for relevant appeal documents to be available for the judge;

4.5 Appeal is heard.

Process for appeals from Courts of Summary Jurisdiction:

The revised Rules have not changed the process in appeals from courts of summary jurisdiction.

Review of Judicial Registrar, Registrar or Deputy Registrar decision

Refer to chapter 18.

Rule 22.01: Application of Chapter 22

This is a machinery provision to set out what appeals the chapter does and does not apply to.

Rule 22.02: Starting an appeal

All appeals are started by the filing a Form 20. A sealed copy of the order appealed is to be attached to the Form 20. The general rules in Chapter 24 apply to filing a Form 20 i.e. by delivery, post or electronic communication. A Form 20 must be filed in the regional appeal registry except if it is an appeal from a court of summary jurisdiction, then it must be filed in the nearest Registry to the court appealed from.

Rule 22.03: Time for appeal

A Form 20 must be filed within 28 days after the date of the order appealed. A party can apply for an extension of time to appeal by filing a Form 2 and an affidavit (see r1.14 and r22.43).

Rule 22.04: Parties to appeal

This is a new rule based on the Queensland Civil Procedure Code and the Federal Court's provisions which sets out who should be joined as a party in an appeal. A party is added by naming them in the Form 20 as either an appellant or a respondent (Rule 6.03). A child representative appointed in a case under appeal remains appointed if there is an appeal but may choose not to participate see r 8.02(5).

Rule 22.05: Service

Under this rule the Form 20 must be served on the respondent and the child representative, if any, within fourteen days of filing. Ordinary service is required under r7.03(12). The Court may order that notice of the appeal be given to other interested persons (Rule 7.02(2)). There is no change to existing practice**.**

Rule 22.06: Notice to other courts

This rule was formerly O32 r3 (1A); and O32 r23(b) (FLR 1984) and requires the appellant to give notice of the appeal to the Court which made the order appealed so that that court's file can be sent to the Family Court. There is no change to existing practice.

Rule 22.07: Cross appeal

This is a new rule inserted to make it clearer the circumstances in which a party should cross appeal. A cross appeal is started by filing a Form 20 indicating it is a cross appeal. The general rules in Chapter 24 apply to the filing of the cross appeal including service copies and ordinary service is required by Rule 7.03(12).

Rule 22.08: Time for cross appeal

A cross appeal must be filed within 14 days from date of service of the Form 20.

Rule 22.09: Amendment

This rule provides that a Form 20 may be amended without permission of the court up to and including the date of the procedural hearing. Any amendment after the procedural hearing is only allowed if the court gives permission. A party amends the Form 20 in accordance with rule 11.12 which requires the amendments to be marked clearly. The amended notice must be filed in accordance with Chapter 24 and served by ordinary service Rule 7.03(12).

Rule 22.10: Documents filed in current appeal

This rule provides where documents are to be filed in a pending appeal. There is no change to existing practice.

Rule 22.11: Exhibits

This rule requires a party to return any exhibits to the court when required to do so by an appeals registrar. The practice to be adopted by an appeals registrar in relation to the Lists of Exhibits etc formerly in O 32 r9 (FLR 1984) will be in the manual. There is no change to existing practice.

Rule 22.11: Stay

This rule repeats the law that except for s 55(4) of the Act an appeal does not stay the operation or enforcement of an order. It then provides when a party may apply for a stay and refers to Division 22.7.1 which sets out the procedure which is by filing a Form 2 and an affidavit**.** This application will be listed before the person who made the order appealed from or another judicial officer with jurisdiction (see r 1.13)**.**

Part 22.3: Full Court appeals

Overview

The main purpose of this Part is to set out the discrete case management process for appeals to be heard by the Full Court. All of the requirements in Part 22.3, and Parts 22.6, 22.7, 22.8 apply to these appeals.

Rule 22.13: Application of Part 22.3

This rule is a machinery provision which provides that this Part applies to appeals to be heard by the Full Court.

Upon the filing of the Form 20 the regional appeals registrar sends the relevant documents to the Senior Administrative Judge (Full Court) to determine whether it is appropriate for the jurisdiction of the Full Court to be exercised by a single judge. (s. 94AAA(3) of the Act; s102A (2)

of the Assessment Act and s 107A(2) of the Registration Act). As soon as possible after the Form 20 is filed, the parties are to be advised which part of the Rules applies so that if Part 22.3 applies the appellant can comply with the next rule which requires the filing of a pre-argument statement.

If the appeal is to be heard by a Full Court -- Part 22.3 applies. If the appeal is to be heard by a single judge -- Part 22.4 applies.

There is no change to existing practice.

Rule 22.14 : Pre-argument statement

This rule aims to minimise resources wasted on appeals started for tactical or other reasons where the appellant does not intend to proceed. An appellant in an appeal to be heard by the Full Court must file a pre-argument statement in the regional appeal registry not later than 21 days after the appeal is started. As an appeal includes a cross appeal this rule also applies to a cross appellant.

The pre-argument statement must state in a concise form the actual issues to be raised at the hearing of the appeal. (See definition in dictionary).

Chapter 24 applies in relation to the filing of the document and the copies required. Once filed the document must be served on each other party by ordinary service (Rules 7.03 (1), 7.04).

Non-compliance with Rule 22.14 may result in the appeal being treated as abandoned under Rule 22.57(1).

Rule 22.15: Fixing first court date

When a pre-argument statement is filed the regional appeals registrar will fix a date for a procedural hearing/settlement conference before a judge of the Appeal Division and notify the parties.

Rule 22.16: Draft index to appeal books

An appellant must file a draft index to the appeal books seven days prior to the first court date fixed under Rule 22.15. Non-compliance results in the automatic cancellation of the first court date and may result in the appeal being treated as abandoned under Rule 22.57(2).

Chapter 24 applies in relation to the filing of the document and the copies required. Once filed the document must be served on each other party by ordinary service (Rules 7.03 (1), 7.04).

Rule 22.17: Attendance on first court date

To enable the judge to conduct a settlement conference on the first court date if he or she thinks that is appropriate both parties are required to attend. A request can be made to attend by telephone or video (see rule 22.39). Similarly a party can, in appropriate circumstances, seek to be excused.

Rule 22.18: Procedure on first court date

This rule adopts the recently introduced process for all Full Court appeals namely that of a first court date which is conducted by a judge of the Appeal Division (or another judge under rule

1.13). In exceptional circumstances this might be adjourned to an appeal registrar but the intention is that the judges of the Appeal Division will manage appeals from their commencement.

The general powers of the Court in relation to case management (Rule 11.01) apply to appeals so therefore a conference or procedural hearing may be adjourned to another day or another judicial officer or registrar and the Court will make necessary procedural orders about the conduct of the case.

If a Registrar makes procedural orders in an appeal that decision can be reviewed - see Rule 22.53.

Rule 22.19: Settlement conference

This rule provides parties must make a genuine effort to settle the case at the conference**.**

Rule 22.20: Procedural hearing

The orders that must be made at a procedural hearing include those which were previously considered at the appointment to settle the appeal papers i.e. the contents of the appeal books. The judge would also consider any other applications brought by either of the parties under the Act or the Rules.

Rule 22.21: Appeal Books

This rule specifies what documents are to be included in the appeal books unless the Court orders otherwise under Rule 1.12. It is not intended to change existing practice but may make clearer for self represented litigants what to include in the draft Index to the appeal papers.

Rule 22.22: Form of appeal books

This does not change existing practice and sets out what was previously in O32 r14 (FLR 1984).

Rule 22.23: Transcript of hearing

This rule provides the appellant must obtain the transcript unless otherwise ordered. The transcript must be that prepared by the contractor providing transcription services to the court (see Dictionary).

Rule 22.24: Preparation of appeal books

The appellant is to prepare the appeal books unless otherwise ordered and these must be filed within 56 days of the procedural hearing.

Failure to comply with this time limit may result in abandonment of the appeal under r22.57.

Chapter 24 applies in relation to the filing of the document and the copies required. Once filed the document must be served on each other party by ordinary service (Rules 7.03 (12), 7.04).

Rule 22.25: Fixing date of appeal

A regional appeals registrar will only list an appeal after the appeal books have been filed and the appeal is ready to proceed.

The parties are to be advised of the sittings of the Full Court in which the appeal will be listed, not less than 28 days before the sittings starts.

Rule 22.26: Summary of argument and list of authorities

This rule does not change existing practice which requires both parties to file these documents prior to the sittings of the Full Court in which the appeal is listed. It provides guidance as to the form and contents of the document.

Part 22.4: Appeals from Federal Magistrates Court where appeal is to be heard by a single judge

Overview

The main purpose of this Part is to separate the process for appeals to be heard by a single judge into a discrete Part to make it clear that the case management process is different from appeals to be heard by the Full Court. All of the requirements in Part 22.3, and Parts 22.6, 22.7, 22.8 apply to these appeals.

Rule 22.27: Application of Part 22.4

This is a machinery provision which provides that this Part is applicable to all appeals from the FMC which are to be heard by a single judge (where a determination to that effect has been made by the Chief Justice or delegate pursuant to s 94AAA(3), s 102A(2) Assessment Act, s 107A(2) Registration Act.).

Rule 22.28: Appeal Registry

Upon the filing of the Form 20 the regional appeals registrar sends the relevant documents to the Senior Administrative Judge (Full Court) to determine whether the jurisdiction of the Family Court is to be exercised by the Full Court or a single judge. (s. 94AAA(3) of the Act; s102A (2) of the Assessment Act and s 107A(2) of the Registration Act). As soon as possible after the Form 20 is filed the parties are to be advised which part of the Rules applies. If the appeal is to be heard by a Full Court -- Part 22.3 applies. If the appeal is to be heard by a single judge -- Part 22.4 applies.

Once a decision is made that the appeal is to proceed under this Part, the file will be referred to a judge in chambers. The judge may direct that a first court date be allocated for the appeal (see Rule 22.29) or may instead proceed to make procedural orders about the future conduct of the appeal in chambers.

Rule 22.29: Procedural hearing

The parties are to be given 28 days notice of a procedural hearing directed under Rule 22.28. This may or may not be conducted by the judge who will hear the appeal.

Rule 22.30: Attendance at procedural hearing

To enable the judge to conduct a settlement conference on the first court date if he or she thinks that is appropriate both parties are required to attend. A request can be made to attend by telephone or video (see Rule 22.39).

Rule 22.31: Procedural orders for conduct of appeal

The orders to be made either in chambers pursuant to Rule 22.28(2) (a) or at the procedural hearing are those that will enable the appeal to be heard as soon as practicable and include what documents are to be before the judge at the hearing of the appeal, which party is to arrange that, who is to obtain the reasons for judgement from the FMC, timetable for filing of documents for hearing and if practicable a date for hearing is to be allocated.

As the ordinary case management powers (Rule 11.01) of the court apply, the procedural hearing can be adjourned and a request can be made for it to be conducted by electronic communication. A judge may direct that it be conducted by an appeal registrar and require that the parties attend a settlement conference.

Rule 22.32: Documents for hearing

This rule specifies what documents are to be before the judge at the hearing of the appeal, unless otherwise ordered.

Rule 22.33: Transmission of file (FMC)

This is an administrative matter to ensure the file is received by the judge prior to the hearing.

Rule 22.34: Date fixed for hearing

Unless otherwise ordered an appeal is to be heard within 90 days of the filing of the Form 20.

Part 22.5: Appeals from court of summary jurisdiction

The main purpose of this Part is to set out the discrete case management process for appeals from courts of summary jurisdiction. All of the requirements in Part 22.3, and Parts 22.6, 22.7, 22.8 apply to these appeals.

These rules adopt the current practice for these appeals except that the same Form is used for the notice of appeal i.e. Form 20.

The documents relating to these appeals must be filed in the Family Court Registry closest to the court of summary jurisdiction. The appellant must give notice of the appeal to the Court of summary jurisdiction so that Rule 22.37 applies.

Rule 22.35: Application of Part 22.5

Machinery provision.

Rule 22.36: Hearing date

When a Form 20 is filed, the appeal will be listed for a hearing de novo by a judge on a date as near as practicable to 56 days from filing**.**

Rule 22.37: Transmission of papers

This is an administrative matter to ensure the file is received by the judge prior to the hearing.

Part 22.6: Powers of appeal courts

Rule 22.38: Non attendance by party

This rule codifies current practice.

Rule 22.39: Attendance by electronic communication

This rule provides the procedure for a party to follow if they wish to attend an appeal event by electronic communication. The rule allows a request in writing rather than requiring an application. This would be subject to a direction of the court to the effect that an application was required.

Rule 22. 40: Attendance by party in prison

This rule repeats the general rule that a party who is in prison must attend an appeal event by telephone or video conference if the facilities are available at the facility the party is held**.** The court is in the process of making arrangements with various facilities in this regard.

Rule 22.41: Short reasons for decision

SS 102(5), 102(a) (6) Assessment Act and ss 107(4), 107A(6) provide the court may give reasons for decision in short form when the Full Court dismisses an appeal and is satisfied that the appeal does not raise any question of general principle: former O32 r19AA (FLR 1984).

Part 22.7: Applications in relation to appeals

Rule 22.42: Application of Part 22.7

This Part applies to all appeals and sets out the process for all applications that can be made before and during the course of an appeal. The Part is broken into three Divisions:

Division 22.7.1 - general, which sets out the general procedure to bring an application;

Division 22.7.2 - applications for permission to appeal

Division 22.7.3 - other specific applications.

The substantive law in relation to the procedure to be followed has not changed significantly from current practice.

Rule 22.43: Filing an application

All applications are made by filing a Form 2 and an affidavit. There is no discrete form for these applications. The Form 2 has a box to indicate that it is an application in relation to an appeal. . The Court retains the discretion to entertain an oral application (Rule 11.01).

Chapter 24 applies in relation to filing of the documents and Chapter 7 in relation to service see Rule 7.04 and 7.03(12).

Rule 22.44: Hearing date of application

When the application is filed, depending on the nature of the application and the nature of the appeal the application will either be listed for hearing by the Court (eg if it is an application which can only be heard by the Full Court) or referred to a judge in chambers for consideration.

Subrule (3) sets out the date which may be allocated for the hearing of the application.

Rule 22.45: Decision without oral hearing/absence of the parties

This rule extends the general power of the Court to determine an application in an appeal without an oral hearing and in the absence of the parties if the parties agree. If the application is to be dealt with without an oral hearing Part 5.4 applies and the parties must file supporting submissions in accordance with Rule 5.17.

Division 22.7.2: Applications for permission to appeal

Rule 22.46: Time for filing

The Form 2 and affidavit must be filed within 28 days from date of the decision appealed against. The rule provides where the documents must be filed and what the affidavit must contain. The application may be referred to a judge in chambers who make procedural orders or direct that it be listed for a procedural hearing.

If it is an application relating to a decision of a federal magistrate, the regional appeals registrar will send the relevant documents to the Senior Administrative Judge (Full Court) to determine whether the jurisdiction of the Family Court is to be exercised by the Full Court or a single judge.

Rule 22.47: Notice of application to others

Notice must be given by the applicant/appellant to the Court appealed from and the child support registrar if it relates to the child support legislation.

Rule 22.48: Orders about conduct of application

This rule was formerly O32A rr 8, 9 (FLR 1984) and does not change existing practice.

At the hearing of the application, the Court may determine the application only, may grant permission on conditions or in granting permission to appeal proceed immediately to determine the appeal.

Division 22.7.3: Other applications

This Division sets out special rules relating to other specific applications including security for costs (Rule 22.49), expediting an appeal (Rule 22.50) and further evidence on appeal (Rule 22.51) and review of an appeal registrar's decision (Rule 22.52). There is no change to existing practice. All of these applications are made on a Form 2.

Part 22.8: Concluding an appeal

Rule 22.53: Consent orders

This rule confirms that parties can conclude an appeal by seeking consent orders and provides a process for this**.**

Rule 22.54: Discontinuance

An appellant can discontinue (withdraw) an appeal by filing a Form 10 in which event they must pay the respondent's costs unless the court orders otherwise.

Rule 22.55: Dismissal of appeal

This is a new rule.

A respondent to an appeal can apply in a Form 2 for an order that the appeal be dismissed on the basis that it is incompetent for example commenced out of time or commenced when leave to appeal was required.

Rule 22.56: Abandoning appeal

An appeal is taken to have been abandoned at the end of 28 days from the date that the pre-argument statement or appeal books should have been filed and three months after the draft index to appeal books should have been filed.

As an appeal includes a cross appeal, this rule applies equally to cross appeals.

If an appeal is abandoned the appellant may be ordered to pay the respondent's costs.

Rule 22.57: Application for reinstatement

Application can be made on a Form 2 for an appeal (which is deemed to be abandoned under Rule 22.57), to be reinstated. This rule provides a guide as to the factors the Court requires to be addressed in relation to such an application.

Rule 22.58: Dismissal - want of prosecution

This rule was formerly O32 r18 (FLR 1984) and provides that the Court can dismiss an appeal for want of prosecution of its own motion as well as upon application provided due notice is given to the appellant.

Part 22.9: Appeals to High Court

Rule 22.59: Application for certificate to appeal to High Court

This is in the same terms as former O32 r20 (FLR 1984) except the time allowed is 28 days for consistency.

Part 22.10: Case stated

Rules 22.60 to 22.66

This part is in similar terms to the former O 32 r21 (FLR 1984). There is no change to existing practice but the process is set out in clearer terms.

CHAPTER 23 - Registration of documents

As to registration of orders under ss 66S and 70C, 70D and 70E see Regulation 17

Rule 23.01: Registration of agreements

This rule provides how to register an agreement in the Court where there is a provision enabling registration such as child support agreements under s.95 Child Support Assessment Act.

Rule 23.02: Registration of debt due to the Commonwealth

This was formerly O26 r4 (FLR 1984).

Part 23.2: Parenting plans - revocation agreements

Rules 23.03 to 23.05

A party can no longer register a parenting plan until Part VII Division 4 of the Act (FLAA 2003).

This Part applies to a request by a party to register an agreement revoking a registered parenting plan provided for in the legislation.

CHAPTER 24 - Documents, filing, registry

Part 24.1: Requirements for documents

Rule 24.01 General Requirements

This rule combines and revises former O2 rr 2 and 5 (FLR 1984). New provisions include allowing printing on both sides of the paper and providing what must be included at the top of a document which is not a prescribed form to enable its recognition and proper management when filed. This is particularly important for documents which are to form part of the court record when filed for example, a notice of objection to hearing in the absence of the parties (e.g. Rule 3.10) and requests for listing for procedural hearing from an expert (Rule 15.60), enforcement officer (Rule 20.19), a sequestrator (Rule 20. 45) or Marshal (Rule 21.17).

The requirements in subrule (1) do not need to be strictly complied with if the nature of the document, or the manner of filing, means that strict compliance would be impracticable in for example filing by electronic communication may make it impracticable to comply with Subrule (1) (f).

Subrule 4 provides that a document (other than an affidavit) may be signed or given by a party or by the lawyer for the party.

Rule 24.02: Corporation as a party

This rule requires that where a Corporation is a party the Corporation's registered office and Australian business number be included in a document filed.

Rule 24.03: Change of name of party

This rule requires that a party notify the Court if their name changes and that the other party must then use that name in all documents filed.

Rule 24.04: Compliance with forms

Strict compliance with a Form in Schedule 2 is not required. A document in a form prescribed for the Federal Magistrates Court is taken to be in substantial compliance with the form prescribed for the same purpose in the Family Court Rules.

Part 24.2: Filing documents

Rule 24.05: How a document is filed

This rule provides that a document is filed if it is delivered, posted or transmitted to the registry and the filing fee (if any) is paid or waived and the Registry Manager has accepted the document for filing by marking the date of filing on it. A document is also filed if it is accepted for filing by a judicial officer in court during a court event. The only document that must be sealed when is filed is a subpoena.

Subrule (4) provides that if a document is sent for filing by electronic communication after the filing registry is closed it is taken to have been received on the next day that the Registry is open.

Rule 24.06: Filing a document by facsimile

This rule sets out the only circumstances in which a document sent by facsimile will be accepted for filing.

Rule 24.07: Filing by e-mail and Internet

Subrules (1) and (2) set out the only circumstances in which a document sent by e-mail will be accepted for filing.

Subrule (3) provides that if a document (other than an Acknowledgement of service (Form 6)):

(a): is filed by electronic communication; and

(b): is required to be signed, but not sworn;

the document is taken to be signed, before it is transmitted, by the party or lawyer who filed it.

This subrule cannot apply to an Acknowledgment of Service (Form 6) attached to an Affidavit of Service, because the signature must appear on the Acknowledgment of Service for the deponent of the affidavit of service to be able to identify it.

Subrule (4) provides that if a document that is required to be sworn is filed by electronic communication, the document:

(a): is taken to have been sworn by the deponent before it is transmitted; and

(b): must bear the name of the deponent, witness and date of swearing.

A person who files a sworn document by electronic communication, must keep the printed form of the document bearing the original signature and make it available for inspection on request.

Rule 24.08: Additional copies for filing

This rule sets out the requirement that a person filing a document must provide sufficient additional copies for service. This is a general rule which applies to all documents filed to avoid repeating the information each time a rule provides for a form to be filed.

Rule 24.09: Documents filed during a case

During a case, all documents must be filed in the filing registry. This is a general rule which applies to all documents filed to avoid repeating the information each time a rule provides for a form to be filed.

Rule 24.10: Refusal to accept document for filing

This rule sets out the circumstances in which a Registrar may refuse to accept a document for filing. There is no change to existing practice.

Rule 24.11: Filing of notice of payment into court

This rule is inserted to provide a process as required by various sections of the Act and Rule 19.30 (1) (b).

Part 24.3: Registry records

Rule 24.12: Removal of document from registry

This rule provides the only circumstances in which a document may be removed from a Registry.

Rule 24.13: Searching court record and copying documents

This rule provides who may search and request information from the Court file. There is no change to existing practice.

CHAPTER 25 - Applications under Corporations Act 2001

Rule 25.01: Application of chapter 25

Part 9.6A of the Corporations Act 2001 (C'W) confers original jurisdiction on the Family Court with respect to civil matters arising under the Corporations legislation (see ss. 1337C(1); 1337J and 1337L). This Division applies only to an application brought pursuant to that Act which is started in a Family Court or transferred to a Family Court.

Rule 25.02: Application of Corporations Rules

This provides that the Federal Court (Corporations) Rules 2000 apply to an application in a Family Court under the Corporations Act unless the court orders otherwise or unless modified by rule 4.38. The effect of this is that the procedure including Forms in the Corporations Rules apply to proceedings brought in the Court or transferred to the Court relying on the Corporations Act for jurisdiction.

The Federal Court (Corporations) Rules 2000 are based on Model Rules finalised by the Council of Chief Justices of Australia and New Zealand in 1999. Those Model Rules were prepared so that they could be adopted uniformly by different jurisdictions.

Rule 25.03: Modification of Corporations Rules

The Corporations Rules are modified in the way set out in this rule the effect of which is that:

* the powers delegated or conferred by those Rules on judicial registrars is delegated to both SES registrars and judicial registrars of the Family Court; and

* the reference to the procedure for a case stated is modified so that the Family Law Rules apply instead of the Federal Courts Rules.

Rule 25.04: Application under Corporations Act 2001

In case there is confusion as to which Form to use, this provides that an application under the Corporations Act 2001 must not be dismissed because it is in the wrong form**.**

Under the Corporations Rules, Form 2 is used for an originating process and Form 3 is used for interlocutory process. Both must be supported by an affidavit and must be listed for hearing on the first court date though no time limit is provided in the Rules. The listing of such an application would need to be arranged with the Listing Judge.

Rule 25.05: Transfer of case under Corporations Act 2001

A party who seeks to transfer a case brought under the Corporations Act to another court or procedural orders about the conduct of a case does so by filing a Form 2 and an affidavit. Paragraph (b) specifies what must be addressed in the affidavit.

An application to transfer a case must be listed for hearing by a Registrar, judicial registrar or a judge 28 days after filing.

SCHEDULE 1 - Pre-action procedures

This schedule sets out the actual procedures that the court expects parties to follow before starting a case as required by r1.05. See explanation under that rule.

SCHEDULE 2 - Forms

Form 1 - Application for final orders

This is the application used to make an application for property, parenting, child support, maintenance, special medical procedures, validity, nullity and passport. It replaces the Form 2, 3, 6, 12, 35, 63 and 64. The Form 1 incorporates the information formerly contained in the Information sheet. The affidavit at the end of the form requires the applicant to swear:

(1): that the orders sought are supported by the evidence which was included as a result of recommendation 17 of 1989 ALRC report ;and

(2): that they are aware of the duty of disclosure.

Form 1A - Response to application for final orders

This form is used to respond to the Form 1 and to apply for orders in a new cause of action. It replaces the Form 3A, 14, 12B.

Form 1B - Reply

This form is used to reply the new cause of action raised in the Form 1A. It replaces Form 3B

Form 2 - Application in a case

This application is used to seek orders other than final orders. It replaces the Form 8, 45B, 46, 42A, 44, 67.

Form 2A - Response to application in a case

This form is used to respond to the Form 2 and to apply for orders in a new cause of action. It replaces the Form 8A.

Form 3 - Application for a divorce

This form replaces the Form 4.

Form 3A - Response to application for divorce

This form replaces the Form 13.

Form 4 - Notice of child abuse or risk of abuse

This form replaces the Form 66.

Form 5 - Notice by person entitled to intervene

This form replaces the Form 65.

Form 6 - Acknowledgment of service

This form replaces the Form 19.

Form 7 - Affidavit of service

This form replaces the Forms 20, 21 and 22.

Form 8 - Notice of address for service

This form replaces the Form 18.

Form 9 - Notice of ceasing to act

This form replaces the Form 54 and 55.

Form 10 - Notice of discontinuance

This form replaces the Form 15A and 42B.

Form 11 - Application for consent orders

This form replaces the Form 12A.

Form 12 - Notice of non party production of documents

This is a new form which is served on a person who is not a party to a case requesting that that person produce documents for inspection and copying. If the request is ignored or refused the party may apply for an order for disclosure. See Part 13.4.

Form 13 - Financial Statement

This form replaces the Form 17.

Form 14 - Subpoena

This form replaces the Form 36.

Form 15 - Notice disputing costs

This form replaces the Form 57.

Form 16 - Enforcement Warrant - seizure and sale of property

This form is a new form which is issued on the application of a person owed money under an order, agreement or child support liability, directed to an enforcement officer to seize and sell the property of the debtor. See Division 20.6.

Form 17 - Third Party Debt Notice

This form is a new form which is issued on the application of a person owed money under an order, agreement or child support liability, directed to a third person to attach money owing by that third party to the debtor. See Division 20.7.

Form 18 - Application - contravention

This form replaces the Forms 48 and 49 and is used by a person who wishes to apply for a person to be punished for contravention of an order. See Chapter 21.

Form 19 - Application - Contempt

This form replaces the Form 47 and is used by a person who wishes to apply for a person to be punished for contempt of court. See Chapter 21.

Form 20 - Notice of appeal

This form replaces the Forms 42, and 43 and is used for all appeals.

Form 60 - Offer to Settle

This form replaces the Form 60.

SCHEDULE 3 - Itemised Scale of Costs

The scale of costs has been updated and the language modernised. The amount to be charged for items have been amended to reflect the change in the way the item is to be charged but apart from the amount for photocopying the amounts have not been reduced from the amounts payable under the existing rules.

Criticisms of the current scale include

* It is complex and outdated;

* It has not kept up with changes in practitioners' work practices, particularly in the area of Information Technology;

* It provides no guide to litigants of the total amount of costs that they will be required to pay at certain stages of a case or that they might be ordered to meet in the event that a party and party costs order is made against them.

These criticisms have been addressed in the revised Rules in the following ways:

* by the retention in the rules of the requirement that lawyers keep their client informed about costs at each stage;

* by the retention in the rules of the requirement that there be an exchange between the parties of the notices about costs;

* by the inclusion of a rule which provides that when an offer of settlement is made the client must be told the amount of the costs so they can work out what the net result for them would be if the offer is accepted;

* the language in the scale has been modernised and the items have been simplified.

SCHEDULE 4 - Conduct money and witness fees

This is a new schedule which fixes a minimum amount payable for conduct money. It has been inserted for educative purposes and to provide more certainty and uniformity across the Registries of the Court.

SCHEDULE 5 - Guidelines for Conferences of expert witnesses

Practice Direction 2/2003 "Guidelines for Expert Witnesses and those instructing them in proceedings in the Family Court of Australia" will be withdrawn on the commencement of these Rules. Part 15.5 and the Guidelines in this Schedule will contain a complete code of the court's practice procedure and guidelines in this area. These provisions were not appropriate for Rules of Court.

DICTIONARY

The terms defined are principally the ones that are specific to the legislation in some way -- for example because they have been specially invented. Ordinary dictionary words are not normally defined; they are assumed to take their ordinary dictionary meanings. Terms defined in the Act take the same meanings in the Rules. Legal terms also are not normally defined; again, they are assumed to have their ordinary legal meanings.

The Rules use many technical terms. A term of which the meaning is well known within family law and generally accepted is usually not defined. Occasionally a term that is in general use may be defined because the general meaning of the term is not sufficiently precise (for example, "applicant includes cross applicant".

EXPLANATORY GUIDE

The explanatory guide is for the assistance of the audience in the use of the Rules. It is not a part of the rules.

FOOTNOTES:

[1] This type of service applies, in the main, to applications seeking orders which affect substantive rights and documents such as subpoenas upon which a warrant for arrest may be issued for non- compliance.

[2] Chief Justice Paul de Jersey AC "Experts, adversarialism, a non-partisan solution: Queensland's draft rules" 20th June 2003