27th Annual Calabro SV Consulting Family Law Residential

ENDING A PROCEEDING EARLY

Neil McGregor

Barrister

17 August 2012

This paper examines circumstances in which a proceeding may be ended early.

In some circumstances a matter can be ended early by judicial determination – e.g. summary dismissal , a *Rice v. Asplund* determination. Matters may be 'ended' on the ground they ought not to have been commenced – lack of jurisidiction, and *res judicata* arguments are examples.

A "default" determination of a matter may arise when a party fails to appear at the hearing to present his or her case or has otherwise failed to comply with the Court process and /or has been barred from proceeding further.

A stay order may be considered when there is no utility in proceeding further or to proceed would be an abuse of process or contrary to justice or public policy. Similarly, an order under section 118 of the *Family Law Act 1975* restraining a vexatious litigant from proceeding further with a pending application or from filing any application without leave of the Court may be made in circumstances when, for example, a party has a history of using proceedings – consciously or in ignorance – in a way that harasses the other party(ies) and the Court requires that party to first show he or she has a bona fide case with merit before being allowed to commence or continue litigation.

No separate consideration is given in this paper to how to prepare for an undefended hearing. Suffice it to say, preparation for an undefended hearing cannot

be neglected and should be as precise and thorough as for a defended hearing as, although cross examination will not occur, no concession can be expected or extracted from an opponent and their witnesses will not be available to 'fill the gaps', so that each element required to be proved to obtain an order must be proved, or the case will fail. However, judicial officers will not 'rubber stamp' the orders sought. The bench must, in most family law matters, be satisfied that the Orders sought are in the best interests of the children or are just and equitable, as the case may be.

Don't forget that in a parenting case in which abuse has been alleged there is a requirement in the Family Court to address Order 15 Rule 10A and the equivalent rule in the Federal Magistrates Court, r. 13.04A. There may be other specific matters which have to be addressed in order to satisfy the Court that an order should be made.

Summary Dismissal

Rule 10.12 of the *Family Law Rules* provides:

> "*The Court can, on an application under rule 10.12:*
> - *Dismiss any part of the case*
> - *Decide an issue*
> - *Make a final order on any issue*
> - *Order a hearing about an issue or fact*
> - *With the consent of the parties, order arbitration about the case or any part of the case*"

Rule 13.10(a) of the *Federal Magistrates Rules 2001* provides:

> *The Court may order that a proceeding be stayed, or dismissed generally or in relation to any claim for relief in the proceeding, if the Court is satisfied that:*
>
> *(a) The party prosecuting the proceeding or claim for relief has no reasonable prospect of successfully prosecuting the proceeding or claim*

In section 17A of the *Federal Magistrates Act 1999* it is provided:

(2) The Federal Magistrates Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:

(a) The first party is defending the proceeding or that part of the proceeding: and

(b) The Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding

(3) For the purposes of this section, a defence or a proceeding or part of a proceeding need not be:

(a) Hopeless; or

(b) Bound to fail;

for it to have no reasonable prospect of success

The principles to be applied to an application for summary dismissal have been discussed in a number of leading cases. They were summarized in *Lindon v. The Commonwealth (No 2),* following *Bigg v.* Suzi (1998) F.L.C. 92-799, and approved in *Pelerman v. Pelerman* [2000] FamCA 881; (2000) F.L.C. 93-037, and later in *Korsky & Bright and Anor (No.2)* (2007) F.L.C. 93-352 (and many following cases) as follows:

- The relief sought is rarely and sparingly provided
- The party seeking the relief must show, on the face of the opponent's documents that the opponent lacks a reasonable cause of action or is advancing a claim that is clearly frivolous or vexatious. [Also known as the 'doomed to failure' test].
- It is not sufficient that the Court may think the case appears weak or that it is unlikely to succeed. Such a case is not 'sufficient to warrant termination'. In *Australian Building Industries Pty Ltd v. Stramit Corporation Ltd* [1997] FCA 1318 the Full Court of the Federal Court said:

  > "*A proceeding should not be dismissed summarily merely on the ground that it appears at an early stage of the hearing of the motion brought for that purpose, to advance a highly implausible claim which will very probably fail*"

- An application for summary relief under (formerly Order 26 rule 18) is no substitute for demurrer. If there is a serious legal question to be determined then it should ordinarily be determined at trial – the proof of facts can sometimes assist the Court to understand and apply the law invoked in circumstances where it is more conducive to deciding a real case with actual litigants than one determined on imagined or assumed facts
- If, notwithstanding defects in the pleadings, it appears a party may have a reasonable cause of action which has been poorly framed, the Court will ordinarily allow that party to reframe the pleading[1]
- The guiding principle is **doing what is just**. If the proceedings within the concept of the pleading are doomed to fail then there should be a dismissal to save the respondent from being further troubled, to save the applicant from further costs and disappointment and to relieve the Court from the burden of further wasted time and resources.[2]

- The material which is used for an application for summary dismissal is only the opponent's documents and non-contentious facts (even if raised by the applicant in argument):
  - *Custodio and Pinto & Ors* [2006] FamCA 941; (2006) F.L.C. 93-279
  - *Bain Pacific Associations & Ors and Kelly & Ors* [2006] FamCA 518; (2006) F.L.C. 93-270 referring to *Beck and Beck* [2004] FamCA 92; (2004) F.L.C. 93-181
  - *Simmons and Anor & Simmons* [2008] FamCA 1088

---

[1] An adjournment was not granted in *Pearce & Gough* [2008] FamCA 485 where the father was in jail and had had ample opportunity to properly present his case but had failed to do so. He had been given 'one last opportunity' to present proper material and had failed to do so. The trial Judge (Strickland J.) determined the mother could not be '*kept dangling on a string wondering when this matter might be ready to proceed"* and that the Court is not there for someone to say "*look, when I'm ready and when I've got the evidence then I will proceed. In the meantime, you keep this matter alive*'

[2] See too, *Taffa & Taffa (Summary Dismissal)* [2012] FamCA 181 at para 56

- In *Beck & Beck*, the Full Court referred to the judgment of Mason CJ, Dean & Dawson JJ in *Webster v. Lampard*;

  > "*It is important to note at the outset that the issue before the learned Master on the application for summary judgment was not whether Mr & Mrs. Webster would probably succeed in their action against Sergeant Lampard. It was whether the material before the master demonstrated that that action should be permitted to go to trial in the ordinary way because it was apparent that it must fail*"

- Since the introduction of rule 10.12, the Court has applied the 'doomed to failure test' including in *Bain Pacific*[3]*, JB & BW* [2006] FamCA 639; *Gitane and Velacruz* [2007] FamCA 183; (2007) F.L.C. 93-309 and *Korsky & Bright an Anor (No.2)*.
- Procedural fairness must be given to a litigant if an application is made for summary dismissal[4].

The provisions governing summary dismissal in the Federal Magistrates Court differ from the provisions governing summary dismissal in the Family Court.

The *Federal Magistrates Court Rules 2001* follow the provisions of the *Federal Magistrates Act* 1999, which, in turn, mirror the provisions relating to summary dismissal found in the *Federal Court of Australia Act 1976 (*not the *Family Law Rules)* set out earlier in this paper.

The power of the Federal Magistrates Court to summarily dismiss was described by Jarrett F.M. as 'fundamentally different' in *Jacobs & Vale* [2008] FMCAfam 641 at 13. Watt J., in *Simmons and Anor & Simmons* [2008] FamCA 1088 agreed at para 50. Watt J., described the standard required by the *Federal Magistrates Rules* as less demanding (see para 51) .

---

3 *Bain Pacific Associations & Ors & Kelly & Ors* [2006] FamCA 518

4 *Haydon & Bennett and Anor* [2012]FamCAFC 89

Jarrett FM discussed 'summary dismissal' in the Federal Magistrates Court most recently in *Latorre & Maddock*[5] at paras 8 to 11 inclusive. His Honour cited the High Court in *Spence v. Commonwealth of Australia* (2010) 241 C.L.R. 118, para 60:

> "*… The Federal Court may exercise power under section 31A if, and only if, satisfied that there is 'no reasonable prospect' of success. Of course, it may readily be accepted that the power to dismiss an action summarily is not to be exercised lightly. But the elucidation of what amounts to 'no reasonable prospect' can best proceed in the same way as content has been given, through a succession of decided cases, to other generally expressed statutory phrases, such as the phrase 'just and equitable' when it is used to identify a ground for winding up a company. At this point in the development of the understanding of the expression and its application, it is sufficient, but important, to emphasise that the evident legislative purpose revealed by the text of the provision will be defeated if its application is read as confined to cases of a kind which fell within earlier, different, procedural regimes"*

One example of 'summary dismissal' in the Federal Magistrates Court is found in *Carey & Carey*[6] . That case involved an application by a father to spend time with his daughter. Preceding the application his Honour was adjudicating, there had been earlier proceedings, namely:

- a trial before Guest J in 2005 resulting in the children living with the father,
- alleged mistreatment of the children between 2005 and 2008,
- child protection proceedings in 2008 through which an order was made in favour of the Department of Human Services, as a result of which the children were placed with the maternal grandparents and later the mother, and
- Charges laid against the father arising out of an incident with the maternal grandparents over the children for which he was convicted and imprisoned.

The father was self-represented,. He was offered the opportunity to consult the duty lawyer which he declined. Court procedures were explained to him and he

5 [2012] FMCAfam 97
6 [2012] FMCAfam 554

declined to cross examine. He was in breach of various Court orders. The mother sought summary dismissal of his application. Burchardt F.M., determined that the father's application had no reasonable prospects of success and summarily dismissed it. [7]

Another case which is instructive – more for the balance of compassion with the law – is *Carey & Carey*[8] . Burchardt FM said at 27 0 28:

> *"Here in my view, the father's case has no reasonable prospects of success, I could dismiss the matter, in any event, under division 13.1A of the Court's rules, as the father is in default in any event. In my view, that is not appropriate*
>
> *I do have, like I think all the judicial officers who have dealt with the matter, some measure of sympathy for the father. His demeanour in Court has been entirely appropriate and respectful and dignified. Now that this bipolar is being treated, he may very well be a substantially different person to who he was before. But the Court is primarily concerned with X's wellbeing, and unfortunately the events of 2007 simply cannot be washed away, no matter how sorry he is."*

Rice v. Asplund[9]

In *Sheldon & Sheldon* [2012] FMCAfam 492, Scarlett FM said, at para 31, that an application for dismissal under the 'rule' in *Rice v. Asplund* was, in fact, an application for summary dismissal. His Honour said that strictly speaking an application in a case should be filed seeking dismissal under Rule 13.09 of the *Federal Magistrates Court Rules 2001*.

---

[7] See too, *Johnson & Haddix & Anor* [2011] FMCAfam 880 at para 45 et seq per Scarlett FM.;

[8] [2012] FMCAfam 554

[9] (1979) FLC 90-725; See too *Bennett & Bennett* (1990) 14 Fam.L.R. 397; (1991) F.L.C. 92-191; *King & Finneran* [2001] FamCA 344; (2001) F.L.C. 93-079; *D and Y* (1995) 18 Fam L.R. 662; (1995) F.L.C. 92-851; *SPS and PLS* [2008] FamCAFC 16; (2008) F.L.C. 93-363; *Marsden & Winch* [2009] FamCAFC 152

No doubt an application must be filed for and Order sought to be made at the commencement of the proceedings but the description may not be accurate nor may it be necessary to file a formal application if the Order for dismissal is sought at trial.

There has been a deal of debate recently about what the true nature of an application under the 'rule' in *Rice v*. Asplund. It is respectfully submitted that whilst the application is for 'dismissal' and it is to be 'summary' it is difficult to regard *Rice v. Asplund* applications as applications for summary dismissal in the true sense. The application does not really fit well with the terms of the *Family Law Rules* r. 10.12 or the *Federal Magistrates Court Rules 2001* r. 13.10 or the *Federal Magistrates Court Act 1999* section 17A.

An application for dismissal under the 'rule' in *Rice v. Asplund* is , it is submitted, a separate genre of application governed by its own principles – founded in the paramountcy principles. The Full Court in *Miller & Harrington*[10] said:

> *99. … we do not think it is correct to describe the 'rule' as 'cause of action estoppel' or indeed, estoppel at all.*
> *100. The language of 'issue estoppel' or, 'res judicata' is not appropriate because the judicial determination of what is in a child's best interests, although bringing the then proceedings to an end, does not dispose 'once and for all' of that issue ..*
> *101. The use of such expressions is apt to cause confusion in the application of the 'rule' and its content. As Warnick J held in SPS and PLS: 'at whatever stage of a hearing the rule is applied, its application should remain merely a manifestation of the 'best interests' principle"* [11]

At times the boundaries between the various 'species' of applications becomes blurred in parenting matters. *Miller & Harrington* was an appeal against the summary dismissal of the mother's application for parenting orders where, it

10 [2008] FamCAFC 150
11 *Miller & Harrington*

appears, the trial judge made findings on contested facts[12]. The Full Court said that although the parties had not articulated the basis of the application, it was probable that the application was pursuant to the 'rule' in *Rice v. Asplund* rather than a summary dismissal application.

The Full Court then said:

> *69. This Court has used, and continues to use, expressions such as 'striking out' and 'summarily dismissed' where financial issues are in dispute (see, eg: Bigg v. Suzi (1998) F.L.C. 92-799; Bain Pacific Associations and Ors & Kelly & Ors[2006] FamCA 518; (2006) F.L.C. 93-270 per Bryant CJ, Warnick and May JJ). In those types of case, principles familiar to the common law are applicable. In particular, the usual approach has been to determine the application by reference to material in the case for a respondent together with any non-contentious facts (See, eg, Bain Pacific at para 21)*
> *70. In parenting applications, when a party submits an application should not proceed to a full hearing a common approach is exemplified by the discussion in this case in the passages of transcript already set out; in particular references to 'dismiss the mother's application for parenting orders on a summary basis', after a hearing 'on the papers"*
> *71. The use of this terminology is readily understandable, both in the light of usage in authorities and usage in the Act, e.g., s,69ZQ(1)(a), which obliges the court hearing an application for parenting orders to 'decide which of the issues in the proceedings require full investigation and which may be disposed of 'summarily'.*
> 72. *It may be, however, that neither the expressions "summary dismissal' or "striking out" is the best term to describe the procedure when, in a parenting case, the rule in Rice v. Asplund is considered at a preliminary stage. This is because, as we seek to emphasise, at whatever the stage the rule in Rice v. Asplund is applied, the court is bound to take into account best interests considerations and also because specific requirements, including legislative requirements, apply*
> *..*
> *77. In SPS and PLS [2008] FamCAFC 16; (2008) F.L.C. 93-363,Warnick J held:*
>
> > *64. …in strict logic, if a judge is unable to determine on the papers if a change of circumstances, sufficient to embark on a fresh hearing of a parenting issue exists, then what the judge should*

[12] [2008] FamCAFC 150; (2008) 39 Fam L.R. 654; (2008) F.L.C. 93-383 at para 63

embark upon is a hearing directed to that question, not one directed to 'how the welfare of the children should best be served'

65. However, ellipsis in logic or not, subsequent authority has clearly reiterated that if the rule is not applied as a preliminary matter, then the hearing that follows is a full hearing of the 'custody dispute'

..

81. Nor, as presently advised, do we think that the authorities cited by Warnick J in SPS preclude the possibility that, in a 'preliminary' hearing for the purpose of ascertaining if an application for parenting orders should go no further because of the rule in Rice v. Asplund, some resolution of factual disputes may occur, for example, whether a change of circumstances has or has not occurred.

82. However, the qualitative question of whether a change that has occurred is or is not sufficiently significant to justify a full further hearing of a parenting issue may be one much more difficult to answer in a preliminary hearing involving resolution of only some disputed facts.

83. This observation may be behind the approach that either the case for the applicant for parenting orders is, at a preliminary stage, taken at its highest, or the hearing embarked upon, is an enquiry into all matters relating to the best interests of the child or children

In the course of the discussion the Full Court examined the decision of Wilson FM in *Collivas & Cassimatis* [2007] FMCAfam 293. At paragraphs 18 and 19 of that decision the learned Federal Magistrate said:

18. What the cases do not make clear is the process that the Court should follow if it decides the threshold question in advance on a preliminary basis. That is, should the application be dealt with as on a demurrer or strike out application, and the court only look at the material of the applicant and decide, on that material alone, whether, assuming it is accepted, there is sufficient evidence to warrant the earlier orders being revisited. Or, should the court treat the application similarly to a summary judgment application, and look at the material of both sides, and decide whether there is a serious issue raised which justifies the earlier orders being revisited. Or should the court effectively conduct a trial on the preliminary issue, with evidence and cross examination on the alleged change of circumstances.

19. There is some guidance as to the approach to be adopted. In R & BH, supra, the use of language that the court should be left in no doubt that it is necessary to revisit the parenting orders supports a critical analysis of the applicant's material. Although the passage from King & Finneran seems to

suggest that the court looks at all material then available to the court, which encompasses the material from both sides, it seems to me that the court should logically follow a three step process, sequentially dealing with the three questions articulated in paragraph 18 above. Each case will vary of course as to the stage at which the decision can be made that there is/is not sufficient evidence to warrant a re-opening of the evidence. .. An applicant's material might disclose no change in circumstances such that the application can be summarily dismissed without a respondent being required to put on evidence. An applicant's material might raise the suggestion that there is a changed circumstance which requires investigation but after reading the respondent's material the court might be satisfied that there is nothing in the point raised. The court may as a matter of discretion, determine the threshold issue without testing the evidence. Alternatively there may be contested issues of fact as to whether there are changed circumstances in which case a court may need to hear from witnesses and allow cross examination.

The Full Court then cited from *Saad & Saad*[13] (also cited by Wilson FM), namely:

(3) Although it may be inappropriate, and is often unhelpful, in proceedings in relation to the guardianship and custody of or access to a child, to treat either party as bearing an onus of proof in relation to the welfare of the child, where a party applies for the variation or discharge of an existing order of that kind that party bears at least a forensic onus of placing before the Court sufficient evidence of changed circumstances since the making of the existing order upon which the Court could be satisfied that it is in the interests of the welfare of the child to vary or discharge that order.
(4) It was therefore not for the wife to adduce evidence sufficient to satisfy her Honour that Burton J's orders should continue in force, but rather for the husband to at least place before her evidence sufficient to justify a reconsideration of those orders, and only if that were done was her Honour called upon to decide, in the exercise of her discretion, whether the welfare of the child required the discharge or variation of those orders, or their continuance.

In *Mann & Prewett* [2009] FamCA 929, Fowler J considered an application for parenting orders 18 months after consent orders were made where the mother asserted she had not really consented to the orders made. The principles in *Rice v. Asplund* were applied. The mother argued that although the orders had been

13 (1993) F.L.C. 92-332

entered into by consent she did not truly consent at that time. Notwithstanding the mother 's case that she had reservations about the consent orders, his Honour said the orders must be taken as being in the best interests of the child at the time they were made, and that they were made after proper discussion in which the parties had advice and their relative positions were before the Court. The parties should be assumed to have accepted that those orders were in the best interests of the child and that they had resolved their dispute accordingly.

Stay applications – how and when to bring them?

Stay applications are ordinarily made when a party is dissatisfied with a decision, seeks to review or appeal that decision, and does not wish to be bound to comply with the order pending a determination of the review or appeal.

However, there are circumstances when a stay may be granted on the basis, for example, that the proceedings are an abuse of process, or when proceedings between the same parties are pending in relation to the same issues in another jurisdiction.

The Family Law Rules provide:

"Reg 22.11 – Stay

> *(1**) **The filing of a Notice of Appeal does not stay the operation** or enforcement of the order appealed from, unless otherwise provided by a legislative provision.*
>
> *(2) If an appeal has been started, or a party has applied for leave to appeal against an order, **any party may apply for an order staying** the operation or enforcement of all, or part, of the order to which the appeal or application relates.*
> *..*

Similarly, in relation to a review of a decision by a Registrar, Reg 18.09(1) provides:

(1) Subject to subrule (3), ***the filing of an application for a review of an order does not operate as a stay*** *of the order.*

(2) A party may apply for a stay of an order in whole or in part.

..

In the Federal Magistrates Court, reg 20.02(4) provides there is no automatic stay on an application for review (from a Registrar's decision):

(4) ***Unless the Court or a Registrar otherwise orders, the application does not operate as a stay*** *of the exercise of power under review.*

The principles applicable in stay applications have been set out clearly in many authorities. In *Aldridge v. Keaton (Stay Appeal)* (2009) FamCAFC 106, the Full Court said:

> *"The principles to be applied in determining an application for stay of orders, both in the general law and in respect of parenting applications are also well known. See The Commissioner of Taxation of the Commonwealth of Australia v. Myer Emporium Limited (No 1) (1986) HCA 13, Alexander v. Cambridge Credit Corporation (1985) 2 N.S.W.L.R. 685; Jennings Construction Limited v. Burgundy Royale Investments Pty ltd (1986) HCA 84, Clemett and Clemett (1981) F.L.C. 91=013; JRN and KEN v. IEG and BLG (1998) 72 ALJR 1329.*

The principles applied to be applied in stay applications are as follows:

> "*The authorities stressed the discretionary nature of the application which should be determined on its merits. The principles relevant to this matter include the following:*
> 1. *The onus to establish a proper basis for the stay is on the applicant for the stay. However, it is not necessary for the applicant to demonstrate any special or exceptional circumstances:*
> 2. *A person who has obtained a judgment is entitled to the benefit of that judgment;*
> 3. *A person who has obtained a judgment is entitled to presume the judgment is correct;*

4. *The mere filing of an appeal is insufficient to grant a stay;*
5. *The bona fides of the applicant*
6. *A stay may be granted on terms that are fair to all parties. This may involve a court weighing the balance of convenience and the competing rights of the parties*
7. *A weighing of the risk that an appeal may be rendered nugatory if a stay is not granted. This will be a substantial factor in determining whether it will be appropriate to grant a stay*
8. *Some preliminary assessment of the strength of the proposed appeal whether the appellant has an arguable case*
9. *The desirability of limiting the frequency of any change in the child's living circumstances*
10. *The period of time in which the appeal can be heard and whether existing satisfactory arrangements may support the granting of the stay for a short period of time*
11. *The best interest of the child, the subject of the proceedings are a significant consideration*

(Cited by Foster FM in *Gaffney & Gaffney*[14]*)*

At para 32 (of *Aldridge v. Keaton (Stay Appeal))*, the Full Court said:

> "*The granting or refusal of a stay involves an exercise of discretion by a trial judge. While such discretion must be exercised judicially in cases involving children, we accept that from time to time circumstances in existence at the date of the orders or which may occur from the date of the orders until the hearing of a stay application, may be very relevant matters to be considered in the exercise of discretion in determining whether or not to grant a stay.*
>
> *The interests of the children would not be promoted by an inflexible requirement of presumption in every case to maintain the status quo prior to the making of orders the subject of the stay application and to ignore unsatisfactory arrangements at the time of the orders or significant events which have occurred after the making of those orders*

In *JRN & KEN v. IEG & BLG* (1998) 72 ALJR 1329 at 1332, Kirby J said:

> *In my opinion, some adaptation of the rules stated in the cases governing stays in this court must also occur in cases which affect significantly third parties who are not parties before the Court and, in particular, children whose welfare must always be in the mind of a court in making an order affecting their interests*

14 [2012] FMCAfam 390

Stay application other than pending an appeal or review

The *Federal Magistrates Court Rules* 2001 contemplate an application for a 'stay' in circumstances other than pending an appeal or review. In reg 13.09 it is provided:

> *An application for judgment or for an order that a proceeding be stayed or dismissed must be made by filing an application in accordance with the approved form.*

The heading to Division 13.3 of the Federal Magistrates Court Rules refers to 'Summary Disposal **and Stay'**.

The power of both Courts to restrain vexatious litigation is a form of stay. In the Federal Magistrates Court, in reg 13.11, there is power for the Court to make an order that any proceeding instituted by a person may not be continued without leave of the Court. The rule can apply to a particular proceedings already commenced or to proceedings which may be commenced by a particular person. The Family Court has a similar power under r.11.04.

Further, each Court has power to end 'dormant proceedings'. The Family Court can use r 11.06 (if a party has not taken a step for one year) and the Federal Magistrates Court Rules provide for the power to be exercised if no step has been taken for six months (r.13.12). If, under the *Family Law Rules* an order is also made for costs on that application, then the Court has power to stay a subsequent application while those costs remain outstanding.

It has been held that the Family Court has an inherent power to stay proceedings.

In *Strahan and Strahan (Stay and Various Interim Orders)* [2010] FamCA 708, Dawe J considered the power to order a stay pending application for special leave to appeal to the High Court. Her Honour could not identify a statutory power but said:

62. The inherent jurisdiction of a Judge at first instance to hear the stay is not inconsistent with the authorities to which the Court has been referred because the Judge at first instance is in this case "the Court before which the matter is pending" and the Court which is familiar with the proceedings.
63. I conclude that a Judge at first instance has inherent power to hear a stay of an order made in interim proceedings by a Judge at first instance if the Judge who made the interim order is not available. In this instance the orders of Justice Strickland made on 5 November 2009 were made before His Honour was disqualified from hearing the matter further.
64. It is therefore within my power or jurisdiction to make the orders sought.

In *Norman & Howarth*[15], Le Poer Trench determined an application for a permanent stay in circumstances where it was alleged the application before the Court was an abuse of process and said:

40 The husband's counsel submits as follows in relation to the Courts jurisdiction to grant the relief sought by the husband. The submissions were largely in written form and for convenience I reproduce same here.

> *"The Family Court of Australia, as a superior court of record[1], has inherent jurisdiction "such as might be necessary to enable it to do justice within the limits of the jurisdiction which that Act [Family Law Act] confers on it": Taylor v Taylor[2].*
> *The court's ability to utilise that inherent jurisdiction to exercise control over proceedings before it is not limited by statutory provisions such as s.118: see Aldred & Aldred; Westpac Banking Corp.[3] Furthermore, although the Family Law Rules do not address a stay of proceedings upon the ground that a proceeding may constitute an abuse of process, such a specific rule is found in Order 63 rule 2 High Court Rules and may be applied by virtue of the operation of s.38(2) of the Act."*

41 The wife does not argue against this jurisdictional point. Her written submission is in the following terms: -

> *"That this Court has the necessary power to dismiss or permanently stay an application was recognised by Nygh J in Aldred (1986) FLC 91-753, affirmed by the Full Court in Spellson (1989) FLC 92-046 and applied by the Full Court in Bigg v Suzi (1998) FLC 92-799 at84,974. The Full Court said: -*

15 [2003] FamCA 1284

On inherent powers

> *"So under its inherent jurisdiction the Court may strike out the whole or part of the indorsement on a writ or stay or dismiss an action which is frivolous or vexatious or an abuse of process or which must fail or which the plaintiff cannot prove, and which is without a solid basis..." [Bigg v Suzi at 711 (at 5.5)] on application of the High Court Rules (via S.38(2))"**An application to stay proceedings on the ground that there is not a reasonable or probable course of action or suit, or that the proceeding is vexatious and oppressive or is an abuse of the process of the Court, may be made at any time and whether the plaintiff does or does not admit the allegations of fact, if any on which the application is founded**." [Bigg v Suzi at 711 (at 5.8)]"*

42 I agree with both parties submissions on this point of inherent jurisdiction and find I do have jurisdiction/power to grant the application of the husband should a case be made to warrant same.

43 The foundation of the husband's case is that an abuse of process will occur if the wife's application is not permanently stayed.

Watts J referred to the power to permanently stay an application in *Bemert & Swallow*[16]. In that case his Honour summarily dismissed an application by a paternal grandfather to spend time with his grandchildren and an application by the paternal great grandfather. (The paternal great grandfather was found not to be a person interested in the care of the children). His Honour determined not to make an alternate order for a permanent stay as he had summarily dismissed the application – but said that he would have done so if he was found to be wrong; At para 151 his Honour said:

> *Given I have made an order for summary dismissal of the maternal grandfather's application for the children to spend time with the maternal grandfather, I will not make any alternate orders sought for effectively the same relief. But if I am wrong about making the order for summary dismissal of the maternal grandfather's application that the children spend time with him, I shall indicate my views about the alternate relief sought.* ***There is in this case little difference between making an order for summary dismissal of the applications and making an order for a permanent stay. The court has the necessary inherent power to order a permanent stay*** *(see generally*

[16] [2009] FamCA 5

Minister for Immigration and Multicultural and Indigenous Affairs v B [2004] HCA 20; (2004) 219 CLR 365 at paragraph 68). Clearly, as with the power to summarily dismiss an application, ***an order for permanent stay should only be made in circumstances where the court considers that there is an abuse of the process of the court****. That is, where the court is satisfied that the application is "doomed to fail" as distinct from "weak or unlikely to succeed". This is not a case where a permanent stay is being sought because of the existence of similar proceedings in another country (which is the most usual example where an application for a permanent stay is made****). In cases relating to children there is obviously an overlap between the powers of stay proceedings and the power to dismiss them on the grounds that they are frivolous and vexatious. Usually stay orders are made in cases that have no real prospects of success where usually frivolous and vexatious applications are made in circumstances where there has been continuous use of the court to re-agitate issues which are beyond further reasonable consideration****. As I will discuss when dealing with the application under s 118(1) there are some unusual features of this case that lead to me making an order under s 118(1) even though this is the first occasion that the maternal grandfather has made an application under the Family Law Act 1975 in relation to these children*

Dormant proceedings

This subtitle is probably the antithesis of ending proceedings 'early', but for the sake of completeness, as earlier set out, both the Family Court and the Federal Magistrates Court have specific power in the rules to dismiss proceedings that lie dormant through the inaction of the litigant. The Family Court can exercise the power in rule 11.06 after a delay of one year and the Federal Magistrates Court, under r.13.12, after a delay of 6 months. Each is subject to some restrictions which must be examined.

Orders in default of appearance

Reg 3.08 provides (in relation to the divorce hearing only):

(2) Subject to Part 3.4:

(a) if the applicant fails to attend the hearing in person or by a lawyer, the application may be dismissed; and

(b) if the respondent fails to attend the hearing in person or by a lawyer, the applicant may proceed with the hearing as if the application were undefended.

The *Family Law Rules*, r 5.11 deal with interim hearings, and provides:

(1) If a party does not attend when a hearing starts, the other party may seek the orders sought in that party's application, including (if necessary) adducing evidence to establish an entitlement to the orders sought against the party not attending

(2) If no party attends the hearing, the court may dismiss the application and response, if any.

R. 12.13 provides specific powers in the event a party or parties do not attend "Court events":

(1) If an applicant does not attend a case assessment conference or procedural hearing, the court may:

(a) dismiss the application; or

(b) make an order for the future conduct of the case.

(2) If a respondent does not attend a case assessment conference or procedural hearing, the court may:

(a) if respondent has not filed a Response to an Application for Final Orders -- make the order sought in the application;

(b) list the case for dismissal or hearing on an undefended basis; or

(c) make an order for the future conduct of the case.

(3) If a party does not attend a conciliation conference, the court may:

(a) list the case for dismissal or hearing on an undefended basis; and

(b) make an order for the future conduct of the case.

In the Family Court, r.16.07 requires each party to attend:

> *Parties' participation*
>
> *(1) Each party to an application set down for hearing on the first day before the Judge must attend in person and, if legally represented, with their legal representatives.*
>
> *Note The court may dispense with compliance with a rule (see rule 1.12)*
>
> *(2) If a party does not attend on the first day before the Judge, the other party may seek the orders sought in that party's application by, if necessary, adducing evidence to establish an entitlement to those orders in a manner ordered by the court.*
>
> *(3) If no party attends the first day before the Judge, the court may dismiss all applications before it.*

Rules 13.03C and 16.05(2) of the *Federal Magistrates Rules 2001* is the equivalent rule, with modifications

Murphy J., in *Sorrell & Holt* [2012] FamCA 156 made parenting orders in circumstances where the father failed to appear at trial, despite having been specifically directed to take certain steps and to show cause why orders should not be made in default of his compliance. The father was self-represented. At paragraphs 29 – 32 Murphy J., said:

> "*29. It is an unfortunate fact of life – and, one might observe, unfortunately an increasingly common unfortunate fact of life – that parties are not afforded legal assistance. One of the results of that it that this court sees, very commonly, many people appearing for themselves. Many of them might be said to be at a disadvantage as a result of their lack of representation.*
>
> *30. However, it is important to emphasise that, subject to those parties being given every opportunity to present, as best they can, their case, and to avail themselves of the resources of the court – including, in parenting cases, an opportunity to present their case, as it were, to reporting experts – lack of legal representation, or lack of legal*

assistance, does not provide an excuse for failing repeatedly to comply with directions of the court.

31. *I repeat, very many parties who represent themselves, although they may be seen properly as being disadvantaged, nevertheless have no difficulty in complying with directions made by the court. Indeed, it has been observed by me, and indeed by many other judges of this court, that sometimes the compliance with directions by self-represented parties is better than that compliance by legal practitioners.*

32. *The father has, in my view, been afforded more than enough opportunities to put forward such case for parenting orders as he might properly desire.*

And at para 37:

37. *In the circumstances earlier referred to, it seems to me appropriate that I should make those orders if I consider them to be in the best interests of the children because, part and parcel of the obligations mandatorily imposed upon the court – for example, section 69ZN of the Act – include a mandatory obligation (expressed as the fifth principle) that "proceedings are to be conducted without undue delay and as with (sic) formality and legal technicality and form as possible"*

The equivalent power in the Federal Magistrates Court was considered by Jarrett F.M. in *Clifford & Mountford* [2006] FMCAfam 450. Where a party does not appear and orders are made in that party's absence, it is sometimes possible for the party to apply to set aside the judgment or order. Jarrett FM considered an application to set aside the order made in default and set out the principles to be applied as follows:

- The discretion is unfettered but is to be exercised judicially and bearing in mind the public interest in there being an end to litigation[17]

[17] In *Aon Risk Services Australia Limited v. Australia National University* [2009] HCA 27 at para 5, the chief justice of the High Court said: "*In the proper exercise of the primary judge's discretion, the applications for adjournment and amendment were not to be considered solely by reference to whether any prejudice to Aon could be compensated by costs. Both the primary judge and the Court of Appeal should have taken into account that, whatever costs are ordered, there is an irreparable element of unfair prejudice in unnecessarily delaying proceedings. Moreover, the time of the Court is a publicly funded resource. Inefficiencies in the use of that resource, arising from the vacation or adjournment of trials, are to be*

- There are three criteria each of which should usually be demonstrated before a judgment or order is set aside, namely;
    - A reasonable explanation for the applicant's absence at the trial or hearing
    - Material arguments available to the applicant that might reasonably lead to the making of an order different to that sought to be set side
    - No prejudice to the party with the benefit of the orders sought to be set aside that is not able to be adequately addressed by the Court
- Matters relevant to the three criteria will include but not necessarily be limited to:
    - Whether a party with notice of the proceedings disregarded the opportunity to appear at and participate in the trial or hearing
    - Delay, if any, in bringing the application to set aside and whether, during any period of the delay the successful party has acted on the judgment or third parties have acquired rights by reference to it
    - The conduct of the applicant since the judgment or order sought to be set aside was made.
    -

Failure to comply with Court Orders/Directions

In the Family Court, r.11.02 provides:

---

taken into account. So too is the need to maintain public confidence in the judicial system. Given its nature, the circumstances in which it was sought, and the lack of a satisfactory explanation for seeking I, the amendment to ANU's statement of claim should not have been allowed. The discretion of the primary judge miscarried."

(1) If a step is taken after the time specified for taking the step by these Rules, the Regulations or a procedural order, ***the step is of no effect****.*
Note A defaulter may apply to the court for relief from this rule (see rule 11.03.

(2) If a party does not comply with these Rules, the Regulations or a procedural order, the court may:

(a) dismiss all or part of the case;

(b) set aside a step taken or an order made;

(c) determine the case as if it were undefended;

(d) make any of the orders mentioned in rule 11.01;

(e) order costs;

(f) prohibit the party from taking a further step in the case until the occurrence of a specified event; or

(g) make any other order the court considers necessary, having regard to the main purpose of these Rules (see rule 1.04)

Note This list does not limit the powers of the court. It is an expectation that a non-defaulting party will minimise any loss.

In the Federal Magistrates Court the equivalent provisions are found in a combination of rr 13.03A and 13.03B:

When a party is in default

(1) For rule 13.03B, an applicant is in default if the applicant fails to:

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

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

(c) produce a document as required by Part 14; or

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

(e) prosecute the proceeding with due diligence.

(2) For rule 13.03B, a respondent is in default if the respondent:

(a) has not satisfied the applicant's claim; and

(b) fails to:

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

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

(iii) comply with an order of the Court in the proceeding; or

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

(v) produce a document as required by Part 14; or

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

(vii) defend the proceeding with due diligence.

The Court can then apply r 13.03B

Orders on default

(1) If an applicant is in default, the Court may order that:

(a) the proceeding be stayed or dismissed as to the whole or any part of the relief claimed by the applicant; or

(b) a step in the proceeding be taken within the time limited in the order; or

(c) if the applicant does not take a step in the time mentioned in paragraph (b) -- the proceeding be stayed or dismissed, as to the whole or any part of the relief claimed by the applicant.

(2) If a respondent is in default, the Court may:

(a) order that a step in the proceeding be taken within the time limited in the order; or

(b) if the claim against the respondent is for a debt or liquidated damages -- grant leave to the applicant to enter judgment against the respondent for:

(i) the debt or liquidated damages; and

(ii) if appropriate -- costs; or

..

(d) give judgment or make any other order against the respondent; or

(e) make an order mentioned in paragraph (b), (c) or (d) to take effect if the respondent does not take a step ordered by the Court in the proceeding in the time limited in the order.

By r. 13.03C it is provided:

Default of appearance of a party

(1) If a party to a proceeding is absent from a hearing (including a first court date), the Court may do 1 or more of the following:

(a) adjourn the hearing to a specific date or generally;

(b) order that there is not to be any hearing, unless:

(i) the proceeding is again set down for hearing; or

(ii) any other steps that the Court directs are taken;

(c) if the absent party is an applicant -- dismiss the application;

(d) if the absent party is a party who has made an interlocutory application or a cross-claim -- dismiss the interlocutory application or cross-claim;

(e) proceed with the hearing generally or in relation to any claim for relief in the proceeding.

(2) If a party to a proceeding is absent from a hearing, the Court may also make an order of the kind mentioned in subrule 13.03B (1), (2) or (4), or any

other order, or may give any directions, and specify any consequences for non-compliance with the order, that the Court thinks just.

Reference has been made earlier in this paper to *Pearce & Gough* [2008] FamCA 485 and *Sorrell & Holt* [2012] FamCA 156 (supra) where litigants failed to comply with orders or were not ready for the hearing despite being given every indulgence and opportunity to do so.

The Full Court is also often faced with appeals in which an appellant fails to comply with orders and seeks continual adjournments and, or, other indulgences. In *Kettle & Baker* [2012] FamCAFC 73, an applicaiotn was made to dismiss an appeal in circumstances of continual default. The majority (Coleman and May JJ) said at para 55:

> "*The application should be considered in the light of the well-known discussion in Gallo v. Dawson (1990) 93 ALR 479.* ***The appellant has not complied with the orders; it is not simply a matter of delay****. No attempt has been made by him to seek an extension of time. Nor is it apparent that he would ever comply with the orders. The other issue in considering whether the appeal should be dismissed is the lack of merit in the appeal. … The appellant has failed to comply with the orders and thus it is not apparent how any appeal could sensibly be argued by him. The positions of the respondent mother and the Independent Children's Lawyer should not be ignored especially as the final hearing has not yet commenced"*

Limiting the Issues at Trial

It is convenient to acknowledge that proceedings may sometimes be 'shortened' and costs saved in appropriate circumstances by seeking to have discrete issues determined.

There is provision in the *Family Law Rules 2004 r 10.13*

Application for separate decision

A party may apply for a decision on any issue, if the decision may:

(a) dispose of all or part of the case;
(b) make a trial unnecessary;
(c) make a trial substantially shorter; or
(d) save substantial costs.

and similar provisions in Part 17 of the *Federal Magistrates Court Rules*.

A decision on an issue may (as reflected in reg 10.13 above) dispose of part or all of a case, make a trial unnecessary or substantially shorter or may save costs. Consideration should then be given to an application to the Court for a separate decision to be determined.[18]

Frivolous or vexatious litigants/proceedings.

Specific power is found in section 118 of the *Family Law Act 1975* to:

(a) dismiss the proceedings;
(b) make costs orders; and
(c) order the person who instituted the proceedings shall not, without leave of a court having jurisdiction under this Act, institute proceedings under the Family Law Act of the kind or kinds specified in the order;

The Rules, in both the Family Court of Australia and the Federal Magistrates Court of Australia provide power to deal with frivolous or vexatious applications.

Family Law Rules, r. 11.04

Frivolous or vexatious case
(1) If the court is satisfied that a party has frequently started a case or appeal that is frivolous, vexatious or an abuse of process, it may:
(a) dismiss the party's application; and

[18] Most reported cases seem to be around section 79A applications where, however, the majority seem to be unsuccessful in convincing the Court to determine the question of whether the property order should be set aside. One exception is *Re Bernadette*[2010] Fam CA 94 where power was said to be found under "r.10.3" to determine the issue but it seems the reference was, in fact, to r.10.13

(b) order that the party may not, without the court's permission, file or continue an application.

(2) The court may make an order under subrule (1):

(a) on its own initiative; or

(b) on the application of:

(i) a party;

(ii) for the Family Court of Australia -- a Registry Manager; or

(iii) for the Family Court of a State -- the Executive Officer.

(3) The court must not make an order under subrule (1) unless it has given the applicant a reasonable opportunity to be heard.

Note Under section 118 of the Act, the court may dismiss a case that is frivolous or vexatious and, on application, may prevent the person who started the case from starting a further case. Chapter 5 sets out the procedure for making an application under this rule.

In the Federal Magistrates Court the equivalent rule is reg 13.11 although it is expressed in different terms[19]. Watts J recently considered an application under section 118 to restrain the father from making further applications in *Marsden & Winch* [20]. His Honour set out the law as follows:

156. The power to make the order sought by the mother is found in both s 118(1)(c) FLA and in rule 11.04(1) Family Law Rules 2004 (Cth) ("FLR").

157. Section 118(1)(a) to (c) FLA provides:-

The court may, at any stage of proceedings under this Act, if it is satisfied that the proceedings are frivolous or vexatious:

(a) dismiss the proceedings;

(b) make such order as to costs as the court considers just; and

(c) if the court considers appropriate, on the application of a party to the proceedings -- order that the person who instituted the proceedings shall not, without leave of a court having jurisdiction under this Act, institute

[19] Reg 13.11(1) states: If the Court is satisfied that a person has instituted a vexatious proceeding and the Court is satisfied that the person has habitually, persistently and without reasonable grounds instituted other vexatious proceedings in the Court or any other Australian court (whether against the same person or against different persons) …

[20] [2102] FamCA 557 at paras 152 et seq

proceedings under this Act of the kind or kinds specified in the order;

and an order made by a court under paragraph (c) has effect notwithstanding any other provision of this Act.

158. The word "proceedings" is defined in s 4 FLA as follows:

Proceedings means a proceeding in a court, whether between parties or not, and includes cross proceedings or an incidental proceeding in the course of or in connection with a proceeding.

159. Rule 11.04(1) FLR is in the following terms;

If the court is satisfied that a party has frequently started a case or appeal that is frivolous, vexatious or an abuse of process, it may:

(a) dismiss the party's application; and

(b) order that the party may not, without the court's permission, file or continue an application.

160. The words "frivolous" and "vexatious" are not defined by the FLA.

161. An Explanatory Guide (accompanying but not forming part of the FLR) provides the following explanation of the words "frivolous" and "vexatious":

frivolous — not worthy of serious consideration, insupportable in law, disclosing no cause of action or groundless (see also vexatious).

vexatious, in relation to an application — having no reasonable prospect of success (see Section 118 of the Act for the court's powers in relation to a vexatious case; see also frivolous).

162. It can be seen, the words "frivolous" and "vexatious" are related in that, by definition, a frivolous application is a vexatious application.

163. The Oxford Dictionary of English 2nd edition records that the original meaning of the word "vex" was to cause distress, whilst its more modern meaning is to make somebody feel annoyed, frustrated, worried, irritated or unhappy.

164. Mullane J in Darwin and Darwin [2008] FamCA 588 said:-

16. "Frivolous" is defined by the Macquarie Dictionary as "of little or no

weight, worth or importance", "Not worthy of serious notice", or "characterised by lack of seriousness or sense".

17. The mother's case is not that the father's application is frivolous. From the evidence it appears she relies on the ground that it is "vexatious".

18. "Vexatious" is defined by the Macquarie Dictionary as "something that vexes" and "vex" is defined as "to irritate, annoy, provoke, make angry", "to torment", "plague, worry", and in the sense use of legal actions is defined as "instituted without sufficient grounds, and serving only to cause annoyance".

165. In Sinclair-Small & Sinclair [2008] FamCA 1056, Dawe J generalised by saying:

27. It is not frivolous of a father to seek to spend time with his children.

166. Her Honour went on to consider whether, in that case, the application was vexatious and found that it was not.

167. It can be correctly argued that, in this case, the father's application is not frivolous in that it cannot be said that the application is of "little importance" or "not worthy of serious notice".

168. In Attorney General (NSW) v Wentworth (1988) 14 NSWLR 481, at 491, Roden J set out a test for determining whether proceedings are vexatious, in the context of s 84 of the Supreme Court Act 1970 (NSW), as it then was. This test has been widely cited and applied (see for example, Mullane J in Darwin and Darwin [2008] FamCA 588 at paragraph 20). Roden J set out the test as follows:

I believe that the test may be expressed in the following terms:

1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.

2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.

3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.

4. In order to fall within the terms of s 84:

(a) proceedings in categories 1 and 2 must also be instituted without reasonable ground (proceedings in category 3 necessarily satisfy that requirement);

(b) the proceedings must have been "habitually and persistently" instituted by the litigant.

169. As can be seen, the motive of the applicant is not necessarily relevant to the assessment as to whether or not the proceedings themselves are vexatious.

170. An issue that arises in this case is whether or not the expression of the meaning of vexatious proceedings as described by Roden J is exhaustive. I have concluded that they are not.

171. I note in passing that the definition of vexatious proceedings in the Access to Justice (Federal Jurisdiction) Amendment Bill 2011 (yet to pass Parliament) is an inclusive one in the following terms:

vexatious proceedings includes:

(a) proceedings that are an abuse of the process of a court or tribunal; and

(b) proceedings instituted in a court or tribunal to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and

(c) proceedings instituted or pursued in a court or tribunal without reasonable ground; and

(d) proceedings conducted in a court or tribunal in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

172. The present case involves protracted serial proceedings over many years, involving a child, in circumstances where that litigation itself has had a significant effect on the psychological health of the primary care giver of that child and potentially future litigation might have a far greater effect on the psychological health of the primary care giver to the extent that that person's parenting capacity might be seriously compromised. I accept that the mother has, inter alia, developed post traumatic stress disorder, substantially as a result of the persistent litigation.

173. The question to be considered is whether or not the proceedings brought by the father, whilst not falling precisely within any particular description, are nonetheless vexatious when considered in the light of the effect that the proceedings has had on the respondent in the proceedings.

Watts J has also considered the matter in at least two other 'grandparent' cases – *Bemert & Swallow*[21] and *Coleman & Hindle*[22].

Conclusion:

While this paper has examined separate topics related to the ending of proceedings early, the reality is there is a great deal of 'cross-over' in relation to each of the various types of applications. Nominating them as particular types of application may not be of great assistance.

It is fundamental that a practitioner identify a clear source of power to enable the Court to make the order sought in given circumstances. The Court will be loathe to deprive a litigant of an opportunity to present his or her case even if it is initially presented as confused or weak. Care will be taken and some leeway given to enable a case, albeit confused or weak, to be aired.

Procedural fairness requires that an application be filed setting out that an application for 'summary dismissal' is being made.

The difficulty was highlighted in D*oisy & Wilmot-Doisy & Anor*[23]*.* There, the Full Court said at 68 et seq:

> *68. The Family Law Rules 2004 are properly read as supplementing the power of the Court to dismiss frivolous or vexatious proceedings pursuant to s 118(1) of the Family Law Act 1975. The Rules are also to be read in the context of the many cases confirming the Court's inherent power to dismiss or permanently stay an application which cannot succeed, as to which see the authorities discussed in Bigg v Suzi (1998) FLC 92-799 at 84,974.*
>
> *69. The Family Law Act 1975 does not contain a provision similar to s 31A*

21 [2009] FamCA 5
22 [2010] FamCA 319
23 [2009] FamCAFC 14

of the Federal Court of Australia Act 1976 and s 17A of the Federal Magistrates Act 1999, which provide that a case need not be "hopeless" or "bound to fail" in order to have "no reasonable prospect of success". We therefore need not concern ourselves with the developing jurisprudence in the Federal Court and the Federal Magistrates Court concerning a possible "lowering of the bar" in summary dismissal applications following the 2005 amendments to the legislation governing those courts: see for example the divergence of views in the Full Court of the Federal Court in Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd [2008] FCAFC 60; (2008) 167 FCR 372.

…

Discussion

73. The Family Law Rules have not provided for the "striking out" of applications or responses since formal pleadings were abolished in 1995. For the reasons discussed by the Full Court in Bigg v Suzi (supra at [5.4]), such a provision would be "a nonsense" in the absence of a system of pleadings.

74. The wife's "strike-out" application before Benjamin J was therefore misconceived. It is apparent that what the wife wanted was an order for summary dismissal pursuant to r 10.14 and her application should therefore have been couched in those terms.

75. An application with such potentially serious consequences would ordinarily be made by the filing of an Application in a Case (as required by r 5.01) rather than being made orally. The application before Benjamin J was not only made orally but in circumstances where, notwithstanding the assertions of counsel for the wife to the contrary, the intervenor was on notice only that an application would be made for an adjournment.

76. Apart from its informality, it is apparent that the wife's application was attended by a degree of confusion. Counsel for the wife was unable to tender to his Honour the particulars provided by the intervenor. Counsel also did not have to hand the flurry of correspondence that had passed in the days immediately before the trial (which is no doubt why counsel confused the letter sent by her instructors on 31 May 2008 with that sent on 2 June 2008).

77. If the wife's application had been made formally and with proper notice it is likely his Honour would have received more helpful submissions than he did concerning the principles to be applied when one party seeks to

prevent another party from having their case heard. It might also have encouraged the intervenor to give more careful consideration to the precise basis on which her claim was being made.

78. In the proceedings before Benjamin J no reference was made to the relevant authorities we have cited above (nor to the many other authorities to similar effect, including the decisions of the High Court in Fancourt v Mercantile Credits Ltd [1983] HCA 25; (1983) 154 CLR 87 at 99 and Webster v Lampard [1993] HCA 57; (1993) 177 CLR 598 at 602-603 and the decisions of the Full Court in Bigg v Suzi (supra), Pelerman v Pelerman [2000] FamCA 881; (2000) FLC 93-037 and Ferrall & McTaggart (trustees for Sapphire Trust) v Blyton [2000] FamCA 1442; (2000) FLC 93-054). Nor was any reference made to the relevant Rules to which we have referred.

79. The submissions made by counsel for the wife before us (as before Benjamin J) focussed on the express intention of the intervenor to rely on s 79 of the Family Law Act 1975 as the basis for the declaration sought under s 78. Counsel for the wife submitted that it is "clear law that s 79 creates no legal or equitable interest in any property, it merely provides each spouse with an inchoate or incipient right to seek an order under the section against the property of the other spouse".

80. We accept that the intervenor's Summary of Case document in the proceedings below was drawn on the express basis that the "the only way to ascertain the [intervenor's] entitlement to the asset pool is through section 79". We also accept that at the mention hearing on 29 May 2008, the intervenor's solicitor accepted (in response to a proposition formulated by his Honour) that the intervenor's claim to an equitable interest in the husband's assets arose under s 79 and did not "arise by way of any resulting constructive trust [sic]".

81. We do not cavil with the submission made on behalf of the wife that there is much authority to indicate that a potential entitlement of a spouse to pursue s 79 proceedings does not confer any legal or equitable interest in property held by the other spouse (see Sieling and Sieling (1979) FLC 90-627 at 78,262; Fisher v Fisher [1986] HCA 61; (1986) 161 CLR 438 at 453; Dougherty v Dougherty [1987] HCA 33; (1987) 163 CLR 278 at 293 and Praxoulis v Praxoulis (1995) FLC 92-621 at 82,244 – 82,245). There would therefore appear to be some force in the submission that the intervenor's purported reliance on s 79 was misconceived. This is so even if it is possible for s 79 proceedings to be commenced prior to any breakdown of the marital relationship (as to which see the discussion in Jennings and Jennings (1997) FLC 92-773 and see also A and A [2000] FamCA 1638).

82. However, despite what was said about reliance on s 79 in the intervenor's Summary of Case document and by her solicitor on 29 May 2008, his Honour was informed by counsel on 3 June 2008 that the intervenor had an alternative basis in equity for seeking a declaration under s 78. Having heard this, counsel for the wife accepted his Honour's formulation that the "essence" of the intervenor's claim was "that her interest in the property arises by virtue of the possibility of the section 79 application and/or some trust". This was in accordance with the advice contained in the letter from the intervenor's solicitors of 1 June 2008 that "in the alternative the [intervenor] will plead a resulting trust, or failing that a constructive trust, and a presumption of advancement".

83. The intervenor was not, in our view, necessarily bound by the position adopted in her Summary of Case document, which is arguably no more than an aid for the Court. Nor do we regard the intervenor as being bound by what can be reasonably seen as "off the cuff" comments made by her solicitor in dealing with an oral application. This is especially so where the solicitor made clear that she would be relying on counsel to particularise the intervenor's claim after the hearing concluded. However, there is no doubt that what the intervenor said in her Summary of Case document, as well as what her solicitor said to the trial Judge, coupled with the late addition of an alternative basis for her application, created significant confusion in the proceedings and justified the response of the wife in seeking further and better particulars.

84. Counsel for the wife properly acknowledged before us that:

> *it may be open to a second spouse, in the position of the [intervenor], to mount a proper basis for intervention in property proceedings between her husband and a former wife, on the basis of a claim to some existing equitable interest in some property to which the husband holds the legal title, in order to seek a declaration of that interest under s. 78 of the Act, and thus protect that interest against orders which might otherwise be made in favour of the former wife in those proceedings.*

85. In our view, once this was acknowledged, the wife would have no basis on which to seek the summary dismissal (or striking out) of the intervenor's entire claim, especially in circumstances where the husband (being the party against whom the declaration was sought) had conceded that the intervenor did have an equitable interest in property to which he held the legal title.

The outcome – leave to appeal refused

86. We accept that the intervenor's case below was presented in a confusing and at times contradictory fashion. If such were sufficient to grant an order for summary dismissal, the workload of courts would be greatly reduced. However, as Kirby J has said:

87. Even a weak case is entitled to the time of a court. Experience teaches that the concentration of attention, elaborated evidence and argument and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment...

A concise summary of the interaction between summary dismissal, restraint of frivolous and vexatious proceedings and abuse of process is found in two decisions of O'Reilly J.

In *Costello and Anor & Condi and Anor*[24], O'Reilly J., said at 27 - 28:

> 27. *If the Court plainly has no jurisdiction, or there is plainly demonstrated a want of legal capacity to apply for orders sought, or if a matter plainly is frivolous or vexatious or an abuse of process an application for summary dismissal must succeed*
>
> *28. Otherwise, the authorities make clear that the power for summary dismissal is to be exercised sparingly. … the Rules properly are read as supplementing the power of the Court under section 118(1) to dismiss frivolous or vexatious proceedings and are also to be read in the context of the many cases confirming the Court's inherent power to dismiss of permanently stay an application which cannot succeed"*

In *Polik and Polik*[25] application was made, inter alia for summary dismissal and also raised the allegation of 'abuse of process'. At 111, O'Reilly J., said:

> *110. An allegation of abuse of process is a serious matter.*
>
> *111. Thus, in Starkey & Starkey (No 2) (above), Murphy J (at a trial) dealt with an allegation that proceedings were "initiated and maintained for*

[24] [2012] Fam CA 355
[25] [2012] FamCA 335 at 10 - 16

purposes other than purposes consistent with the Family Law Act": [18]. His Honour said [19]:

> *However, an assertion of the type just mentioned is a very serious assertion and, essentially, amounts to an assertion that a party or parties are using the Family Law Act, and more particularly the procedures of this Court, for an improper purpose. I would not be inclined to make a finding to that effect unless there was clear evidence before me of which I could be well satisfied that such an assertion has been made out. (emphasis added)*

112. Similarly, the wife's allegation in this case as to the husband bringing the proceedings for purposes other than those consistent with the Act is a "very serious assertion", incapable of being the subject of a finding absent "clear evidence" that the assertion has been made out.

113. The particular allegations by the wife, as articulated by Mr Sofronoff, could only be the subject of findings at a trial, after factual determination.

114. Hence, these matters cannot be determined summarily, on the particular facts of the case, to support summary dismissal of the proceedings under Rule 10.12(c).

Conclusion

115. In Bain Pacific Associations LLC v Kelly (2006) FamCA 518, Bryant CJ, Warnick and May JJ said in relation to an application for summary dismissal, at [31]:

> *...[O]nce it is conceded that an order as sought is within power, the argument in support of summary dismissal is rendered extremely difficult.*