In the explanatory statement to the Federal Circuit and Family Court of Australia (Family Law) Rules 2021, the general philosophy behind the 2021 rules is stated:

> *"Many of the rules comprising the 2021 Rules derive from either the FLR 2004 or the FCCR 2001, or both. The 2021 Rules do not represent a complete rewriting of the existing Rules of Court but involve the rearrangement and streamlining of those Rules, the harmonisation of differences between those Rules, and magnifications directed at modernising particular processes and achieving compatibility with FCFCOA Act.*
>
> *The general objectives of the 2021 Rules are:*
>
> - *To provide harmonised Rules of Court suitable for use in family law matters following the commencement of the FCFCOA Act;*
> - *To update and modernise the structure, language, forms and processes of the*
> - *Rules applicable in family law matters;*
> - *To ensure that issues of child abuse and/or family violence come to the attention of the court at an early stage of a family law proceeding, to promote the safety of children and of all parties to proceedings and inform the management of proceedings;*
> - *To facilitate access to justice by implementing procedures that are in the best interests of children and the parties to family law proceedings;*
> - *To promote the fair and efficient use of court resources;*
> - *To facilitate flexibility in the case management of approaches applicable to different types of family law applications;*
> - *To increase the accessibility and utility of the Rules for the courts, legal practitioners and self-represented parties;*
> - *To address issues of non-compliance with rules and procedure orders;*
> - *To adopt modern drafting practices;*
> - *To facilitate the filing management of court documents in an electronic environment; and*
> - *To aim for uniformity of rules and performance between all courts exercising family law jurisdiction.*

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Some of the main concepts underlining the 2001 Rules include:

- *Parties should be encouraged to resolve disputes before they start a proceeding;*
- *Parties should be fully informed about costs, the processes available, the consequences of non-compliance, and the likely timetable of events;*
- *Court events should be conducted and disposed of in a manner, at a cost, and within a time scale which is appropriate, taking into account the issues involved to the means of the parties;*
- *Wherever possible parties must be encouraged to identify the issues which are in dispute and those which are agreed; and*
- *Only such discovery should take place, and only such evidence shall be before the court, as is necessary for the just and appropriate disposal of the proceedings and the evidence should be in a form which is most appropriate in all circumstances." (emphasis added)*

LIST OF APPLICABLE PRACTICE DIRECTIONS INTRODUCTION

PRACTICE DIRECTION	DATE ISSUED
Central Practice Direction – family law case management	01/09/2021
Family Law Practice Direction – appeals	01/09/2021
Family Law Practice Direction – arbitration	01/09/2021
Family Law Practice Direction – Bankruptcy Act proceedings	01/09/2021
Family Law Practice Direction – child support and child maintenance proceedings	01/09/2021
Family Law Practice Direction – Corporations Act proceedings	09/09/2021
Family Law Practice Direction – divorce proceedings	09/09/2021
Family Law Practice Direction – financial proceedings	18/11/2021
Family Law Practice Direction – lighthouse project and Evatt list	01/09/2021
Family Law Practice Direction – major complex financial proceedings list	30/09/2021
Family Law Practice Direction – medical procedure proceedings	01/09/2021
Family Law Practice Direction – national contravention list	01/09/2021
Family Law Practice Direction – national Covid-19 list	01/09/2021
Family Law Practice Direction – nullity and validity of marriage proceedings	01/09/2021
Family Law Practice Direction – parenting proceedings	18/11/2021

Family Law Practice Direction – passport proceedings	01/09/2021
Family Law Practice Direction – priority property pools under $500,000	01/09/2021
Family Law Practice Direction – surrogacy proceedings	01/09/2021
Family Law Practice Direction – Trans-Tasman Proceedings Act proceedings	01/09/2021
FCFCOA information notice – applications for review	12/11/2021
FCFCOA information notice – court record	01/09/2021
FCFCOA information notice – subpoenas in the Department of Fairness Families and Housing Victoria	01/09/2021
FCFCOA practice direction – Covid-19 special measures	07/09/2021
FCFCOA practice direction – revocation of practice directions and information notices	01/09/2021
FCFCOA practice direction – transitional arrangements	01/09/2021
FCFCOA special measures information notice – Covid-19 electronic subpoena inspection	28/01/2022
FCFCOA special measures information notice – Covid-19 hearing protocol	17/01/2022

INTRODUCTION

The obligation to disclose is fundamental to family law litigation. The starting point is to set out the relevant rules and practice directions.

The relevant rules concerning disclosure apply in both division 1 and division 2, as the *Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021* make plain.

The *Federal Circuit and Family Court of Australia (Family Law)* Rules 2021 and the Central Practice Directions make plain that the obligation as to full and frank disclosure is required prior to the commencement of proceedings.

Schedule 1 of the *Family Law Rules* sets out pre-action procedures. Part 1 concerns financial proceedings and part 2 concerns parenting proceedings.

Part 1 – Financial Proceedings

Subclause 1.(2) states:

> *"There may be serious consequences for non-compliance with a pre-action procedures, including cost penalties or a stay of proceedings pending compliance."*

Subclause 1.(4) states, relevantly:

"The objectives of the pre-action procedures are as follows:

a. to encourage early and full disclosure in appropriate proceedings by the exchange of information and documents about the prospective proceeding;
b. To ensure the efficient management of proceedings in the court, if the proceedings become necessary;
c. to give effect to the overarching purpose of the family law practice and procedure provisions as provided by section 67 of the Federal Circuit and Family Court of Australia Act 2021."

Section 67 of the Federal Circuit and Family Court of Australia Act 2021 provides:

> *"Overarching purpose of family law practice and procedure provisions*
>
> *(1) The overarching purpose of the family law practice and procedure provisions is to facilitate the just resolution of disputes*:
>
> *(a) according to law; and*
>
> *(b) as quickly, inexpensively and efficiently as possible.*
>
> *Note 1: See also paragraphs 5(a) and (b).*
>
> *Note 2: The Federal Circuit and Family Court of Australia (Division 1) must give effect to principles in the Family Law Act 1975 when exercising jurisdiction in relation to proceedings under that Act.*
>
> *(2) Without limiting subsection (1), the overarching purpose includes the following objectives*:
>
> *(a) the just determination of all proceedings before the Federal Circuit and Family Court of Australia (Division 1);*
>
> *(b) the efficient use of the judicial and administrative resources available for the purposes of the Court;*

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

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

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

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

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

(a) the Rules of Court;

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

Key paragraphs in that section that stand out are to facilitate the just resolution of disputes as quickly, inexpensively and efficiently as possible and at a cost that is proportionate to the importance and complexity of the matters in dispute.

Subclause 1.(5)(i) provides:

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

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

Clause 1.(6) provides:

"The parties must not:

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

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

Clause 1.(7) provides:

"The court expects parties to take a sensible and reasonable approach to the preaction procedures."

Significantly, clause 1.(9) provides:

> *"At the time of filing an application to start a proceeding or response to that application, a party must file a Genuine Steps Certificate outlining:*
>
> *(a) both:*
>
> *(i) the parties compliance with the pre-action procedures;*
>
> *and*
>
> *(ii) the genuine steps taken by the party to resolve the dispute; or*
>
> *(b) the basis of any claim for an exemption from compliance with either or both of the requirements referred to in subparagraphs (a)(i) and (ii)."*

Clause 2 provides:

> *"(1) The court regards the requirements set out in these pre-action procedures as the standard and appropriate approach for a person to take before filing an application in a court.*
>
> *(2) If a proceeding is subsequently started, the court may consider whether these requirements have been met and, if not, any consequences for non-compliance.*
>
> *(3) The Court may take into account a compliance and non-compliance of the preaction procedures when it is making orders about case management and considering orders for costs (see subrule 1.33(2) and paragraphs 1.34(2)(b) and 12.15(1)(b)).*
>
> *(4) Unreasonable non-compliance may result in the court staying the proceeding pending compliance, or ordering the non-compliant party to pay all or part of the costs of the party or parties in the proceedings.*
>
> *(5) In situations of non-compliance, the court may ensure that the complying party is in no worse position than the party would have been in had the pre-action procedures been complied with.*
>
> *Note: examples of non-compliance of the pre-action procedures include the following:*
>
> *...*
>
> *(e) not responding appropriately within a reasonable time to any reasonable request for information, documents or other requirement of the procedures."*

I've highlighted sensible and reasonable, and standard and appropriate as key words that will be used as a shield or a sword in correspondence or by the Court when our client is trying to advance their

position, or being criticized for so doing.

Subclause 4 deals specifically with disclosure and exchange of correspondence. It provides:

> *"(1) Parties to a proceeding have a duty to make full and frank disclosure of all information relevant to the issues in dispute in a timely manner (see rule 6.01).*
>
> *(2) As soon as practicable on learning of the dispute and in the course of exchange in correspondence under clause 3 of this Part, parties must exchange the following:*
>
> > *(a) a schedule of assets, income and liability;*
> > *(b) a list of documents in the parties' possession or control that are relevant to the dispute;*
> > *(c) a copy of any document required by the other party, identified by reference to the list of documents.*
>
> *(3) The parties must refer to the Financial Statement and rule 6.06 of these Rules as a guide for the information to provide in documents to exchange.*
>
> *(4) The documents that the court considers appropriate to include in the list of documents and to exchange include:*
>
> > *(a) in financial proceedings (other than an application for maintenance only) – those listed in subrule 6.06(8), and*
> > *(b) in an application of a maintenance only – those listed in rule 6.06(9).*
>
> *(5) It is reasonable to require a party who is unable to produce a document for inspection to provide a written authority addressed to a third party authorising the third party to provide a copy of the document in question to the other party, if this is practicable.*
>
> *(6) The parties must agree to a reasonable place and time for the documents to be inspected and copied with the cost to the person requesting the copy.*
>
> *Note: the court will refer to Chapter 6 of these Rules as a guide for what is regarded as reasonable conduct by the parties in making this arrangement.*
>
> *(7) The parties must not use a document disclosed by another party for a purpose other than the resolution or determination of the dispute to which the 11 disclosure of the document relates, unless an exception applies under subrule 6.04(2).*
>
> *(8) Documents produced by a person to another person in compliance to the preaction procedures are taken to have been produced on the basis of an undertaking from the party receiving the documents that the documents were used for the purposes of the proceeding only.*

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

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

What is new, from the perspective of disclosure, is the requirement that prior to filing and as set out in clause 4(2) as soon as practicable on learning of the dispute, there must be an exchange of list of documents in the parties' possession or control that are relevant to the dispute. This is another example, that we've seen of many, of frontloading costs onto parties.

The common practice is to disclose the documents and send them electronically as PDF files and if more bulky, via Dropbox or similar link or Zip file.

The court seeks to enforce this disclosure process by three means:

- Compliance with the Genuine Steps Certificate.
- Compliance with the provision of the undertaking as to disclosure.
- Costs orders (including against practitioners) for failure to comply.

Clause 6 specifies lawyers' obligations which include these:

"(1) Lawyers must, as early as practicable:

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

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

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

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

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

Part 2 - Parenting Proceedings

These are a mirror of the provisions concerning the Part 1 – Financial Proceedings. Sub-clause 1(4) provides, relevantly:

> *"The circumstances of the pre-action procedures are as follows:*
>
> *(a) to encourage early and full disclosure in appropriate proceedings by the exchange of information and documents about the prospective proceeding;*
>
> *(d) to ensure the efficient management of proceedings in the court, if proceedings become necessary;*
>
> *(f) to give effect to the overarching purpose of the family law practice and procedure provisions as provided in section 67 of the Federal Circuit and Family Court of Australia Act 2021."*

Clause 1.(5) provides, relevantly:

> *"At all stages during the pre-action procedures and, if a proceeding has started, during the conduct of the proceedings, the parties must have regard to the following:*
>
> *(a) the best interests of any child, including the need to protect and safeguard them against risk or harm;*
>
> *(i) the duty to make full and frank disclosure of all material facts, documents and other information relevant to the dispute."*

Clause 1.(6) provides, relevantly:

> *"The parties must not:*
>
> *(a) use the pre-action procedures for an improper purpose (for example, to harass the other party or to cause unnecessary cost or delay."*

Clause 1.(7)-(9) provide:

> *"(7) The court expects parties to take a reasonable and sensible approach to the pre-action procedures.*
>
> *(8) The parties are not expected to continue to follow the pre-action procedures if it is not safe to do so, or if reasonable attempts to follow the pre-action procedures have not achieved a satisfactory solution.*

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

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

(i) the parties' compliance to the pre-action procedures and the Genuine Steps taken by them to resolve the dispute; or

(ii) the basis of any claim for an exemption from compliance with either or both the matters referred to in subparagraph (1); and

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

Clause 2 deals with compliance and following the requirements considered to be the standard and appropriate approach:

"2.(1) Again there are issues as to non-compliance if the requirements have not been met: *2.(2), including as to costs*: *2.(3) or staying proceedings*: *2.(4)."*

Clause 2.(5) provides, relevantly:

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

Note: *examples of non-compliance for the pre-action procedures include the following*:

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

Clause 4 deals with disclosure and exchange of correspondence:

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

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

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

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

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

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

Significantly, there is no requirement for parties in pre-action to parenting proceedings to provide a list of documents in their possession or control of a party (as there is for financial proceedings).

Lawyers' obligations are set out in clause 6. This includes, relevantly:

"(1) Lawyers must, as early as practicable:

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

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

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

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

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

CENTRAL PRACTICE DIRECTION

The Central Practice Direction sets out pre-action requirements:

"4.1 Prior to commencing proceedings, parties are required to:

(a) comply with the pre-action procedures for both financial and parenting proceedings (see schedule 1 of the Family Law Rules and section 60I of the Family Law Act); and

(b) take genuine steps to attempt to resolve their issues prior to commencing proceedings, unless it is safe to do so or a relevant exemption applies.

4.2 A Genuine Steps Certificate in the approved form must be filed with an initiating application or response to initiating application, outlining:

(a) that filing parties' compliance with the pre-action procedures; and

(b) the genuine steps taken to resolve the dispute; or

(c) the basis of any claim for an exemption from compliance with either or both of these requirements.

4.3 Other than in urgent circumstances, and subject to any safety concerns, no application for final or interim orders should be filed without appropriate notice being given to the respondent of the intended content of the application and without genuine steps being taken to avoid the need for the application to be filed.

4.4 Failure to comply with the relevant pre-action procedures may result in the application being adjourned or stayed until the failure to comply is rectified (see Part 4.1 of the Family Law Rules)."

GENUINE STEPS CERTIFICATE

The party must say in the Genuine Steps Certificate that they have complied with the following pre-action procedures by tick a box, the relevant one being: "*Exchange copies of relevant documents with the other party/ies.*" There is then the relevant exemption to be sought if necessary and a statement of truth. Whilst the statement of truth can be signed by the lawyer, I would at all times have it signed by the client. It provides:

"I certify that the contents of this Genuine Step Certificate are true and correct. I acknowledge there may be consequences for any non-compliance with the pre-action procedures."

The lawyer should never sign that document - when a lawyer does not know ultimately whether a client has made full and frank disclosure. If a lawyer signs that on behalf of a client and it is subsequently discovered that the client has not made full and frank disclosure, the lawyer will be hoist by their own petard. A costs order is more likely to be visited upon a lawyer in those circumstances than upon the client, as well as other professional consequences. It is much better to have the client execute this document, in case the client has either:

- not been honest with the lawyer and therefore not made full disclosure (unbeknownst to the lawyer); or
- by inadvertence overlooked disclosure of documents (again unbeknownst to the lawyer).

Subject to the issue of proportionality, I would be absolutely rigorous in compliance with the rules.

The subrules are based on FLR 2004 subrules 13.04(1)-(2). See also FCCR 2001 rule 24.03. the terms 'legal entity' and 'party to a financial proceeding' are now defined in rule 1.05.

AUSTRALIAN SOLICITORS CONDUCT RULES

Rule 3.1:

> *"A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty."*

The Queensland Law Society then sets out on its page about the duty not to counsel or assist a client to destroy documents on social media. The Society notes sections 129 and 140 of the Criminal Code: section 129:

> *"A person who, knowing something is or may be needed in evidence in a judicial proceeding, damages it with intent to stop it being used in evidence commits a misdemeanour."*

Section 140 provides:

> *"A person who attempts to obstruct, prevent, pervert, or defeat the course of justice is guilty of a crime."*

As Lord Wright noted in Myers v Elman[2]:

> *"A client cannot be expected to realise the whole scope of that obligation, without the aid and advice of his solicitor, who therefore has a peculiar duty in this matter as an officer of the Court carefully to investigate the position and as far as possible see that the order is complied with. A client left to himself could not know what is relevant, nor is he likely to realise that it is his obligation to disclose every relevant document, even a document which would establish, or go far to establish, against him his opponent's case."*

[2] [1940] AC 282, 322.

In Lester v Allied Concrete Co[3] a US attorney failed to appreciate the scope of his duties. It concerned an instruction to a client involved in litigation to clean up his Facebook page. The attorney also attempted to hide the exchange of emails between his law practice and his client concerning the strategy to clean up the plaintiff's Facebook account. This included an intentional omission of details of the exchange in material filed with the court.

The court found that the plaintiff had a duty to disclose and produce the documents and electronic data, the subject of the defendant's requests, subject to well-founded objection. The attorneys and the plaintiff's actions were in breach of obligations under the court's rules and both were ordered to pay sanctions and the attorney was referred to his Bar Association for consideration of disciplinary action.

The Queensland Law Society makes this comment:

"We need to be aware that a client could be tempted to destroy, delete or remove documents which may be unfavourable or assist his or her opponent to advance their case. We cannot simply allow the client to do whatever they wish or to make whatever list or affidavit they think fit. We cannot escape our responsibility for careful investigation or supervision of the disclosure process.

If a client will not give us the information we need or insists on swearing an affidavit or delivering a list of documents which we know is imperfect or which we have every reason to think is imperfect, then our proper course is to withdraw.

Similarly, we cannot counsel our client to 'clean up' their social media pages where it is likely legal proceedings may be commenced in relation to which such material may be required. Nor should we participate in a stratagem designed to delete documents or information from such pages in circumstances where litigation may be contemplated in relation to which the information contained in such social media may be required. The attorney in Lester ignored the fundamental responsibility we owe to the administration of justice and paid a heavy financial price for doing so."

As an officer of the court, a solicitor's primary duty is to the court and that is a duty which is paramount to the duty owed to a client. Mason CJ in Giannarelle v Wraith[4] said:

> *It is not that a barrister's duty to the court creates such a conflict with his duty to his client that the dividing line between the two is unclear. The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary. Rather it is that a barrister's duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretional judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice."*

[3] 83 Va.Cir. 308 (2011).
[4] (1998) 165 CLR 543; [1988] HCA 52 at [12].

Brennan J stated at [1]:

> *"The purpose of court proceedings is to do justice according to law. That is the foundation of a civilised society. According to our mode of administering justice, parties with inconsistent interests are cast in the role of adversaries and the court or judge is appointed to be an impartial arbiter between them. Counsel (whether barrister or solicitor) may appear to represent the adversaries, but counsel's duty is to assist the court in the doing of justice according to law. A client – and perhaps the public – may sometimes think that the primary duty of counsel in adversary proceedings is to secure judgment in favour of the client. Not so, the true position was stated by Lord Eldon …*
> *:*
>
> > *'He lends his exertions to all, himself to none. The result of the cause is to him a matter of indifference. It is for the court to decide. It is for him to argue. He is, however he may be represented by those who understand not his true situation, merely an officer assisting in the administration of justice, and acting under the impression the truth is best discovered by powerful statements on both sides of the question.'"*

Rule 4.1 provides:

> *"A solicitor must also*:
>
> *4.1.1 act in the best interests of a client in any manner in which the solicitor represents the client;*
>
> *4.1.2 be honest and courteous in all dealings in the course of legal practice;*
>
> *4.1.3 deliver the legal services competently, diligently and as promptly as reasonably possible;*
>
> *4.1.4 avoid any compromise to the integrity and professional independence; and*
>
> *4.1.5 comply with these Rules and the law."*

Rule 19 concerns the need to for frankness in court.

ASCR Rules 20.1 and 20.3 provide:

> *"20.1 A solicitor who, as a result of information provided by the client or a witness called on behalf of the client, learns during hearing of after judgment or the decision is reserved and while it remains pending, that the client or a witness call on behalf of the client*:
>
> > *20.1.1 has lied in a material particular to the court or has procured another person to lie to the court;*
> >
> > *20.1.2 has falsified and procedure another person to falsify in any way a document which has been tendered; or*

20.1.3 has suppressed or procured another person to suppress material evidence upon a topic where there was a positive duty to make disclosure to the court; must –

20.1.4 advise the client that the court should be informed of a like on a falsification or suppression and request authority so to inform the court; and

20.1.5 refuse to take any further part in the case unless the client authorises the solicitor to inform the court of the lie, falsification or suppression and must promptly inform the court of the lie, falsification or suppression upon the client authorising the solicitor to do so but otherwise may not inform the court of the lie, falsification or suppression.

20.3 A solicitor whose client informs that the solicitor the client intends to disobey a court's order must:

20.3.1 advise the client against that course and warn the client of its dangers;

20.3.2 not advise the client how to carry out or conceal that course; and

20.3.3 not inform the court or opponent of the client's intention unless:

i. the client has authorised the solicitor to do so beforehand; or

ii. the solicitor believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety."

It is not uncommon, particularly with wrongly forwarded emails, for there to be inadvertent disclosure. Rule 31 provides:

"31.1 Unless otherwise permitted or compelled by law, a solicitor to whom material known or reasonably suspected to be confidential is disclosed by another solicitor, or by some other person and who is aware that the disclosure was inadvertent must not use this material and must:

31.1.1 return, destroy or delete the material (as appropriate) immediately upon becoming aware that disclosure was inadvertent; and

31.1.2 notify the other solicitor or the other person of the disclosure and the steps taken to prevent inappropriate misuse of the material.

31.2 A solicitor who reads part or all of the confidential material before becoming aware of its confidential status must:

31.2.1 notify the opposing solicitor or the other person immediately; and

31.2.2 not read any more of the material.

31.3 If a solicitor is instructed by a client to read confidential material received in error, the solicitor must refuse to do so."

Two examples that have happened to me recently are:

1. When the other side accidentally forwarded me privileged communication. I immediately saw that it was privileged. I telephoned the other side to say that I had received it and that I would delete it and that I had not read it. I then confirmed that by email. The response was many thanks.

2. When a respondent to a subpoena, despite all the directions on the subpoena, decides to send me the subpoenaed material either by email or in the post. When sent by email, I cause it to be on-forwarded to the subpoena section and then deleted it, unread from my system. When it is received by post, I cause it to be sealed up and then delivered to the court. Sometimes my staff in their enthusiasm of following procedure for all incoming mail have already scanned the document, which I then cause to be deleted from our system

CHAPTER 6 OF THE FAMILY LAW RULES

Chapter 6 concerns disclosure and subpoenas.

The explanatory note states:

"This Chapter harmonises and reorganises the rules in relation to discovery and also contains the rules regulated in the use of subpoenas.

Due to section 45(1) of the Federal Circuit Court of Australia Act 1999 (Cth), discovery and interrogatories are not currently allowed in the Federal Circuit Court unless the Court declares that it is appropriate in the interests of justice to allow the discovery or the interrogatories. This restriction will cease when the FCFCOA Act commences, as subsection 176(1) of the FCFCOA Act expressly allows discovery and interrogatories in family law and child support proceedings in the FCFCOA (Division 2)."

Rule 6.01 provides:

"6.01 General duty of disclosure

(1) Subject to subrule (4), each party to a proceeding has a duty to the court and to each other party to give full and frank disclosure of all information relevant to the proceeding, in a timely manner.

Note: the proceedings in which the duty of disclosure applies include both parenting proceedings and financial proceedings. Failure to comply with the duty may result in the court excluding evidence that is not disclosed or imposing a consequence, including punishment for a contempt of court.

The explanatory note states:

> *"This rule sets out the parties' general duty of disclosure. It is a duty to give full and frank disclosure of all information relevant to proceeding, in a timely manner, to both the court and to each other party. It is a continuous duty which applies from the start of the proceeding until the proceeding is finalised. A note indicates the parties are also expected to comply with the duty of disclosure when complying with the preaction procedures.*
>
> *The duty of disclosure also applies to a litigation guardian appointed under Part 3.5. However, it does not apply to a respondent to an application alleging a contravention or contempt.*
>
> *The importance of the duty of disclosure is emphasised by the requirement for parties to confirm they are aware of the duty and to give an undertaking to the court as to their compliance with it (rule 6.02). It is further reinforced by rule 6.17, which sets out the serious consequences of non-compliance with the duty of disclosure.*
>
> *This rule is based on FLR 2004 rule 13.01."*
>
> *(2) The duty of disclosure applies from the start of the proceeding and continues until the proceeding is finalised.*
>
> *Note: the parties are also expected to comply with the duty of disclosure when complying with the pre-action procedures.*
>
> *(3) The duty of disclosure also applies to a litigation guardian appointed under Part 3.5.*
>
> *(4) This rule does not apply to a respondent to an application alleging contravention or contempt."*

Lucev FM when discussing the obligation of full and frank disclosure said in Kennedy & McDermott[5]:

> *"Put succinctly, as it often is by Counsel, the obligation is to 'show and tell' not 'hide and seek'."*

I have long found that referring to the need to show and tell, not hide and seek is an easy concept for clients to understand, as opposed to that of full and frank disclosure.

[5] [2007] FMCAfam524 at [13].

Time and time again we have seen cases where a party has purported to comply with specific requirements of disclosure, but has lost sight of the general duty of disclosure, or to put it another way, has not seen the wood for the trees.

As Watts J stated in Lambert and Jackson [2010] FamCA 357 at [119]:

> *"Well known case law (Oriolo and Oriolo (1985) FLC 91-653, Black & Kellner (1992) FLC 92-287, Weir & Weir (1993) FLC 92-338 require a party to property proceedings to make a full and frank disclosure of a party's financial position. Senior counsel for the wife colourfully summarised the these (sic) authorities in the following way:*
>
> > *'Come to this court and chance your hand at having the court determine the case without putting all of the facts on the table, that hand will be burnt if you left on the unfortunate side of it.'"*

His Honour stated that the case law was reinforced by the then Family Law Rules, including the need for an undertaking.

The husband maintained that he had made full and frank disclosure. The issue was the state of negotiations with a Mr EN, a third party associate of the husband. The husband maintained that negotiations for the sale of substantial property were preliminary. He went on to claim:

> *"that he had been given advice during mediation in June 2009 by Mr Eric Baker, the mediator, and the husband's barrister, Mr Tom Kirk, that matters regarding negotiations did not need to be disclosed in the family court proceedings. It was later put to the husband by senior counsel for the wife that such advice had been based on the incorrect premise put by the husband to Mr Baker and Mr Kirk that the only negotiations underway were that Mr EN had threatened the husband that if he did not buy out Mr EN's interests in the partnership, Mr EN would wind up the business. It was put to the husband that not only was it was the husband who had put forward this incorrect premise and then sought to rely upon the advice flowing from it, but that as at the date of mediation in June 2009 a deal had already been made between the husband and Mr EN. The husband denied that this was the case…"*

His counsel said at trial:

> *"Your Honour, my client is not a lawyer, he is a builder. It seems that the mediation that there was some form of discussion between my client and Mr [Eric] Baker. The outcome of those discussions is now reflected in that memorandum [by Mr Kirk QC] which was tendered before you yesterday. My client is not, as I have indicated – is a builder, he is not a lawyer. He clearly was under the impression that he did not have to make disclosure of those negotiations. Whether your Honour ultimately finds that he was right or wrong in that conclusion, he sought advice and he relied upon advice."*

Justice Watts stated:

> *"Well, if he knew the premise was wrong then it does not matter if he is a builder or a lawyer, he knows he cannot rely on advice when it is based on an incorrect premise … [and] that it was an incorrect premise and he knew it was incorrect premise when he sought the advice."*

It would appear that the husband already knew that it was incorrect premise as a deal had already been done.

On the last day of trial, following final submissions, subpoenaed documents came from a commercial firm of lawyers. It showed that contrary to the husband's assertion the deal had not been done, it was in very much the last stages of completion.

The husband was represented by an accredited family law specialist. Within a week of her going on the record, she and her client spoke with the commercial law firm, as to what had been suggested by an internal email of the commercial law firm that both the husband and his family law solicitor "*wanted to delay signing of the documents and the transfer… until after the Family Court proceedings to avoid valuation problems in the Family Court proceedings.*"

An email was sent within the commercial law firm:

> *"The big problem is the divorce proceedings. After speaking with [the husband's] family lawyer, it appears that no contracts can be signed as once signed there is an obligation on [the husband] to disclose to the court. If there are 'negotiations' ongoing then there is no obligation … My view is this fiction won't stand up as the partied (sic) have already agreed on everything. There is not real negotiation left. It is just sign the agreement time. If we were subpoenaed there wouldn't be anything we could say to indicate the parties hadn't concluded a deal."*

Furthermore,

> *"Our view is the actions of the parties … and the evidence clearly indicates that the parties had settled on a deal, the terms of which have all been agreed. The only changes have been the timing of settlement and completion of certain transactions which may impact on the proceedings. While we have endeavoured to structure the transactions in accordance with the wishes of the parties, our strong view is that any investigation of these transactions in their history will clearly show an agreement had been reached and should have been disclosed for consideration in the proceedings. … We also suggest that the full extent of the transaction and the documentation be disclosed to [the husband's] family lawyer for her to determine and advise on what if any disclosure should be made to the Family Court."*

The court inferred that the husband, with the assistance of his family law solicitor, developed a strategy to conceal the true situation about agreement which had been reached between the husband and his business associate.

The matter was relisted so that the solicitor had an opportunity to lead evidence and/or address the court if she wishes to as to whether she should be referred to the Legal Services Commission.

The court was satisfied that counsel for the husband had no idea about the discussions that his instructing solicitor had with the husband's commercial lawyer.

Nor was there any suggestion of impropriety on the part of Mr Kirk or Mr Baker.

Subsequently in Lambert v Jackson [2011] FamCA 275, his Honour ordered that the husband pay costs to the wife of $182,000 and that the husband and his solicitor jointly pay to the wife costs of $140,000 for which they were jointly and severally liable.

Watts J stated[6]:

> *"Any duty that [the solicitor] had to her client was overwritten by a paramount duty to the court. It was her duty not to mislead the court and she failed in that duty."*

The court subsequently gave the solicitor the opportunity to provide any relevant evidence that might have assisted herself. She chose not to do so.

It was no surprise that the husband then sought to blame the solicitor to conceal the progress of the agreement, saying it was the solicitor's decision and that the husband was unaware of the ramifications. His affidavit repeatedly raised issues as to his instructions to his solicitor, her advice and her actions and did so in the context of his reliance upon that material to defend the costs application against himself, but in full knowledge that there was also an application springing from those events as against the solicitor. The solicitor chose not to provide any evidence in response to her client's evidence.

Watts J stated[7]:

> *"I find that [the solicitor] breached her ethical obligations as a solicitor in her duties to the court. She entered into a series of steps designed to present a contrived position to the court for the express purpose of improving the chances of the husband receiving a superior alteration of the joint property of the parties than he would otherwise have been expected to, had the deliberate concealment not taken place. The second respondent [the solicitor] prepared and witnessed the husband's provision to the court of an undertaking as to disclosure. She prepared the husband's affidavits knowing that they were misleading by omission. She remained in court and continued to act for the husband during a time during which she gave oral evidence and she herself knew that evidence to be untrue. …*

[6] At [116]
[7] At [130] and at [133]-[134].

The [solicitor]'s acts were intentional and were at the most and serious kind. [She] deliberately contrived to conceal important and relevant financial information from the court. The husband embarked upon a course of conduct which was aided and abetted by the [solicitor]. The sole purpose of acting in that fashion was to increase the likelihood that the husband would receive a more favourable outcome but the method employed was one that undermined the integrity of the proceedings.

I have no difficulty in concluding that this course of action from the point of time when the [solicitor] commenced it, made the proceedings more expensive, lengthier and more difficult. And assumption has to be made, in favour of the wife in the context of this costs application, that had the [solicitor] encouraged the husband to openly

disclose matters which were deliberately not disclosed, settlement discussions may have taken place which may have shortly thereafter led to the wife agreeing to a properly informed equitable outcome. I conclude that it would be wholly inequitable for this court to leave the wife out of pocket because of the [solicitor]'s conduct."[8]

In Millhouse and Mullens[9], Forrest J stated:

"Tensions may sometimes merge between duties a practitioner owes to the client and those owed to the Court in the cut and thrust of the solicitor-client relationship. I also accept that the authorities make it clear that in any conflict of fulfilment of the duties owed by a practitioner, the practitioner's duty to the Court takes priority. However, consistent with the requirement for cautious exercise of this supervisory jurisdiction, absent a finding such as the solicitor having a clear and direct financial interest in the fruits of the litigation (other than an expectation of being paid), or a finding that a particular piece of advice or a particular action of the practitioner demonstrates a prioritising of the duty to the client over the duty to the Court, restraint should not, in my opinion, be imposed on a solicitor on purely speculative grounds. In this respect, I add that I reject the submission of counsel for the wife that a solicitor, consistent with his or her duties to the court, including those that arise pursuant to the rules, must cease acting for a litigant simply because that litigant refuses to follow the solicitor's advice …"

His Honour subsequently in Worth & Worth[10] considered whether a failure by a solicitor to identify the name of the contact centre employee was a failure to disclose by the solicitor's client as part of the pre-action procedure and rules. Counsel for the father submitted that as the mother's solicitor had drawn the mother's affidavit by containing a "half truth" in that the mother deposed to speaking with the contact centre and did not identify the person with whom she spoke and as the mother was later said to have instructed her solicitor not to disclose the identity of the staff member to the father's solicitor, the solicitor was in breach

[8] See also Ryan v Primesafe [2015] FCA 8 when an improper ambit claim had been made.
[9] [2015] FamCA 754 at [38].
[10] [2016] FamCA 4, one of many cases between that couple

of the obligations imposed on him by the rules and was bound to "cease to act for the client", or, in default of himself ceasing to act, mut be restrained from so acting.

Counsel for the father submitted that the obligations set out in schedule 1 part 1 parenting cases of the previous pre-action procedures clearly applied notwithstanding the fact that the proceedings were now before the court and had been for many months.

Forrest J did not accept that submission. He said[11]:

> *"I do not consider that the 'obligation' set out in paragraph 6(4) schedule 1 part 2 of the Family Law Rules imposes an ongoing, inflexible obligation on a solicitor to cease to act if his or her client instructs him or her during the conduct of proceedings in the court that he or she is not to disclose to the other party the identity of a person with whom the client has spoken and obtain the information that is relevant to the proceedings where the client gives the solicitor some reasonable explanation for not wanting to disclose that identity at that particular stage of the proceedings. That's far different from a client telling a solicitor before proceedings have been commenced that they do not intend to honour the obligation to make full and frank disclosure during any subsequent proceedings that might be commenced."*

His Honour further held[12]:

> *"In this particular case, the burden of proof is on the father who seeks an order restraining [the mother's solicitor] for continuing to act for the mother. It is for him to adduce the evidence to persuade to the court that the solicitor he seeks to have restrained is clearly prioritising his duty to his client over his duty to the court. In the absence of evidence of the confidential conversations between [the solicitor] and his client, the court would be engaging in pure speculation in this case to attribute or not attribute certain actions or advice to [the solicitor] consistent or inconsistent with the discharge of his duty to the court. For example, the court cannot simply make a finding, without evidence, that [the solicitor] advised his client that she will not have to disclose the information at any time, or that he did not advise her that if ordered to by the court she will have to disclose the information and that she might face cost consequences if she has to be ordered to as opposed to just instructing [her solicitor] to disclose the information by correspondence as he has been asked to do.*
>
> *That [the solicitor] did not adduce any evidence in support of the opposition of the application for restraint is no answer to this evidentiary dilemma the father faces. It is his application and he carries the evidentiary burden of proof. In my judgment, he has fallen short of meeting it as required to be successful in this application.*

[11] At [28].
[12] At [30]-[33].

Finally, on the point, I am not satisfied that the drawing of the mother's affidavit … [and in particular that paragraph] by [the mother's solicitor] evidence is a prioritising of his duty to his client over his duty to the court necessitates restraining him from continuing to act. The wording of the subject paragraph could well have been better, but again, absent evidence of what he asked the client and what evidence he gave to her in and around that task of preparing that affidavit, the court cannot speculatively impute some professional misconduct or subversion of his duty to the court that justifies restraint.

I am satisfied, on the facts of this case, that the 'fair minded, reasonably informed member of the public' might very well ask the same question that I did of the father's solicitor at the hearing, namely as to why the procedure provided for in the rules for requesting answers to specific questions or an application for an order that the mother disclose the identity of the staff member in an affidavit had not been pursued in lieu of the application for restraint of the mother's solicitor. I do not consider that same 'member of public' would conclude that the proper administration of justice requires [the mother's solicitor] to be now restrained from acting for the mother in the interests of the protection of the judicial process."

The father's application was dismissed with costs

RULE 6.02-6.04

These provide:

"6.02 Undertaking by Party

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

(a) stating that the party:

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

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

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

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

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

Penalty: 50 penalty units.

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

The explanatory statement notes that the rule is based on FLR 2004 Rules 13.15 and 13.16.

(3) If the court makes an order against a party under section 112AP of the Family Law Act in respect of a false or misleading statement referred to in subrule (2), the party must not be charged with an offence against subrule (2) in respect to that statement.

The explanatory statement notes that the rule is based on FLR 2004 Rule 13.07.

(4) Use of Documents

(1) A person who inspects or copies a document, in relation to a proceeding, under these Rules or an order:

(a) must use the document for the purpose of the proceeding only; and

(b) must not otherwise disclose the contents of the document, or give a copy of it, to any other person without the court's permission.

(2) However:

(a) a solicitor may disclose the contents of the document or give a copy of the document to the solicitor's client or counsel; and

(b) a client may disclose the contents of the document or give a copy of the document to the client's solicitor or counsel; and

(c) this rule does not affect the right of a party to use a document or to disclose its contents if that party has a common interest in the document with the party who has possession or control of the document."

The explanatory statement notes that the subrule (1) is based on FLR 2004 Rule 13.07A, see also FCCR 2001 Rule 14.11.

Rule 6.05 sets out the duty of disclosure in parenting proceedings:

"(1) The duty of disclosure applies to a parenting proceeding.

(2) Documents that may contain information relevant to a parenting proceeding may include, among other documents:

(a) criminal records of a party; and

(b) documents filed an intervention order proceedings concerning a party; and

(c) medical records or reports about a child or parties; and

(d) school reports."

The explanatory note states:

> *"Subrule (2) sets out a non-exhaustive list of documents which may contain information relevant to a parenting proceeding. Not all documents in this list will contain relevant information or must be disclosed in every proceeding."*

There is separately a positive obligation under the rules to file family violence orders, including any variations: rule 2.10.

Housekeeping measures

Contrary to the emphasis in the rules about disclosure and financial proceedings, the list of documents to be disclosed and parenting proceedings is scant. Other documents that might be relevant are:

- Social media posts.
- Communications between the parties or with other relevant third parties as to representations made – by SMS, Messenger, Instagram, Snapchat, Whatsapp or other social media.

I ask that other practitioners have their clients use an app such as SMS Export. It's cheap. I am overwhelmed at times at the number of screenshots I have to look at of text messages between the parties, undated, often incomplete, difficult to replicate and bulky as an annexure. It is much easier using a cheap app like SMS Export which converts all the text messages to an excel spreadsheet and can then easily be copied and pasted into the body of the affidavit, making it a lot easier to read and absorb.

I am astonished at times at the number of recordings that have been undertaken by parties on their mobile phones. Whether it is recordings of the children or of conversations with their ex, many of these will be relevant. One would anticipate that most discussions that they have recorded with their ex will be relevant. Disclosure in such circumstances appears to be the exception rather than the rule. You need to ask your client if they have made any recordings and then have them provided (and if relevant then disclosed).

I ask that practitioners really focus on this issue of disclosure so that your client is seen as doing absolutely everything to act transparently.

At the beginning of a matter, you should have a case plan. You should continue to evolve that case plan as the matter progresses. The case plan should identify what issues are relevant – which in turn identifies what types of documents ought to be relevant. I have been astounded to see in a matter that

a party stated that a father stated that he had attended upon a courtordered psychiatrist – but did not disclose any report from the psychiatrist or any court order requiring him to attend upon the psychiatrist or the nature of the criminal charges that led to the court making an order requiring him to attend upon the psychiatrist or anything explaining what the criminal conduct might have been – when most if not all of these documents were available to him.

I continue to be astonished by the gold mine seen in social media posts – and the failure of that party to disclose those posts. It seems at times de rigueur for a party to criticise their ex either expressly or by implication in social media posts, but not be brave enough to disclose to the other side and the court as they are obliged to do. It seems yet another example of keyboard warriors – with the exception that if they are making those comments online, what are they saying in the presence of or to their children?

It is essential from the beginning of the matter to have a chronology. It should have three columns: date, fact/allegation and source. It is extraordinary when you prepare a chronology when you see the gaps in the evidence and the gaps in disclosure by your client or the other side.

The chronology should be updated during the course of the matter as the case builds.

You should have a systematic approach to electronic disclosure, for example, on your system there should be a separate folder under your client of disclosure to the other side – setting out the correspondence and any documents, preferably numbered.

There should be a separate folder for disclosure from the other side set out in the same manner.

There should also be a separate folder for all correspondence dealing with requests for disclosure or complaining about the lack of disclosure by the other side or by your client.

When dealing with at times hundreds of documents (in a complex parenting or property matter), having those simple folders makes it a lot easier to find individual documents which could provide the answer to the question at hand.

As rule 6.05(2)(a) mentions criminal records of a party, it would be wise in every case to ask your client at the first appointment when they have any criminal convictions and whether the other party has any criminal convictions. It would also be wise to find out about their traffic history. If they or their ex has criminal history, then there are red flags for lines of inquiry as to:

- Domestic violence (knowing that there is an obligation to disclose protection orders anyway)[13]
- Mental health issues
- Alcohol and drug abuse.
- Child abuse in the family of origin.

This is an apt time to set out what was held in the inquest into the death of Mason Jett Lee[14]:

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[13] See, for example: https://www.aic.gov.au/sites/default/files/2020-05/ti580_domestic_violence_offenders_prior_offending.pdf
[14] Found at: https://www.courts.qld.gov.au/__data/assets/pdf_file/0009/651636/cif-lee-mj-20200602.pdf at [928]-[931].

"928. The errors and failings of the individual employees of the department were merely the component parts of the collective failure of the department.

929. The failings occurred in a context complicated by issues of mental health, domestic violence, drug and alcohol abuse, homelessness, poor socio-economic status – all of these issues were present for Mason's family.

930. Families that come into contact with the department are typically becoming increasingly complex, with significant needs across multiple disciplines. Sadly, Mason's family situation was not unusual. Statistics collated in November 2019 in relation to families involved with the department demonstrate:

a. 66% of households substantiated for harm or risk of harm to a child had a parent with a current or past drug and/or alcohol problem;

b. 50% of families had been impacted by domestic and family violence in the past year;

c. 42% had a parent who had been abused as a child;

d. 53% had a parent with a criminal history;

e. 53% had a parent with a diagnosed mental illness;

f. 74% of households had a combination of these factors. 931. Every one of these factors was present for Mason's family."

I hate surprises. I don't want my clients to give me surprises. I can't control surprises from the other side. I want my client to be fully transparent with me and to dig deep to find those documents. I would rather know my client's case warts and all – and address the issues, rather than be taken by surprise later on.

EXAMPLES OF DOCUMENTS AS TO DE FACTO RELATIONSHIP

In a recent matter of mine, there was a dispute about whether the two parties were, on the relevant day, in a de facto relationship. The matter concerned s.60H. The applicants said that the woman in question (who was the sister and sister-in-law of the applicants) and the respondent were not in a de facto relationship although they had been in an intimate relationship on the relevant day. The respondent said that she and the applicant were in a de facto relationship on the relevant day. It was necessary for the court to determine the issue- in order to determine as to whether or not the respondent was a parent.

The respondent said that the parties that she and the deceased had been together 5-6 nights a week in a period from June 2020 through to a separation in mid-November 2020, then a reconciliation in February 2021 following by a final separation in early April 2021.

The relevant date was in September 2020.

The documents that established that they were not in a de facto relationship at the relevant time were extensive. They included:

- Phone recordings
- Voice mail messages
- Recordings in person
- Text messages between the parties
- Social media posts
- Documents to do with the IVF clinic and attendance on doctors
- Receipts
- Mobile phone account records- which showed the local tower from calls were made.
- Bank statements- which showed the location every time PayWave was used
- Toll data- which showed in effect almost every time the deceased drove to and from the respondent's home

The critical question was on a day by day basis whether the two women spent time at the respondent's house. It was common ground that the two women had not spent time at the deceased's house. Combing through these documents was onerous, but essential.

A separate chronology of these events was required in addition to the general chronology between the parties – which was then reduced to a joint schedule for the trial. This was a huge amount of work, but saved days in court. Analysis of the documents pointed quite definitively when the parties were together and when they were not. The documents showed that the assertion of the respondent that they were in a de facto relationship on the relevant day, and had been spending time together 5 to 6 nights a week, was untrue. Reliance on the documents was essential in circumstances where one of the parties to the relationship had died.

Rule 6.06

Rule 6.06 provides:

> *"(1) The duty of disclosure applies to a financial proceeding.*
>
> *(2) Subrules (3) to (9) do not apply to a party to a property proceeding who is not a party to the marriage or de facto relationship to which the application relates, except to the extent that the party's financial circumstances are relevant to the issues in dispute.*

The explanatory note says as to subrule (2) that it:

"Provides that subrules (3)-(9) do not apply to third parties (persons who are not party to the marriage or de facto relationship) except to the extent that their financial circumstances are relevant to the issues in dispute. This subrule is based on FLR 2004 subrule 13.02(2)."

(3) Without limiting subrule (1), a party to a financial proceeding must make full and frank disclosure of the party's financial circumstances, including the following:

(a) the party's earnings, including income that is paid or assigned to another party, person or legal entity;

(b) any vested or contingent interest in property;

(c) any vested or contingent interest in property owned by a legal entity that is fully or partially owned or controlled by a party;

(d) any income earned by a legal entity fully or partially owned or controlled by a party, including income that is paid or assigned to any other party, person or legal entity;

(e) the party's other financial resources;

(f) any trust:

- *i. of which the party is the appointor or trustee; or*
- *ii. of which the party, the party's child, spouse or de facto spouse is an eligible beneficiary as to capital or income; or*
- *iii. of which a corporation is an eligible beneficiary as to capital or income if the party, or the party's child, spouse or de facto spouse is a shareholder or director of the corporation; or*
- *iv. over which the party has any direct or indirect power or control; or*
- *v. of which the party has the direct or indirect power to remove or appoint a trustee; or*
- *vi. of which the party has the power (whether subject to the concurrence of another person or not) to amend the terms; or*
- *vii. of which the party has the power to disapprove a proposed amendment of the terms or the appointment or removal of a trustee; or*
- *viii. over which a corporation has a power referred to in any of subparagraphs (iv) to(vii), if the party, the party's child, spouse or de facto spouse is a director or shareholder of the corporation;*

(g) any disposal of property (whether by sale, transfer, assignment or gift) made by the party, a

legal entity referred to in paragraph (c), a corporation or a trust referred to in paragraph (f) that may affect, defeat or deplete a claim:

i. in the 12 months immediately before the separation of the parties; or

ii. since the final separation of the parties;

(h) liabilities and contingent liabilities.

(4) Paragraph (3)(g) does not apply to a disposal of property made:

(a) with the consent or knowledge of the other party; or

(b) in the ordinary course of business.

(5) A party starting, or filing a response or reply to, a financial proceeding (other than by an Application for Consent Orders) must file, at the same time:

(a) a Financial Statement; and

(b) a financial questionnaire in the form approved by the Chief Executive Officer.

The explanatory statement says about (5) and (6):

"These subrules are based on FLR 2004 rules 13.05 and FCCR 2001 rule 24.02 (Financial Statement), and FLR 2004 subrule 12.06(1) (Financial Questionnaire). The Financial Questionnaire is now to filed at the start of the proceeding, at the same time as the Financial Statement."

(6) If a party is aware that the completion of a Financial Statement will not fully discharge the duty to make full and frank disclosure, the party must also file an affidavit giving further particulars.

(7) If a party's financial circumstances have changed significantly from the information set out in the Financial Statement or an affidavit filed under subrule (6), the party must, within 21 days after the change of circumstances, file:

(a) a new Financial Statement; or

(b) if the changes can be set out clearly in 300 words or less—an affidavit containing details about the party's changed financial circumstances.

This is according to the explanatory statement based on FLR 2004 rules 13.06 and FCCR 2001 rule 24.06.

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

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

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

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

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

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

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

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

According to the explanatory statement this is based on FCCR 2001 rule 24.04, however the document is now to be served prior to the first court date.

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

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

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

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

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

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

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

According to the explanatory statement this is based on FCCR 2001 rule 24.05.

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

The explanatory statement notes that subrule 10 is new.

The explanatory statement says:

> *"This Division applies to all family law and child support proceedings. It sets out a process for parties to request and inspect documents to which the duty of disclosure applies. This process is additional to other specific requirements for disclosure documents under the Rules (for example, under rule 6.06) and any specific orders for the disclosure of documents that the court may make.*
>
> *In summary, the process is as follows:*
>
> > *1. After the proceeding has been allocated a first court date, a party may request another party to provide a list of documents which are or have been in their possession or control, to which the duty of disclosure applies (subrule 6.09(1));*
> >
> > *2. The other party must, within 21 days, provide a list of documents to which the duty of disclosure applies (subrule 6.09(2));*
> >
> > *3. The first party may ask to inspect the documents disclosed in the list or be provided with copies of them (rule 6.10);*
> >
> > *4. The first party may also ask to inspect any document referred to in a document filed in the proceeding or in correspondence between the parties (rule 6.11), or to inspect an original document to which the duty of disclosure applies (rule 6.12);*
> >
> > *5. Where copies are requested, these are to be provided within 21 days, electronically where practicable (rule 6.13), but if there are too many documents inspection can be arranged under rule 6.14;*
> >
> > *6. Where inspection is requested, the other party must notify the first party within 14 days of a time and place to inspect the documents (rule 6.14);*
> >
> > *7. If an objection is taken to disclosure, production or inspection, or there is non-compliance, the court may make an order (rule 6.16-6.18)."*

Rule 6.08 provides:

> *"This Division does not affect:*
>
> > *(a) the right of a party to inspect a document, if the party has a common interest in the document with the party who has possession or control of the document; or*
> >
> > *(b) any other right of access to a document other than under this Division; or*
> >
> > *(c) an agreement between the parties for disclosure by a procedure that is not described in this Division."*

The explanatory notes that rule 6.08 is based on FLR 2004 subrule 13.19(2).

Rule 6.09 provides:

> *"(1) After a proceeding has been allocated a first court date, a party (the requesting party) may, by written notice, ask another party (the disclosing party) to give the requesting party a list of documents to which the duty of disclosure applies.*
>
> *(2) The disclosing party must, within 21 days after receiving the notice, serve on the requesting party a list of documents identifying:*
>
> *(a) the documents to which the duty of disclosure applies; and*
>
> *(b) the documents (if any) no longer in the disclosing party's possession or control to which the duty would otherwise apply (with a brief statement about the circumstances in which the documents left the party's possession or control); and*
>
> *(c) the documents (if any) for which privilege from production is claimed.*
>
> *(3) If a document that must be disclosed is located by, or comes into the possession or control of, a disclosing party after service of the list under subrule (2), the party must disclose the document within 7 days after it is located or comes into the party's possession or control."*

The explanatory statements notes that this is based on FLR 2004 subrules 13.20(1), (2) and

(5). The process may now be used following the allocation of a first court date for the proceeding.

Rule 6.10 provides:

> *"(1) This rule applies to a document disclosed under rule 6.09.*
>
> *(2) The requesting party may, by written notice, ask the disclosing party to:*

(a) provide a copy of the document in accordance with rule 6.13; or

(b) produce the document for inspection in accordance with rule 6.14."

According to the explanatory statement, this is based on FLR 2004 subrule 13.20(3).

Rule 6.11 provides:

"(1) This rule applies to a document referred to:

(a) in a document filed or served by a party on another party or on an independent children's lawyer; or

(b) in correspondence prepared and sent by or to another party or to an independent children's lawyer.

(2) A party may, by written notice, require another party to:

(a) provide a copy of the document in accordance with rule 6.13; or

(b) produce the document for inspection in accordance with rule 6.14."

According to the explanatory statement, this is based on FLR 2004 subrule 13.08(1). See also FCCR 2001 subrule 14.10(1).

Rule 6.12 provides:

"(1) A party may, by written notice, require another party to produce for inspection an original document if the document is a document that must be produced under the duty of disclosure.

(2) If a party receives a notice under subrule (1), the party must produce the document for inspection in accordance with rule 6.14."

This rule is based on FLR 2004 rule 13.09.

Rule 6.13 provides:

"(1) Subject to subrule (2) and rule 6.15, a party must provide copies of documents to the party requesting the copies:

(a) within 21 days after receiving a notice under paragraph 6.10(2)(a) or 6.11(2)(a); and

(b) at the expense of the party requesting the copies; and

(c) if practicable, in an electronic format

(2) If it is not convenient for a disclosing party to provide copies of documents under subrule (1) because of the number and size of the documents, the disclosing party must produce the documents for inspection in accordance with rule 6.14."

According to the explanatory statement, this is based on FLR 2004 subrules 13.08(2) and 13.20(4). A uniform 21 day timeframe for provision of the copies has been adopted.

Rule 6.14 provides:

"(1) A party must produce documents for inspection in accordance with this rule if the party:

(a) receives a notice under paragraph 6.10(2)(b); or

(b) receives a notice under paragraph 6.11(2)(b); or

(c) receives a notice under paragraph 6.10(2)(a) or 6.11(2)(a) and subrule 6.13(2) applies; or

(d) receives a notice under subrule 6.12(1).

(2) Subject to rule 6.15, a party must, within 14 days after receiving a notice referred to in subrule (1):

(a) notify, in writing, the party requesting the document of a convenient place and time to inspect the document; and

(b) produce the document for inspection at that place and time; and

(c) allow copies of the document to be made, at the expense of the party requesting it.

(3) The time fixed under paragraph (2)(a) must be within 21 days after the party receives the notice referred to in subrule (1) or as otherwise agreed.

(4) A party who fails to inspect a document after receiving a notice under subrule (2) may not later do so unless the party tenders an amount for the reasonable costs of providing another opportunity for inspection."

The explanatory statement says of rule 6.14:

"This rule sets out the procedure for producing documents for inspection. It applies if a party requests to inspect a document under rule 6.10, 6.11 or 6.12, or if a party requests copies of documents under rule 6.10 or 6.11 but the provision of copies is inconvenient. In general, the disclosing party must, within 14 days of the request, propose a time within 21 days of the request for the inspection to take place. The inspecting party must be given the opportunity to make copies of the inspected documents at their own expense.

The rule is based on FLR 2004 rules 13.10, 13.11 and 13.21. See also FCCR 2001 rules 14.07 and 14.08."

Rule 6.15 provides:

"(1) A party must disclose, but need not provide a copy of nor produce to the party requesting it:

(a) a document for which there is a claim of privilege from production; or

(b) a document that is no longer in the disclosing party's possession or control; or

(c) a document a copy of which has already been provided, if the copy contains no change, obliteration or other mark or feature that is likely to affect the outcome of the proceeding.

(2) Subrule (1) does not affect the operation of rule 7.14. Note: Rule 7.14 requires the disclosure of an expert's report in a parenting proceeding."

The explanatory statement says this is based on FLR 2004 rule 13.12 and subrule 13.20(4).

Rule 6.16 provides:

"(1) This rule applies if:

(a) a party claims:

(i) privilege from production of a document; or

(ii) that the party is unable to produce a document; and

(b) another party, by written notice, challenges the claim.

(2) The party making the claim must, within 7 days after the other party challenges the claim, file an affidavit setting out details of the claim.

(3) The court may inspect the document for the purpose of determining whether the claim is valid."

The rule is based on FLR 2004 rule 13.13 subrule (3), which makes it clear that the court may inspect the document for the purpose of determining the validity of the claim, as based on FCCR 2001 subrule 14.05(2).

Rule 6.17 provides:

> *"If a party does not disclose a document as required by these Rules:*
>
> *(a) the party:*
>
> *(i) must not offer the document, or present evidence of its contents, at a hearing or trial without the other party's consent or the court's permission; and*
>
> *(ii) may be guilty of contempt for not disclosing the document; and*
>
> *(iii) may be ordered to pay costs; and*
>
> *(b) the court may stay or dismiss all or part of the party's case.*
>
> *Note 1: A party who discloses a document under this Part must produce the document at the trial if a notice to produce has been given (see rule 6.42).*
> *Note 2: Section 112AP of the Family Law Act sets out the court's powers in relation to a contempt of court."*

According to the explanatory statement this rule is based on FLR 2004 rule 13.14. See also FCCR 2001 rule 14.09.

Rule 6.18 provides:

> *"(1) A party (the first party) may seek an order that:*
>
> *(a) another party comply with a request for a list of documents in accordance with rule 6.09; or*
>
> *(b) another party provide an affidavit of documents; or*
>
> *(c) another party disclose a specified document, or class of documents, by providing a copy of the document, or each document in the class; or*
>
> *(d) another party produce a document for inspection; or*
>
> *(e) another party file an affidavit stating:*
>
> *(i) that a specified document, or class of documents, does not exist or has never existed; or*
>
> *(ii) the circumstances in which a specified document or class of documents ceased to exist or passed out of the possession or control of that party; or*
>
> *(f) the first party be partly or fully relieved of the duty of disclosure.*

(2) A party making an application under subrule (1) must satisfy the court that the order is appropriate in the interests of the administration of justice.

(3) The court may make an order of a kind referred to in subrule (1) on its own initiative if it is satisfied that the order is appropriate in the interests of the administration of justice

(4) In making an order under subrule (1) or (3), the court may consider:

(a) whether the disclosure sought is relevant to an issue in dispute; and

(b) the relative importance of the issue to which the document or class of documents relates; and

(c) the likely time, cost and inconvenience involved in disclosing a document or class of documents, taking into account the amount of the property, or complexity of the corporate, trust or partnership interests (if any), involved in the proceeding; and

(d) the likely effect on the outcome of the proceeding of disclosing, or not disclosing, the document or class of documents.

(5) If the disclosure of a document is necessary for the purpose of resolving a proceeding at a dispute resolution event, a party (the requesting party) may, on the first court date, seek an order that another party:

(a) provide a copy of the document to the requesting party; or

(b) produce the document to the requesting party for inspection and copying.

(6) The court may make an order under subrule (5) only in exceptional circumstances.

(7) The court may inspect a document to decide:

(a) an application made under this rule; or

(b) whether to make an order under subrule (3).”

The explanatory statement says:

“This rule is based on FLR 2004 rule 13.22.

(1)(b) enables a party to seek an order that another party provide an affidavit of documents (as opposed to a list of documents under rule 6.09). New subrule (3) makes it clear that the court can make an order under this rule on its own initiative.”

Rule 6.19 provides:

> *"If the cost of complying with the duty of disclosure would be oppressive to a party,the court may order another party to:*
>
> *(a) pay the costs; or*
>
> *(b) contribute to the costs; or*
>
> *(c) give security for costs."*

According to the explanatory statement this is based on FLR 2004 rule 13.23.

Rule 6.20 allows the court to make an order directing electronic disclosure. According to the explanatory rule, this is based on FLR 2004 rule 13.24.

Specific questions

These can only be asked in relation to an application seeking final orders: **rule 6.21**.

The explanatory statement says:

> *'This rule is a simplified version of FLR 2004 rule 13.25.*
>
> *The commencement of the FCFCOA Act will end the current requirement in the Federal Circuit Court for the court to make a declaration under section 45(1) of the Federal Circuit Court Act 1999 before interrogatories allowed in family law and child support matters. As such the FLR 2004 rules regarding specific questions have been adopted for both the FCFCOA (Division 1) and the FCFC 0A (Division 2)."*

Rule 6.22 provides:

> *"(1) After a proceeding has been allocated a first court date, a party (the* **requesting party***) may serve on another party (the* **answering party***) a request to answer specific questions.*
>
> *(2) A party may only serve one set of specific questions on another party.*
>
> *(3) The specific questions must:*
>
> *(a) be in writing; and*
>
> *(b) be limited to 20 questions (with each question taken to be one specific question); and*
>
> *(c) not be vexatious or oppressive.*

(4) If an answering party is required, by a written notice served under rule 6.09 or an order, to give the requesting party a list of documents, the answering party is not required to answer the questions until the time for disclosure under Part 6.2 or an order has expired.

(5) The requesting party must serve a copy of any request to answer specific questions on all other parties."

These can only be used once and is limited to 20 questions. Leave is not required to serve a request to answer specific questions, however the questions must not be vexatious or oppressive. The rule is based on FLR 2004 rule 13.26.

Rule 6.23 provides:

"(1) A party on whom a request to answer specific questions is served must answer the questions in an affidavit that is filed and served on each person to be served within 21 days after the request was served.

(2) The party must, in the affidavit:

(a) answer, fully and frankly, each specific question; or

(b) object to answering a specific question.

(3) An objection under paragraph (2)(b) must:

(a) specify the grounds of the objection; and

(b) briefly state the facts in support of the objection."

This is based on FLR 2004 rule 13.27.

Rule 6.24 provides:

"(1) A party may apply for an order:

(a) that a party comply with rule 6.23 and answer, or further answer, a specific question served on the party under rule 6.22; or

(b) determining the extent to which a question must be answered; or

(c) requiring a party to state specific grounds of objection; or

(d) determining the validity of an objection; or

(e) that a party who has not answered, or who has given an insufficient answer, to a specific question be required to attend court to be examined.

(2) A party making an application under subrule (1) must satisfy the court that the order is appropriate in the interests of the administration of justice.

(3) In considering whether to make an order under subrule (1), the court may take into account whether:

(a) the requesting party is unlikely, at the trial, to have another reasonably simple and inexpensive way of proving the matter sought to be obtained by the specific questions; and

(b) answering the questions will cause unacceptable delay or undue expense; and

(c) the specific questions are relevant to an issue in the proceeding."

According to the explanatory statement, this is based on FLR 2004 rule 13.28:

"New subrule (2) makes it clear that the parties seeking the order must satisfy the court that the order is appropriate in the interests of the administration of justice."

Rule 6.25 enables information to be obtained from employers:

"(1) This rule sets out the information a party may require from an employer of a party to a financial proceeding.

(2) The court may order a party to inform the court, in writing, within a specified time, of:

(a) the name and address of the party's employer or, if the party has more than one employer, each employer; and

(b) other information the court considers necessary to enable an employer to identify the party

(3) Subrule (4) applies if:

*(a) a party (the **requesting party**) requests the employer of another party (the **employee**) to give particulars about:*

(i) the employer's indebtedness to the employee; or

(ii) the employee's present rate of earnings, or of all the earnings of the employee that became payable during a specified period; or

(iii) the employee's conditions of employment; or

(iv) the employee's accrued or potential leave entitlements as at a particular date or dates; or

(v) any entitlement of the employee to earn bonuses and any conditions that the employee must satisfy in order to be paid such bonuses; and

(b) the employer refuses, or fails to respond to, the requesting party's request.

(4) The requesting party may apply for an order that the employer inform the court, in writing, within a specified time, of the particulars referred to in paragraph (3)(a).

Note: A document purporting to include the information referred to in paragraph (2)(a) or (b), or the particulars referred to in paragraph (3)(a), may be admitted as evidence of its contents (see section 48 of the Evidence Act 1995). However, subject to sections 4 and 5 of the Evidence Act 1995, that Act does not apply to the Family Court of Western Australia or any other court of a State."

According to the explanatory statement, this rule is based on FLR 2004 rules 13.29 and 13.30 and "the particulars that may be requested have been extended to included particulars of an employee's accrued or potential leave entitlements and any entitlement of the employee earned bonuses."

SUBPOENAS AND NOTICES TO PRODUCE

The explanatory statement says:

> *"This Part harmonises existing rules about subpoenas and notices to produce, with some modification. It is generally based on the FCCR 2001 rules, although the FLR 2004 rules have been adopted in some instances."*

Rule 6.26 which concerns the issue of subpoenas, according to the explanatory note is based on FCCR 2001 rule 15A.02. See also FLR 2004 rule 15.17. Under **rule 6.27(1)** a selfrepresented party must not request the issue of a subpoena without the permission of the court. According to the explanatory statement, this is based on FLR 2004 rule 15.18(a).

There has been a significant change for subpoenas for a final hearing, now requiring the permission of the court, consistent with the *Family Law Rules*, not FCCA practice. Subrule **6.27(2)** provides:

> *"A party or an independent children's lawyer must not request the issue of:*
>
> *(a) a subpoena to give evidence; or*
>
> *(b) a subpoena for production and to give evidence; or*
>
> *(c) a subpoena for production for a final hearing; or*
>
> *(d) a subpoena for production directed to another party to the proceeding; without the permission of the court."*

There is still the five subpoena limit for production of documents on an interlocutory order without permission of the court: **6.27(3)** and the limit does not apply generally to independent children's lawyers: 6.27(4). The former is based on FCCR 2001 rule 15A.05.

There is still not the ability to issue a subpoena requiring the production of document or thing in the possession of the court or another court. This is based on FCCR 2001 rule 15A.03, see also FLR 2004 rule 15.18(b) and rule 15.34.

There is a time limit for when subpoenas must be returnable under rule **6.29** i.e. no later than **three days before a court event** to which it relates and must be **served at least 10 days before production** is required. A **subpoena requiring attendance** must be made returnable on a day when the proceeding is listed for a hearing, and must be **served at least seven days before** attendance is required. This is based on FCCR 2001 rule 15.A4 however the three day limit is new and is intended to give *"parties an opportunity to inspect subpoena documents before the court event"*.

Under **rule 6.30** a subpoena for production of documents only may be served by ordinary service or as agreed with the person to whom the subpoena is directed, consistent with current practice. The subrules 1 and 2 harmonise FCCR 2001 subrule 6.06(1) and FLR 2004 subrule 15.22(1A).

There remains the requirement to serve the subpoena by ordinary service on each other party, any interested person and any independent children's lawyer, based on FCCR 2001 subrule 15A.06(2) and FLR 2004 subrule 15.22(2).

There are different rules concerning serving subpoenas requiring the attendance of a person – which is personal service and on a corporation.

Rule 6.31 requires conduct money to be paid in subrules 1 and 2 and subrule 3 provides that a person who is served with a subpoena to give evidence or production and to give evidence is entitled to be paid a witness fee by the issuing party in accordance with part 2 of schedule 2, immediately after attending court in compliance with the subpoena. According to the explanatory statement, this harmonises FCCR 2001 rule 15A.07 and FLR 2004 subrule 15.23(1).

The minimum conduct money is as follows, as set out in part 1 of schedule 1:

- Minimum conduct money $25
- Travel for fares on public transport for return travel between the place of employment or residence in the court or if no public transport is available – at 80 cents per kilometre required to be travelled between the place of employment or residence and the court
- A reasonable allowance for accommodation and meals to be incurred during the estimate of time of the hearing or trial.

Witness fees under part 2 of schedule 2 are $75 per day or part of a day for necessary absence in the witnesses' place of employment or residence and for expert witnesses such further amount as the court allows for the preparation of a report in absence from the expert witnesses' place of employment.

Of course, the conduct money and witness fees may be significantly higher than that set out in the rules.

Under **rule 6.32** the issuing party for a subpoena may undertake not to require compliance with the subpoena. This is based on FCCR 2001 rule 15A.08 and FLR 2004 rule 15.25(1)(b).

Setting aside a subpoena **under rule 6.33** is based on FCCR rule 15A.09. See also FLR 2004 rule 15.26.

Rule 6.34 provides:

> *"Subject to rule 6.35, the court may, on application, make an order for the payment of any loss or expense incurred in complying with the subpoena."*

This rule is based on FCCR 2001 rule 15A.10.

Rule 6.35 provides:

> *"1 This rule applies if:*
>
> *(a) a subpoena is addressed to a person who is not a party to the proceedings; and*
>
> *(b) before complying with the subpoena, the person subpoenaed has given the issuing party notice that substantial loss or expense would be incurred in properly complying with the subpoena, including a particularised estimate of the loss or expense; and*
>
> *(c) the court is satisfied that substantial loss or expense is incurred in properly complying with the subpoena*
>
> *2. Unless the court otherwise directs, the amount of the loss or expense estimated under paragraph (1)(b) is payable by the issuing party.*
>
> *3. The court may fix the amount payable having regard to the scale of fees and allowances payable to witnesses in the Supreme Court of the State or Territory where the person is required to attend.*
>
> *4. The amount payable is in addition to any conduct money paid.*
>
> *5. If a party who is to pay an amount under this rule obtains an order for the costs of the proceeding, the court may:*
>
> *(a) allow the amount to be included in the costs recoverable; or*
>
> *(b) make any other order it thinks appropriate."*

As an example where further conduct money and costs were refused to a firm of solicitors who had been subpoenaed, Murphy J in *Markoska and Markoska (Costs) [2011] FamCA 833* had a long discussion about the history of conduct money and the rules. His Honour stated[15]:

> *"57. The rules refer to a 'substantial' loss or expense.*
>
> *58. The determination of what is substantial is very subjective. In my view, it means that the expense must be large causing loss; it must be unusual in the sense of requiring normal activity to be stopped; or it must cause an unfair inconvenience having regard to the fact that the recipient has nothing to do with the litigation.*
>
> *59. Assessment of the reasonableness of burdens involved in complying with the subpoena must take account [of] the capacity of a party to collect and produce the documents. That means that in a large organization, the capacity to cover the expense is greater than in a small organization (see Lucas Industries v Hewitt (1978) 18 ALR 555 and G & D (2005) FamCA 1429).*
>
> *60. Notwithstanding the administration of justice issue, the rules are not intended to put the individual presenting the documents in a position where they lose income or capital. The rule however refers to a substantial expense and each situation must be determined on its peculiar facts.*
>
> *61. However, if the subpoena is simple and clear, requiring the production of the recipient's own documents, the inconvenience is intended and expected to be minimal.*
>
> *62. Thus, in a case where a professional fee is claimed or the bobcat driver claims significant hours of 'downtime', the question still remains whether the finding, collecting, collating, marshalling and producing the documents or materials require the attention of the owner, partner or professional or whether it could be done by a clerical person albeit with some ownership or professional oversight. It is that question that the judicial officer has to ask in every case.*
>
> *63. The outcome is determined by the exercise of a discretionary judgment guided by the rules of court.*
>
> *61. As has been seen, the Rules contemplate the 'named person' as the primary source of objection and that same person potentially seeking recompense. In circumstances where what is in issue is documents of the husband in the possession of former solicitors and there is an objection on the basis of legal professional privilege, the client (here the husband) is, clearly, a person having 'a sufficient interest' in the subpoena."*
>
> *(the numbering is out on the AustLII version).*

His Honour went on to say[16]:

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[15] At [57][61].
[16] At [73]-[76] & [80] "

73. In my view, the rules should be read as a whole and the sub-rule as governing the amounts that might be paid by an 'issuing party' to a 'named person' as 'conduct money' or a 'witness fee' as the case may be.

74. Consistent with the historical context earlier referred to (eg Bank of New South Wales v Withers; Lucas Industries v Hewitt, above) the Rules prescribe very modest amounts payable as a minimum or 'default' (r15.23(1) and (2)) but, in order to strike the balance referred to, for example, in the authorities just mentioned, application can be made for the issuing party to pay a greater (but reasonable) amount where loss or expenses are established as 'substantial'

75. In my view the sub-rule gives power to the Court to enlarge the amounts of onduct money or witness fee payable to a named person by an issuing party in compliance with a subpoena, whether claimed loss or expense can be regarded as "substantial"; where the conduct or witness fee as the case may be is otherwise payable to pursuant to sub-rules (1) or (2); and where any amount claimed is, in any event, determined by the Court to be reasonable in all the circumstances of the individual case.

76. In other words, the sub-rule does not, in my respectful view, give power to the Court to recompense loss or expense to a person other than the issuing party.

80. So, too, it may be that, where an issuing party is ordered to pay to a named person a sum pursuant to r15.23(3) (whether including, as part thereof, any legal costs incurred by the named person), the circumstances may be such that the issuing party can include the sum so ordered as part of an order for costs as against the other party to the substantive proceedings. But, that, in my view, is a matter quite separate from the power contained in r15.23(3) and any sum that might be awarded as between the issuing party and the named party thereunder."

That substantial loss or expense is a separate head of power to the ability toward costs under section 117(2)[17], noting that the sum so claimed might, in appropriate circumstances, include legal costs or expenses (see eg *Kelleher and Anderson [2008]* FamCA 113; *Moriarty and Moriarty* [2009] FamCA 369; F*uel Xpress Pty Ltd v LM Ericsson Pty Ltd* (1997) 75 ALR 284).

Rule 6.36 provides that a person who inspects or copies a document produced in compliance with the subpoena must use the document only for the purpose of the proceedings and must not disclose the contents of the document or a give a copy of it to any other person without the court's permission. The document can only be disclosed by a solicitor to the solicitor's client or counsel but can provide it to an expert for the purposes of the proceeding as permitted by chapter 7 of the rules. Take care if you have a shadow expert.

This rule is stated by the explanatory statement to compliment rule 6.04 and is based on FCCR 2001 rule 15A.12.

17 Per Murphy J at [79]

Rule 6.37 takes up the principle of issuing NORTI's. There is ability to copy a subpoenaed document other than a child welfare record, criminal record, medical record or police record. These are defined in rule 1.05:

- **Child welfare record** is defined as meaning a record relating to child welfare held by State or Territory agency referred to in Schedule 9 to the Family Law Regulations.

  Schedule 9 items 5 and 6 are defined in respect of Queensland:

  - Department of Child Safety, Youth & Women (of course the old name for what is now the Department of Children, Youth Justice and Multicultural Affairs).

  - Queensland Police Service (established under section 2.1 of the *Police Service Administration Act 1990* (Qld)).

- **Criminal record** is defined in rule 1.05:

  "For a person, means a record of offences of which the person has been found guilty."

- **Medical record** is defined in rule 1.05:

  "For a person, means their histories, reports, diagnoses, prognoses, interpretations and other data or records, written or electronic, relating to the person's medical condition or treatment, that are maintained by a physician, counsellor, hospital or other medical provider of services or facilities for medical treatment."

  The explanatory statement says:

  "The definition of medical record has been amended to explicitly include records of a counsellor.

- **Police record** is defined in rule 1.05:

  "For a person, means records relating to the person kept by police, including statements, police notes and records of interview."

Rule 6.37, according to the explanatory statement is based on FCCR 2001 rule 15A.13. See also FLR 2004 rules 15.30 and 15.32.

The process for objection to production or inspection or copy the document is the same as that under the Federal Circuit Court rule 15A.14. See also FLR 2004 rule 15.31.

Rule 6.39 provides that unless the subpoena specifically requires otherwise, the production of a copy of the document or thing is sufficient. The explanatory statement says:

> *"Electronic copies should be produced in PDF format unless the issuing party indicates that another format is acceptable (which does not accord with the rule)."*

Rule 6.39(3) provides:

> *"The copy of the document or things may be:*
>
> *(a) a photocopy; or*
>
> *(b) in PDF format; or*
>
> *(c) in any other electronic form that the issuing party has indicated is acceptable."*

The explanatory statement says that the rule is based on FCCR rule 15A.15.

Rule 6.40 deals with destruction of subpoenaed documents which may occur 42 days after final determination of an application or appeal or earlier with the permission of the person subpoenaed. According to the explanatory statement, this is based on FLR 2004 rule 15.35.

Notices to produce are provided for under rule 6.42 but the notice must be served no later than seven days before a hearing or 28 days before a trial.

Notices to produce used to be common but I have not seen them commonly used recently.
The rule is based on FLR 2004 rule 15.76 FCCR 2001 rule 15A.17.

SOURCE OF RULES IN CHAPTER 6

Rule	Description	Source	See also
6.01	General duty of disclosure	FLR 2004 r13.01	
6.02	Undertaking by party	FLR 2004 r13.15, 13.16	
6.03	Duty of disclosure – documents	FLR 2004 r13.07	
6.04	Use of documents 6.04(1) 6.04(2)	FLR 2004 r13.07A New	FCCR 2001 r14.11
6.05	New	New	

6.06	Duty of disclosure – financial proceedings 6.06(2) 6.06(3) & (4) 6.06(5) & (6) 6.06(7) 6.06(8) 6.06(9) 6.06(10)	FLR 2004 r13.02(2) FLR 2004 r13.04(1)-(2) FLR 2004 r13.05, FCCR 2001 r24.02 (financial statement) and FLR 2004 r12.06(1) (financial questionnaire) FLR 2004 r13.06, FCCR 2001 r24.06 FCCR 2001 r24.04, however the timing is different FCCR 2001 r24.05 New	FCCR 2001 r24.03
6.07	Application of part 6.2	FLR 2004 r13.19(1)(a)	
6.08	Application of division 6.2.2	FLR 2004 r13.19(2)	
6.09	Disclosure by list of documents	FLR 2004 r13.20(1), (2) and (5)	
6.10	Request for disclosed document	FLR 2004 r13.20(3)	
6.11	Request for other identified document	FLR 2004 r13.08(1)	FCCR 2001 r14.10(1)
6.12	Request to inspect original document	FLR 2004 r13.09	
6.13	Provision of copies of documents	FLR 2004 r13.02(2) and 13.02(4)	
6.14	Production of documents for inspection	FLR 2004 r13.10, 13.11, 13.21	FCCR 2001 r14.07 and 14.08
6.15	Documents that need not be produced	FLR 2004 r13.12, 13.20(4)	
6.16	Objecting to production r6.16(3)	FLR 2004 r13.13 FCCR 2001 r14.05(2)	
6.17	Consequences of non-disclosure F	FLR 2004 r13.14	FCCR 2001 r14.09
6.18	Application for order for disclosure, production or inspection r6.18(1)(b) r6.18(3)	FLR 2004 r13.22 New New	
6.19	Costs of compliance	FLR 2004 r13.23	

6.20	Electronic disclosure	FLR 2004 r13.24	
6.21	Application of part 6.3 as to specific questions	FLR 2004 r13.25 (simplified)	
6.22	Service of specific questionsd	FLR 2004 r13.26	
6.23	Answering specific questions	FLR 2004 r13.27	
6.24	Orders in relation to specific questions 6.24(2)	FLR 2004 r13.28 New	
6.25	Disclosure of employment information proceedings for financial orders	FLR 2004 r3.29, 13.30	
6.26	Issue of subpoena	FCCR 2001 15A.02	FLR 2004 r15.17
6.27	Limits on requests for subpoenas sub-rule 1 – self-represented party 6.27(2) when the court's permission is required 16.27(3) 16.27(4) Not limited of 5 for ICL on interlocutory hearing	FLR 2004 r15.18(a) Based on current general requirement for permission FLR 2004 r15.17(2) FCCR 2001 r15A.05 New – consistent with practice	
6.28	Documents and things in possession or other court	FCCR 2001 r15A.03	FLR 2004 r15.18(b), 15.34
6.29	Time limits	FCCR 2001 r15A.04, but the three day limit is new	
6.30	Rules 6.30(1) and (2) (3)	Harmonising FCCR 2001 r6.06(1), FLR 2004 r15.22(1A) FCCR 2001 r.15A.06(2), FLR 2004 r15.22(2)	
6.31	Conduct money and witness fees	Harmonising FCCR 2001 r15A.07, FLR 2004 r15.23(1)	
6.32	Undertaking not to require compliance with subpoena	FCCR 2001 r15A.08	FLR 2004 r15.25(1)(b)
6.33	Setting aside subpoena	FCCR 2001 r15A.09	FLR 2004 r15.26
6.34	Order for cost of complying with subpoena	FCCR 2001 r15A.10	

6.35	Cost of complying with subpoena if not a party	FCCR 2001 r15A.11	
6.36	Use of documents produced in compliance with subpoena for production	Compliment to rule 6.04, based on FCCR 2001 r15A.12	
6.37	Right to inspection of document	FCCR 2001 r15A.13	FLR 2004 r15.30, 15.32
6.38	Objection to production or inspection or copying of document	FCCR 2001 r15A.14	FLR 2004 r15.31
6.39	Subpoena for production of documents or things	FCCR 2001 r15A.15	
6.40	Return of documents produced	FLR 2004 r15.35	
6.41	Failure to comply with subpoena	FLR 2004 r15.36	FCCR 2001 r15A.16
6.42	Notice to produce 6.42 (new) document must be in a form in which it can be accessed in court	FLR 2004 r15.76	FCCR 2001 r15A.17 (similar)

Notices to Admit

These are now provided for in **rules 8.01 to 8.03**.

The most underused tool available to lawyers in my view is the notice to admit. It is rarely used, and in my view, should be used a lot more. In the case example I gave above, the woman who may otherwise have been my client was dead. I could not call her and I had to rely on documents. In turn, there had to be no dispute about the authenticity of the documents. Admissions were sought as to the authenticity of both the documents and the underlying facts. Extensive admissions were made, possible only from my clients having made extensive rigorous disclosure. Those admissions saved many days of hearing time. I find it extraordinary how rarely notices to admit are used.

A reminder that if a notice disputing fact or document is not served by the person served with the notice to admit, consistent with earlier practice:

> *"The party is taken to admit, for the purposes of the proceeding only, that the fact is true or the document is genuine,"*

And further, if the person serving the notice later proves the fact or the genuineness of the document, the party who served the notice disputing fact or document may be ordered to pay the costs of the proof: **rule 8.02(3)**. As with previous practice, a party may withdraw an omission only with the court's permission or the consent of all parties: **rule 8.03(1)**.

The rules concerning notices to admit are stated by the explanatory statement:

> *"It is directed at narrowing the issues in dispute and reducing costs and delay. It is based on FLR 2004 division 11.2.1."*

Rule 8.01 the request to admit is based on FLR 2004 rule 11.07. The notice disputing the fact or document in **rule 8.02** is based on FLR 2004 rule 11.08. Withdrawing the admission in **rule 8.03** is based on FLR 2004 rule 11.09.

The view of counsel expressed to me is that a notice to admit is a much more valuable approach than that of interrogatories, or as they are called, specific questions, the latter of which lends itself to an argumentative response and therefore merely chews up client's money and delays the matter.

CONSEQUENCES OF FAILURE TO DISCLOSE

In an ideal world, every party is a model litigant and makes disclosure. The reality is otherwise. Most parties from my experience seek to engage in disclosure, but some deliberately engage in the game of hide and seek, not show and tell.

The difficulty for any solicitor in pursuing the issue of disclosure is whether you are acting proportionately. How many times have we told clients that to go down each and every rabbit hole may incur them substantially higher costs and be a case of more heat than light. One must be careful not to engage in going down every rabbit hole if it is not essential.

However, there comes a point where disclosure has not been made by the other party adequately or at all. We should, as a matter of course, be issuing a request under subrule 6.09(1) to provide a list of documents. You should assume once you issue one of those that there will be a response in turn, so you should be organised before you do so.

Once there has been non-compliance or objection taken, then make the application for disclosure production or inspection under rule 6.18.

Rule 6.17 sets out some obvious consequences:

> *"If a party does not disclose a document as required by these Rules:*
>
> *(a) the party:*
>
> *(i) must not offer the document, or present evidence of its contents, at a hearing or trial without the other parties' consent or the court's permission; and*
>
> *(ii) may be guilty of contempt for not disclosing the document; and*
>
> *(iii) may be ordered to pay costs; and*
>
> *(b) the court may stay or dismiss all of the parties' case."*

In the case example, whilst the respondent was under cross-examination, an application was made by her counsel to tender (at belated evidence-in-chief) a letter written by her former solicitor to the deceased shortly after a few days after they had separated. Carew J said:

> *"It remains unclear to me why the letter was not dealt with in re-examination of the respondent."*

In any event, the application was opposed by my clients. The independent children's lawyer neither consented to nor opposed the tender.

The letter was said to be relevant to the determination of whether the respondent was a person concerned with the care, welfare and development of the children. It was conceited that the letter had not previously been disclosed.

Carew J stated:

> *"The parties not only have an ongoing obligation under the Federal Circuit and Family Court of Australia (Family Law) Rules 2021 … to disclose documents relevant to an issue in the proceedings, but an order was made … that the parties provide any further disclosure within 14 days. There was no explanation provided for the failure to disclose the letter prior to the second day of the hearing."*

It was conceded that the letter may well be relevant. However, it was argued that the prejudice that would be caused to the applicants involved their inability to obtain other potentially relevant letters from the deceased's lawyer at the time, two of which were mentioned in the letter sought to be tendered. It did not seem that either of those letters had been disclosed by the respondent. It was submitted on behalf of my clients that there may be a course of correspondence passing between the deceased's and the respondent's lawyers that would provide a different context to what is contained in the one letter now sought to be tendered.

Her Honour noted rule 6.17(a)(i) namely, that if not disclosed, a party must not offer thedocument, or present evidence of its contents, at a hearing or trial without the other party's consent or the court's permission.

The letter if admitted would provide evidence that as at the date of the letter:

> (a) the respondent had caused two previous letters to be sent to the deceased (neither of which were in evidence and at least one had not been disclosed to the applicants).
>
> (b) observe that the deceased was intending to relocate to Queensland and continue to be unwilling to share any information about her pregnancy and the health and welfare of the yet to be born twins.
>
> (c) provided an intention that the respondent is willing to provide financial assistance to support the deceased and the children.

(d) states an intention on the part of the respondent to remain active and involved in the children's growth, welfare and development.

(e) informed the deceased that the respondent intended to commence court proceedings and would seek an order that the respondent be held financially liable for some of the costs associated with the future travel for the respondent to see the children.

(f) sought a response to the two previous letters.

Justice Carew concluded:

> *"I was not satisfied that the evidence as sought to be given by the respondent at the late stage of the proceedings were such that the Court should provide permission for the document to be tendered. In reality, the letter was intended to provide some corroboration for some evidence by the respondent already before the Court. That was not a sufficient reason in my view to warrant the receipt of the letter. The prejudice that would be caused to the applicants by admitting the letter outweighed any possible benefit to the respondent."*

When there is non-disclosure in a financial matter, there might be an argument as to *Kowaliw*[18] type waste i.e.:

(a) where one of the parties has embarked upon a course of conduct designed to reduce or minimise the effect of value or worth the matrimonial assets; or

(b) one of the parties has acted recklessly, and negligently or wantonly with matrimonial assets, the overall effect of which has reduced or minimised their value.

When there is severe lack of disclosure, it can be very hard quantifying the pool. As the Full Court said long ago in 1992 in *Weir & Weir*[19]:

> *"This Court has pointed out in a line of cases leading up to the recent decision of the Full Court in Black and Kellner[20], that it is the duty of a party involved in property proceedings in this jurisdiction to make a full disclosure of their financial affairs … It is clear enough from his Honour's findings in the present case that the husband had not done so and had in fact pocketed the proceeds of a substantial number of cash sales. It is obvious that in most cases of this nature it is difficult enough for the other party to establish that fact let alone establish the quantum of what has been taken.*
>
> *It seems to us that once it has been established that there has been a deliberate nondisclosure, which follows from his Honour's findings in this case, then the court should not be unduly cautious about making findings in favour of the innocent party. To do otherwise might be thought to provide a charter for fraud."*

[18] Kawaliw & Kawaliw [1981] FamCA 70; (1981) FLC 91-092.
[19] [1992] FamCA 69 at [32]-[33].
[20] (1992) FLC 92-287

Often the practical difficulty at that point is to have the evidence before the court to try and establish that quantum. The court went on to say[21]:

> *"In the case of Monte22, the Full Court said that to found jurisdiction under s79 in relation to property other than that which had been identified, the trial judge was obliged to make a finding as to the existence and value of other undisclosed property, even though the unsatisfactory nature of the evidence made it necessary to express that finding in the most general terms both as to identity and value.*
>
> *We confess to some difficulty with this proposition. We should have thought that the court's jurisdiction to make an order going beyond the identified property arises once there is sufficient evidence to support a finding that the party has not made a full disclosure of his or her assets.*
>
> *The difficulty then arises as to what orders should be made. However we are troubled by the proposition which seems to arise from Monte & Monte that if a party is either cunning enough or vague enough to cover his or her tracks sufficiently to prevent a Court making a finding as to the amount that has not been disclosed, then the other party fails. We do not believe this to be the law and insofar as the decision in Monte and Monte support such a proposition, we do not believe that it should be followed."*

The accountant in Weir identified $153,605 unaccounted for. The husband had made a partial explanation of the discrepancy. The Full Court considered that on the evidence given by the husband it would be generous to make an allowance of $50,000 in his favour in this regard, leaving just over $100,000 unaccounted for. The Full Court was prepared to infer that this is what the husband received and did not account for and then a substantial justice will be done if the husband is required to pay half of that, namely, $50,000 to the wife.

The Full Court held[23]:

> *"We appreciate that this is something of a broadbrush approach, but, as we have said, where there is clear evidence of non-disclosure as there was here, the Court should not be unduly cautious about making findings in favour of the other party. It has been said by one commentator (O'Ryan and Broadfoot, 5th National Family Law Conference Handbook, p249) the failure to disclose undermines the whole process of adjudication of proceedings for a settlement of property in that the court is unable to identify the property of the parties, to properly assess contribution, or to properly assess s75(2) factors."*

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[21] At [34]-[37].
[22] (1996) FLC 91-751.
[23] At [45]

Murphy J stated in the High Court in Penfold & Penfold[24]:

> *"Presentation of a false statement of financial circumstances, which puts the other party to the trouble and expense of disproving it, is a circumstance which justifies an order for costs. Court should regard such circumstances which tend to undermine the integrity of proceedings with great concern, and should do everything in their power to determine who is responsible in order to maintain that integrity."*

In *Zao and Lee* [2019] FamCAFC 169 the wife appealed a dismissal of her application for summary dismissal of the husband's application. The basis of her summary dismissal application was because of the husband's failure to disclose. The wife's appeal was unsuccessful. The court noted that dismissal of proceedings is a last resort after citing *Black & Kelner and Weir & Weir* the court said:

> *"It follows that if the proceedings proceed the husband's failure to disclose documents will not be ignored and may have severe consequences for him".*[25]

A difficulty for the wife in proceeding with her summary dismissal application was that she had, through her own efforts, obtained the documents that she had sought from the husband (in which he had not disclosed).

It is a sad state of affairs as to how often *Weir & Weir* is cited. Accordingly to Austlii , *Weir & Weir* was cited 44 times in 2019, even with the effects of Covid it was cited 55 times in 2020 and 27 times in 2021.

In one such recent decision, that of Kent J in *Huda and Huda* [2021] FamCAFC 118 where his Honour sat on appeal from a decision from the Federal Circuit Court, the primary judge explained in some detail his finding that the husband had no credibility as a witness and his finding that the wife's evidence ought to be accepted in preference to the husband where there was a discrepancy. The primary judge provided detailed findings throughout the reasons as to the husband's abject failures to provide any meaningful disclosure of either his historical, or current, financial affairs.

The primary judge also recorded a finding that it is "*highly likely*" that the husband had assets and financial resources that he had not disclosed either to the wife or to the court. Therefore, it was possible for the court to determine the full nature and extent of property interests or financial resources of the husband. There was no challenge on appeal to any of those fundamental findings. By the time the matter came before Kent J, there had been two trials. An issue at trial was that there was an alleged loan to the husband which had principle of about $350,000 owing and interest of over $200,000 owing. The wife always contended that the loan was a fraudulent connivance between the husband and the third party designed to reduce her proper entitlement to property settlement. She relied on undisputed facts surrounding the alleged advances:

> *(a) that the husband and the third party were close friends,*
>
> *(b) the absence of any written loan agreement,*

[24] [1980] HCA 4; (1980) 5 FamLR 579 at [583].
[25] See also Oriolo & Oriolo [1985] FamCA 54; (1985) FLC 91-653; Suiker & Suiker [1993] FamCA 141; (1993) FLC 92-436.

(c) the absence of any contemporaneous documents whatsoever to corroborate that any of the advances were in fact made by the third party to the husband or that any were received by the husband (no bank statements/bank records/copy cheques of either of them had ever been produced),

(d) that the advances were allegedly made from accounts in the names of other parties, not in the name of the third party, which accounts the third party asserted he controlled – but no documents concerning such accounts were disclosed,

(e) the recording of the advances on a single piece of paper in the third party's handwriting, with only a photocopy being produced, the original of which was not produced by either the third party or the husband and was thus unavailable for time verification by forensic examination,

(f) the absence of any documents whatsoever produced by the husband on the disclosure to demonstrate any receipt of any advances or to demonstrate the use made of any advances,

(g) despite it being alleged it was agreed between the husband and the third party, that the total amount linked together with interest was to be repaid before a date in 2015, it was not until three years later (subsequent to the first trial and appeal) that the third party pursued any formal steps of recovery,

(h) despite it being alleged that the advances or some of them were to assist the husband's business, no contemporaneous business records whatsoever, including for example, any taxation returns were produced by the husband to corroborate the receipt of any advances in the business and the use of such advances as a tax deductible debt in the business.

Despite these issues having been agitated at the first trial, there remained at the second trial a dearth of any documents whatsoever to corroborate the husband's case concerning the alleged loan or the use made of monies advanced. Put simply as counsel for the husband acknowledged on the hearing of the appeal, not a single document was produced by the husband to corroborate the movement of any of these funds. Not a single document was disclosed to demonstrate any use made of any advance the husband received.

The trial judge ultimately concluded in reliance upon the third party's uncorroborated oral evidence that the third party had made the advances to the husband. The wife had not filed any cross-appeal or notice of contention in respect of that conclusion. She explained on the hearing of the appeal that she had no money left. All the money she received via the property settlement orders had been consumed in legal fees. The wife sought to agitate on appeal the same proposition she advanced at trial, namely, that the alleged loans were a connivance.

Whilst the trial judge accepted the third party's evidence that the subject advances were made, the trial judge did not accept every aspect of the third party's evidence. As Kent Jstated:

"That would have been impossible given the glaring inconsistency in [the third party]'s evidence on the important question as to whether or not the advances were made to both parties or whether the wife ever had any knowledge of the advances, at the time."

In 2018 the husband consented to judgment in the Supreme Court in the amount of just under $700,000 being entered against him on the basis that he had made no repayment whatsoever and interest had accrued to arrive at that total.

Following the judgment being obtained, the husband granted the third party a mortgage over the husband's interest in the property owned jointly by the parties. That property was sold. At trial, the sale proceeds were held in the trust account of the trustee for sale. The husband also executed a general security agreement in favour of the third party.

His Honour noted that the primary judge found that the husband had failed to disclose any bank statements that would verify the depositing (by him) of monies advanced by cheque from the third party. The third party in his affidavit did not annex any bank statements. The only document he annexed was a photocopy of the handwritten note, the original of which was not produced for forensic examination.

The trial judge noted that the situation was unusual and the unusual aspects included:

> *(a) there was no written loan agreement,*
>
> *(b) the third party and the husband were friends,*
>
> *(c) no bank statements were disclosed in the name of any party to prove that the advances of money actually occurred at the time stated,*
>
> *(d) the money was not actually advanced from account in the name of the third party but came from the name of an account in the name of other parties.*

The trial judge accepted the wife's evidence that the husband told her that the money to build the home came from income earned from the business and:

> *"the husband has not provided any or any adequate disclosure of documents. The husband has not made a full disclosure of his financial affairs … Full and frank disclosure of his financial affairs during this period would have given the Court an opportunity to weigh the competing assertions of the parties."*

The husband also made a number of serious allegations against the wife, including that she physically abused the children, that she had sex with another man in front of the children, that she was a drug addict and abused the children, that she masturbated in front of the children and that she had sex with the children since they were born. The trial judge found that none of those allegations were proved and accepted the wife's evidence.

The trial judge had no confidence in the husband's assertions as to what he did with the money lent to him by the third party and was not prepared to make a finding that the husband used the money lent to him by the third party to build up the assets of the family and nor was the trial judge prepared to accept that he used the money for the benefit of the family.

Kent J stated[26]:

> *"It did not follow from the finding that [the third party] made the advances to the husband that a finding had to be made that the husband used those funds for the benefit of the family. It is unknown to what use the husband put those funds and it bears repeating that there is an unchallenged finding by the primary judge that the husband probably has property and financial resources which he has not disclosed either to the wife or to the court."*

Kent J formed the view that the findings of the primary judge amply supported the essential conclusion that the husband did not discharge his onus of proof to establish any basis for the liability being treated as a joint liability.

The husband contended separately that the primary judge was obliged to warn the husband that his conduct in the parenting proceedings would be taken into consideration in making adverse findings of credit against him in the making of property settlement orders. Kent J noted that the husband advanced a serious of heinous allegations against the wife, including as to her sexual abuse to the children, all of which were vehemently denied by the wife. All of these allegations were ultimately found to be baseless, outrageous and scandalous. There was no challenge on appeal to those characterisations. The court concluded that the primary judge was not obliged to give some separate warning to the husband of the risk when the parties joined issue on those most serious allegations advanced by the husband.

The appeal was dismissed.

As the Full Court recently reminded us in Hicks & Trustee of the Bankrupt Estate of Hicks [2021] FamCAFC 19 at [89]:

> *"Importantly, failure by parties to provide credible evidence relating to aspects of their financial affairs does not entitle the Court to dismiss applications or to relieve the court of he responsibility of applying the provisions of the Act in the light of such findings as can be made."*[27]

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[26] At [63].
[27] Efthimiadis & Efthimiadis [1993] FamCA 15; (1993) FLC 92-361 and Stay v Stay [1997] FamCA 20; (1997) FLC 92-751.