

# **THE COLLEGE OF LAW**

## **THE IMPORTANCE OF FINANCIAL DISCLOSURE IN FAMILY LAW MATTERS**

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## THE IMPORTANCE OF FINANCIAL DISCLOSURE IN FAMILY LAW MATTERS

### Overview

Property cases have four components: identifying and valuing the asset pool and financial resources, assessing contributions, FLA s. 75 (2) factors and the just and equitable principles. Financial disclosure obligations apply to all matters in issue in the proceedings, and often that can be all four components.

Disclosure is a two way street: it must be given and can also be demanded.

This paper will attempt to provide an insight into how these issues can and should be addressed.

### Binding nature of final orders

Final Orders are intended to be binding, subject to any appeal. In children's cases the Court is directed when making Orders to treat the best interests of the child as paramount (FLA s. 60CA), whilst in adjustment of property cases the court shall not make an order under unless it is satisfied that, in all the circumstances, it is just and equitable to do so (FLA s. 79 (2))

### FLA s. 79A

The Act recognizes, however, that in appropriate cases there may be grounds to warrant the Court in revisiting it's own Orders, where such Orders were improperly obtained or something significant and not in the contemplation of the parties has occurred subsequently.

## **FAMILY LAW ACT 1975 - SECT 79A**

### **Setting aside of orders altering property interests**

(1) Where, on application by a person affected by an order [made](#) by a [court](#) under section 79 in [property](#) settlement [proceedings](#), the [court](#) is satisfied that:

- (a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information), the giving of false evidence or any other circumstance; or
- (b) in the circumstances that have arisen since the order was [made](#) it is impracticable for the order to be carried out or impracticable for a part of the order to be carried out; or
- (c) a person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make another order in substitution for the order; or
- (d) in the circumstances that have arisen since the making of the order, being circumstances of an exceptional nature relating to the care, welfare and development of a [child](#) of the [marriage](#), the [child](#) or, where the [applicant](#) has caring responsibility for the [child](#) (as defined in subsection (1AA)), the [applicant](#), will suffer hardship if the [court](#) does not vary the order or set the order aside and make another order in substitution for the order; or
- (e) a [proceeds of crime order](#) has been [made](#) covering [property](#) of the parties to the [marriage](#) or either of them, or a [proceeds of crime order](#) has been [made](#) against a party to the [marriage](#);

the [court](#) may, in its discretion, vary the order or set the order aside and, if it considers appropriate, make another order under section 79 in substitution for the order so set aside.

(1A) A [court](#) may, on application by a person affected by an order [made](#) by a [court](#) under section 79 in [property](#) settlement [proceedings](#), and with the consent of all the parties to the [proceedings](#) in which the order was [made](#), vary the order or set the order aside and, if it considers appropriate, make another order under section 79 in substitution for the order so set aside.

(1AA) For the purposes of paragraph (1)(d), a person has *caring responsibility* for a [child](#) if:

- (a) the person is a [parent](#) of the [child](#) with whom the [child](#) lives; or
- (b) a [parenting order](#) provides that:
  - (i) the [child](#) is to live with the person; or
  - (ii) the person has [parental responsibility](#) for the [child](#).

(1B) An order varied or [made](#) under subsection (1) or (1A) may, after the death of a party to the [marriage](#) in which the order was so varied or [made](#), be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

(1C) Where, before [proceedings](#) under this section in relation to an order [made](#) under section 79 are completed, a party to the [marriage](#) dies:

- (a) the [proceedings](#) may be continued by or against, as the case may be, the legal personal representative of the deceased party and the [applicable Rules of Court](#) may make provision in relation to the substitution of the legal personal representative as a party to the [proceedings](#);
- (b) if the [court](#) is of the opinion:
  - (i) that it would have exercised its powers under subsection (1) or (1A) in relation to the order if the deceased party had not died; and
  - (ii) that it is still appropriate to exercise its powers under subsection (1) or (1A) in relation to the order;

the [court](#) may vary the order, set the order aside, or set the order aside and make another order under section 79 in substitution for the order so set aside; and

- (c) an order varied or [made](#) by the [court](#) pursuant to paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

(2) In the exercise of its powers under subsection (1), (1A) or (1C), a [court](#) shall have regard to the [interests](#) of, and shall make any order proper for the protection of, a *bona fide* purchaser or other person [interested](#).

(3) In this section, a reference to an order [made](#) by a [court](#) under section 79 includes a reference to an order [made](#) by a [court](#) under [section 86](#) of the [repealed Act](#).

(4) For the purposes of this section, a creditor of a party to the [proceedings](#) in which the order under section 79 was [made](#) is taken to be a person whose [interests](#) are affected by the order if the creditor may not be able to recover his or her debt because the order has been [made](#).

(5) For the purposes of this section, if:

- (a) an order is [made](#) by a [court](#) under section 79 in [proceedings](#) with respect to the [property](#) of the parties to a [marriage](#) or either of them; and
- (b) either of the following subparagraphs apply to a party to the [marriage](#):
  - (i) when the order was [made](#), the party was a bankrupt;
  - (ii) after the order was [made](#), the party became a bankrupt;

the [bankruptcy trustee](#) is taken to be a person whose [interests](#) are affected by the order.

(6) For the purposes of this section, if:

- (a) a party to a [marriage](#) is a bankrupt; and

- (b) an order is [made](#) by a [court](#) under section 79 in [proceedings](#) with respect to the [vested bankruptcy property](#) in relation to the bankrupt party;

the [bankruptcy trustee](#) is taken to be a person whose [interests](#) are affected by the order.

(7) For the purposes of this section, if:

- (a) an order is [made](#) by a [court](#) under section 79 in [proceedings](#) with respect to the [property](#) of the parties to a [marriage](#) or either of them; and
- (b) either of the following subparagraphs apply to a party to the [marriage](#):
  - (i) when the order was [made](#), the party was a [debtor subject to a personal insolvency agreement](#);
  - (ii) after the order was [made](#), the party became a [debtor subject to a personal insolvency agreement](#);

the [trustee](#) of the agreement is taken to be a person whose [interests](#) are affected by the order.

A recent example of the use of this provision is the Full Court's decision in *Barker & Barker* (2007) FamCA 13. In that case, the parties had entered into consent property orders based upon an agreed value of a farm property of \$1.65m. Shortly before this the husband had received and rejected an offer to purchase the property for \$2.3m, and had become aware of the recent sale of a comparable property for a price which suggested a much higher value for the subject property than had been agreed. He did not disclose this information and shortly after the Consent Orders were made sold the property for \$2.65m.

The Full Court said:

*“in our view the husband had an obligation to disclose the amount of the offer, even if he did not wish to sell the property or he thought that the offer was not genuine. It was not for him to determine the relevance of the facts and to make a unilateral decision not to disclose them, whatever his own views may have been”.*

The Court went on, however, to cite with approval the following passage from *Livesey & Jenkins* (1985) 1 All ER 106:

*“It is not every failure of frank and full disclosure which would justify a court in setting aside an order of the kind concerned in this appeal. On the contrary, it will only be in cases when the absence of full and frank disclosure has led to the court making, either in contested proceedings or by consent, an order which is substantially different from the order which it would have made if such disclosure had taken place that a case for setting aside can possibly be made good. Parties who apply to set aside orders on the ground of failure to disclose some relatively minor matter or matters, the disclosure of which would not have made any substantial difference to the order which the court would have made or approved, are likely to find their applications being summarily dismissed, with costs against them....”*

On the facts of the case the Court had no difficulty in finding that:

*“.....these factors did constitute a miscarriage of justice, as a result of “any other circumstance”, because the value of the net property, including “AW”, when the orders by consent were made did not reflect the real value of “AW” and possibly the value of the other properties. Further, the evidence indicates that the value of “AW” was at least \$1,000,000 greater than the figure given to O’Reilly J with the effect that the amount the husband had to pay the wife resulted in her receiving a substantially smaller percentage of the property than that which the parties had submitted was a just and equitable outcome. The trial judge erred in not appreciating the relevance of the offer of \$2,300,000 and the sale of “AW”.*

In addition to this ground, we are satisfied that his Honour erred in rejecting the wife’s contention that the husband was under an obligation to disclose the offer. The husband knew of the “AB” sale and whether or not he accepted or rejected the evidence of the agent Mr H, he had been advised by him that in his view after that sale the value per acre had increased to beyond \$500. The subsequent offer was known to the husband but not to the wife and, as we have found, the husband had an obligation to disclose it, particularly in circumstances in which the wife had raised the possibility of the property

being worth more. We are satisfied that the wife has also established the ground of “suppression of evidence”.

### Pre-action disclosure

#### **1.05 Pre-action procedure**

- (1) Before starting a case, each prospective party to the case must comply with the pre-action procedures, the text of which is set out in Schedule 1, including attempting to resolve the dispute using dispute resolution methods.
- (2) Compliance with subrule (1) is not necessary if:
  - (a) for a parenting case — the case involves allegations of child abuse or family violence;
  - (b) for a property case — the case involves allegations of family violence or fraud;
  - (c) the application is urgent;
  - (d) the applicant would be unduly prejudiced;
  - (e) there has been a previous application in the same cause of action in the 12 months immediately before the start of the case;
  - (f) the case is an application for divorce;
  - (g) the case is a child support application or appeal; or
  - (h) the case involves a court’s jurisdiction in bankruptcy under section 35 or 35B of the Bankruptcy Act.

*Note 1* The court publishes a brochure setting out the pre-action procedures for financial cases and parenting cases.

*Note 2* The court may take into account a party’s failure to comply with a pre-action procedure when considering whether to order costs (see paragraph 1.10 (2) (d)).



**Schedule 1 provides in part:**

(5) The documents that the court would consider appropriate to include in the list of documents and exchange include:

- (a) in a maintenance case:
  - (i) a copy of the party's taxation return for the most recent financial year;
  - (ii) the party's bank records for the 12 months ending on the date when the maintenance application was filed;
  - (iii) if the party receives wage or salary payments — the party's 3 most recent pay slips;
  - (iv) if the party owns or controls a business — the business activity statements for the business for the previous 12 months; and
  - (v) any other document relevant to determining the income, expenses, assets, liabilities and financial resources of the party; and
- (b) in a property settlement case:
  - (i) a copy of the party's 3 most recent taxation returns and assessments;
  - (ii) documents about any superannuation interest of the party, including:
    - (A) a completed superannuation information form for the superannuation interest;
    - (B) if the party is a member of a self-managed superannuation fund — a copy of the trust deed and the 3 most recent financial statements for the fund; and
    - (C) the value of the superannuation interest, including the basis on which the value has been worked out and any documents working out the value;
  - (iii) for a corporation in relation to which a party has a duty of disclosure under rule 13.04:

- (A) a copy of the financial statements for the 3 most recent financial years, including balance sheets, profit and loss accounts, depreciation schedules and taxation returns;
  - (B) a copy of the corporation's most recent annual return that lists the directors and shareholders; and
  - (C) a copy of the corporation's constitution and any amendments;
- (iv) for a trust in relation to which a party has a duty of disclosure under rule 13.04:
- (A) a copy of the financial statements for the 3 most recent financial years, including balance sheets, profit and loss accounts, depreciation schedules and taxation returns; and
  - (B) a copy of the trust deed, including any amendments;
- (v) for a partnership in relation to which a party has a duty of disclosure under rule 13.04:
- (A) a copy of the financial statements for the 3 most recent financial years, including balance sheets, profit and loss accounts, depreciation schedules and taxation returns; and
  - (B) a copy of the partnership agreement, including any amendments;
- (vi) for a person or entity mentioned in subparagraph (i), (iii), (iv) or (v) — any business activity statements for the previous 12 months; and
- (vii) unless the value is agreed, a market appraisal of the value of any item of property in which a party has an interest.

What are the consequences of a failure to comply?

It would be possible to apply to have an Application struck out for failure to comply with the pre-action procedures. Such an Application, if successful, may result in an adverse costs order, perhaps even a personal costs order against a practitioner.

It is however important to note the exceptions, especially the ground of urgency.

The obligation to disclose includes a party's three most recent tax returns. What if the party hasn't lodged returns recently? The short answer is that they should do so without delay, otherwise there is a breach of the obligation to disclose, and the Court may draw an adverse inference from that.

## **Part 13.1 Disclosure between parties**

### **Division 13.1.1 General duty of disclosure**

#### **13.01 General duty of disclosure**

- (1) Each party to a case has a duty to the court and to each other party to give full and frank disclosure of all information relevant to the case, in a timely manner.

*Note* Failure to comply with the duty may result in the court excluding evidence that is not disclosed or imposing a consequence, including punishment for contempt of court. This Chapter sets out a number of ways that a party is either required, or can be called upon, to discharge the party's duty of disclosure, including:

- (a) disclosure of financial circumstances (see Division 13.1.2);
  - (b) disclosure and production of documents (see Division 13.2.1); and
  - (c) disclosure by answering specific questions in certain circumstances (see Part 13.3).
- (2) The duty of disclosure starts with the pre-action procedure for a case and continues until the case is finalised.

*Note* The duty of disclosure applies to a case guardian for a child and a person with a disability (see subrule 6.13 (2)).

## **Division 13.1.2 Duty of disclosure — financial cases**

### **13.02 Purpose of Division 13.1.2**

- (1) This Division sets out the duty of disclosure required by parties to a financial case.
- (2) This Division does not apply to a party to a property case who is not a party to the marriage to which the application relates, except to the extent that the party's financial circumstances are relevant to the issues in dispute.

### **13.03 Definition**

In this Division:

*party to a financial case* includes a payee or other respondent to an enforcement application.

### **13.04 Full and frank disclosure**

- (1) A party to a financial case must make full and frank disclosure of the party's financial circumstances, including:
  - (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;

- (ii) of which the party, the party's child, spouse or de facto spouse is an eligible beneficiary as to capital or income;
  - (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;
  - (iv) over which the party has any direct or indirect power or control;
  - (v) of which the party has the direct or indirect power to remove or appoint a trustee;
  - (vi) of which the party has the power (whether subject to the concurrence of another person or not) to amend the terms;
  - (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 mentioned 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 mentioned in paragraph (c), a corporation or a trust mentioned 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; and
- (h) liabilities and contingent liabilities.
- (2) Paragraph (1) (g) does not apply to a disposal of property made with the consent or knowledge of the other party or in the ordinary course of business.
- (3) In this rule:
- legal entity*** means a corporation (other than a public company), trust, partnership, joint venture business or other commercial activity.

*Note* The requirements in this rule are in addition to the requirements in rules 12.02 and 12.05 to exchange certain documents before a conference in a property case.

### **13.05 Financial statement (Form 13)**

- (1) A party starting, or filing a response or reply to, a financial case (other than by an Application for Consent Orders (Form 11)) must file a Financial Statement (Form 13) at the same time.
- (2) If a party is aware that the completion of a Form 13 will not fully discharge the duty to make full and frank disclosure, the party must also file an affidavit giving further particulars.

*Note* The court may order a party to file an affidavit giving further particulars in relation to the party's financial affairs.

### **13.06 Amendment of Financial Statement (Form 13)**

- (1) This rule applies if, before a conciliation conference, pre-trial conference or trial, or at the time of seeking a consent order, a party's financial circumstances have changed significantly from the information set out in the Form 13 or affidavit filed under rule 13.05.
- (2) At least 7 days before the conciliation conference, pre-trial conference or trial, or at the time of seeking a consent order, the party must file:
  - (a) a new Form 13 with the amendments clearly marked; or
  - (b) if the amendments are able to be clearly set out in 300 words or less, an affidavit containing details about the party's changed financial circumstances.

## **Part 13.2 Duty of disclosure — documents**

## **Division 13.2.1 Disclosure of documents — all cases**

### **13.07 Duty of disclosure — documents**

The duty of disclosure applies to each document that:

- (a) is or has been in the possession, or under the control, of the party disclosing the document; and
- (b) is relevant to an issue in the case.

*Note 1* For documents that parties must produce to the court:

- (a) on the first court date for a Maintenance Application, see rule 4.15;
- (b) on the first court date for a child support application or appeal, see rule 4.19;
- (c) at a conference in a property case, see Part 12.2; and
- (d) at a trial, see Chapters 15 and 16.

*Note 2* Rule 13.15 provides that a party must file a written notice about the party's duty of disclosure.

*Note 3* Rule 15.76 provides that a party may give another party a notice to produce a specified document at a hearing or trial.

*Note 4* A document disclosed to a party must be used for the purposes of the case only and must not be used for any other purpose without the consent of the other party or an order.

### **13.08 Inspection of documents**

- (1) A party may, by written notice, require another party to provide a copy of, or produce for inspection, a document referred to:
  - (a) in a document filed or served by a party on another party or independent children's lawyer; or
  - (b) in correspondence prepared and sent by or to another party or independent children's lawyer.
- (2) A party required to provide a copy of a document must provide the copy within 21 days after receiving the written notice.

**13.09 Production of original documents**

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

**13.10 Disclosure by inspection of documents**

- (1) If a party is required to produce a document for inspection under rule 13.08 or 13.09, the party must:
  - (a) notify, in writing, the party requesting the document of a convenient place and time to inspect the document;
  - (b) produce the document for inspection at that place and time; and
  - (c) allow copies of the document to be made, at the expense of the party requesting it.
- (2) The time fixed under paragraph (1) (a) must be within 21 days after the party receives a written notice under rule 13.08 or 13.09 or as otherwise agreed.

*Note* The court may shorten or extend the time for compliance with a rule (see rule 1.14).

**13.11 Costs for inspection**

A party who fails to inspect a document under a notice given under rule 13.08 or 13.09 or paragraph 13.20 (3) (a) may not later do so unless the party tenders an amount for the reasonable costs of providing another opportunity for inspection.

*Note* The court may, on application, order that a party not pay costs (see rule 1.12).

**13.12 Documents that need not be produced**

Subject to rule 15.55, a party must disclose, but need not produce to the party requesting it:

- (a) a document for which there is a claim for privilege from disclosure; or



- (b) a document a copy of which is already disclosed, if the copy contains no change, obliteration or other mark or feature that is likely to affect the outcome of the case.

*Note* Rule 13.13 sets out the requirements for challenging a claim of privilege from disclosure.

### **13.13 Objection to production**

- (1) This rule applies if:
  - (a) a party claims:
    - (i) privilege from production of a document; or
    - (ii) that the party is unable to produce a document; and
  - (b) another party, by written notice, challenges the claim.
- (2) The party making the claim must, within 7 days after the other party challenges the claim, file an affidavit setting out details of the claim.

*Note* If there is a dispute about disclosure, an application may be made to the court (see rules 13.18 and 13.22).

### **13.14 Consequence of non-disclosure**

If a party does not disclose a document as required under these Rules:

- (a) the party:
  - (i) must not offer the document, or present evidence of its contents, at a hearing or trial without the other party's consent or the court's permission;
  - (ii) may be guilty of contempt for not disclosing the document; and
  - (iii) may be ordered to pay costs; and
- (b) the court may stay or dismiss all or part of the party's case.

*Note 1* Under rule 15.76, a party who discloses a document under this Part must produce the document at the trial if a notice to produce has been given.

*Note 2* Section 112AP of the Act sets out the court's powers in relation to contempt of court.

The duty of disclosure is an ongoing one. For example, during the course of the proceedings one of the parties may enter into negotiations with their employer for a redundancy payout, as happened in *Suiker & Suiker* (1993 ) FLC 92-436.

Examples: discretionary trusts; assets outside the jurisdiction; expectation of inheritance; pending personal injury claims.

Discretionary trusts are capable of being either property or a financial resource. Ultimately the question is one of control. That is itself usually a function of who is the appointor pursuant to the trust instrument. The Court's power in FLA s. 79 is to adjust interests in property. See FLA s. 4: "**property**", in relation to the parties to a [marriage](#) or either of them, means [property](#) to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion.

A financial resource is not property, but must still be disclosed.

Assets outside the jurisdiction are still assets and must be disclosed. The Court's power is to order the parties to abide by its orders, and accordingly it may order the parties to take certain steps in relation to property outside the jurisdiction.

An expectation of inheritance is a financial resource but only once the testator has died. The Court has power to adjourn proceedings (for example see FLA S. 79 (1b)) and in some cases this may be appropriate, for example if a party is likely to inherit a substantial sum from a terminally ill relative.

A chose in action such as a personal injury claim is also a financial resource. If it is a substantial one it would be possible to appoint a single expert, although the better course would perhaps be an adjournment of the Family Law proceedings.

### How to disclose

The most common method of providing financial disclosure is in a sworn Financial Statement filed and served pursuant to the Rules. Note however that by Rule 13.05 a separate Affidavit may be required.

The Affidavit sworn by the parties states that they have read Rule 13.04 and practitioners would be well advised to ensure that their clients do so. Particular care should be taken with financial resources, especially discretionary trusts.

Financial Statements have their limitations. For example, it may be asserted that one party's family lent money to the parties, whilst the other party asserts that it was a gift. That issue may be able to be resolved by way of an Affidavit annexing a Loan Agreement, or by evidence of the making of repayments

Contributions may be in issue, for example the nature and extent of the care of children by a party. Records may be available from a Day Care Centre, or an Affidavit sworn by a family member as to their involvement in the care of the children

#### Single expert reports

#### **15.54 Instructions to expert witness**

- (1) A party who instructs an expert witness to give an opinion for a case or an anticipated case must:
  - (a) ensure the expert witness has a copy of the most recent version of, and has read, Divisions 15.5.4, 15.5.5 and 15.5.6 of these Rules; and
  - (b) obtain a written report from the expert witness.
- (2) All instructions to an expert witness must be in writing and must include:
  - (a) a request for a written report;
  - (b) advice that the report may be used in an anticipated or actual case;
  - (c) the issues about which the opinion is sought;

- (d) a description of any matter to be investigated, or any experiment to be undertaken or issue to be reported on; and
  - (e) full and frank disclosure of information and documents that will help the expert witness to perform the expert witness's function.
- (3) All instructions to a single expert witness appointed by agreement between the parties must be provided jointly by the parties and, if an independent children's lawyer has been appointed in the case, the independent children's lawyer.

### Financial Agreements

## **FAMILY LAW ACT 1975 - SECT 90K**

### **Circumstances in which court may set aside a financial agreement or termination agreement**

- (1) A [court](#) may make an order setting aside a [financial agreement](#) or a termination agreement if, and only if, the [court](#) is satisfied that:
- (a) the agreement was obtained by fraud (including non-disclosure of a material matter); or
  - (aa) either party to the agreement entered into the agreement:
    - (i) for the purpose, or for purposes that included the purpose, of defrauding or defeating a creditor or creditors of the party; or
    - (ii) with reckless disregard of the [interests](#) of a creditor or creditors of the party; or
  - (b) the agreement is void, voidable or unenforceable; or
  - (c) in the circumstances that have arisen since the agreement was [made](#) it is impracticable for the agreement or a part of the agreement to be carried out; or

- (d) since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a [child](#) of the [marriage](#)) and, as a result of the change, the [child](#) or, if the [applicant](#) has caring responsibility for the [child](#) (as defined in subsection (2)), a party to the agreement will suffer hardship if the [court](#) does not set the agreement aside; or
- (e) in respect of the making of a [financial agreement](#)--a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable; or
- (f) a [payment flag](#) is operating under Part VIIIIB on a [superannuation interest](#) covered by the agreement and there is no reasonable likelihood that the operation of the flag will be terminated by a [flag lifting agreement](#) under that Part; or
- (g) the agreement covers at least one [superannuation interest](#) that is an [unsplittable interest](#) for the purposes of Part VIIIIB.

(1A) For the purposes of paragraph (1)(aa), *creditor* , in relation to a party to the agreement, includes a person who could reasonably have been foreseen by the party as being reasonably likely to become a creditor of the party.

(2) For the purposes of paragraph (1)(d), a person has *caring responsibility* for a [child](#) if:

- (a) the person is a [parent](#) of the [child](#) with whom the [child](#) lives; or
- (b) a [parenting order](#) provides that:
  - (i) the [child](#) is to live with the person; or
  - (ii) the person has [parental responsibility](#) for the [child](#).

(3) A [court](#) may, on an application by a person who was a party to the [financial agreement](#) that has been set aside, or by any other [interested](#) person, make such order or orders (including an order for the transfer of [property](#)) as it considers just and equitable

for the purpose of preserving or adjusting the rights of persons who were parties to that [financial agreement](#) and any other [interested](#) persons.

(4) An order under subsection (1) or (3) may, after the death of a party to the [proceedings](#) in which the order was [made](#), be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

(5) If a party to [proceedings](#) under this section dies before the [proceedings](#) are completed:

(a) the [proceedings](#) may be continued by or against, as the case may be, the legal personal representative of the deceased party and the [applicable Rules of Court](#) may make provision in relation to the substitution of the legal personal representative as a party to the [proceedings](#); and

(b) if the [court](#) is of the opinion:

(i) that it would have exercised its powers under this section if the deceased party had not died; and

(ii) that it is still appropriate to exercise those powers;

the [court](#) may make any order that it could have [made](#) under subsection (1) or (3); and

(c) an order under paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

(6) The [court](#) must not make an order under this section if the order would:

(a) result in the acquisition of [property](#) from a person otherwise than on just terms; and

(b) be invalid because of paragraph 51(xxxi) of the Constitution.

For this purpose, acquisition of [property](#) and just terms have the same meanings as in paragraph 51(xxxi) of the Constitution.

## Part 13.3            **Answers to specific questions**

### 13.25    **Application of Part 13.3**

This Part applies to all Applications for Final Orders (Form 1), except:

- (a) an application for an order that a marriage is a nullity or a declaration as to the validity of a marriage, divorce or annulment;
- (b) a Maintenance Application;
- (c) a child support application or appeal;
- (d) a Small Claim; or
- (e) a case listed for trial without a pre-trial conference.

### 13.26    **Service of specific questions**

- (1) After the final resolution event, a party (the *requesting party*) may serve on another party (the *answering party*) a request to answer specific questions.
- (2) A party may only serve one set of specific questions on another party.
- (3) The specific questions must:
  - (a) be in writing;
  - (b) be limited to 20 questions (with each question taken to be one specific question); and
  - (c) not be vexatious or oppressive.
- (4) If an answering party is required, by a written notice served under rule 13.20 or an order, to give the requesting party a list of documents, the answering party is not required to answer the questions until the time for disclosure under Part 13.2 or an order has expired.
- (5) The requesting party must serve a copy of any request to answer specific questions on all other parties.

**13.27 Answering specific questions**

- (1) A party on whom a request to answer specific questions is served must answer the questions in an affidavit that is filed and served on each person to be served within 21 days after the request was served.
- (2) The party must, in the affidavit:
  - (a) answer, fully and frankly, each specific question; or
  - (b) object to answering a specific question.
- (3) An objection under paragraph (2) (b) must:
  - (a) specify the grounds of the objection; and
  - (b) briefly state the facts in support of the objection.

**13.28 Orders in relation to specific questions**

- (1) After the final resolution event, a party may apply for an order:
  - (a) that a party comply with rule 13.27 and answer, or further answer, a specific question served on the party under rule 13.26;
  - (b) determining the extent to which a question must be answered;
  - (c) requiring a party to state specific grounds of objection;
  - (d) determining the validity of an objection; or
  - (e) that a party who has not answered, or who has given an insufficient answer, to a specific question be required to attend court to be examined.
- (2) In considering whether to make an order under subrule (1), the court may take into account whether:
  - (a) the requesting party is unlikely, at the trial, to have another reasonably simple and inexpensive way of proving the matter sought to be obtained by the specific questions;
  - (b) answering the questions will cause unacceptable delay or undue expense; and
  - (c) the specific questions are relevant to an issue in the case.



These provisions are rarely used, but if drafted carefully can narrow the issues, reduce the length of the trial and result in substantial costs savings to the parties.

Example 1: One of the parties asserts that their earning capacity has been reduced, by reason of a lengthy period out of the workforce by reason of caring for children. Specific questions might usefully address such matters as the party's qualifications and experience, work history and actual past and present earnings, present work duties if employed, asserted earning capacity both now and in the future, intentions if any concerning re-training or future study and proposed arrangements for the care of children.

Example 2: A party has been injured and asserts diminished earning capacity. Specific questions could address firstly and importantly, whether the injury is compensable; if it is, then subject to other considerations prima facie that party should not be compensated twice for that, both by their spouse and by an insurer. Other considerations would include the likely value of the claim and when it is likely to be received and it's likely impact upon any entitlement to receive Centrelink benefits

In both of these examples, information and documents can be sought and obtained. What then? A person's earning capacity and the extent of their physical injuries are matters for expert opinion. An assessment needs to be made of the likely impact of these matters on the split of the asset pool. An adjustment of between five and ten percent might be significant and warrant the appointment of an expert.

These matters can be raised at Directions Hearings and be the subject of an Order. Bear in mind that what you are trying to achieve is a resolution on terms favourable to your

client. At a Conciliation Conference that means persuading a Registrar that your client's case has merit. Mere unsupported assertions are unlikely to achieve that.

Non-party disclosure

## **Part 13.4 Information from non-parties**

### **Division 13.4.1 Employment information**

#### **13.29 Purpose of Division 13.4.1**

This Division sets out the information a party may require from an employer of a party to a financial case.

#### **13.30 Employment information**

- (1) The court may order a party to advise the court, in writing, within a specified time, of:
  - (a) the name and address of the party's employer or, if the party has more than one employer, each of those employers; and
  - (b) other information the court considers necessary to enable an employer to identify the party.
- (2) Subrule (3) applies if:
  - (a) a party (the *requesting party*) requests the employer of another party (the *employee*) to give particulars about:
    - (i) the employer's indebtedness to the employee;
    - (ii) the employee's present rate of earnings, or of all the earnings of the employee that became payable during a specified period; or
    - (iii) the employee's conditions of employment; and
  - (b) the employer refuses, or fails to respond to, the requesting party's request.

- (3) The requesting party may apply for an order that the employer advise the court, in writing, within a specified time, of the particulars mentioned in paragraph (2) (a).

*Note* A document purporting to be a statement within the meaning of subrule (1) or (2) may be admitted as evidence of its contents (see section 48 of the *Evidence Act 1995*). However, subject to sections 4 and 5 of the *Evidence Act 1995*, that Act does not apply to the Family Court of Western Australia or any other court of a State.

## **Division 13.4.2 Non-party documents**

### **13.31 Purpose of Division 13.4.2**

This Division sets out the procedure for obtaining the production of documents by a person who is not a party to a case.

### **13.32 Definitions**

In this Division:

***non-party*** means a person who is not a party to, or an independent children's lawyer in, a case.

***requesting party*** means a party who serves a Notice of Non-party Production of Documents (Form 12) on a non-party.

### **13.33 Notice of Non-party Production of Documents**

- (1) A requesting party may serve a Notice of Non-party Production of Documents (Form 12) on a non-party, requiring the non-party to produce to the requesting party a specified document or class of documents:
- (a) relevant to an issue in the case;
  - (b) in the possession, or under the control, of the non-party; and
  - (c) that the non-party may be required to produce at the trial.

- (2) A Form 12 may be served only if there is no other reasonably simple and inexpensive way of proving the issue sought to be proved by the document specified in the Form.
- (3) When serving the Form 12 on the non-party, the requesting party must also:
  - (a) serve a brochure called *Production of Documents by a Person who is not a Party to the Case*, approved by the Principal Registrar; and
  - (b) give written confirmation that the requesting party has complied with the requirements in rule 13.34.
- (4) The requesting party must not serve a Form 12 for the production of a document that is in the custody of the court or another court.

### **13.34 Service on others affected by Notice**

At least 14 days before serving a non-party with a Form 12, a requesting party must serve a copy of the Form on:

- (a) each other party to the case; and
- (b) any other person who may be affected by the production of some or all of the documents specified in the Form.

*Note* The court may:

- (a) dispense with compliance with a rule (see rule 1.12); and
- (b) shorten or extend the time for compliance with a rule (see rule 1.14).

### **13.35 Compliance with Form 12**

A non-party who has been served with a Form 12 must:

- (a) not earlier than 7 days, and within 21 days, of being served with the Form — comply with the requirements of the Form; or
- (b) within 21 days of being served with the Form — object to the production of some or all of the documents specified in the Form by serving the requesting party with an objection in accordance with Part G of Form 12.

*Note 1* Under rule 13.40, the operation of a Form 12 is stayed if a person objects to it.

*Note 2* Some legislative provisions prohibit government departments from communicating certain information; for example, see section 150 of the Assessment Act and section 16 of the Registration Act.

*Note 3* The court may shorten or extend the time for compliance with a rule (see rule 1.14).

### **13.36 Production of documents**

- (1) A non-party must produce, for inspection by a requesting party, a document specified in a Form 12 at the place stated in the Form or at a time and place convenient to the requesting party and non-party.
- (2) Subrule (1) does not apply if the operation of a Form 12 is stayed under rule 13.40.

### **Conclusion**

The obligation to disclose relevant information and documents is an important one with serious consequences for the parties. Care should be taken to identify the issues and to seek and provide adequate disclosure. Consideration should then be given to how best to use that disclosure, by way of specific questions, subpoenas, non-party disclosure or the strategic use of experts in order to best promote your client's case.

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