LEGALWISE

PRACTICAL FAMILY LAW DRAFTING INTENSIVE

25 FEBRUARY 2026
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INTRODUCTION

What I'm talking about today is drafting for interim property and maintenance applications: tips and traps.

BEFORE YOU FILE

STEP 1: LOOK BEFORE YOU LEAP

A reminder that under rule 4.01 each subject in most cases, except where the court is satisfied it was not appropriate for a party to comply with the pre-action procedures, the expectation is that *"each prospective party to the proceeding must comply with the pre-action procedures"*: rule 4.01(1).

Before seeking an interlocutory order, there must be compliance with rule 4.03:

> *"(1) Before filing an application seeking an interlocutory order, a party must make a reasonable and genuine attempt to settle the issue to which the application relates.*
>
> *(2) Compliance with subrule (1) is not necessary if:*
>
> *(a) compliance will cause undue delay or expense; or*
>
> *(b) the application would be unduly prejudiced; or*
>
> *(c) the application is urgent; or*
>
> *(d) there are circumstances in which an application is necessary (for example, if there is an allegation of child abuse, family violence or fraud).*
>
> *(3) A person who makes an application for an interlocutory order must indicate, in the affidavit filed with the application, either:*
>
> *(a) that the person has made a reasonable and genuine attempt to settle the issue to which the application relates; or*
>
> *(b) which exception in subrule (2) applies to the application and the factual basis for the exception claimed.*

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

The last is clearly sheeting home responsibility not only to the party, but also to you. Therefore, it is important to set out in the affidavit that there has been compliance.

Therefore, as part of the process of preparing to go to court, one must take care with correspondence. The court certainly does not wish to have reams of correspondence (particularly in email format with the thread attached) where each party is seeking to out-maneuver the other. Nevertheless, there are cases where it is wise to make an open offer. In meeting the requirement of the rule, it can be wise to put that open offer as an annexure to the affidavit, so there is no doubt that the offer was made.

You should always assume that you have a skillful opponent (even if you don't) and that that skillful opponent will take each significant point (even if they take none). It is therefore best to draft defensively and act defensively from the beginning, which is to ensure that you can show to the court throughout that your client is reasonable and has tried to do their best to avoid coming to court. In bringing the application to court, they are seeking the most limited relief from the court.

In seeking an interlocutory application, you might have 47 points of difference with the other side in which you want 47 orders (or as seen in one case, 66). Given the limited amount of time that the court has to deal with an application, seek the minimum number of orders from the court that you can. If there are only three points, limit it to three, not 47. If you are focused on the 47, then it is almost certain that the court will be irritated, and will ask you for your three best points (or similar) *"given the limited listings available to the court and limited time"* and may visit an order for costs against your client (or you personally) otherwise. As the rules make plain in rule 4.04, a failure to comply with the pre-action procedures may result in a stay of the application and an order for costs, including an order for costs against the lawyers concerned.

If you have had a mediation as to property settlement and this occurred before you filed, but an offer has not been made, then your client will likely be in breach of the rules. Rule 4.11 requires that each party must make a genuine offer to settle to all parties within:

(a) 28 days after a conciliation conference or mediation,

(b) if no conciliation conference or mediation has been held or is to be so held – 28 days after the first court date, or

(c) such further time as ordered by the court.

The offer to settle must state that it is made under division 4.2.2 of the rules.

In making your client's first interim application, when you file the application initiating proceedings, it is vital to ensure at that point that you can say to the court on day 1 (and subsequently) that the pre-action procedures have been complied with. As a reminder, the court has said as to the pre-action procedures:

> *"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."*

To state the obvious:[2]

> *"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 other party or parties in the proceeding."*

Examples are given of non-compliance:

(a) Not sending a written notice of proposed application.

(b) Not providing sufficient information or documents to the other party.

(c) Not following a procedure required by the procedures.

(d) Not responding appropriately within the nominated time to the written notice of proposed application.

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

Don't forget the requirement under (1):

> *"A person who is considering filing an application to start a proceeding must, before filing the application, and only if it is safe to do so:*
>
> *(a) give a copy of these pre-action procedures to the other prospective parties to the proceedings; and*
>
> *(b) make inquiries about the dispute resolution services available; and*
>
> *(c) invite the other parties to participate in dispute resolution with an identified person or organisation or other person or organisation to be agreed."*

It seems, at times, a large amount of effort and correspondence is engaged as to whether or not the pre-action procedures have been complied with or have not been complied with.

An example in a recent matter is where there had been extensive discussions about parenting matters (and there had been compliance by the parties with the pre-action procedures) but the other party sought then to tack on a notice of intention to start a proceeding concerning property settlement. There had been no mediation or even suggestion of mediation concerning property settlement. The point was taken by my client, requiring either agreement about property settlement or for the other party to then put forward a proposed mediator so that that matter could be discussed before there was any filing.

They didn't. When they filed, they only filed about parenting, not parenting and property.

Make sure that your client is up-to-date with disclosure before filing, given the obligations on the pre-action procedures. Nothing is more embarrassing (or worse) for a party's case when disclosure has not occurred.

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[2] Schedule 1(1 General) (4).

DON'T FORGET DISCLOSURE

Although it is not part of the drafting exercise, nothing can be more damaging than to have an assertion on an interlocutory basis that your client has not made full and frank disclosure. The words of Lucev FM from years ago ring true – that disclosure is a game of show and tell, not hide and seek[3].

Make sure your client complies with the pre-action procedures, and if they have not, that there is an excellent explanation. The pre-action procedures include these requirements as part of the duty of disclosure:

> *"4. (2) As soon as practicable on learning of the dispute and in the course of exchanging correspondence under clause 3 of this Part, parties must exchange the following:*
>
> *(a) a schedule of assets, income and liabilities;*
>
> *(b) a list of documents in the party's possession or control that are relevant to the dispute;*
>
> *(c) a copy of any document required by the other party, identified by reference to the list of documents.*
>
> *(3) Parties must refer to the Financial Statement and rule 6.06 of these Rules as a guide for the information to provide and documents to exchange.*
>
> *(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 for 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."*

There is often a view that disclosure is much less important in parenting disputes than it is in financial disputes. I disagree. That is certainly not the requirement under the rules or the administration of justice, but it seems to be the practice by some family lawyers. Much less focus is given in parenting proceedings to disclosure than it is in property proceedings. You are certainly protecting your client much better in parenting proceedings by making full disclosure in a timely manner.

When annexing a document to an affidavit, this should not be the first that the other side is made aware of it. Otherwise, successful objection can be taken to that document. It is much

[3] *Kennedy & McDermott* [2007] FMCAfam 524, [13].

better to make disclosure and then to annex. If a document has just come to light, then disclose it. Then have your client execute the affidavit, not the other way around.

Section 71B sets out the requirement as to the duty of disclosure:

> *"(1) Each party to a proceeding relating to financial or property matters of a marriage (other than proceedings on appeal) has a duty to the court and to each other party to give full and frank disclosure, in a timely manner, of all information and documents relevant to:*
>
> *(a) for a party to the marriage--the issues in the proceeding that relate to financial or property matters of the marriage; or*
>
> *(b) for any other party to the proceeding--so much of the party's financial circumstances as are relevant to the issues in the proceeding that relate to financial or property matters of the marriage.*
>
> *(2) The duty under subsection (1) applies from the start of the proceeding and continues until the proceeding is finalised.*
>
> *Note: Courts have a range of powers that may be exercised to impose consequences when a person fails to comply with their duty of disclosure. For example, a court might do any of the following:*
>
> *(a) take the failure into account when making an order under section 79 (alteration of property interests);*
>
> *(b) make any orders with respect to costs or security for costs against the person that the court considers just, having regard to the failure;*
>
> *(c) make any orders with respect to disclosure that the court considers appropriate;*
>
> *(d) if an order made by the court is contravened--impose sanctions under section 112AD;*
>
> *(e) punish the person under section 112AP for contempt;*
>
> *(f) stay or dismiss all or part of the proceedings.*
>
> *(3) If a party has a litigation guardian, the duty under subsection (1) is taken to have been complied with if the litigation guardian complies with the duty to the extent they are capable of doing so.*
>
> *(4) The duty under subsection (1) does not apply to the respondent to an application that alleges a contravention of a court order or a contempt of court in relation to that application.*
>
> *Duty of disclosure while preparing for proceedings*
>
> *(5) If separated parties to a marriage are preparing for a proceeding relating to financial or property matters of the marriage (other than proceedings on appeal), each party has a duty to the other party to give full and frank disclosure, in a timely*

manner, of all information and documents relevant to the issues in the proposed proceeding that relate to financial or property matters of the marriage.

(6) The duty under subsection (5) applies at any time while the party is preparing for the proceeding.

Note: If proceedings are instituted, consequences, as mentioned in the note beneath subsection (2), may apply to a person who has failed to comply with their duty of disclosure under subsection (5).

Financial or property matters of the marriage

(7) Any of the following matters, so far as they relate to a marriage, are financial or property matters of the marriage:

(a) financial matters;

(b) matters that are or might become the subject of proceedings under any of the following provisions of this Act:

(i) this Part (orders with respect to spousal maintenance or the property of the parties to the marriage);

(ii) section 90K (orders setting aside a financial agreement or a termination agreement);

(iii) Part VIIIB (orders with respect to allocation of superannuation interests);

(iv) section 106B (orders with respect to instruments or dispositions to defeat an existing or anticipated order in proceedings under this Act);

(c) matters that are or might become the subject of proceedings relating to the distribution, after the breakdown of the marriage, of any vested bankruptcy property in relation to a bankrupt party to the marriage;

(d) matters that are or might become the subject of proceedings under any of the following provisions of the Child Support (Assessment) Act 1989:

(i) section 116 (orders for departure from administrative assessment in special circumstances);

(ii) section 123 (orders for provision of child support otherwise than in form of periodic amounts paid to carer);

(iii) section 129 (orders modifying orders under section 123A or 124).

Relevant information and documents

(8) A party's duty to disclose information and documents is a duty to disclose information known to the party and documents that are or have been in the possession or under the control of the party.

(9) A party's duty to disclose information and documents includes any information or documents prescribed by the applicable Rules of Court for the purposes of the duty.

Note: The duty to disclose is not limited to prescribed information and documents. The applicable Rules of Court may also prescribe other matters in relation to the duty of disclosure.

Practitioners' obligation to provide information etc.

(10) A legal practitioner or family dispute resolution practitioner who engages with a separated party to a marriage who is or might be subject to the duty in subsection (1) or (5) must:

(a) provide the party with information about:

(i) the duties of disclosure under this section and explain the circumstances in which they apply; and

(ii) potential consequences of the party not complying with the duties; and

(b) encourage the party to take all necessary steps to comply with the duties."

Section 90RI provides:

"(1) Each party to a proceeding relating to financial or property matters of a de facto relationship (other than proceedings on appeal) has a duty to the court and to each other party to give full and frank disclosure, in a timely manner, of all information and documents relevant to:

(a) for a party to the relationship--the issues in the proceeding that relate to financial or property matters of the relationship; or

(b) for any other party to the proceeding--so much of the party's financial circumstances as are relevant to the issues in the proceeding that relate to financial or property matters of the relationship.

(2) The duty under subsection (1) applies from the start of the proceeding and continues until the proceeding is finalised.

Note: Courts have a range of powers that may be exercised to impose consequences when a person fails to comply with their duty of disclosure. For example, a court might do any of the following:

(a) take the failure into account when making an order under section 90SM (alteration of property interests);

(b) make any orders with respect to costs or security for costs against the person that the court considers just, having regard to the failure;

(c) make any orders with respect to disclosure that the court considers appropriate;

(d) if an order made by the court is contravened--impose sanctions under section 112AD;

(e) punish the person under section 112AP for contempt;

(f) stay or dismiss all or part of the proceedings.

(3) If a party has a litigation guardian, the duty under subsection (1) is taken to have been complied with if the litigation guardian complies with the duty to the extent they are capable of doing so.

(4) The duty under subsection (1) does not apply to the respondent to an application that alleges a contravention of a court order or a contempt of court in relation to that application.

Duty of disclosure while preparing for proceedings

(5) If separated parties to a de facto relationship are preparing for a proceeding relating to financial or property matters of the relationship (other than proceedings on appeal), each party has a duty to the other party to give full and frank disclosure, in a timely manner, of all information and documents relevant to the issues in the proposed proceeding that relate to financial or property matters of the relationship.

(6) The duty under subsection (5) applies at any time while the party is preparing for the proceeding.

Note: If proceedings are instituted, consequences, as mentioned in the note beneath subsection (2), may apply to a person who has failed to comply with their duty of disclosure under subsection (5).

Financial or property matters of the relationship

(7) Any of the following matters, so far as they relate to a de facto relationship, are financial or property matters of the relationship:

(a) financial matters;

(b) matters that are or might become the subject of proceedings in a de facto financial cause;

(c) matters that are or might become the subject of proceedings under any of the following provisions of this Act:

(i) Division 7 of Part VII (child maintenance orders);

(ii) this Part (orders with respect to the maintenance of a party, or the property of the parties, to the relationship), other than Subdivision C of Division 1 (declarations about existence of de facto relationships);

(iii) section 90UM (orders setting aside a financial agreement or a termination agreement);

(iv) Part VIIIB (orders with respect to allocation of superannuation interests);

(v) section 106B (orders with respect to instruments or dispositions to defeat an existing or anticipated order in proceedings under this Act);

(d) matters that are or might become the subject of proceedings under any of the following provisions of the Child Support (Assessment) Act 1989:

(i) section 116 (orders for departure from administrative assessment in special circumstances);

(ii) section 123 (orders for provision of child support otherwise than in form of periodic amounts paid to carer);

(iii) section 129 (orders modifying orders under section 123A or 124).

Relevant information and documents

(8) A party's duty to disclose information and documents is a duty to disclose information known to the party and documents that are or have been in the possession or under the control of the party.

(9) A party's duty to disclose information and documents includes any information and documents prescribed by the applicable Rules of Court for the purposes of the duty.

Note: The duty to disclose is not limited to prescribed information and documents. The applicable Rules of Court may also prescribe other matters in relation to the duty of disclosure.

Practitioners' obligation to provide information etc.

(10) A legal practitioner or family dispute resolution practitioner who engages with a separated party to a de facto relationship who is or might be subject to the duty in subsection (1) or (5) must:

(a) provide the party with information about:

(i) the duties of disclosure under this section and explain the circumstances in which they apply; and

(ii) potential consequences of the party not complying with the duties; and

(b) encourage the party to take all necessary steps to comply with the duties."

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.

(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.

(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.

(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.

(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.

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

DRAFTING OF THE AFFIDAVIT

Where possible, use direct words quoted, not interpreted or observed. Keep quotes as short as possible and to the point. It must be remembered at all times that the court is a court of impression.

An example of the challenges (admittedly which arose from a trial not an interim hearing) was the *Kennon* case of ***Britt & Britt*** [2017] FamCAFC 27. The difficulty the wife faced at trial was that much of her evidence was successfully objected to by the husband and rejected by the primary judge and the primary judge did not accept her evidence that had been admitted, saying:

> *"I cannot be satisfied on the balance of probabilities that any of the evidence the wife gave about the husband's aggression or violence is true. The wife was not a witness of credit and the evidence of Mr [K] is only as good as the truth of the things the wife told him. The wife clearly has aggressive tendencies herself which leaves open to question whether she would have meekly put up with her husband assaulting her."*

The Full Court stated:[4]

> *"The primary judge, on the application of counsel for the respondent, rejected parts of the appellant's evidence as to family violence, essentially on the basis that the evidence was not in "proper form". The primary judge considered that the evidence consisted of conclusions, was "just too general" and lacked particularity. In particular, her Honour was critical of adjectives such as "regularly", "routinely", "repeatedly" and "often". This was because these words lacked specificity and were too general. Her Honour was of the view that such evidence gave no indication as to "whether [the family violence] happened once a week or once a decade". Further, scattered throughout the transcript are statements made by the primary judge to the effect that the evidence was not relevant to the issues before the court.*

[4] At [25]-[27].

The primary judge rejected the following evidence from the appellant's affidavit:

- *"I had been having a sexual relationship with [the respondent] since I was 11 years old".*

- *"Our first sexual acts were not consensual on my part".*

- *"[The respondent] dominated me throughout our relationship. He has been violent and aggressive towards me prior to the time I commenced cohabitation with him. He regularly forced me to have vaginal and anal sex with him without my consent, often causing me considerable pain and discomfort, throughout our relationship. Our first sexual interactions were without my consent. He routinely punched and beat me and was verbally rude and aggressive throughout our relationship. He also routinely denigrated me in public, called me a "slut" and "scum", and regularly told people, including our children, that I was having affairs with other people. He regularly drank heavily. He would drink until he was extremely intoxicated. He was always violent, aggressive and abusive after drinking, particularly towards me. On numerous occasions during the marriage he said;*

  'Why don't you pack your shit and fuck off'

  and

  'You are just a bloody [dodo] ([a reference to] my maiden name). Without me you'd be back in the gutter where you started from. That's where you really belong'."

- *"For a long time while living at [Property D] we only had one motor vehicle. If [the respondent] left the farm he left in the vehicle and took the phone with him so I could not contact anybody".*

- *"[The respondent] regularly left me alone on the property for days at a time while he went away socialising and drinking. Sometimes he left in the afternoon saying he was going to the local hotel for a drink and would not return for a day or more. He regularly came home extremely intoxicated. When he was in this condition he was always aggressive and violent. On these occasions he would punch me, hit me, try to choke me and grab me and drag me around by my hair. It usually took him more than a day of sleeping to recover. Usually he had no recollection of what he had done to me when he awoke".*

- *"I had no close family and few close friends. My only contact with the outside world was on monthly and sometimes fortnightly shopping visits to [F Town], when we went to one of the local hotels or on the odd social occasion involving local people".*

- *"I am aware that that [the respondent] has been charged with drink-driving offences on at least 3 occasions and he has wrecked at least 2 motor vehicles through crashing them whilst intoxicated. In both cases the vehicle was uninsured and we suffered financial loss as a consequence. In one of these cases he wrecked our [vehicle] the day we made the last payment on it. [The respondent] developed an aversion to driving after these incidents and thereafter I always drove when we went anywhere".*

- *"Whenever he was unhappy with me [the respondent] would hit and punch me, throw me to the ground, choke me or drag me somewhere by the hair to make his point".*

- *"I lived my life in fear of him and often intervened when he attempted to hurt the children physically usually with the result that I was assaulted physically myself. I was always anxious when he was drinking or when he returned to the farm after drinking. If we socialised in the local area be [sic] would not stop drinking until he was extremely intoxicated and he would never leave a hotel until closing time. On numerous occasions the children and I waited outside a hotel in the car until it closed and he was required to leave".*

- *"Prior to the final separation in November 2011 I had left [the respondent] for short periods on many occasions. Every time my responsibility to my children and financial necessity caused me to return. On many of these occasions [the respondent] came and found me and forced me to return to the farm. On other occasions he prevented me from leaving the farm by depriving me of the car keys and ..."*

- *"I complained to [G Town] police who spoke to [the respondent] about [his behaviour towards me on one occasion]. Thereupon [the respondent] started acting in a very caring way towards me. He repeatedly said to me words to the effect;*

  > *'If you drop the complaint I will never hurt you again. I promise. I am very, very sorry. I was pissed when I did it. I will give up drinking. I didn't know what I was doing. I didn't mean to hurt you. I will never call you "a slut" again. I promise.'*

  This behaviour continued for a couple of days until I relented and contacted the police and withdrew the complaint. I did so partly because my self-esteem was so low after years of [the respondent]'s treatment that I did not consider anyone would believe my story against his. I was at the point where I believed I deserved his treatment of me. I still experience those feelings today. [The respondent] was not violent to me when other people were around although he still regularly denigrated me in front of other people. I still feel guilty about the sexual acts he has forced me to perform although they are against my will".

- *"[The respondent] was never satisfied with the standard of my cooking, housekeeping or parenting. He regularly criticised the meals I cooked or the standard of my housekeeping. I had to wash up immediately after every meal. If he was not satisfied with something he would make me do it again. He sometimes made me repeat vacuuming several times a day. He required me to clean the house and wash up the dishes from the family's evening meal when I came home from second or third jobs after midnight. He was usually in bed asleep when I got home but if I didn't do the cleaning I was abused and assaulted in the morning. At the same time he required me to rise before him and do my morning chores and jobs before breakfast. He remained in bed while I did this. He usually got up about 8:10 am when I had returned home from the 40 minute round trip to the bus stop. In winter I had to get up at 5:30 am to light the fire so the house would be warm when he got up. He repeatedly said about my cooking:*

> *'What is this shit? Can't you cook something better than this? I'm sick of eating the same shit all the time.'*
>
> *Then he would throw his food out the door to the dogs and say:*
>
> *'Now get your arse in there and cook something decent.'*
>
> *I would then have to prepare another meal. I had never had any cooking training but learnt how to cook meat and vegetables. We rarely ate meat other than lamb because we killed our own sheep and struggled to afford other foodstuffs. At one time he agreed I could go to cooking classes. After 4 classes he stopped me attending because he thought I was having an affair with someone there.*
>
> *He repeatedly made me re-iron clothes. If he took a freshly ironed pair of trousers from a coathanger and there was a slight mark where they had been hanging over the hanger he would throw the trousers at me and say:*
>
> *'Have a fucking look at me. I look like a fucking ragman. I'm not going out looking like a fucking ragman. Go and iron the fucking thing again and do it properly this time and don't let it happen again. Can't you do anything properly.'"*

- *"Often whilst he was abusing me he would punch and hit me, push me to the floor or pull my hair and drag me. I used heavy make-up and frequently wore long-sleeved shirts, jeans and large dark glasses to conceal my bruising and black eyes. I was sensitive and embarrassed about it in public especially when I had to turn up to work with bruises, black eyes and still emotionally upset.... I even lied to a doctor when I had ear trouble and he asked me about the cause of it. A hearing defect I have had for some years has since been diagnosed as being due to the beatings I received from [the respondent]".*

- *"[The respondent] regularly administered corporal punishment to the children when they were young. I often had to intervene to protect them and was punched and beaten in the process".*

- *"I eventually left [the respondent] because I could no longer tolerate the violent and abusive way in which he treated me throughout our relationship".*

The appellant had also adduced evidence which, if accepted, was that a third party had, on three occasions, observed bruising and been told that it had been caused by the respondent."

The Court said that there four issues on appeal:

- Was the evidence of family violence properly rejected by the primary judge?
- Was the primary judge correct to refuse the appellant leave to adduce oral evidence?
- Was the evidence capable of establishing a claim that the appellant's contributions were made more onerous by the conduct of the respondent?
- Are the primary judge's findings as to the credit of the appellant such that, in any event, these grounds should not succeed?

The Court held at [31]-[35]:

"[E]vidence that is probative, even slightly probative, is admissible because it could rationally affect the determination of an issue. For it to be inadmissible it must lack any probative value.

⋯ s 55 of the Evidence Act proceeds on the basis that a trial judge cannot take the credibility, or lack thereof, of a witness into account when determining the admissibility of evidence. Any issue of credit is taken into account later, when considering the weight or importance the evidence should be given.

Therefore, in determining the admissibility of the proposed evidence set out above, the primary judge was obliged to consider whether the evidence could rationally affect the assessment of the existence of family violence, which led to the appellant's contributions becoming more onerous. If the evidence could do so – that is, if it was not "inherently incredible, fanciful or preposterous" – it should have been admitted.

In this regard it is important to note that the probative value of a particular piece of evidence should not be considered in isolation from the rest of the evidence, including the proposed evidence. This is particularly so where the court is asked to draw an inference from all of the evidence, that is to say, all of the circumstances of the matter. This is because one piece of evidence may affect the probative value of another and a number of pieces of evidence when considered together may have a probative value greater than if each is considered individually.

Evidence is capable of being relevant to an issue if it puts other evidence into context, such as explaining the nature of the relationship in which other events occurred."

And then the Court gave us and our clients the saving grace that affidavits do not need to be too long, and can speak when appropriate with generalities:

"38. The proposed evidence went to the relationship between the parties. In proceedings under the Family Law Act, evidence of relationships and the parties' contributions to their property is commonly given in general terms and in terms which are redolent of being a conclusion. Affidavits would be excessively long otherwise. For example, parties often describe "relationships commencing" or starting "to live together" and this evidence is routinely and unremarkably admitted. Judges use their experience and, importantly, all of the evidence in the case to understand such statements.

39. It is true, of course, that complaints of family violence raise serious issues. Even so, there is not a higher standard for the admissibility of evidence of family violence compared to evidence on other issues. In determining whether or not allegations of a serious nature have been proven, the Court will apply s 140 of the Evidence Act, but such a task is undertaken after issues of admissibility have been decided.

40. The issue of whether or not the particular passages set out above were impermissible conclusions is more difficult. There is nothing in the Evidence Act that prevents evidence being given as a conclusion (save for expert opinion expressed as conclusions which can only be given by expert witnesses). The test remains that posed by s 55 and s 56. Thus a trial judge is required to consider whether the proposed evidence has sufficient, even if slight, probative value to make it admissible. If the nature of the conclusion is such that it has no probative value, the evidence should be rejected."

The case highlights that while it is helpful to particularise (and I am always of the view where possible to particularise), that it can be difficult to do so at times, when a general statement is required, and it is particularly difficult in an interlocutory application where not all the facts may be known and there is a prescribed length of the affidavit.

WHAT ARE YOUR CLIENT'S GOALS?

It never ceases to amaze me to see applications that are poorly drafted where the form of order is vague and unclear and in which the goal sought on an interim basis again remains unclear.

Rule 2.01 provides:

> *"(1) Unless otherwise provided in these Rules, a proceeding must be started by filing an application for final orders in accordance with the relevant approved form.*
>
> *(2) An application for final orders may include an application for an interlocutory order.*
>
> *(3) A person must not file an application for an interlocutory order unless:*
>
> *(a) an application for final orders is current in the proceeding; or*
>
> *(b) the application includes an application for final orders.*
>
> *(4) If a person makes an application for an interlocutory order after the start of the proceeding and before final orders have been made in the proceeding, the application must be made by filing an 'Application in a Proceeding'.*
>
> *(5) The required documents must be filed with an application if they have not already been filed in the proceeding."*

The relevant approved forms are set out in Table 2.1 under item 4 it is an application in a proceeding is the form required for interlocutory orders sought after an application for final orders is made. Where interlocutory orders at the same time as an application of final orders is made, the form is Initiating Application (Family Law).

When drafting your application (and any affidavit material) remember section 67 of the *Federal Circuit and Family Court of Australia Act* (2021):

> *"(1) The overarching purpose of the civil practice and procedure provisions, in relation to the Federal Circuit and Family Court of Australia (Division 1), is to facilitate the just resolution of disputes:*
>
> *(a) according to law; and*
>
> *(b) as quickly, inexpensively and efficiently as possible."*

This includes the following objectives as set out under (2):

> *"(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."

When drafting material, particularly on an interlocutory application, one must take into account that last statement and seek to be compliant. The requirement in sub (3) is:

> *"The civil practice and procedure provisions, in relation to the Federal Circuit and Family Court of Australia (Division 1), 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."*

That overarching purpose also applies to the conduct of the parties in a way that is consistent with the overarching purpose: section 68(1). A party's lawyer must (including negotiations for settlement) on the party's behalf:

(a) take account of the duty imposed on the party, and

(b) assist the party to comply with the duty: 68(2).

In case there is any doubt about it, section 68(5) provides:

> *"Without limiting the exercise of that discretion [as to award costs in a civil proceeding], the Federal Circuit and Family Court of Australia (Division 1) or a Judge may order a party's lawyer to bear costs personally."*

If that order is made because of a failure to comply with section 68(2), under section 68(6) the lawyer must not recover the costs from the lawyer's client.

Paragraphs 4.1-4.4 of the *Central Practice Direction* provide:

> *"4.1 Prior to commencing proceedings, parties are required to:*
>
> *a. comply with the pre-action procedures for both financial or property and parenting proceedings (see Schedule 1 of the Family Law Rules and section 60I of the Family Law Act);*
>
> *b. clearly identify the issues requiring determination; and*
>
> *c. take genuine steps to attempt to resolve those issues prior to commencing proceedings, unless it is unsafe 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. the filing party's 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 contents 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)."

Orders sought should be identified with particularity, not an *"aspirational claim"* as Jarrett J has said. Set out precisely the relief that your client seeks.

Paragraphs 1.7-1.9 of the Family Law Practice Direction: Financial proceedings provide:

"1.7 Each prospective party to the proceeding must comply with the pre-action procedures in Schedule 1 of the Family Law Rules, unless an exception in rule 4.01(2) applies. Those pre-action procedures require parties to take genuine steps to resolve the dispute before proceedings are instituted.

1.8 A Genuine Steps Certificate *must be filed with any* Initiating Application (Family Law) *or* Response to Initiating Application *seeking financial or property orders.*

1.9 Where a party applies for a consent order which is expressed to bind the trustee of an eligible superannuation plan, the applicant must notify the trustee of the eligible superannuation plan pursuant to rule 10.06 of the Family Law Rules not less than 28 days before lodging the draft consent order or filing the Application for Consent Orders *(unless the trustee provides written consent pursuant to rule 10.06(4))."*

As with your ongoing duty to the Court, do not gild the lily with the Certificate.

Paragraphs 2.6-2.7 provide:

"2.6 Subject to 2.7, the following documents must be filed with an Initiating Application (Family Law) in financial proceedings:

a. a Genuine Steps Certificate, confirming the applicant's compliance with the pre-action procedures listed in Schedule 1 of the Family Law Rules;

b. a Financial Statement;

c. a Financial Questionnaire, unless the Family Law Rules require an affidavit to be filed;

d. a copy of the current family violence order affecting the party in accordance with rule 2.10 of the Family Law Rules;

e. an Undertaking as to Disclosure in accordance with rule 6.02 of the Family Law Rules;

f. if the applicant is aware that the Financial Statement will not fully discharge the duty to make full and frank disclosure, an affidavit providing further particulars: see rule 6.06(5) of the Family Law Rules;

g. if the application seeks interlocutory orders, an affidavit stating the facts relied on in support of the interlocutory orders sought;

h. if the application seeks a search order, an affidavit which includes the required evidence as set out in rule 5.19(3) of the Family Law Rules; and

i. if the application seeks a freezing order, an affidavit which includes the required evidence as set out in rule 5.23(3) of the Family Law Rules.

2.7 If the only orders a party seeks are in relation to a pet, the following documents may be lodged for filing with an Initiating Application (Family Law) by email to the relevant registry:

a. a Genuine Steps Certificate, confirming the applicant's compliance with the pre-action procedures listed in Schedule 1 of the Family Law Rules;

b. a copy of the current family violence order affecting the party in accordance with rule 2.10 of the Family Law Rules; and

c. an affidavit stating the facts relied on in support of the orders sought."

There is some leeway with an urgent application, in paragraphs 2.11 -2.13:

*"2.11 If an application is urgent (**urgent application**), the applicant need not file all of the documents set out at 2.6 above (although they may be required to do so at a future date) but they must file the following:*

a. an Initiating Application (if there are no current proceedings) or an Application in a Proceeding (if proceedings have already commenced) which includes an order that the proceedings be listed urgently; and

b. an affidavit stating the facts relied on in support of the urgent application.

2.12 An urgent application must be accompanied by a cover letter as to urgency, outlining the nature of the application and the basis upon which an urgent listing is required. The cover letter should refer to specific paragraphs of the affidavit relied upon in support of the urgent application.

2.13 If no application for final orders has been made, the urgent application should be included in the interlocutory orders sought in the Initiating Application (Family Law). If an application for final orders has already been made, an urgent application should be made by filing an Application in a Proceeding."

WORK OUT WHO THE OTHER PARTIES ARE

Most of the time this is straightforward. It is the other party to the marriage or de facto relationship. Care must be taken when involving third parties, even if it is a company which is a creature of the other party. Few things are guaranteed to blow out costs than involving and having third parties as respondents. If, when being considerate of being proportionate as to costs, there are orders that need to be made as to company property, that can usually be achieved by seeking an order against the other party as a director of that company and/or as a shareholder of that company, rather than against the company.

KEEP IT SHORT!

Rule 5.08 provides:

> *"(1) The following affidavits may be relied on as evidence in chief at the hearing of an application for interlocutory orders:*
>
> *(a) subject to rule 5.06 [an affidavit in reply by the applicant], one affidavit by each party;*
>
> *(b) one affidavit by each witness, provided the evidence is relevant and cannot be given by a party.*
>
> *(2) Unless express leave is granted by the court, an affidavit filed and served in support of or in opposition to an application for interlocutory orders must not exceed 25 pages.*
>
> *(3) Unless express leave is granted by the court, an affidavit filed and served in support of or in opposition to an application for interlocutory orders must not contain more than 10 annexures."*

The initial interlocutory application almost certainly will be in Division 2. Rule 2.02 of the *Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules* (2021) notes that there is a limit of 10 pages for the affidavit under rule 5.02 and five annexures under rule 5.08(3). Therefore, despite your best efforts to keep the affidavit short, it is essential that leave is granted by the court under rule 5.08 and if necessary, rule 2.02 of the division 2 rules, for the affidavit to be longer than the set limit of 10 or 25 pages, and the number of annexures to be greater than that of five or 10 respectively. Failure to make that application may mean automatically that you have not alerted the other parties to seeking leave (and therefore cause prejudice to them) which may result in an adjournment or costs or deletion of some of that valued material upon which your client will want to rely.

Where possible, seek to keep it simple, and put the material simply before the court.

This can be difficult in cases involving complexity, such as complex financial arrangements or allegations of family violence, or other bad behaviour. It may be necessary, to keep the affidavit short to have a broad statement such as:

> *"John engaged in a process of coercive control [detail the nature of that coercive control to comply with section 4(2A), having regard to the decision of the Full Court in Isles & Nelissen [2022] FedCFamC1A 97], but in particular by these examples:*
>
> *(a) on 1 January 2026, after we had been celebrating New Years Eve and after John had drunk 10 stubbies of full strength beer, he kicked me in the back, causing bruising and resulting in me attending my GP.*
>
> *(b) on 2 January 2026 John sent me 25 text messages to check where I was. Some of them were abusive, including one that called me a fucking cunt and a 'bitch'.*
>
> *(c) on 7 January 2026 John gave me $200, saying 'that's all the money that you are entitled to, to buy all our groceries for the week, because you spend far too much'. Out of that $200, John said, 'that includes children's shoes and school books', which I was to pay to have the children ready for the new year of school."*

Avoid the temptation to squeeze in more typing in the same space. Rule 2.14 provides that the documents:

(a) be typed in at least 12 point font size (Times New Roman or equivalent) with line spacing of 1.5 lines; and

(b) have margins (left, right, top and bottom) of approximately 2.5 cm; and

(c) have each page consecutively numbered; and

(d) have a coversheet in the approved form including the court file number distinctive to the proceeding.

That requirement does not need to be strictly complied with if the nature of the document or the manner of filing means that strict compliance would be impracticable: rule 2.4(5).

Self-evidently, do not file an affidavit unless there is a legal basis to file one. Rule 8.13 provides:

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

Rule 8.15 sets out the requirements for affidavits:

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

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

(2) If, in a parenting proceeding:

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

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

(c) the deponent's address has not already been provided to the court;

the deponent's address must be provided to the court by email and the address must not be disclosed other than in accordance with an order of the court.

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

(a) must be identified in the affidavit; and

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

(c) must be paginated; and

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

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

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

KEEP IT FOCUSED

In a property matter, obtain instructions from your client:

- About financial and non-financial contributions of each of the parties, including gifts, inheritances and other windfall gains (like redundancies and lotto wins)
- Post-separation contributions, including as a homemaker and parent.
- S.79(5) matters:

(a) the effect of any family violence, to which one party to the marriage has subjected or exposed the other party, on the current and future circumstances of the other party, including on any of the matters mentioned elsewhere in this subsection;

(b) the age and state of health of each of the parties to the marriage;

(c) the income, property and financial resources of each of the parties to the marriage and the physical and mental capacity of each of them for appropriate gainful employment;

(d) the effect of any material wastage, caused intentionally or recklessly by a party to the marriage, of property or financial resources of either of the parties to the marriage or both of them;

(e) any liabilities incurred by either of the parties to the marriage or both of them, including the nature of the liabilities and the circumstances relating to them;

(f) the extent to which either party to the marriage has the care of a child of the marriage who has not attained the age of 18 years, including the need of either party to provide appropriate housing for such a child;

(g) commitments of each of the parties to the marriage that are necessary to enable the party to support themselves and any child or other person that the party has a duty to maintain;

(h) the responsibilities of either party to the marriage to support any other person;

(i) the eligibility of either party to the marriage for a pension, allowance or benefit under:

(i) any law of the Commonwealth, of a State or Territory or of another country; or

(ii) any superannuation fund or scheme, whether the fund or scheme was established, or operates, within or outside Australia;

(j) if either party to the marriage is eligible for a pension, allowance or benefit as mentioned in paragraph (i)--the rate at which it is being paid to the party;

(k) if the parties to the marriage have separated or divorced, a standard of living that in all the circumstances is reasonable;

(l) the extent to which an alteration of the interests of the parties to the marriage in any property would enable a party to undertake education or establish a business or otherwise obtain an adequate income;

(m) the effect of any proposed order on the ability of a creditor of a party to the marriage to recover the creditor's debt, so far as that effect is relevant;

(n) the extent to which each party to the marriage has contributed to the income, earning capacity, property and financial resources of the other party;

(o) the duration of the marriage and the extent to which it has affected the earning capacity of each party to the marriage;

(p) the need to protect a party to the marriage who wishes to continue that party's role as a parent;

(q) if either party to the marriage is cohabiting with another person--the financial circumstances relating to the cohabitation;

(r) the terms of any order or declaration made, or proposed to be made, under Part VIIIAB in relation to:

(i) a party to the marriage; or

(ii) a person who is a party to a de facto relationship with a party to the marriage; or

(iii) the property of a person covered by subparagraph (i) and of a person covered by subparagraph (ii), or of either of them; or

(iv) vested bankruptcy property in relation to a person covered by subparagraph (i) or (ii);

(s) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage is to provide, or might be liable to provide in the future, for a child of the marriage;

(t) the terms of any financial agreement that is binding on the parties to the marriage;

(u) the terms of any Part VIIIAB financial agreement that is binding on a party to the marriage;

(v) any other fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.

When you first take instructions, carry out an assessment of any urgent matters, for example, risk of flight, or dissipation of assets.

From the beginning, you should be preparing a balance sheet, and continuing to rework it as new material comes to light. I typically have different columns for each of the party's values for each asset, liability, super and financial resource, so that there can be an easy compare and contrast, both as to the totals, but also as to where the parties are apart on individual items.

The balance sheet, along with the preparation from the beginning of a comprehensive chronology (which needs to be updated as the matter moves along) will point you to where there are the gaps in the evidence, and issues of concern, even urgency.

The late Rick Jones used to marvel at the ability of family law clients, on hearing of a range of costs, and a range of outcomes, to inevitably choose the lowest cost, and the highest outcome. Make sure your advice to your clients is realistic, couched in qualified language where appropriate, is updated as the matter moves along, and mentions dollars that your client will receive, not just percentages, at the same time you are updating your costs estimates (and linking the two, so that your clients can make an informed choice about their prospects).

COMMENT AS TO THE SETTING OUT OF AN AFFIDAVIT

The person you are seeking to persuade is a judicial officer. Make it easy for them. In a property case, it is usually straightforward in setting out what is the pool and, so far as it is relevant to the interlocutory application, the pool at the time of commencement of the relationship, at separation and currently. I am a visual person. I like setting out tables in the affidavit as they make it much easier to visualize the balance sheet.

Put your big points up front in the affidavit. Assume that you have a lazy reader. Therefore, your big points should be right at the beginning of the affidavit, not buried in the middle or at the end.

Keep affidavit paragraphs to about eight lines. This is again to make it easy for the reader to read.

Use headings and sub-headings. This makes it a joy to work out what is the story you are seeking to convey.

For longer affidavits, use an index. Again, this is making it as easy as possible for the reader to follow the affidavit through.

The attachment is either an annexure or exhibit. Even though you may only have five or 10 of those, it is vitally important that you have an index to the annexures and that the index is paginated and that all of them together are paginated. Therefore, when you file your document as a pdf on the portal, it is immediately obvious to a judicial officer when you make submissions as to what page you are referring to.

Few things irritate judges more than when you are referring to an annexure that they can't find or a page in the annexure that they can't find. Setting it out simply by having an annexure and an index to the affidavit keeps it simple for the judge.

Your client's case should be won or lost on the affidavit material. Advocacy by skilled advocate is a great skill but it is the underlying substance of the material which will win or lose the case in most matters. Therefore, trying to keep the case as clear as possible, is by an act of persuasion with the court.

If your case on the interlocutory application is about wastage, then emphasise that – rather than giving a long story of little relevance. If your case is primarily a concern about a fear of disposal of property, again, focus on that.

If your case is about family domestic violence issues, then again, focus on that.

While the LAT rules now apply to both property and parenting matters, try so far as possible to keep the affidavit in strictly admissible form. In doing so, you will waste less time (and costs) on objections, and your affidavit will be more effective. While a poorly drafted affidavit may still contain relevant evidence, it may be of such little weight that it is in effect disregarded.

While little time is usually taken up on interlocutory applications about objections, it is good to remember the standard objections:

- opinion/hearsay;
- opinion/conclusion/form;
- conclusion/hearsay;
- opinion/argumentative;
- form/deponent does not have requisite expertise to offer opinion in respect of health;
- form, self-serving, without prejudice communication, s.131 *Evidence Act 1995* (Cth), what is discussed in family dispute resolution (s.10J *Family Law Act*) or mediation;
- form/deponent does not have requisite expertise to offer opinion;
- irrelevant, vague and embarrassing;

- vague and embarrassing/opinion/submission, general discretion to exclude: s.135 *Evidence Act*;

- submission/argument/conclusion;

- opinion;

- self-serving.

Presumably, you are proficient in English. In the words of former Queensland Premier TJ Ryan, it is important that what your client says in the affidavit is not only capable of being understood, but not capable of being misunderstood.

The worst sentence in an affidavit

It was some years ago when I was an independent children's lawyer, having come into the matter, that I read the worst sentence I have ever seen in an affidavit. This sentence was drafted by a lawyer, the lawyer for the father. The father was not spending time with his child and applied to the court for time. This sentence begged a myriad of questions:

"I stopped seeing my court ordered psychiatrist, because I couldn't afford it."

The court does not have a general power to order a psychiatrist in family law matters: *L v T* (1999) FamCA 1699. As far as I was aware, there were no previous orders made in family law proceedings. Therefore, that meant that the father had been the subject of some criminal proceedings.

Experience has taught me that a psychiatrist would normally only be required if there were some mental health (and possibly associated with drug or alcohol issue). The mother asserted that the father had a drug habit.

The father did not disclose in his affidavit that he had any criminal history, in breach of his obligation of disclosure.

A subpoena was issued, which showed that the father had a conviction and that this related to use of ice. As it turns out, the father discontinued those proceedings, after making admissions in the child impact report that he was unable to spend time with the child at a children's contact centre because he could not afford it (at the same time that he was spending money on ice).

If the father had been properly guided at commencement, he would either have not commenced proceedings or, made it plain that he was engaged in a fess and a void i.e. that yes he had taken drugs, but these are the steps he was taking to deal with those drugs, much like a Damascene conversion. The court often likes a story of redemption.

Of course, any story of redemption also has to face reality, which means that the solicitor in preparing the material must have verified the story as far as possible, using all material available, and ensure that the client had made full and frank disclosure.

CONSISTENCY

Assume that there is more than one interlocutory application and, with a long running matter, more than one financial statement. It is essential that when drafting the affidavit, the financial questionnaire, the genuine steps certificate and the financial statement, that each is not done in isolation but that both are done as part of a whole. It is extraordinary to see a difference between what is said in an affidavit and what is contained in the party's financial statement.

It is also telling when there are apparent conflicts between different versions of the financial statement, as the matter progresses. Great care must be taken to ensure that these documents are consistent and, where they are not, that there is a clear explanation as to why they are not. If there has been a significant change in circumstances, then that ought to be set out, preferably briefly, even if as a notation at the end of the financial statement.

FINANCIAL STATEMENT

Great care must be taken in drafting a financial statement. The starting point is the requirement that the party either swears or affirms that they have read section 71B or 90RI of the Act and rule 6.06 of the Rules.

Ensure that your client is given a copy of these by correspondence and that, preferably, they acknowledge receipt – and that this occurs before they execute their first financial statement.

It is important, before your client executes a financial statement, that you have as part of your checklist, a proforma letter to confirm the obligation upon your client to tell the truth and to make full disclosure – and for them to confirm that they have done so.

I am amazed, when I have read financial statements, that basic steps haven't been done. Failure to do so can lead to an adverse costs order, or worse. Follow the kit closely! If there needs to be an explanation at the end- have the explanation at the end. The more gaps there are, the more you should assume that something has been hidden.

Once disclosure has been made, talk to your client about making a realistic offer. Not only does your client want to be able to settle, but you want to make sure that both you and your client are protected on the issue of costs. The offer should be as detailed as possible, so that it is capable of being accepted. Tie down lose ends! Don't leave it vague. A vague, imprecise offer, is less likely of being accepted, and therefore less likely of having a costs order made in favour of your client if it is not accepted.

INTERIM PROPERTY, URGENT AND INTERIM MAINTENANCE, AND INTERIM COSTS APPLICATIONS

In the last few years, there has been the remarkable rise of family law litigation funders, such as JustFund and Juel. Their existence, and ability to provide funds, has meant for many parties that the need to bring an urgent, expensive application to Court is not needed.

When drafting the orders your client seeks, go to the case law to find some good examples. I set out some of these below.

Then work back through the material to see whether your client's evidence supports the making of that order.

Rules 21.1 of the *Australian Solicitors Conduct Rules 2023* (Qld) provides:

> *"21.1. A solicitor must take care to ensure that the solicitor's advice to invoke the coercive powers of a court:*
>
> *21.1.1. is reasonably justified by the material then available to the solicitor;*
>
> *21.1.2. is appropriate for the robust advancement of the client's case on its merits;*
>
> *21.1.3. is not given principally in order to harass or embarrass a person; and*
>
> *21.1.4. is not given principally in order to gain some collateral advantage for the client or the solicitor or a third party out of court."*

Applications for urgent spousal maintenance applications under s.77 are intended for just that- urgent. There must be an immediate need: i.e. urgent and immediate: *Williamson & Williamson* [1978] FamCA 57. Therefore, it is for the just now, until a handle can be given as to what the needs of the party are. The amount to be paid depends on the circumstances of each case, and the financial background and history of the parties: *Chapman & Chapman* [1979] FamCA 14.

Just because the other party has a huge surplus of income does not entitle your client to establish a basis for spousal maintenance. Even on an urgent basis, your client has to show that there is a need for a spousal maintenance order.

When filing, be clear as to whether it is an urgent order that is sought, or an interim. The urgent order, if obtained, would likely only last until interim determination is made.

Redman & Redman [1987] FamCA 2 is an illustration of how hard it is to separate the costs of the party from those of the children. The Court stated at [27]:

> *"A strict line between costs referable to the custodial parent and those referable to the children cannot always be drawn with clarity. Some expenditure relating to the household as a whole, such as the provision of housing, electricity, fuel, transport, and possibly food and groceries, cannot be strictly divided. Where an application is made which covers both the custodial parent and the children those expenses can with some justification be allocated under either heading. They are relevant to spousal maintenance in pursuance of sec. 75(2) para. (c) (d) and (e). In such a case it will be difficult to stipulate with any precision how the maintenance should be allocated or to challenge any such allocation if it is made. It may be different if a custodian who is able to support himself/herself adequately, seeks an order for child maintenance which includes part of the cost of housing and the like. Here again, if the matter is likely to be reviewed in the near future there may be no need for a full and detailed examination of the issues."*

Marlowe-Dawson & Dawson [2012] FamCA 702 is an illustration of an interim spousal maintenance decision. The orders, by Kent J, are thorough:

> *"(8) Until further Order, the Husband pay or cause to be paid the following as and by way of interim spousal maintenance for the Wife:*
>
> - *(a) The monthly mortgage repayments (including any arrears) for any loan secured by mortgage over the property situated at S Street, Town P in the United Kingdom;*

- *(b) The monthly mortgage repayments (including any arrears) to the Commonwealth Bank of Australia for any loan secured by mortgage over the property situated at V Street, Suburb C;*

- *(c) The monthly mortgage repayments (including any arrears) to the Commonwealth Bank of Australia for any loan secured by mortgage over the property situated at W Street, Suburb U, net of any rental income received by the Wife for the property;*

- *(d) The monthly loan repayments (including any arrears) to the Commonwealth Bank of Australia for any loan relating to the Volvo motor vehicle in the possession of the Wife;*

- *(e) The rates (including water rates) and insurance for the properties situated at:*

    - *(i) S Street, Town P in the United Kingdom;*

    - *(ii) V Street, Suburb C;*

    - *(iii) W Street, Suburb U;*

- *(f) Car insurance and registration for the Volvo motor vehicle in the possession of the Wife;*

- *(g) Commencing Monday 6 August 2012, the Husband cause to be paid to the Wife's nominated bank account the amount of AUD$3,600.00 per calendar month."*

Kent J stated:

> *"Taking a "broad brush" approach and applying modest discounting, I would, in this context, accept that the Wife's weekly needs are in the order of $850.00.*
>
> *The written submissions on behalf of the Husband contend that the Wife has the capacity to meet her own needs from employment. Whether or not that is so in the longer term, no doubt an issue to be agitated at trial, the fact is that from separation in late 2002 until early this year, the Husband, on the Wife's case and on his own case to a lesser extent, acquiesced in the provision of substantial support to the Wife and children. That was in the context of the Wife not working nor seeking work.*
>
> *In circumstances where the time to trial is a matter of weeks; the Wife has been out of the workforce since 1994; and where the Wife will have a need to focus upon the preparation of her trial, it would be unrealistic, even if the evidence allowed for such a conclusion, to assume that the Wife can now obtain employment that can meet in whole or part her needs of $850.00 per week.*
>
> *I am thus satisfied that the Wife is unable to support herself (in circumstances where the Suburb U rental income is applied to the mortgage) and that her reasonable needs are $850.00 per week.*
>
> *Turning to the Husband's capacity, I have already made several references to the Husband's exceedingly high income earning capacity and anticipated receipts of*

distributions of profit as well as the evidence concerning the level of support he has provided over the nine years or so from separation in October 2002 until the end of 2011.

Indeed, it is to be noted that even in January of this year, the Husband was proposing substantial monthly payments to the Wife, albeit not contemplated as being limited to her own personal support.

Whilst it was submitted that the Husband's financial position reached a point earlier this year which did not allow him to meet the proposal he had advanced the objective evidence does not readily establish what changes or developments in circumstances produced that.

Whilst obvious caution needs to be taken in approaching untested evidence, I do not consider that such a cautious approach includes acceptance at face value of assertions in affidavit material that appear to be inherently unlikely or improbable. To my mind, at first blush, many of the expenses claimed by the Husband appear extraordinary or at least requiring further and better explanation than is provided by the Husband. As but one example, the Husband claims that for food for himself, his present wife, Ms A, their two infant children and Ms A's niece, D, the weekly expense is $2,300.00. On its face that is an extraordinary claim. Similar questions might be raised, as they are raised in the submissions on behalf of the Wife, as to the claimed expenses in general. I cannot accept, without better elucidation from the Husband, expenses which are, on their face, extraordinary, as reasonable.

In the end, accepting that the Husband has a historically demonstrated capacity to provide substantial support, I rely primarily upon that feature in reaching the conclusion that he has the capacity to meet the Wife's reasonable needs."

That was not all. The wife also obtained an order for interim costs to be met by the husband from borrowed funds. The form of order was, again, thorough:

"(1) The Husband forthwith provide to the Wife for her signature an application or applications for finance to enable the parties to jointly refinance the existing mortgage debt upon the property situate at S Street, Town P in the United Kingdom, and to obtain loan facilities additional to the current debt of the equivalent of AUD$200,000.00 to be provided to the Husband, with the characterisation of such advance to be determined at trial.

(2) Within seven (7) days of the receipt by the Wife of such application or applications, the Wife return to the Husband, duly executed by her, such application or applications together with:

- *(a) A copy of her current passport which she is to obtain;*
- *(b) Recent utilities bills and receipts for the property situate at W Street, Suburb U, and the property situate at V Street, Suburb C.*

(3) Both parties shall do all acts and things reasonably required to secure the refinancing referred to in Order 1 as soon as possible, including the signing of further applications for finance to potential credit providers if necessary.

(4) Within fourteen (14) days of the date of these Orders, the Husband shall cause to be paid to the trust account of the solicitors for the Wife the sum of AUD$100,000.00.

(5) Within thirty (30) days of the date of these Orders, the Husband shall cause to be paid to the trust account of the solicitors for the Wife the further sum of AUD$96,000.00.

(6) The sums referred to in paragraphs 4 and 5, or such proportion of them as are necessary, are to be utilised by the Wife solely in respect of her legal costs and outlays of these proceedings, and are to be taken into account at the final trial of these proceedings, with the categorisation of such amounts to be determined at trial.

(7) By 4.00 pm on Friday 14 September 2012:

- *(a) The Husband shall file and serve an affidavit detailing the amount of loan funds obtained pursuant to these Orders and accounting for his use of those funds;*
- *(b) The Wife shall file and serve an affidavit accounting for the sums referred to in paragraphs 4 and 5 and her use of those sums or any proportion thereof; and*
- *(c) The parties shall exchange costs disclosure statements detailing the amounts of paid and unpaid legal costs and outlays incurred by each party in respect of these proceedings."*

The wife was not in employment, and had not been for many years. Her finances were entwined with her husband's.

By contrast, the husband earned $29,000 per week, and had significant borrowing capacity. Kent J stated:

> *"Clearly enough, fairness and equity dictates that both parties have similar opportunities and access to funding to prepare and prosecute the substantive proceedings at the forthcoming trial….*
>
> *I am satisfied that it is reasonable to conclude that if funding is not identified and obtained in advance of the trial, it is more likely than not that the Wife will not have her proposed legal representation. This includes payment of her outstanding legal fees.*
>
> *Fairness dictates a level playing field, as it were, with respect to litigation funding in the circumstances, and there is nothing extraordinary in the Wife's claim for anticipated costs by reference also to the Husband's anticipated legal costs as would lead to any conclusion that what the Wife proposes to expend on the litigation is unreasonable."*

Nowing & Nowing [2014] FamCA 888 is an excellent example of partial property settlement, interim costs and interim spousal maintenance. The orders of Kent J were:

> *"**IT IS ORDERED UNTIL FURTHER ORDER THAT:***
>
> ***The X Property***

1. *The Wife and Husband will do all acts necessary and sign all necessary documents to place the real property situated at Brisbane in the State of Queensland ("the X property") on the market for sale as agreed to and failing agreement as follows:*

    - *(a) on or before 1 December 2014, the X property be listed for sale with such agent as agreed between the Wife and Husband and failing agreement, the Wife shall appoint the agent of her choice and the Husband shall appoint the agent of his choice. Both agents are to be instructed to market the property jointly;*

    - *(b) the sale price of the X property is to be as agreed between the Wife and Husband and failing agreement, the value attributed to the property by P Valuers in their report dated 14 February 2014, being $6,250,000.00;*

    - *(c) the Wife and Husband shall co-operate in every way with the agent/s including without limiting the generality of the foregoing:*

        - *(i) making the key available for the agent/s;*

        - *(ii) allowing inspection of the X property at all reasonable times requested by the agent/s;*

        - *(iii) doing or saying nothing to hinder or prevent the sale being effected;*

        - *(iv) ensuring that the property, including the grounds, are in neat and clean condition at the time of inspection by the agent/s and prospective purchasers; and*

        - *(v) signing all documents requested by the agent/s in relation to the listing for sale of the properties except a contract or agreement for sale which has not been authorised by the parties' solicitors;*

    - *(d) in the event that the X property has not been sold within nine (9) months of the listing date, then the Wife and Husband shall have liberty to apply to the Court for further Orders in relation to the sale of the property.*

2. *From 24 October 2014, the Wife is at liberty to relocate to the X property and have sole use and occupancy of the property until seven (7) days prior to the settlement of the sale of the X property provided:*

    - *(a) upon the giving of twenty-four (24) hours written notice, the Wife provide the Husband access to the X property to allow him or his agent to inspect the property;*

    - *(b) the Wife is responsible for the payment of all costs associated with the X property save for:*

        - *(i) repayments for the Westpac mortgages (account numbers ...856 and ...106) and N Pty Ltd overdraft (account number ...993);*

        - *(ii) rates, water/sewerage and house and contents insurance expenses;*

- *(iii) gardening and pool maintenance expenses;*
- *(iv) agreed general repair and maintenance expenses;*
- *(v) cleaning costs of a maximum of three (3) hours per week; and*
- *(vi) security (back to base alarm system).*

3. *The Husband shall pay, or cause to be paid, the expenses listed in paragraph 2(b) above.*

4. *Upon the sale of the X property, the gross proceeds of sale are to be appropriated in the following order and manner:*

    - *(a) all costs and expenses of sale including legal costs and disbursements, agent's fees and commission, including marketing and advertising costs;*
    - *(b) payment of the Westpac mortgages (account numbers ...856 and ...106) and N Pty Ltd overdraft (account number ...993) and any other encumbrance affecting the property;*
    - *(c) the balance to be divided as follows:*
        - *(i) 33% to the Wife;*
        - *(ii) 33% to the Husband; and*
        - *(iii) the balance then transferred to the trust account of Barry.Nilsson. Lawyers and invested in the name of the Wife and Husband in an interest bearing account pending written agreement between the parties or an Order of the Court.*

5. *If either party refuses or neglects to sign any document or do anything as may be reasonably required to give effect to these Orders within forty-eight (48) hours of the service of a demand upon him or her to sign the document or to do the thing, a Registrar of the Family Court of Australia be appointed, pursuant to s 106A of the Family Law Act 1975 (Cth), to execute all documents and do all acts and things necessary in the name of the defaulting party to give validity and operation to these Orders and the affidavit of the solicitor for the non-defaulting party shall be sufficient evidence of such non-compliance. The defaulting party shall be responsible for the payment of the non-defaulting party's costs associated with the appointment of the Registrar on an indemnity basis.*

Litigation Funding

6. *Each party do all acts and things reasonably required, including signing any necessary documents, so as to cause monthly redraws to be made (commencing October 2014 and each month thereafter) from the Westpac bank overdraft redraw facility secured by the X property, so that each party receives as and by way of partial property settlement $20,000.00 each month up to a total of $300,000.00 for each party provided that such redraws shall cease upon settlement of the sale of the X property or further order.*

Interim Spousal Maintenance

7. *Pending the Wife's receipt of her share of the net proceeds of sale of the X property and commencing in the week beginning 20 October 2014 and weekly thereafter the Husband shall cause to be paid to the Wife as and by way of interim spousal maintenance:*

    - *(a) the sum of $2,178.00 (net of tax);*
    - *(b) the Wife's gap medical and dental expenses*

    provided that in any week such payments shall be reduced by the amount of net income from employment derived by the Wife, as to which the Wife is to keep the Husband advised.

IT IS FURTHER ORDERED BY CONSENT UNTIL FURTHER ORDER THAT:

8. *The Husband reduce his loan drawings from N Pty Ltd to $1,500.00 per week.*

9. *In the event that M Pty Ltd obtains an unconditional contract for the sale of the property at B Street, the Husband shall request the approval of the board of that company to release to the Wife the information and documents the Wife has requested of the Husband with respect to such sale.*

10. *On the 10th day of each month the Husband shall provide to the Wife copies of the previous month's bank statements for all accounts in respect of which the Husband has authority to provide.*

11. *Within ten (10) days of completion, the Husband will provide to the Wife copies of the quarterly general ledgers and quarterly management accounts for N Pty Ltd.*

IT IS FURTHER ORDERED THAT:

12. *The Wife have liberty to re-list her Application in a Case filed on 21 July 2014, to the extent that orders are sought for disclosure, injunctions, adult child maintenance or other orders sought not dealt with by these Orders, to a future duty list for interim applications.*

13. *The requirement that the parties attend a Conciliation Conference with a Registrar of this Honourable Court is dispensed with.*

14. *The Conciliation Conference listed before the Registrar at 9.00 am on 29 October 2014 be vacated, and the substantive proceedings proceed as if such a Conciliation Conference had been held.*

15. *Each party's costs of the Wife's Application in a Case filed 21 July 2014 be reserved."*

The wife had sought some 66 separate interlocutory or interim orders, with extensive material filed (before the current cap on material).

An example of a spousal maintenance case, albeit on a final basis, is the decision of Baumann J in ***Lagow & Lagow (No 2)*** [2023] FedCfamC1F 410. His Honour helpfully sets out in the judgment various tables:

- Wife's weekly expenses, concluding with a deficit

- Husband's net income
- Husband's reasonable personal expenses.

Use of the tables, taking into account the other evidence, makes crystal clear that the wife is in need of spousal maintenance, and the husband had the ability to pay.

In *McNaulty & McNaulty (No 3)* [2023] FedCFamC1F 468 (forerunner to *No 4*, discussed next), the wife sought interim spousal maintenance of $66,000 and $368,000 for anticipated costs. The husband noted that the wife had remarried- and he was content with a spousal maintenance order of $20,000.

The husband contended that there were significant liabilities, which in turn were disputed by the wife. The husband was agreeable to a dollar for dollar order being made. The wife set out in her affidavit as to how she had used $1m that she had already received:

a) $440,000 towards the purchase of the property in the United States of America (now registered in the name of Mr C);

b) $35,000 to repay credit cards;

c) $62,000 for flights for herself and the children (and accommodation) including between Australia and the United States of America;

d) $32,000 on high-end shopping including handbags and clothing;

e) $81,000 "on my legal fees and other day to day living expenses"

f) $25,800 for securing current City B accommodation;

g) $5,000 towards purchase of furniture;

h) $13,000 for a motor vehicle;

i) $38,200 towards electricity, internet and mobile phone expenses "and costs of the United States property";

j) $9,037 to G School;

k) $7,150 towards an immigration lawyer;

l) $43,000 in repayment of loans (not otherwise particularised);

m) $25,000 in relation to further airfares including to the United States of America;

n) $30,000 towards the purchase of "toiletries and clothing for myself and the children";

o) $28,922 remaining in bank account at 17 May 2023;

p) $171,300 towards legal fees; and

q) Balance of $43,591 on "day to day living expenses, including food, medical expenses and children's activities".

The wife's solicitor set out in her affidavit as to the costs incurred (including attaching the costs agreement) and:

(a) $46,986 is held in trust on account of counsel's fees of $29,700, with the remaining sum of $17,286 held on account of costs and outlays; and

(b) the further costs associated with the current application detailed at paragraph 10 (not including costs frozen for Counsel) were estimated at $40,000.

The wife's solicitors estimated that the costs to final hearing on the parenting dispute were between $253,000 to $341,000. Baumann J noted that the matter was returnable before him, after a family report was obtained, at which point he would be in a better position to consider whether that estimate was reasonable.

Baumann J ordered that $60,000 be paid by way of interim costs:

> *"When the wife has chosen to use funds available for legal costs as a result of Court Orders for personal expenditure, I regard it as just and equitable to be cautious about the funds she may need to retain her preferred solicitors and counsel. Although I did not decide (and was not pressed to do so), which of the alleged debts the parties individually said should be paid from the trust funds have priority (or are even genuine), I do not ignore the asserted liabilities.*
>
> *The funds in trust will meet a number of already agreed future expenses including airfares for the children; forensic accountant and other expert witness fees and any obligations under this Order.*
>
> *I am, on the current evidence, comfortably satisfied that the husband, with access to the business income now generated by S Pty Ltd, can meet his legal expenses without access to the trust funds. The wife cannot do so. Allowing for the $440,000 already received by the wife under Court Orders, I am satisfied it is just and equitable for a further payment to the wife's solicitors of $60,000 to be made. Although I do not say that will necessarily enable all the additional fees incurred to 18 August 2023 to be met, I expect, if required to consider a further application for litigation funding, after that date, the Court will be in a much better position to know the pool of interests (including the business S Pty Ltd) and valuations of the F Town land. I would also expect, through the process of discovery and reflection, the genuineness and enforceability of many of the alleged third party liabilities might be clarified. At the moment, my view is some of the claims have a hint of unreasonableness (for example the demand for repayment of over $3 million for a debt originally said to be in the vicinity of $600,000).*
>
> *Although Senior Counsel for the wife, Mr Williams KC, gently admonished the Court in observing (if all the asserted debts were genuine and enforceable) these parties could be facing personal bankruptcy, one thing is certain –they each have an interest in ensuring they have some nett property interests to divide rather, than appears in some ways from the untested evidence, making future decision which could reduce and diminish the pool of interests available for alteration under s 79. I am reasonably satisfied that these further payments totalling $80,000 will not restrict the Court ultimately making just and equitable orders after a marriage of nearly 30 years."*

In ***McNaulty & McNaulty (No 4)*** [2024] FedCFamC1F 302, the wife sought a 65/35 division in her favour, described by Jarrett J as an *"aspirational claim"*, subsequently particularised in her amended response by enforcement of a BFA entered between the parties:

> *"That from the Husband's property settlement entitlement, pursuant to paragraph 27(b) above, the Husband pay or cause to be paid to the Wife the cash adjustment owing to the Wife pursuant to the Binding Financial Agreement, plus interest."*

The wife then filed an application in a proceeding, in which she sought:

> *"2. That pending further Order of this Honourable Court, urgent release of funds in the amount of $250,000 from those held in trust be allocated as a partial property settlement to [Ms McNaulty].*
>
> *3. That this Honourable Court enforces the Binding Financial Agreement/ 90C Agreement dated June 2022 between the husband [Mr McNaulty] and [Ms McNaulty]."*

Because the husband had applied to set aside the BFA, an application that appeared *"particularly weak"*, his Honour intended to allow the husband to regularise his case. That argument was to occur on another date.

On an interim basis, Jarrett J had no difficulty in making the partial property orders.

His Honour helpfully summarised *Strahan* into two steps:

> *"12. In Strahan v Strahan [2009] FamCAFC 166; (2009) 42 Fam LR 203 at [131], Boland and O'Ryan JJ agreed that there is a two-stage approach to applications for partial property settlement: first, the procedural or adjectival step (that is to say, whether the Court should exercise its discretion to entertain or embark on hearing and determining an interim property settlement application), and secondly, the substantive step (the nature of the order, if any, once it has been determined it is appropriate to hear and determine the application).*
>
> *13. In relation to the first step, it was said at [132]:*
>
> > *... In our view, when considering whether to exercise the power under s 79 and s 80(1)(h) of the Act to make an interim property order the 'overarching consideration' is the interests of justice. It is not necessary to establish compelling circumstances.*
> >
> > *All that is required is that in the circumstances it is appropriate to exercise the power. In exercising the wide and unfettered discretion conferred by the power to make such an order, regard should be had to the fact that the usual order pursuant to s 79 is a once and for all order made after a final hearing.*
>
> *1. At [135] their Honours said of the second step that:*
>
> > *Once a court proceeds to exercise the power in s 79 of the Act, being in the substantive phase, a court is required to undertake consideration of the matters in s 79(4) including by reference to s 79(4)(e) the matters in s 75(2) so far as they are relevant. However, consideration of such matters may be brief and if it is established that 'it seems likely to the court that ... the applicant ... will be likely to receive by way of property settlement a sum sufficient to cover the advance, that would seem to be sufficient to enable the order sought to be made': Zschokke; Polletti and Polletti per Nygh J and Wenz v Archer. As senior counsel for the Wife submitted, 'provided scope*

> *can be found within the assets of the parties for an order of the size sought ... then that should be the end of the matter'. In other words, in such circumstances the applicant would only be receiving what he or she was entitled to receive when the power was exhausted."*

The property pool was at least $11m. The effect of the orders that the husband was that the wife would receive $4m. The wife had no property, all of the property being in the control of the husband. $1.3m was held in a solicitors trust account on behalf of the parties. The evidence of the wife was succinct:

> "*I require urgent funds to be released from those held in trust in the amount of $250,000 to be classified as a partial property settlement. These funds will be used to cover the costs of the return flights for my children from Sydney Australia to USA for my upcoming spend time with my two children in the June/July school holidays. Additionally funds will be used for children's bedding and furniture in preparation for their arrival, for the purchase of a vehicle and for legal representation for my upcoming trial with a direction hearing set for 17/04/24.*
>
> *The respondent's evidence is that she is currently unemployed and she is not legally able to work in the United States of America where she presently lives, until she obtains a "green card". She receives no spousal support from the applicant or any government assistance.*"

Jarrett J stated:

> *"Accordingly, on the evidence, I am satisfied that the respondent has no source of income and no capital that she can access to assist her to meet the expenses to which she says a partial property settlement will be applied. The applicant did not identify any source of income or capital available to the respondent from which she might meet those expenses…*
>
> *Other orders for partial property settlement have been made in favour of the respondent in these proceedings. There appears to be two orders that provide for a total of $230,000 to be paid to the respondent by way of partial property settlement (12 June, and 22 September, 2023). Further, by two additional orders (made on 22 February and 15 March, 2023) the respondent received a total of $440,000, such sum to be characterised by the trial judge. Thus, the respondent has received a total of $670,000.*
>
> *The amount sought by her is far less than her entitlement as contended for by the applicant, even taking into account the amounts already received by her. Any order for partial property settlement in the sum sought by the respondent might easily be accounted for when final property adjustment orders are made.*
>
> *It is appropriate in the circumstances to order that from the monies presently resident in the O Lawyers trust account, the sum of $250,000 be paid to the respondent by way of partial property settlement."*

Jarrett J ordered:

> *"The parties give all necessary instructions and sign all necessary documents to forthwith cause a payment of $250,000 to the respondent or at her direction, from the funds currently held in trust by O Lawyers, such sum to be characterised as partial property settlement to the credit of the respondent."*

Kent J in ***Nowing*** at [55]-[63] applied *Strahan*:

> *"In terms of the "adjectival or procedural step" or the "first step" referred to by the plurality in Strahan …, I am satisfied that this is a proper case in all the circumstances for an interim property settlement order to be made. Those circumstances include the following:*
>
> *a. Self-evidently there is significant complexity about the financial affairs of the parties. There are numerous entities involved in the N Group and a complexity about the financial transactions and arrangements as between those entities. The difference between the parties of potential Division 7A issues is but one example evidencing the complexity of the affairs involved;*
>
> *b. It is appropriate in order to do justice to the parties that they each have access to capable legal representation and accounting expertise in pursuing their competing claims in the substantive proceedings, if injustice is to be avoided;*
>
> *c. The parties have now been separated for almost four years and each apparently agitates issues, each in themselves of some complexity, concerning expenditures and use of funds in the post-separation period;*
>
> *d. The husband has maintained, and continues to maintain, financial control over what may be described as the parties' corporate or business interests and entities. There would be inherent unfairness to the wife if the husband were able to exert that control to fund his own expenses of this litigation whilst the wife has no commensurate ability.*
>
> *Turning then to "the second step" referred to in Strahan's Case as to whether it is just and equitable and appropriate to make an order, there is no issue in this case in circumstances where both parties seek orders for property adjustment after the end of a marriage of some 28 years, which produced four children, that the just and equitable requirement in s 79(2) is fulfilled. It is readily apparent by reference to what was said by the plurality in Stanford v Stanford [2012] HCA 52; (2012) 247 CLR 108 at [42] that the end of the marriage here also brought an end to common use of property and a range of assumptions underlying the parties' marriage relationship whilst it subsisted.*
>
> *In the course of argument the Court raised with the parties the appropriateness of orders being made that rather than lump sums in the amount sought by the wife being drawn that a monthly sum in the order of $20,000.00, pending receipt by each party of their 33 per cent share of net settlement proceeds of the X property, might be redrawn on the mortgage facility over the X property so that each party might fund their litigation expenses pending receipt of those settlement proceeds. No good reason was advanced to my satisfaction as to why lump sums rather than periodical payments were necessary.*
>
> *Given the issues involved and the disputed issues of fact on this application it is not possible for the Court to resolve in any concluded way the likely identification and value of the net property interests of the parties. As already noted, by reference to the subject balance sheet, the wife contends that the combined property and superannuation interests of the parties amounts to about $16,000,000.00 whilst the husband contends that after making allowance for Division 7A tax the existing net asset pool is calculated at only $538,455.00. I have already noted some inconsistency between that contention and the orders the husband proposes with respect to distribution of the proceeds of sale of the X property.*

Plainly it would be relevant to the "clawback" issue or reversibility of the effect of an interim property order if indeed it was ultimately demonstrated that the net pool was to be taken at a calculation in the order of $500,000. However, I infer from the husband's approach with respect to the orders sought with respect to the distribution of proceeds of the X property that this aspect can be addressed. The wife will receive capital from the sale proceeds of the X property (as will the husband) and it is to be reasonably assumed that each party will invest that capital in other assets. Certainly it is clear that from the wife's perspective, by reference to expert accounting evidence, there is an issue of significance raised by her as to the quantum of any Division 7A loans issue in these proceedings in calculating the net divisible pool.

I am therefore satisfied that it is more likely than not that any "reversibility" or "clawback" issue can be addressed in the final determination of the s 79 proceedings if the litigation funding proposed for each party is allowed for. That is, whilst I cannot reach any firm conclusions as to the ultimate likely net asset value I am satisfied that it is more likely than not, on the evidence currently available, that the parties' joint and respective net property interests will be of sufficient magnitude to address this issue in the final determination of s 79 orders, even if interim property orders are now made for litigation funding.

In terms of contribution as identified in s 79(4)(a), (b) and (c) there cannot be any doubt that over a 28 year relationship producing four now adult children; and having regard to the chronology of relevant events submitted by each party; that each has made substantial financial and non-financial contributions to the property of the parties or either of them and to the welfare of the family constituted by the parties and their children.

None of the other matters in s 79(4) including the factors in s 75(2) would stand in the way of the appropriateness of an order now being made for partial property settlement to fund each party's litigation expenses.

In circumstances where the litigation funding is to be provided from, in effect, the parties' equity in the X property pending its sale from the redraw facility; with that debt to be repaid from the proceeds of sale; an interim property order in the proposed form of monthly draws simply gives the parties access to property to fund litigation from the equity in the X property."(emphasis highlighted)

As Kent J demonstrated, there might be another way of enabling payment, rather than the one agitated by your client. Look at the other options before you file, and continue to consider those as the matter progresses.

Although it may seem obvious, never make the mistake of assuming as a matter of course that there ought to be a property settlement (and therefore ought to be a partial property settlement), unless it is clear that the holistic exercise has been done as per *Stanford* [2012] HCA 52 that it is just and equitable that there be a property settlement. *Chancellor & McCoy* [2016] FCCA 53 is the classic case where the court determined that there ought not to be a property settlement, despite the parties having been in a de facto relationship for 27 years. Their property had always been held separately. They had no children.

If there is a realistic concern that the other party is unlikely with comply with orders, consider having a s.106A order made. These cases are noteworthy that a s.106A order was not made, which indicates either an oversight, or a belief that there would be compliance.

NOTICE TO ADMIT

An often under used tool is a notice to admit. This is an extremely valuable tool which should be considered in most cases. Drafted correctly, it will result in the admission of facts and the authenticity/genuineness of documents, save a huge amount of time and cost, and in may cases increase the chances of settlement.

In *Wickham & Toledano (No 2)* [2022] FedCFamC1F 32, I found myself acting for the sister and sister-in-law (who were a couple) of a woman who had died of childbirth, after she had given birth to twins. The two preliminary issues in the case were whether another woman, who had briefly been in a de facto relationship with the deceased, was a parent or was a person concerned with the care, welfare and development of the children.

Therefore, it was necessary to show, from my clients' point of view, that the two women were not, for the purposes of s.60H(1) in a de facto relationship on the day that the embryos had been implanted into the mother. This was a difficult task, given that the person who could have provided instructions or given direct evidence as to whether or not there was a de facto relationship, was dead.

I was able to prove that the de facto relationship did not exist on the day in question, despite the other party asserting that the relationship existed. This was done by the difficult tasks of:

- Use of a comprehensive chronology
- In the absence of the deceased's phone (and therefore access to most social media), which had gone missing
- Piecing together bank statements, mobile phone accounts (to show the local call towers) and toll data records (to locate the car at a particular time), with sparse social media posts that had somehow been retained against the odds.
- Extensive admissions from use of the notice to admit.

The hearing on these preliminary points lasted 3 days. It is likely that the trial would have lasted well in excess of a week, without the admissions.

In that case, at about the time the first notice was served on the other side, there was a change of solicitors. While my clients could have insisted on the 14 day rule, there is a risk that the deemed admission would have been set aside, due to the change of solicitors. My clients wisely gave an extension of time in the circumstances. As a result, many admissions were made.

The notice compels the other side, within 14 days, to admit or dispute, and if the latter course is taken, and your client is able to prove the point, then a costs order should be assumed to be the norm. The key to the facts that you want to prove is to be able to plead the facts that you assert are true, for example:

> "1. Since 1 April 2025, I have been unemployed.
>
> 2. Since that time, I have been in receipt of JobSeeker payment, for which I currently receive $x per fortnight.
>
> 3. On 13 June 2025, you travelled to Manila on holiday.

4. While in the Philippines, you stayed at the Shangri-La Boracay resort, in Boracay.
5. Boracay is a resort island.
6. The Shangri-La Boracay resort is rated as 5 star luxury island resort.
7. You returned to Brisbane on 5 July 2025.
8. On that trip, you flew business class between Brisbane and Manila."

You should not set out conclusions as to law. For example, you could plead, if wanting to establish that there was a de facto relationship, as this is a fact:[5]

"1. On 1 January 2025, we both lived at 1 Bonagaree Road, Dubbo."

You would not seek the admission of this, as this is a conclusion of law:

"1. On 1 January 2025, we lived in a de facto relationship."

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[5] Of course, you would assert many more things. I give these two to compare what to say and what not to say.