# DRAFTING PLEADINGS INVOLVING THIRD PARTIES IN FAMILY COURT LAW MATTERS

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## ***PLEADINGS***

The logical point to start this discussion is to look at the nature and purpose of pleadings.

In *Bullen & Leake and Jacob' Precedents of Pleadings* 12 ed. The Common Law Library No 5, at Chapter 1, page 3 is stated:

> "*Pleadings are the written statements of the parties in actions begun by writ which are served by each party in turn on the other, setting forth in a summary form the material facts on which each relies in support of his claim or defence, as the case may be. They are the means by which the parties are enabled to state and frame the issues which are in dispute between them, without embarking at that stage on the evidence which each party may adduce at trial. The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the Court will be called upon to adjudicate between them. It thus serves the two-fold purpose of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."*

There are three fundamental principles of pleadings (as set out in Bullen & Leake), namely:

1. each party must plead the material facts on which he relies for his claim or defence; and
2. the material facts stated are deemed to be admitted if not expressly traversed or denied by implied joinder of issue; and
3. any fresh matter must be specifically pleaded which makes the claim or defence not maintainable or which might take the opposite party by surprise or which raises issues of fact not arising out of the previous pleading(s)

In the civil court system, the plaintiff/applicant's formal pleading is in the form of a Statement of Claim and supports a writ.

The writ is the initiating document in which the claimant sets out the relief the "plaintiff" seeks.

The Statement of Claim states the factual matters relied upon to found the relief sought in the writ.

The defendant or respondent files a defence. The defendant is required to admit or deny the allegations made by the plaintiff in the statement of claim – or whatever the initiating claim is said to be – and may file a counterclaim in which it makes a claim against the plaintiff. The Defendant then responds to that counterclaim.

Pleadings do NOT set out the evidence by which the material facts are proved.

When formal pleadings were a part of the family law practice (in the early 90's) there were, from time to time, the inevitable applications to strike out (usually on the basis that no claim was disclosed). One such case was *Epstein and Epstein* (1994) FLC 92-445 in which Treyvaud J said (taking the head note as being accurate):

> "A pleading is merely a recitation of material facts which provide the basis upon which, as a matter of law, the party making the claim is entitled to the orders or relief sought. A person so pleading is not permitted to do more than set out the material facts, is not to plead the law and is not to plead the evidence relied on. "

Ellis J dealt with an application in *Dennis and Dennis (1990) FLC 92-179*. The headnote reads:

The husband filed an application, and the wife a cross-application, after the commencement of the Family Law Rules concerning pleadings.

O. 11 r. 5 provides that a pleading shall:

- (a) be as brief as possible;
- (b)...
    - (i) contain only the material facts on which the party relies;
    - (ii) not include the evidence by which those facts are to be proved;

Both the application and cross-application were struck out.

- The husband's application did not comply with the relevant rules of Court as they were almost in the form of an affidavit expressed in the third person. They were not as brief as possible, and the contents were not limited to only the material facts. Not only that, they did not disclose a valid claim
- The wife's answer and her cross-application also did not comply with the provisions of the Rules.
- The husband's reply was, again, in the form of an affidavit expressed in the third person. The reply was directed only to the answer and not to the cross-application.
- Ellis J., said one of the principal objects of pleadings is to define with clarity and precision the issues or questions which are in dispute between the parties and fall to be decided by the Court. Having read the pleadings in this case, the Court was unable to determine those issues and the pleadings were therefore defective on that basis.
- The Court had undoubted power to dispense with the requirements of compliance with O. 11 (the then ‘pleadings” rule) but the dispensation should only be exercised in those rare cases where the issues between the parties have already been or can be stated with clarity and precision.

Pleadings do not set out the evidence on which a claim is based. The material facts, not the evidence by which those material facts are to be proved, are to be pleaded.

Particulars of a material fact may be pleaded in some part of an application separate from the paragraph containing the material fact, however use of this style can be unnecessarily confusing and in most cases unacceptable.

A defendant reading a pleading should be able to identify a ``particular'' with the ``material fact'' to which it applies without looking at some other paragraph in the pleading. If the pleader is stating his or her case methodically, the particulars should immediately follow the material fact to which they refer. [1]

In *Dare v Pulham* (1982) 148 CLR 658 at page 664, the High Court said:

> *Pleadings and particulars have a number of functions; they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it (Gould and Birbeck and Bacon v. Mount Oxide Mines Ltd. (In liq.) (16); they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial (Miller v. Cameron (17)); and they give a defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into court. Apart from cases where the parties choose to disregard the pleadings and to fight the case on issues chosen at the trial, the relief which may be granted to a party must be founded on the pleadings (Gold and Birbeck and Bacon (18); Sri Mahant Govind Rao, v. Sita Tam Kesho (19)). ...*

## *THE FAMILY LAW SYSTEM OF PLEADING*

The family law system is different from the civil system. There are no formal pleadings (recognised in the Rules) in the sense of a statement of claim and defence etc. The use of pleadings ceased in the Family Court a few years after it was introduced in the early 1990's.

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[1] Brown, Rea & Brown S.L (1991) 15 FamLR 190

The Family Law system uses an 'Initiating Application' in lieu of a writ in which the relief sought is set out together affidavits to set out the factual matters upon which the relief is based. The Initiating Application must be supported by the documents set out in rule 2.02 (see table 2.2) - [2] In most cases, an affidavit is

[2] Table 2.2 Documents to be filed with applications

| Item | Application | Documents to be filed with application |
|---|---|---|
| 2A | Initiating Application (Family Law) in which an order is sought under Part VII of the Act, for example, a parenting order | (a) a certificate given to the applicant by a family dispute resolution practitioner under subsection 60I(8) of the Act; or<br><br>(b) if no certificate is required because paragraph 60I(9)(b), (c), (d), (e) or (f) of the Act applies--an affidavit in a form approved by the Chief Executive Officer unless another affidavit filed in the proceedings sets out the factual basis of the exception claimed<br><br>(c) if the application is for a parenting order in relation to a child born under a surrogacy arrangement--an affidavit in a form approved by the Chief Executive Officer<br><br>Note: Division 4.2.8 of these Rules and section 60HB of the Act relate to children born under surrogacy arrangements. |
| 2B | Initiating Application (Family Law) in which an order is sought relating to a de facto relationship | (a) the documents required by an item in this table that applies to the application (for example items 2A to 6 and 9); and<br><br>(b) to satisfy the court for section 90SB of the Act that the relationship is or was registered under a prescribed law--the certificate of registration; and<br><br>(c) for an applicant who has made a choice under subitem 86A(1) or 90A(1) of Schedule 1 to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* --a document that satisfies the requirements of subitem 86A(5) or 90A(5) of that Act |
| 3 | Initiating Application (Family Law), or Response to Initiating Application (Family Law), in which financial orders are sought, for example, property settlement, maintenance, child support | a completed Financial Statement (see rule 13.05) |

| | | |
|---|---|---|
| 4 | Initiating Application (Family Law) or Response to Initiating Application (Family Law) in which property settlement orders are sought, and Reply responding to Response to Initiating Application (Family Law) in which property orders are sought as a new cause of action | (a) the documents mentioned in this column in item 3;<br><br>(b) a completed superannuation information form (attached to the Financial Statement) for a superannuation interest of the party filing the Initiating Application (Family Law), Response or Reply to an Initiating Application (Family Law) |
| 5 | Initiating Application (Family Law) or Response to an Initiating Application (Family Law) relying on a cross-vesting law, or seeking an order under Part 4.2:<br><br>*□ for a medical procedure;<br><br>*□ for step-parent maintenance, if there is consent;<br><br>*□ for nullity of marriage;<br><br>*□ for a declaration as to validity of a marriage or divorce or annulment; or<br><br>*□ relating to a passport | an affidavit (see section 66M of the Act and rules 4.06, 4.09, 4.29 and 4.30) |
| 6 | Initiating Application (Family Law) or Response to an Initiating Application (Family Law) in which a child support application or appeal is made | the documents mentioned in rule 4.18 for the application |
| 7 | Application for interim, procedural, ancillary or other incidental orders in an Initiating Application (Family Law) or Application in Case (other than an application seeking review of a decision of a Registrar or Judicial Registrar) | an affidavit (see rules 5.02 and 9.02) |
| 9 | Application for Consent Orders | (a) if the orders sought are for a de facto relationship--one of the documents mentioned in this column in item 2B;<br><br>(b) if the orders sought relate to a superannuation interest--proof of the value of the interest (see subsection 90MT(2) of the Act) |
| 10 | Application--Contravention, other than an application to which item 10A applies | an affidavit (see subrules 21.02(2) and (3)) |
| 10A | Application--Contravention in which an order is sought under Part VII of the Act | (a) an affidavit (see subrules 21.02(2) and (3)); and<br><br>(b) either:<br><br>(i) a certificate given to the applicant by the family dispute resolution practitioner under subsection 60I(8) of the Act; or |

required to be filed – save and except under items 3 & 4 where only financial orders are sought. Further, in the Family Court, where a party seeks final orders only, an affidavit is not filed with the Initiating Application.

More particularly, Rule 5.02 of the Family Law Rules provides that a party who applies for an interim, procedural, ancillary or other incidental order in an Initiating Application (Family Law), or who files an Application in a Case, must at the same time file an affidavit stating the facts relied on in support of the orders sought.

Affidavits may only be relied upon if they are filed and served in accordance with the Rules (see r 15.06 and *F and S* (2005) FLC ¶93-208) and **may only be relied upon for the purpose of the application for which it was filed**.

Rule 15.08 sets out the requirements of affidavits generally.

> "An affidavit must:
>
> (a) be divided into consecutively numbered paragraphs, with each paragraph being, as far as possible, confined to a distinct part of the subject matter;
>
> (b) state, at the beginning of the first page:
>
> (i) the file number of the case for which the affidavit is sworn;
>
> (ii) the full name of the party on whose behalf the affidavit is filed; and
>
> (iii) the full name of the deponent;
>
> (c) have a statement at the end specifying:
>
> (i) the name of the witness before whom the affidavit is sworn and signed; and

| | | |
|---|---|---|
| | | (ii) if no certificate is required because paragraph 60I(9)(b), (c), (d), (e) or (f) of the Act applies--an affidavit in a form approved by the Chief Executive Officer unless another affidavit filed in the proceedings sets out the factual basis of the exception claimed |
| 11 | Application--Contempt | an affidavit (see subrule 21.02(2)) |

(ii) the date when, and the place where, the affidavit is sworn and signed; and

(d) bear the name of the person who prepared the affidavit."

In the Federal Circuit Court family law jurisdiction, *rule 15.25* makes similar provision in that it provides the affidavit must be divided into consecutively numbered paragraphs with each paragraph being confined, as far as possible, to a distinct part of the subject matter of the claim.

Affidavits provide notice to the respondents of the nature of the evidence in the case, so as to prevent the hearing of the case being postponed or adjourned by reason of surprise in the material. The purpose of Affidavit evidence is to enable a party to put his or her material:

(a) in a clear form
(b) organised in a convenient way and
(c) in a way which may be referred to conveniently in the evidence of other witnesses.

Care should always be taken in drawing affidavits. When sworn, they become testimony and must be absolutely true. Affidavits, in the family law jurisdictions, are the 'first notice' of the grounds of the claim or response. They should be very carefully prepared. Not only must you comply with the technical requirements, including not more than one distinct part of the subject matter in each paragraph but the deponent may always be cross examined and held to account on his or her sworn testimony at a later stage. There are serious consequences for false testimony – and it is not an excuse that an affidavit was prepared in haste.

A finding that a deponent has sworn to something false is extremely damaging (if not critical) to what might otherwise be a good case. Always bear in mind that you will later be trying to convince a judicial officer to accept your client's testimony in order to succeed in your case!

In the family law jurisdiction, pleadings are not to guide the preparation of the affidavit. The affidavit serves the dual purpose of setting up the grounds for the remedy your client seeks as well

as setting out the evidence upon which it is based. Be very careful to keep affidavits relevant to the issues in the case. The Honourable Justice Graham said in a Regional CLE in Albury for the College of Law CLE program entitled "*Family Law Pleadings 90/10.1"*:

> "*At least in the initial stages custody affidavits should be confined to the matters directly relevant, namely, the formal details, a statement of circumstances by which the parties came to be separated, their current circumstances, the circumstances of the children and some detail about their proposals for the children"…*

The address by the Honourable Justice Graham was part of what appears to have been a series of lectures to introduce the use of pleadings in the Family Law arena in or about 1990.

An advantage of the use of affidavit evidence is that all parties can consider whether or not the evidence of various deponents is of such importance that the deponent is ultimately required for cross examination or whether the affidavit is accepted into evidence unchallenged.

If all of the affidavit evidence is before the court at the beginning of the hearing, each party has a clear view of what issues need to be pursued in cross-examination. At least, in theory, there ought to be focus on the 'real' issues – i.e., those which will make a difference. Contrast that situation to a system operating on oral testimony. Subsidiary witnesses are required to be called to give evidence of what may be fairly minor matters in the overall scheme of things

A wide range of issues can arise in a parenting case, so the use of affidavit evidence is said to be one of the most practical means for keeping the case within a reasonable compass.

Whether a case is initiated or pleaded via a Statement of Claim or via affidavit, the fundamental principle remains the same:

- You need to know what are the elements you need to prove to support the relief sought
- The claim (in whichever, or whatever, form it is set out) must address the **relevant** elements.

- If a matter is not related to a relevant element – then it is irrelevant – and prima facie should not be included.

In *Ensabella and Ensabella* (1980) FLC ¶90-867, Fogarty J outlined his view of the appropriate way in which affidavit evidence should be presented in a parenting matter. His Honour said at p 75,504:

> "*It is, I think, being increasingly recognised that* ***at least in the initial stages custody affidavits should be confined to the matters directly relevant, namely, the formal details, a statement of circumstances by which the parties came to be separated, their current circumstances, the circumstances of the children and some detail about their proposals for the children****. Only subsequently when the various conciliatory processes of the court have been exhausted may it become necessary to refer to the past history of the matter in more detail. But even then the spirit and purpose of the Act must be steadily borne in mind and such matters* ***should only be included where they really are relevant*** **to the ultimate issue — the future of the children.**"

His Honour said (at p 75,504):

> *"Past events in the marriage are rarely of real significance except to the extent that they may reflect upon the character or personality of one or both of the parties as a future custodian. Consequently it is a matter for professional judgment whether such past events ought to be included in the material at all and, if so, the extent that they should occur."*

The applicant had filed an affidavit in which irrelevant material had been set out at length and in which material that was only of marginal relevance had been dealt with at excessive length. Fogarty J held that the affidavit had been "grossly unreasonable". The court considered the amount of costs to which the husband had been put in replying to that lengthy affidavit and assessed the affidavit as being at least 50% too long and accordingly ordered the wife to pay one-half of the husband's costs of preparing his affidavit in reply.  Section 117(2) enables a Court to take into

account the conduct of a case, including relevancy of material in determining whether or not to make an order for costs.

The reference to the various conciliatory processes in the first part of the quotes above highlights one of the main differences between a 'family law' action and a civil action (most of the third party claims that come before the Courts exercising family jurisdiction are in the nature of civil claims). His Honour warned that inflammatory material should NOT be included at the initial stages so as to give matters proceeding through the conciliation processes the best chance of success in reaching a resolution with little damage to the humans involved.

*Ensabella* (in which it seems those who crafted the affidavits bore criticism for including too much material) should be contrasted with *McGrath & McGrath* (1988) FLC 91-922 esp. at 76,678 (in which those who crafted the affidavits bore criticism for a complete lack of relevant material):

> *14. The initial affidavits filed on behalf of the wife in support of her application are of an abysmal standard. Her first affidavit in support of her property application failed to recognise many of the matters which the Act requires the Court to take into account in such proceedings and those issues on which it does touch are dealt with in an appallingly superficial manner.*
>
> *15. I do not know when counsel received their respective briefs in the matter. However, it is clear that neither party's case received the benefit of the attention and professional competence which members of the public are entitled to expect from qualified members of the legal profession.*
>
> *16. I have no doubt that if the parties had received proper legal representation the proceedings would have been concluded on the first day and the parties would have avoided the expenses and delay involved in two adjournments and two further days of hearing.*
>
> *17. The Court has inherent general powers in relation to ordering costs to be paid by legal representatives and some specific powers (e.g. O. 38 r. 39).*

18. *On the face of it appears that the two adjournments arose because of the failure of the solicitors to comply with orders and to file and serve affidavits within a reasonable time and that probably the appropriate order is for the solicitors to pay the costs of the parties for two days of hearing. Perhaps orders should be made for the costs concerning particular affidavits to be paid by the solicitors who drew them.*

19. *If either of the parties wishes to make an application for an order for costs against either of the solicitors, then it is appropriate that that party be advised and represented by other solicitors for the purposes of the application and I propose to grant leave to both parties to restore the matter to the list for the purpose of seeking such orders for costs as they may see fit.*

In *Baines and Baines (No 2)* (1981) FLC ¶91-063 the Full Court said at 76,497:

> The affidavit material, if properly prepared, can define the issues which are involved so that when the case commences both counsel and the trial Judge are aware what the real issues are. If it appears that the parties have mistaken what the real issues should be, the trial Judge has a duty to dissuade parties from presenting material of remote or tenuous relevance and if necessary should exclude such material as a matter of exercise of discretion."

As referred to in relation to the Initiating Application earlier, there are restrictions on filing affidavits in the initial stages of a matter. There are specific rules relating to the Response material – see, for example, rule 9. [3]

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[3] **Part 9.1—Response to an Initiating Application (Family Law)**

**9.01 Response to an Initiating Application (Family Law)**

(1) A respondent to an Initiating Application (Family Law) who seeks to oppose the orders sought in the application or seeks different orders must file a Response to an Initiating Application (Family Law).

There are some applications under the *Family Law Act* in which the Court may be assisted by ordering pleadings so in matters where there are specific grounds required to make an order, those rounds are set out.

For example, section 106B of the *Family Law Act 1975* provides:

*"106B (1) In proceedings under this Act, the court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, which is made or proposed to be made to defeat an existing or anticipated order in those proceedings or which, irrespective of intention, is likely to defeat any such order.*

*106B (1A) If:*

- *(a) a party to a marriage, or a party to a de facto relationship, is a bankrupt; and*
- *(b) the bankruptcy trustee is a party to proceedings under this Act; the court may set aside or restrain the making of an instrument or disposition:*

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(2) A Response to an Initiating Application (Family Law) must:
  (a) state the facts in the application with which the respondent disagrees;
  (b) state what the respondent believes the facts to be; and
  (c) give full particulars of the orders the respondent wants the court to make.

(3) In addition to the matters in subrule (2), a Response to an Initiating Application (Family Law) may:
  (a) consent to an order sought by the applicant;
  (b) ask that the application be dismissed; or
  (c) ask for orders in another cause of action.

(4) A Response to an Initiating Application (Family Law) must not include a request for any of the following orders:
  (a) a divorce order;
  (b) an order that a marriage be annulled;
  (c) a declaration as to validity of a marriage, divorce or annulment;
  (d) an order under Division 4.2.3 authorising a medical procedure.

- *(c) which is made or proposed to be made by or on behalf of, or by direction or in the interest or, the bankrupt; and*
- *(d) Which is made or proposed to be made to defeat an existing or anticipated order in those proceedings or which, irrespective of intention, is likely to defeat any such order.*

*106(1B) If:*

- *(a) party to a marriage, or a party to a de facto relationship, is a debtor subject to a personal insolvency agreement; and*
- *(b) the trustee of the agreement is a party to proceedings under this Act; the court may set aside or restrain the making of an instrument or disposition:*
- *(c) which is made or proposed to be made by or on behalf of, or by direction or in the interest of, the debtor; and*
- *(d) which is made or proposed to be made to defeat an existing or anticipated order in those proceedings or which, irrespective of intention, is likely to defeat any such order.*

*106B (2) The court may order that any money or real or personal property dealt with by any such instrument or disposition referred to in subsection (1), (1A) or (1B) may be taken in execution or charged with the payment of such sums for costs or maintenance as the court directs, or that the proceeds of a sale shall be paid into court to abide its order.*

*106B(3) The court must have regard to the interests of, and shall make any order proper for the protection of, a bona fide purchaser or other person interested.*

*106B(4) A party or a person acting in collusion with a party may be ordered to pay the costs of any party or of a bona fide purchaser or other person interested of and incidental to any such instrument or disposition and the setting aside or restraining of the instrument or disposition.*

*106B (4AA) An application may be made to the court for an order under this section by:*

- *(a) a party to the proceedings; or*
- *(b) a creditor of a party to the proceedings if the creditor may not be able to recover his or her debt if the instrument or disposition were made; or*
- *(c) any other person whose interest would be affected by the making of the instrument or disposition."*

*106B (4A) In addition to the powers the court has under this section, the court may also do any or all of the things listed in subsection 80(1) or 90SS (1).*

*(5) In this section:*

***"disposition"** includes:*

*(a) a sale or gift; and*

*(b) the issue, grant, creation, transfer or cancellation of, or a variation of the rights attaching to, an interest in a company or a trust.*

***"interest"**:*

*(a) in a company includes:*

*(i) a share in or debenture of the company; and*

*(ii) an option over a share in or debenture of the company (whether the share or debenture is issued or not); and*

*(b) in a trust includes:*

*(i) a beneficial interest in the trust; and*

*(ii) the interest of a settlor in property subject to the trust; and*

*(iii) a power of appointment under the trust; and*

*(iv) a power to rescind or vary a provision of, or to rescind or vary the effect of the exercise of a power under, the trust; and*

*(v) an interest that is conditional, contingent or deferred*."

In respect of section 106B applications, Treyvaud J set out the matters necessary to be established in *Gelley and Gelley (No 2)* (1992) FLC ¶92-291 at p 79,153):

- *"1. There are on foot proceedings under the Act, or completed proceedings the orders from which still have force and effect.*
- *2. The instrument or disposition has been made, or is proposed to be made.*
- *3. The instrument or disposition is any one of a series of transactions by which that disposition is carried out.*
- *4. The instrument or disposition is intended to defeat the order, existing or anticipated, and has that effect, or, irrespective of intention, is likely to defeat such order.*
- *5. The order defeated, or likely to be defeated, must be existing, or anticipated; it is not an anticipated claim.*
- *6. Insofar as the order be anticipated, it is one anticipated by the reasonable disposer at the time of the disposition, properly considering all the circumstances of the case.*
- *7. The effect of the instrument or disposition is that the disposer lacks the capacity to satisfy the orders unless the instrument or disposition be set aside.*
- *8. The onus of proof, on the civil standard, is upon the applicant."*

The 'check list' at items 1 – 7 sets out the matters the applicant will need to prove. An applicant seeking to set aside a disposition under section 106B could easily plead those matters – and whilst not setting out the evidence in support, can set out the facts and circumstances upon which he or she (or it) will rely to establish

each of the matters set out. He, she or it ought to be able to do so – if not, then the case will not succeed.

In *Milligan & Milligan and Anor* [2017] FamCAFC 218; (2017) FLC ¶93-811 the Full Court of the Family Court said (in a section 106B case) at [47]:

> *"With all respect to those involved,* ***insistence upon a pleading (in whatever form might be thought appropriate with appropriate particularity) would have, and should have, established precisely what 'instrument or disposition' was relied upon by the wife. In particular, a properly particularised pleading would have, and should have, made clear whether a series of transactions was asserted to comprise the relevant disposition; how those transactions were asserted to be linked and causative; and how it was said that intention to defeat was established or in the alternative, how it was said that the pleaded instrument or disposition was likely to defeat the existing order.****"*

Section 79A applications [read s.90SN in relation to de facto relationships] also lend themselves to matters under the *Family Law Act 1975* which would benefit from pleading – at least in relation to the threshold question of whether there is a ground to set aside or vary

Whether financial agreements are binding is another area where pleadings may assist the parties and the Court to understand the basis of an application before the Court.

## *THIRD PARTIES*

Within purely 'family law' matters there is an increasing potential for third parties to be joined in the proceedings – either on the application of that third party, or by the actions of one of the parties – within the provisions of the *Family Law Act 1975* and under the Rules of the Family Court and the Federal Circuit Court. The Court also has power to join a necessary party of its own motion.

Rule 6.02 of the Family Law Rules 2004 provides:

(1) A person whose rights may be directly affected by an issue in a case, and whose participation as a party is necessary for the court to determine all issues in dispute in the case, must be included as a party to the case.

Example: If a party seeks an order of a kind mentioned in section 90AE or 90AF of the Act, a third party who will be bound by the order must be joined as a respondent to the case.

In parenting cases, rules 6.02(2) & (3) specifically provide:

(2) If an application is made for a parenting order, the following **must** be parties to the case:

(a) the parents of the child;

(b) any other person in whose favour a parenting order is currently in force in relation to the child;

(c) any other person with whom the child lives and who is responsible for the care, welfare and development of the child;

(d) if a State child order is currently in place in relation to the child—the prescribed child welfare authority.

(3) If a person mentioned in subrule (2) is not an applicant in a case involving the child, that person **must be joined** as a respondent to the application.

Rule 11.01 of the Federal Circuit Court Rules provides:

**Necessary parties**

(1) Subject to any order of the Court, **a person whose participation is necessary for the Court to completely and finally determine all matters in dispute in a proceeding must be included** as a party in the proceeding.

(2) The Court may require a person to be included as a party.

(3) A person required to be included as an applicant who does not consent to be included may be included as a respondent.

(4) The Court may decide a proceeding even if a person is incorrectly included or not included as a party.

Section 79F of the *Family Law Act 1975* provides the rules of Court may specify the circumstances in which a person who applies for an order under Part VIII of the Actor who is a party to proceedings under Part VIII is to give notice to a person who is not a party to the proceedings.

Rule 14.07 sets out the requirement for a person who applies for an order for property adjustment to give notice to each of the persons set out in section 79(10) [or section 90SM (10)] and that the person must be served with a copy of the relevant application and be given notice of the date of the next Court event.

Joinder of a party in the Family Court is provided for in rule 6.03:

**6.03 Adding a party**

(2) A party may add another party after a case has started by amending the application or response to add the name of the party.

(3) A party who relies on subrule (2) must:

(a) file an affidavit setting out the facts relied on to support the addition of the new party, including a statement of the new party's relationship (if any) to the other parties; and

(b) serve on the new party:

(i) a copy of the application, amended application, response or amended response; and

(ii) the affidavit mentioned in paragraph (a); and

(iii) any other relevant document filed in the case.

Note 1: For amendment of an application, see Division 11.2.2.

Note 2: If a Form is amended after the first court date, the Registry Manager will set a date for a further procedural hearing (see subrule 11.10(3)).

Note 3: Pre-action procedures must be complied with by all prospective parties under rule 1.05.

Rule 6.03 provides for an affidavit to be filed setting out the 'new' (or third) party's relationship to the other parties and requires that new party to be served with the application(s) and response(s), the affidavit setting out the facts relied upon to support the addition of that party and any other relevant document filed in the case (presumably the affidavits filed to date, orders made to date, and like documents).

In the Federal Circuit Court, rule 11.02 provides:

> (1) A party to a proceeding may include any person as a party by:
>
> (a) naming the person as a party in the application, response or reply; and
>
> (b) serving on the person a copy of the application, response or reply and all other relevant documents filed in the proceeding.
>
> (2) A party may not include a person as a party after the first court date without the leave of the Court.
>
> (3) The Court may at any time order a party who has included a person as a party to file and serve on each other party in the proceeding an affidavit setting out the basis on which the person has been included.

A third party who is entitled to intervene may do so – if he or she is entitled to intervene without leave then the party can file a "*Notice of Intervention by a Person entitled to Intervene"* together with an Affidavit in support. If the person seeks to become a party to the proceedings but is not entitled to intervene then they must make application by Application in a Case under rule 6.05. That person must apply under section 92 of the *Family Law Act 1975*, and, if the application is granted the person becomes a party. Clearly an applicant would require a proper interest in the proceedings into which he or she seeks to intervene. For example, the Deputy

Commissioner of Taxation sought leave to intervene and an interlocutory injunction to preserve assets of the husband and/or the wife in *Deputy Commissioner of Taxation & Kliman & Kliman*[4]

In all cases, there is a need for both trial judge and all parties (i.e., the original parties and the 'new' party) to be able to identify the nature of the proceedings and the issues for determination. For the third party, obviously that party needs to identify the basis upon which it is said a remedy is sought against it.

Although the rules do not explicitly provide for it, I would suggest there are some cases which lend themselves to filing pleadings – whether termed a statement of claim or defence or points of claim or defence or otherwise. The Courts exercising family law jurisdiction already has the power to order pleadings in appropriate case and does so.

The rules enable the Court to be quite inventive if the need arises!

In the Family Court, rule 11 provides:

**11.01 General Powers**

**The court may exercise any of the powers mentioned in Table 11.1 to manage a case to achieve the main purpose of these Rules (see rule 1.04).**

**Table 11.1 Court's powers**

| Item | Subject | Power |
|---|---|---|
| 1 | Attendance | (a) order a party to attend:<br>(ii) a procedural hearing;<br>(iii) a family consultant;<br>(iv) family counselling or family dispute resolution;<br>(v) a conference or other court event; or<br>(vi) a post-separation parenting program;<br>(b) require a party, a party's lawyer or an independent children's lawyer to attend court |
| 2 | Case development | (a) consolidate cases;<br>(b) **order that part of a case be dealt with** |

[4] [2002] Fam CA 629

| Item | Subject | Power |
|---|---|---|
| | | **separately;**<br>**(c) decide the sequence in which issues are to be tried;**<br>**(d) specify the facts that are in dispute, state the issues and make procedural orders about how and when the case will be heard or tried;**<br>(e) finalise the balance sheet setting out all assets, liabilities and financial resources that either party asserts are relevant to the determination of the case;<br>(f) with the consent of the parties, order that a case or part of a case be submitted to arbitration;<br>**(g) order a party to provide particulars, or further and better particulars, of the orders sought by that party and the basis on which the orders are sought;**<br>(h) order a party to produce any relevant document in a financial case to the court or to any other party for the purpose of developing and finalising the balance sheet |
| 3 | Conduct of case | (a) hold a court event and receive submissions and evidence by electronic communication;<br>(b) postpone, bring forward or cancel a court event;<br>(c) adjourn a court event;<br>(d) stay a case or part of a case;<br>(e) make orders in the absence of a party;<br>(f) deal with an application without an oral hearing;<br>(g) deal with an application with written or oral evidence or, if the issue is a question of law, without evidence;<br>(h) allow an application to be made orally;<br>(i) determine an application without requiring |

| Item | Subject | Power |
|---|---|---|
| | | notice to be given;<br>(j) order that a case lose listing priority;<br>(k) make a self-executing order;<br>(l) make an order granting permission for a party to perform an action if a provision of the Rules requires a party to obtain that permission;<br>(m) for a fee that is required by law to be paid—order that the fee must be paid by a specified date |

Note 1: **The powers mentioned in this rule are in addition to any powers given to the court under a legislative provision or that it may otherwise have**.

Note 2: **Rule 1.10 provides that a court may make an order on its own initiative and sets out what other things the court may do when making an order or giving a party permission to do something.**

I have elsewhere (page 26 footnote 6) referred to the Federal Circuit Court rule 10.01(3) which provides similar wide powers.

It is not uncommon for parties to an action where a claim is made in what might traditionally be termed a "civil matter" – e.g., a declaration of trust in relation to property held in the name of a party but claimed by a third party, or the reverse – a claim that a family member holds property on trust for the parties or one of them.

Often the direction is sought for the filing of points of claim, or a statement of claim, with an order that the respondent file points of defence, or a statement of defence, or alternatively, file an application to strike out the action against it in the event the points of claim do not reveal a claim.

Cronin J in *Martin & Martin (No.4)*[5] ordered "quasi-pleadings" as part of the directions his Honour made in a case involving not only

[5] [2014] FamCA 442

a dispute between husband and wife, but also a third party firm of solicitors seeking to recover its costs:

9. *Whilst all of this might be semantics, there can be little doubt that the protagonists all know what it is that they are fighting about. It is apparent that the husband and wife know that X Firm is asserting that actions were taken by the husband and wife which is said were done to avoid the wife paying them. It is equally apparent that X Firm knows that the husband and wife have reached an agreement under which the settlement would mean that the wife could not pay the sum sought by X Firm. All of those positions can be gleaned from the various arguments that have been put throughout 2014 by all parties.*

10. *Having said that however, it is conceivable that one or all of the parties may have changed their position. To avoid that being a future problem, I consider that a "pleadings" approach would be useful. None of the parties seemed to disagree with that concept although I remain unconvinced whether that had changed the position of anyone.*

11. *I consider the most efficacious way of dealing with this case is to take an old-fashioned two step approach.* ***First, a statement should be made setting out the orders sought and the material facts that support those orders. Once all of those documents have been filed, the second step can be undertaken which is to file the necessary affidavit material which is said to prove those material facts. Whilst this may be old-fashioned or perhaps in the opposite sense, revolutionary, I consider that it can and should be done in this case and that it is a course contemplated within the rules of the Court.***

12. *The* Family Law Rules 2004*, like all rules of court, are designed to assist in the smooth operation of litigation. The main purpose of those rules is to ensure that each case is resolved in a just and timely manner at a cost to the parties as well as to the court that is reasonable in the circumstances of the case* (rule 1.04)*. The court is required to apply the rules to promote the main purpose, and actively manage each case. One such management tool is to identify*

*the issues in dispute early in the case and separate and dispose of any issues that do not need full investigation and trial (rule 1.06(c)). Where a specific practice which can be seen to assist the efficacy of the Court's work, orders can be made for practice and management purposes (rule 1.09).*

13. *The requirement for the concentration of issues can also be seen in the rules. Parties are required in their applications to give full particulars of the orders sought and include all causes of action that could be disposed of conveniently in the same case.*

14. ***The power to order a party to provide particulars and the basis on which orders are sought can be seen in rules 11.01and 16.04[6]***

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5. 16.04 For Part 16.3, the court may make any order about the conduct of the trial, including an order:

(a) related to the issues on which the court requires evidence, including:

(i) the nature of the evidence (including expert evidence) required to decide the issues;

(ii) which witnesses a party may call on a particular issue;

(iii) how the evidence is to be adduced;

(iv) granting permission to issue subpoenas to produce documents or to attend, or both;

(v) preparation by a family consultant of a family report, or requiring the family consultant to undertake other investigations or carry out other tasks having regard to the functions of family consultants set out in section 11A of the Act;

(vi) determining any evidentiary questions that arise;

(vii) the time to be taken for evidence in chief, cross examination or re-examination of witnesses to give evidence, and submissions; or

(viii) the sequence of evidence and addresses;

(b) limiting the time for the presentation of a parties case; or

(c) allocating a date or series of dates for the trial.

15. *There is little doubt therefore that the Court can exercise its discretion about what is filed relating to orders pursued and when. In respect of the second step that I mentioned, rule 15.71permits the Court to determine the order of examination of witnesses.*

16. *The husband and wife began the proceedings between themselves and wanted to conclude them with an order. As is well known and has been previously said, s 79(2) of the Family Law Act 1975 (Cth) ("the Act") requires that the Court must not make orders altering the interests of the parties unless it is satisfied that the orders are just and equitable. Thus, notwithstanding the accusations of X Firm, the husband and wife should put that material first whereupon X Firm should point to the evidence as to why those orders are not just and equitable. At the moment, because of s 79(10) the jurisdiction for X Firm to seek orders is enlivened and as I earlier said, it is not entirely clear what precise orders are sought and what jurisdiction and power is sought that the Court exercise. Thus, X Firm should place those issues clearly in writing (notwithstanding that it is said that those are found in a written submission from January 2014).*

17. *The timetable should then simply follow with the second step of the filing of affidavits and the husband and wife can presume that having received the pleading of X Firm, an endeavour will be made to establish what it wants to prove by that evidence. To the extent that the husband and wife need to reply to that affidavit material, the timetable so provides*.

The Federal Circuit Court has both general and specific powers contained in its rules to manage trials and to decide specific questions – separate from the balance of the matters in issue. The general power is in rule 15.01 (but see also rules 1.07 and 10.01[7].

[7] (3) The Court or a Registrar may make orders or directions in relation to the following:

(a) the manner and sufficiency of service;

(b) the amendment of documents;

Rule 10.01 gives very wide powers to make orders/directions for the determination of a matter.

Section 79(10) of the *Family Law Act 1975* specifically provides for third parties to become parties to property proceedings between spouses to a marriage.[8] (section 90SM (10) in relation to the

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(c) defining of issues;

(d) the filing of affidavits;

(e) cross-claims;

(f) the joinder of parties;

(g) dispute resolution;

(ga) family counselling;

(h) the admissibility of affidavits;

(i) discovery and inspection of documents;

(j) interrogatories;

(k) inspections of real or personal property;

(l) admissions of fact or of documents;

(m) the giving of particulars;

(n) the giving of evidence at hearing (including the use of statements of evidence and the taking of evidence by video link or telephone or other means);

(o) expert evidence and court experts;

(p) transfer of proceedings;

(q) costs;

(r) hearing date;

(s) any other matter that the Court or Registrar considers appropriate.

[8] (10) The following are entitled to become a party to proceedings in which an application is made for an order under this section by a party to a marriage (the ***subject*** marriage ):

(a) a creditor of a party to the proceedings if the creditor may not be able to recover his or her debt if the order were made;

alteration of property interests of *de facto* partners). Section

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(aa) a person:

(i) who is a party to a de facto relationship with a party to the subject marriage; and

(ii) who could apply, or has an application pending, for an order under section 90SM, or a declaration under section 90SL, in relation to the de facto relationship;

(ab) a person who is a party to a Part VIIIAB financial agreement (that is binding on the person) with a party to the subject marriage;

(b) any other person whose interests would be affected by the making of the order.

(10A) Subsection (10) does not apply to a creditor of a party to the proceedings:

(a) if the party is a bankrupt--to the extent to which the debt is a provable debt (within the meaning of the *Bankruptcy Act 1966* ); or

(b) if the party is a debtor subject to a personal insolvency agreement--to the extent to which the debt is covered by the personal insolvency agreement.

(11) If:

(a) an application is made for an order under this section in proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them; and

(b) either of the following subparagraphs apply to a party to the marriage:

(i) when the application was made, the party was a bankrupt;

(ii) after the application was made but before it is finally determined, the party became a bankrupt; and

(c) the bankruptcy trustee applies to the court to be joined as a party to the proceedings; and

(d) the court is satisfied that the interests of the bankrupt's creditors may be affected by the making of an order under this section in the proceedings

**the court must join the bankruptcy trustee as a party** to the proceedings.

79(11) (and s.90SM(11) for *de facto* relationships) provides that the trustee in bankruptcy MUST be joined in proceedings for property settlement if a party was bankrupt at the time the application was made or later becomes bankrupt. PLEASE NOTE that a bankrupt CANNOT commence proceedings in respect of property that forms part of the estate vested in the trustee.

It follows from section 79(10) [s.90SM (10)] that claims can be reasonably anticipated involving third parties in matters involving:

- creditors of a party
- persons who may be affected by virtue of their involvement in another relationship with one of the parties (i.e. de facto partners or former de facto partners, counterparties to a BFA,
- the trustee in bankruptcy, and,
- persons or entities claiming an interest in any of the property of the parties or either of them
- corporations and/or trustees – either as a claimant to property, or because of internal disputes about the entitlement of a party to shares, outstanding loans, share entitlements or dividends, etc.
- There may be an issue raised by a corporation about the transfer of shares to a spouse

There are innumerable potential situations in which a third party might be appropriately joined – applications for removal of caveats, claims for damages for the lodgement of a caveat wrongfully etc; claims in detinue (in which it is alleged a third party is wrongfully holding property … I do not purport to have provided an exhaustive list

The issue that arises is how to manage those competing claims.

There are cases which are transferred to the Family Court from State Courts in which pleadings have already been delivered as part of the process in the State Court. One such example is *Gilchrist & Gilchrist and Anor* (2009) FamCAFC 199.

*Gilchrist* demonstrates that if pleadings are utilised then close attention should be paid to the elements pleaded as giving rise to a remedy. Those pleadings must be followed. If there is to be a

deviation in the evidence against what is pleaded then care must be taken to amend, if necessary. The Full Court found the trial judge fell into error in ordering relief not founded on the pleadings.

The facts were, briefly, the husband's uncle had provided money in connection with the acquisition of property by the husband from his former partner. The husband re-partnered and later sold the property. The sale proceeds were applied, in part to debt and, in part toward a second piece of property (already owned by the husband and wife). None of the proceeds was provided to the uncle.

The wife later commenced property proceedings in the Family Court.

In 2006, the uncle commenced proceedings, raising trust issues, in the NSW Supreme Court.

The State proceedings were transferred to the Family Court and later, Orders and declarations were made to the effect that the husband, and the husband and wife, held certain sale proceeds on trust for the uncle.

The Wife appealed asserting, inter alia that the trial Judge decided the case on matters that were not pleaded.

One matter the wife appealed on was an assertion the trust was a device being used to try to avoid the payment of stamp duty. It was held that, despite the wife's pleading, no submissions of illegality were made at trial, no issues arising from the provisions of stamp duties legislation were raised at trial. Had the question of illegality been raised at trial there may have been matters available to be raised in response. The Full Court found the wife ought not be permitted to raise illegality on appeal.

However, the Trial judge did make a finding that the wife was a constructive trustee with the husband in relation to sale proceeds of the first (sold) property. The question of that trusteeship was not pleaded. The Trial Judge undertook a process of equitable tracing that was not relied upon in the uncle's case as pleaded. It

was held that in ordering relief not founded on the pleadings the trial judge fell into error.

Of particular application to a consideration of the topic of 'pleadings' is the conclusion of the Full Court commencing at para 83:

*83. "We summarise our conclusions in relation to the arguments here considered as follows:*

- *The trial judge found that the wife was a constructive trustee with the husband of the M sale proceeds. That was not pleaded.*
- *The doctrine of "equitable tracing" was not relied upon in Mr Miner's case.*
- *Contrary to Mr Maiden's submissions, there was no pleading that the wife was a trustee for Mr Miner of the B sale proceeds.*
- *There was no basis pleaded for an order that the husband and wife pay the B sale proceeds to Mr Miner.*
- *Had a case that the wife became a constructive trustee of the M sale proceeds, let alone the B proceeds, been pleaded, it may have thrown into much greater relief questions such as whether or not the wife did receive and, if so, to what extent, benefit from the M proceeds by way of the payment of her debts, or whether it was her and the husband's intention that she receive such benefit. As well, it would have brought into focus the question of when the breach of trust actually occurred and whether the wife came to have knowledge of it only after the event.*
- *By proceeding to examine whether the wife had become a constructive trustee of the M sale proceeds, his Honour paid insufficient attention to whether facts had been established to found the claim as pleaded that, by virtue of the M Agreement and the variation to it, the wife had become a trustee with the husband for Mr Miner, of one-half of the M*

*sale proceeds. Some findings that bear on the claim as pleaded are inconsistent with one another.*

*...*

*84. In our view, the parties did not choose to disregard the pleadings or the issues under discussion, so that in ordering relief not founded on the pleadings, Le Poer Trench J fell into error."*

Cases which may be 'cross-vested' from State Courts to the Family Court of Australia lead to the question of what 'pleading' is required (if any).

In *Re: Broman-Clark: Broman and Clark* (1990) FLC 92-115, the applicant mother of an ex-nuptial child took proceedings in the Family Court against the respondent father of the child for custody, child maintenance and a property settlement. The applicant sought to invoke the provisions of the Jurisdiction of Courts (Cross-vesting) Acts 1987 of both the Commonwealth and Victoria.

The applicant's solicitor filed an affidavit in support of the application in accordance with O. 31A r. 4(1) (a) of the Family Law Rules. The affidavit included a statement of the claim being made.

The Court determined to retain the matter in the Family Court.

Counsel raised two issues: (i) whether a formal ``Statement of Claim'' to be followed by a formal set of pleadings was required as under the Victorian Rules of Civil Procedure; and (ii) whether an O. 24 conference could extend to a claim under cross-vesting legislation and therefore whether the Family Court had power to require the parties to attend an O. 24 conference under the Family Law Rules.

It was held that the ``statement of the claim'' as covered in the affidavit adequately complied with the provisions of O. 31A of the Family Law Rules for the purposes of the claim and the appropriate procedure was for the respondent to answer it in an affidavit.

The word ``proceedings'' in O. 24 r. 1 could be widened to include proceedings brought in or proceedings which found their way into the Family Court pursuant to cross-vesting legislation. The application for property settlement was ``proceedings'' within O. 24 r. 1 of the Family Law Rules and could be the subject of a settlement conference. At least within O. 31A the word ``proceedings'' has a different meaning to that contained in the Family Law Act sec. 4(1), a wider meaning to cover all proceedings in the Family Court whether brought under the Family Law Act or under State legislation.

Perhaps the 'quasi-pleading' regime ordered by Cronin J in *Martin & Martin (No 4)* provides a less dangerous path – but the reality is, an application or trial in Court is not a matter of lead the evidence, see what falls and then and then see what "remedy" you can craft from it.

Often in family law matters that can be the approach.

Perhaps it is not entirely our fault as lawyers. We are led to that approach through the parenting style of case – in which the Judge does not have to (and may not) make the orders the parties seek – instead the Orders are to be those which are in the paramount interests of the child. In property matters, the orders made may not be the orders sought by either party – the order must pass the 'just and equitable' test set out in section 79(2) (albeit in both the first step – per *Stanford* and in the last step in the formerly named "four-step" process.

In Part VIIIA of the *Family Law Act 1975* there are specific provisions relating to matters in which an order under section 79 or under section 114 is sought in proceedings, which order might is directed to or which may affect the interest of the third party[9].

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[9] The object of this Part is to allow the court, in relation to the property of a party to a marriage to:

(a) make an order under section 79 or 114; or

(b) grant an injunction under section 114;

that is directed to, or alters the rights, liabilities or property interests of a third party.

PLEASE NOTE that a corporation in which the parties (or one of them) are the only shareholders, in which the parties (or one of them) are the only office holders is nonetheless a third party. Similarly, a trust is a third party – notwithstanding it may be used by the parties simply as a vehicle through which they conduct business or retain assets.

Section 90AE empowers the Court to make 'property' orders which bind third parties.[10] Section 90AF empowers the Court to make

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[10] **Court may make an order under section 79 binding a third party**

(1) In proceedings under section 79, the court may make any of the following orders:

(a) an order directed to a creditor of the parties to the marriage to substitute one party for both parties in relation to the debt owed to the creditor;

(b) an order directed to a creditor of one party to a marriage to substitute the other party, or both parties, to the marriage for that party in relation to the debt owed to the creditor;

(c) an order directed to a creditor of the parties to the marriage that the parties be liable for a different proportion of the debt owed to the creditor than the proportion the parties are liable to before the order is made;

(d) an order directed to a director of a company or to a company to register a transfer of shares from one party to the marriage to the other party.

(2) In proceedings under section 79, the court may make any other order that:

(a) directs a third party to do a thing in relation to the property of a party to the marriage; or

(b) alters the rights, liabilities or property interests of a third party in relation to the marriage.

(3) The court may only make an order under subsection (1) or (2) if:

(a) the making of the order is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage; and

(b) if the order concerns a debt of a party to the marriage--it is not foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full; and

(c) the third party has been accorded procedural fairness in relation to the making of the order; and

(d) the court is satisfied that, in all the circumstances, it is just and equitable to make the order; and

(e) the court is satisfied that the order takes into account the matters mentioned in subsection (4).

orders under section 114 which bind third parties.[11] Orders and injunctions are binding on trustees (and a person who

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(4) The matters are as follows:

(a) the taxation effect (if any) of the order on the parties to the marriage;

(b) the taxation effect (if any) of the order on the third party;

(c) the social security effect (if any) of the order on the parties to the marriage;

(d) the third party's administrative costs in relation to the order;

(e) if the order concerns a debt of a party to the marriage--the capacity of a party to the marriage to repay the debt after the order is made;

Note: See paragraph (3)(b) for requirements for making the order in these circumstances.

Example: The capacity of a party to the marriage to repay the debt would be affected by that party's ability to repay the debt without undue hardship.

(f) the economic, legal or other capacity of the third party to comply with the order;

Example: The legal capacity of the third party to comply with the order could be affected by the terms of a trust deed. However, after taking the third party's legal capacity into account, the court may make the order despite the terms of the trust deed. If the court does so, the order will have effect despite those terms (see section 90AC).

(g) if, as a result of the third party being accorded procedural fairness in relation to the making of the order, the third party raises any other matters--those matters;

Note: See paragraph (3)(c) for the requirement to accord procedural fairness to the third party.

(h) any other matter that the court considers relevant.

## [11] Court may make an order or injunction under section 114 binding a third party

(1) In proceedings under section 114, the court may:

(a) make an order restraining a person from repossessing property of a party to a marriage; or

(b) grant an injunction restraining a person from commencing legal proceedings against a party to a marriage.

(2) In proceedings under section 114, the court may make any other order, or grant any other injunction that:

(a) directs a third party to do a thing in relation to the property of a party to the marriage; or

(b) alters the rights, liabilities or property interests of a third party in relation to the marriage.

(3) The court may only make an order or grant an injunction under subsection (1) or (2) if:

(a) the making of the order, or the granting of the injunction, is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage; and

(b) if the order or injunction concerns a debt of a party to the marriage--it is not foreseeable at the time that the order is made, or the injunction granted, that to make the order or grant the injunction would result in the debt not being paid in full; and

(c) the third party has been accorded procedural fairness in relation to the making of the order or injunction; and

(d) for an injunction or order under subsection 114(1)--the court is satisfied that, in all the circumstances, it is proper to make the order or grant the injunction; and

(e) for an injunction under subsection 114(3)--the court is satisfied that, in all the circumstances, it is just or convenient to grant the injunction; and

(f) the court is satisfied that the order or injunction takes into account the matters mentioned in subsection (4).

(4) The matters are as follows:

(a) the taxation effect (if any) of the order or injunction on the parties to the marriage;

(b) the taxation effect (if any) of the order or injunction on the third party;

(c) the social security effect (if any) of the order or injunction on the parties to the marriage;

(d) the third party's administrative costs in relation to the order or injunction;

(e) if the order or injunction concerns a debt of a party to the marriage--the capacity of a party to the marriage to repay the debt after the order is made or the injunction is granted;

Note: See paragraph (3)(b) for requirements for making the order or granting the injunction in these circumstances.

Example: The capacity of a party to the marriage to repay the debt would be affected by that party's ability to repay the debt without undue hardship.

(f) the economic, legal or other capacity of the third party to comply with the order or injunction;

Example: The legal capacity of the third party to comply with the order or injunction could be affected by the terms of a trust deed. However, after taking the third party's legal capacity into account, the court may make the order or grant the injunction despite the terms of the trust deed. If the court does so, the order or injunction will have effect despite those terms (see section 90AC).

subsequently becomes a trustee).[12] Not surprisingly then, there are protections provided to third parties who act without notice of an order and the Act requires relevant documents to be served on third parties.[13]

In summary, I emphasise that care should always be taken in drawing affidavits. When sworn, they become testimony and must be absolutely true. Affidavits, in the family law jurisdictions, are the 'first notice' of the grounds of the claim or response. They should be very carefully prepared. Not only must you comply with the technical requirements, including not more than one distinct part of the subject matter in each paragraph but the deponent may always be cross examined and held to account on his or her sworn testimony at a later stage. There are serious consequences for false testimony – and it is not an excuse that an affidavit was prepared in haste.

A finding that a deponent has sworn to something false is extremely damaging (if not fatal) to what might otherwise be a good case. Always bear in mind that you will later be trying to convince a judicial officer to accept your client's testimony in order to succeed in your case!

You will not have pleadings to guide the preparation of the affidavit. The affidavit serves the dual purpose of setting up the grounds for the remedy your client will be seeking as well as setting out the evidence upon which it is based. Be very careful to keep affidavits relevant – remember the words of the Honourable Justice Graham:

> "at least in the initial stages custody affidavits should be confined to the matters directly relevant, namely, the formal

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(g) if, as a result of the third party being accorded procedural fairness in relation to the making of the order or the granting of the injunction, the third party raises any other matters--those matters;

Note: See paragraph (3)(c) for the requirement to accord procedural fairness to the third party.

(h) any other matter that the court considers relevant.

[12] Section 90AG.
[13] Sections 90AH & 90AI

details, a statement of circumstances by which the parties came to be separated, their current circumstances, the circumstances of the children and some detail about their proposals for the children"…

How soon we forget!

Don't forget rule 15.13:

**"15.13 Striking out objectionable material**

(1) The court may order material to be struck out of an affidavit if the material:

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

(b) sets out the opinion of a person who is not qualified to give it.

(2) If the court orders material to be struck out of an affidavit, the party who filed the affidavit may be ordered to pay the costs thrown away of any other party because of the material struck out."

and Orders 5.08 to 5.10, and 9.06 and 9.07

**5.08 Interim orders—matters to be considered**

When considering whether to make an interim order, the court may take into account:

(a) in a parenting case—the best interests of the child (see section 60CC of the Act);

(b) whether there are reasonable grounds for making the order;

(c) whether, for reasons of hardship, family violence, prejudice to the parties or the children, the order is necessary;

(d) the main purpose of these Rules (see rule 1.04); and

(e) whether the parties would benefit from participating in one of the dispute resolution methods.

**5.09 Affidavits**

The following affidavits may be relied on as evidence in chief at the hearing of an interim or procedural application:

(a) subject to rule 9.07, one affidavit by each party;

(b) one affidavit by each witness, provided the evidence is relevant and cannot be given by a party.

**5.10 Hearing time of interim or procedural application**

(1) The hearing of an interim or procedural application must be no longer than 2 hours.

(2) Cross-examination will be allowed at a hearing only in exceptional circumstances.

**9.06 Affidavit to be filed with Response to an Application in a Case**

(1) A respondent who files a Response to an Application in a Case must, at the same time, file an affidavit stating the facts relied on in support of the Response to an Application in a Case.

(2) Subrule (1) does not apply to a Response to an Application in a Case filed in response to an application to review an order of a Judicial Registrar or Registrar.

**9.07 Affidavit in reply to Response to an Application in a Case**

If:

(a) a respondent files a Response to an Application in a Case seeking orders in a cause of action other than a cause of action mentioned in the Application in a Case; and

(b) the applicant opposes the orders sought in the Response to an Application in a Case;

the applicant may file an affidavit setting out the facts relied on.

The court usually manages the issues in pre-trial directions, and directs the parties on the topics affidavits are to cover.

**Attachments, Exhibits or Tender bundle**

In addition to the requirements of the Rules, think about:

- • the purpose of the affidavit. In a busy duty list, a short affidavit with documents exhibited or identified and then tendered at the hearing is often best
- • the nature of the document. Lengthy standard business documents such as trust deeds or shareholders' agreements are often better exhibited or tendered, whereas short annexures directly in point are best as attachments
- • usability of the document. A bulky, unpaginated affidavit will not endear you to the judicial officer you hope to persuade. If volumes are required, exhibit, paginate, tab and use ring binders or other binding to make the evidence easy to refer to.

  *Family Law Act Div12A, Pt VII, s60CC, Family Law Rules r15.05, 15.06, 15.08, 15.08(2), 15.08(3), 15.09, 15.09(2), 15 .09(3), 15.10, 15.10(2), 15.13, 15.14, 15.15,*

  *Federal Circuit Court Rules r15.25, 15.26, 15.26(3), 15.27, 15.27(2), 15.28, 15.29, 15.29 A*

***PLEADINGS – IF REQUIRED***

We are operating in a Federal jurisdiction. If neither the Family Court, nor the Federal Circuit Court have rules relating to pleading, then it makes sense that we would turn to the Federal Court. The *Federal Court Rules* 2011, in particular Part 16 governs 'pleadings' in the Federal Court. That provision, together with Part 18 (Interpleader proceedings), Parts 21 & 22 (Interrogatories & Admissions) can easily be utilised. The Federal Circuit Court will already be quite familiar with the use of the Federal Court Rules and would likely apply them if specific rules are not provided in the *Federal Circuit Court Rules* for any particular situation. We should bear in mind that the *Federal Circuit Court Rules* 2001 contains

Chapter 3 dealing with proceedings other than family law or child support.

There are ample legislative provisions which can be called upon in aid of either the Family Court of Australia or the Federal Circuit Court of Australia to deal with any situation which may arise in relation to a third party matter which may require pleading.

It is likely, however, that if the claim is 'wrapped up' into a family law (or de facto relationship) claim, then pleadings may be governed by use of the rules available to Federal courts coupled with evidence being given by affidavit.

## *SPECIFIC JURISDICTIONS*

Don't overlook that that *Family Court Rules* 2001 and the *Federal Circuit Court Rules 2011* each contain specific provisions in relation to claims under the *Bankruptcy Act* 1966 and the *Corporations Act* 2001.

Chapter 25 of the *Family Court Rules* applies the *Corporations Rules* (modified as necessary) to applications being heard in the Family Court and Chapter 26 applies the *Bankruptcy Rules* to applications being heard in the Family Court.

## *CONCLUSION – 'BACK TO THE FUTURE'*

Those who have practiced since at least the early 90's will recall that amendments were made to the Rules and 'pleadings' were introduced to the Family Law system.

The Rules Committee (of Judges) wrote:

> "*The pressures on practitioners, judges and registrars are becoming greater as litigation becomes more complex and the number of cases before eh court increases. Life itself is more complex. In property cases particularly the skein of company infrastructure now often has to be viewed*

*microscopically so as to untangle the web of convolution that couples have built around themselves for various reasons. The present system often means that, at the time of hearing, attorneys and the court are confronted be a mass of affidavits, some of which are quite out of date and some of which contain irrelevant, inadmissible and inflammatory material. We believe this state of affairs must be ended. …"*[14]

His Honour gave an interesting history of pleadings at pages 2 – 3 of the paper – but I will not repeat that history here. Suffice to say, pleadings were traced back to at least the reign of Henry II (1154 – 1189). Originally pleadings were oral. Until the reign of Queen Victoria litigants were allowed only one issue in respect of each cause of action. Defendants were allowed to run one defence.

His Honour made important points in the paper – which apply irrespective of whether pleadings apply or not. Without diminishing any point made by His Honour I mention a few:

*"A party is not well served if pleadings are drafter in a hurried, shoddy, slipshod, or unthinking manner. Conversely, a party is well served where his pleading states his case with clarity and precision, with full particulars and details, with understanding of the law and insight in to the substantive rights of the parties and an intelligent anticipation of how a case will need to be prepared and presented. The former lays bare the weakness of the party's case, the latter clothes it with strength and substance*

*The drafting of a pleading is the equivalent of laying the foundation on which to build a claim or answer and as the foundation is laid whether badly or well and truly so will the claim or answer be weak and fall or be well sustained and upheld. Pleadings, therefore, must be drafted with all due care and circumspection and they require the exercise of skill and not a little art to fulfil their full function. Their influence and importance is pervasive throughout the whole of the stages of an action and they play a central role in litigation"*

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[14] Per The Hon Justice Graham, Family Court of Australia. From " Family Law Pleadings 90/10.1" Regional CLE Albury Session 1; The College of law CLE

I would argue that statement applies equally, if not more forcefully, today irrespective of whether there are formal pleadings – or if the affidavit is viewed as a pleading. Affidavits must be crafted very carefully and thoughtfully.

## *THE PARTING MESSAGE – BE VERY CAREFUL*

Authority for the proposition that lawyers must know the elements they need to prove to found a remedy is found in *Pelerman A.S. & Pelerman R.*[15] (if authority is needed to establish that lawyers should know what has to be proved and set it out).

The applicant sought an order setting aside consent orders on the basis of ``duress'', ``suppression of evidence'' or ``any other circumstance'', within the meaning of s 79A (1) (a). In her material the wife purported to particularise the matters she alleged would give rise to a finding but Jerrard J., held that none of the particularised matters could give rise to findings of ``duress'', ``suppression of evidence'' or ``any other circumstance'', within the meaning of s 79A(1)(a). The initiating application was struck out (after an application for leave to amend was refused) but an appeal against the decision was later allowed, inter alia, on the basis that a failure by the husband to fully disclose his financial position in the financial statement filed with the application for consent orders amounted to 'suppression of evidence".

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[15] (2000) FLC ¶93-037

Magistrates Court of Queensland who presented a paper in 1996 while a Barrister);

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CCH Intelliconnect:  Wolters Klewer.