

**TIME AND RUNNING OUT OF IT
WHAT ARE THE TIME LIMITS AND WHAT TO DO IF YOU ARE LATE
HOW TO GET THAT EXTENSION!**

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FOLEYS LIST

INTRODUCTION

In the Family Law jurisdiction we have many time restrictions

It starts with service of documents and does not end even with appeals

There is a fundamental legal principle that applies **of JUSTICE and EQUITY; in short fairness in the eyes of the law, to all parties at the start**

There is a further fundamental principle that applies when orders are made; one must balance **on the one hand that a litigant is entitled to the “fruit of their labour” as against the first principle above is it fair visa ve the other party?**

Different weight might be seen to apply to these principles depending on when one is “out of time”

What is the reason one might want to set aside or review or appeal an order in proceedings?

How long is it since the other party happily relied upon that order to their detriment if it is now to be set aside?

We explore these issues in this podcast

We will look at

FILING OF DOCUMENTS and STARTING PROCEEDINGS

REVIEWING A REGISTRAR OR SENIOR REGISTRAR DECISION

APPEAL OF A JUDICIAL DETERMINATION

79A APPLICATIONS

We have produced a table to help you work out the various time limits in the two courts

That might become extant when the Courts merge but for now it is current and might be a useful tool for you

FILING DOCUMENTS AND STARTING PROCEEDINGS

By now all of you should know that there is a time limit on starting proceedings

Section 44 (3) of the FLA says this:

Limitation on applications relating to certain maintenance and property proceedings

(3) Where, whether before or after the commencement of section 21 of the *Family Law Amendment Act 1983*:

- (a) a divorce order has **taken effect**; or
- (b) a decree of nullity of marriage has been made;

proceedings of a kind referred to in paragraph (c), (caa), (ca) or (cb) of the definition of matrimonial cause in subsection 4(1) (not being proceedings under section 78 or 79A or proceedings seeking the discharge, suspension, revival or variation of an order previously made in proceedings with respect to the maintenance of a party) shall not be instituted, except by leave of the court in which the proceedings are to be instituted or with the consent of both of the parties to the marriage, **after the expiration of 12 months after:**

(c) in a case referred to in paragraph (a)--the date on which the divorce order took effect; or

(d) in a case referred to in paragraph (b)--the date of the making of the decree.

The court may grant such leave at any time, even if the proceedings have already been instituted.

(3AA) However, if such proceedings are instituted with the consent of both of the parties to the marriage, the court may dismiss the proceedings if it is satisfied that, because the consent was obtained by fraud, duress or unconscionable conduct, allowing the proceedings to continue would amount to a miscarriage of justice.

I have highlighted the relevant time limits AND I note that if consent was obtained to start the proceedings out of time by fraud duress etc then the Court may again dismiss the proceedings (the fairness principle applies)

In relation to **DEFACTO** partners things become a bit tricky

Proceedings in relation to de facto relationships

(5) Subject to [subsection](#) (6), a [party](#) to a de facto relationship may apply for an order under section 90SE, 90SG or 90SM, or a declaration under section 90SL, **only if:**

(a) the application is [made](#) within the period (the *standard application period*) of:

(i) **2 years after the end of the de facto relationship;** or

(ii) 12 months after a [financial agreement](#) between the parties to the de facto relationship was set aside, or found to be invalid, as the case may be; or

(b) both parties to the de facto relationship consent to the application.

(5A) However, if [proceedings](#) are [instituted](#) by an application [made](#) with the consent of both of the parties to the de facto relationship, the [court](#) may dismiss the [proceedings](#) if it is satisfied that, because the consent was obtained by fraud, duress or unconscionable conduct, allowing the [proceedings](#) to continue would amount to a miscarriage of justice.

We have all seen the myriad of arguments made that there indeed WAS NO defacto relationship, that it ENDED far earlier etc etc etc leading to the jurisdictional question under 90RD of the FLA This paper does not address that issue rather the issue of how to approach an application for leave to proceed out of time

SECTION 44(4) and SECTION 44(5) and (6)

44 (4) The [court](#) shall not grant leave under [subsection](#) (3) or (3A) unless it is satisfied:

(a) **that hardship** would be caused to a [party](#) to the relevant [marriage](#) or a [child](#) if leave were not granted; or

(b) in the case of [proceedings](#) in relation to the **maintenance** of a [party](#) to a [marriage](#)--that, **at the end of the period within which the [proceedings](#) could have been [instituted](#) without the leave of the [court](#),** the circumstances of the [applicant](#) were such that the [applicant](#) would have been unable to support himself or herself without an **income tested pension, allowance or benefit.**

[Proceedings](#) in relation to de facto relationships

44 (5) Subject to [subsection](#) (6), a [party](#) to a de facto relationship may apply for an order under section 90SE, 90SG or 90SM, or a declaration under section 90SL, **only if:**

- (a) the application is [made](#) within the period (the *standard application period*) of:
 - (i) 2 years after the end of the de facto relationship; or
 - (ii) 12 months after a [financial agreement](#) between the parties to the de facto relationship was set aside, or found to be invalid, as the case may be; or
- (b) both parties to the de facto relationship consent to the application.

(6) The [court](#) may grant the [party](#) leave to apply after the end of the standard application period if the [court](#) is satisfied that:

- (a) **hardship** would be caused to **the [party](#) or a [child](#)** if leave were not granted; or
- (b) in the case of an application for an order for the **maintenance** of the [party](#)-- the [party](#)'s circumstances were, **at the end of the standard application period**, such that he or she **would have been unable to support himself or herself without an income tested pension, allowance or benefit.**

So what is **HARDSHIP??** Many a paper and many a case has tussled with that one word! It is NOT defined in the Act so it is left to the COURT to determine what HARDSHIP means

HARDSHIP AND GENERAL DISCUSSION

1. The application for leave is interlocutory in nature (see **Sharp & Sharp (2011) FamCAFC 150 per May J Ainslie Wallace JJ at paragraph 2. Young J at paragraph 110**)
2. Hardship has been defined in a number of decisions pursuant to section 44(4) of the Act and that section of the Act itself has changed over the years.
3. A useful summary of the relevant descriptions of “hardship” and the history of section 44(4) as provided by the case law is provided by **Young J in Sharp** at paragraphs 123 to 134 repeated below (with counsel’s highlights)

123. [Section 44\(4\)](#) states that the Court shall not grant leave unless it is satisfied pursuant to subsection “(a) that hardship would be caused to a party to the relevant marriage... if leave were not granted”. The learned Federal Magistrate set out the relevant provisions of the Act and then referred to the decision of *McDonald & McDonald* ([1977](#)) [FLC 90-317](#) at 76,688 where Evatt CJ (Ellis and McGovern JJ agreeing) held that [s 44\(3\)](#) requires an applicant to establish (in summary); **a prima facie case which is in the circumstances substantial, that to deny the applicant the right to commence substantive proceedings would cause hardship in the sense referred to in [s 44\(4\)](#), and that there is an adequate explanation for the delay in commencing the claim.**

124. At the time of that decision [s 44\(3\)](#) and (4) of the Act, incorporating amendments to 11 October 1977, stated:

(3) Where a decree nisi of dissolution of marriage or a decree of nullity of marriage has been made, proceedings of a kind referred to in sub-paragraph (c)(i) or paragraph (ca) of the definition of “matrimonial cause” in sub-section 4(1) (not being proceedings seeking the discharge, suspension, revival or variation of an order previously made in proceedings with respect to the maintenance of a party) shall not be instituted after the expiration of 12 months after the date of the making of the decree or the date of commencement of this Act, whichever is the later, except by leave of the court in which the proceedings are to be instituted.

(4) The court shall not grant leave under sub-section (3) unless it is satisfied that hardship would be caused to a party to a marriage or to a child of the marriage if leave were not granted.

125. Subsequent to the decision of *McDonald* (supra) [s 44\(4\)](#) was amended by the [Family Law Amendment Act 1987](#) (Cth) and took its current form (see [s 19](#) of the [Family Law Amendment Act 1987](#) (Cth), No. 181 of 1987, as in force 1 April 1988). Comparatively, [s 44\(3\)](#) has been amended on a number of occasions since *McDonald* (supra) was decided and as Boland J observed in *Hedley & Hedley* [[2009](#)] [FamCAFC 179](#); [[2009](#)] [FLC 93-413](#), at paragraphs 70 to 71, the proper interpretation of that section has been the subject of a number of authorities and **“in considering the authorities... it is essential to bear in mind the wording of**

the Act at the time the case was decided". In view of the fact that [s 44\(4\)\(a\)](#) has remained in substantially the same form since *McDonald*(supra) was decided her Honour's concerns do not take on the same significance in this appeal as in the matter that was then before the Full Court.

126. However, although the decision of the Full Court in *McDonald* (supra) states a number of factors to be considered in an application under [s 44\(3\)](#), **subsequent decisions of the Full Court have drawn a very clear distinction between the establishment of hardship in [s 44\(4\)\(a\)](#) (which includes a consideration of whether the applicant has a *prima facie* claim) and a consideration of the factors relevant to the exercise of discretion to grant leave, following that preliminary determination:** see *Hall & Hall* ([1979](#)) [FLC 90-679](#) at 78,627; *Whitford & Whitford* ([1979](#)) [FLC 90-612](#) at 78,144.

127. Recent decisions of the Full Court have considered and applied the decisions of *Whitford* (supra), *Hall* (supra), *Frost v Nicholson* ([1981](#)) [FLC 91-051](#) and *Althaus & Althaus* (1982) [FLC 91-233](#) in determining the meaning of "hardship" pursuant to [s 44\(4\)\(a\)](#) and what must be demonstrated by the applicant to establish hardship: see *Tamaniego & Tamaniego* [[2010](#)] [FamCAFC 254](#) at [155] to [159] per O'Ryan J; *Hedley & Hedley* [[2009](#)] [FamCAFC 179](#); [[2009](#)] [FLC 93-413](#) at [131] per Finn, Boland and Cronin JJ; *Oxenham & Oxenham* [[2009](#)] [FamCAFC 167](#) per O'Ryan J; *Richardson & Richardson* [[2008](#)] [FamCAFC 107](#) at [11] to [15], and [23] per Finn, Warnick and Boland JJ.

128. In *Whitford* (supra) the Full Court at 78,144 to 78,145, in addition to the passages cited in the reasons of May and Ainslie-Wallace JJ above, specifically considered the meaning of hardship as stated in [s 44\(4\)\(a\)](#). The Full Court observed that:

In our view the meaning of "hardship" in subsec. 44(4) is akin to such concepts as hardness, severity, privation, that which is hard to bear or a substantial detriment. Cf. the meanings assigned to "hardship" in the *Shorter Oxford Dictionary* and in *Webster's New International Dictionary*. See also *In the Marriage of Mackenzie* ([1978](#)) [FLC 90-496](#)...

In ordinary parlance, hardship means something more burdensome than “any appreciable detriment”. We consider that in subsec. 44(4) the word should have its usual, though not necessarily its most stringent, connotations. It is impossible to lay down in advance what particular facts may or may not amount to hardship in the relevant sense.

129. Similarly, in *Hall* (supra) at 78,627 the Full Court stated that the authorities:

...have considered what is meant by the term “hardship” in this context, and the term “**substantial detriment**” seems to be the generally accepted interpretation of that word.

130. It follows from the discussion in *Whitford* (supra) at 78,144, and *Hall* (supra) at 78, 627, that in the context of [s 44\(4\)\(a\)](#) hardship has a broad meaning and, as identified by the majority, **although the mere loss of a prospective entitlement to pursue a substantive claim may not of itself constitute hardship it is the consequences attending the loss** of the right “with which the subsection is concerned”. However, in *Whitford* (supra) it is important to note that the Court observed at 78, 145 that:

Hardship may be caused to an applicant if leave were not granted to institute proceedings, **although the applicant is not in necessitous circumstances. Whatever the financial situation of an applicant may be**, his or her loss of a prospective entitlement to property including money, or his or her inability to have the financial and property relations of the parties adjusted or resolved, may constitute hardship. In some cases, where a resolution of the property or financial relationships of the parties is desired, **it might be, that the applicant would receive no more or even less, than he or she already owns at law or in equity. Nevertheless, hardship might be caused to the applicant if leave were not granted so as to facilitate such resolution...**

131. From the observations in *Whitford* (supra) and *Hall* (supra), and in view of the recent authorities of the Full Court on the subject of hardship, **it is apparent that an assessment of hardship requires the Court to consider whether the applicant would suffer a substantial detriment as a consequence of the loss of the right to institute the proceedings, although that detriment, in the circumstances of a particular matter, may not be entirely related to financial considerations. In my opinion, it is not possible nor desirable to define exhaustively what will, in all the circumstances of a particular application, constitute hardship for the purposes**

of [s 44\(4\)\(a\)](#). However, in undertaking the exercise the Court should have regard to the nature of the jurisdiction exercised by the Family Court and the power should be **“exercised liberally in order to avoid hardship, but nevertheless in a manner, which would not render nugatory the requirement that proceedings should be instituted within a year from the decree nisi”** per *Whitford* (supra) at 78,146.

132. In undertaking an assessment of hardship the Court is required to consider whether the applicant **has established a prima facie claim** and in *Hall* (supra), at 78,627, the Full Court stated that:

Fundamental to [a finding of hardship] is a determination of the quality or character of the potential claim. In relation to that different cases have used somewhat different phrases to describe it so that it has become something of a matter of semantics to describe in different ways **what is really the same basic concept**. For example in *Swallow’s case* (unreported Emery J, 16 September 1977; referred to in *McDonald’s case*) it was said to be **“a prima facie case which is in the circumstances substantial”**; the Full Court in *McDonald’s case* differed from that by stating that it ought to be **“a reasonable prima facie case”**. In *Mackenzie’s case* it was described as being **“a probability of success”**, and in *Whitford’s case* the distinction was said to be that the applicant would need to show that she would **“probably succeed”** to be contrasted with a situation where she had **“no real probability of success”**. In *Perkins’ case* ([1979](#)) [FLC 90-600](#) Lindenmayer J described it as **“a reasonable probability of the claim being successful in some measure”**.

These varying phrases may tend to suggest different shades of meaning whereas in reality they are directed to the same fundamental inquiry which basically is in the context **whether on the applicant’s material he or she has a reasonable claim to be heard by the court...**

133. In *Althaus* (supra) at 77,267 the Full Court similarly observed that **“[t]he exercise is to determine whether there is a reasonable claim to be heard. That is the essence of the inquiry into whether hardship will be suffered by denying the applicant the right to litigate that claim.”**

134. More recently in *Hedley* (supra) at paragraph 215, Cronin J cited the Full Court decision of *Richardson* (supra) at paragraph 14, in which Finn, Warnick and Boland JJ stated and affirmed the principles set out by the primary judge who

observed that **“it is not a decision about whether the claim will succeed but whether there is a reasonable claim to be heard”**.

One might be totally confused when one reads the authorities set out above

However there are some strong pointers to remember

1. Hardship must be established *Lagioia V Rapino* 2020 FamCA11 at para 13

13. *That is, a determination of hardship is what enlivens the discretion to grant leave. The discretion can only be exercised after a determination of hardship is made.*

2. Even then the Court has DISCRETION so hardship alone does not mean that you have proved your case, albeit if the degree of hardship is so great it is hard to imagine that other factors would prevail including reason for delay As was said by McHugh J in the High Court decision of *Gallo V Dawson* (1990) HCA 30 at para 2 (an extension of time application to file a notice of appeal against an order of that court) *“The discretion to extend time is given for the sole purpose of enabling the Court or Justice to do justice between the parties:”*
3. In determining whether or not to exercise that discretion consideration must be given to the time delay and why (but this **is NOT** a sole determinative factor) and the adverse impact on the other party See the Full Court in *Carlton and Carlton*(1982)FamCA60 (1982) FLC 91-272

*“... it is in our judgment a correct statement of the law that while Parliament in [sec. 44\(4\)](#) has placed a fetter on the discretion of the Court, the Court itself should not and probably cannot do the same by laying down any strict principles such as that a party must give an adequate explanation for delay. Once hardship has been established in the sense referred to in *Whitford* (supra) then the Court is in the exercise of its discretion at large and should take into account all relevant facts including, if that be the case, that no or no satisfactory explanation has been given for delay. Such a*

position namely no or no satisfactory explanation for delay is no more than another factor which must be given appropriate weight in the exercise of discretion.”

PROCEEDINGS HAVE COMMENCED

YOU HAVE STARTED YOU ARE OFF TO A GREAT START AND YOU GET BOWLED OVER BY AN INTERIM DECISION OF A REGISTRAR OR A SENIOR REGISTRAR

OR YOUR CLIENT SETTLED (with another solicitor) and NOW SAYS IT IS ALL WRONG!! WHAT TO DO??

YOUR CLIENT PROCRASTINATES ON A REVIEW You are out of time

WHAT PRINCIPLES APPLY

WHAT TO DO

One has to understand the rather convoluted rules of Court in relation to these matters before any discussion of the Law can take place.

Under the FCC rules of Court 3.05 the Court MAY extend or shorten any time fixed by the rules or by a judgement or order and a Registrar can extend a time fixed by the rules or of course the parties can always agree to do so

Under the FC rules one may APPLY to the court for time extension as fixed under the rules or by procedural order and the rule makes it clear that the party seeking the extension may be ordered to pay the others costs in relation to the application See rule 1.14

Under Both the FCC and the FC rules there are various times for REVIEW of an order of a Registrar Judicial Registrar and a Senior Registrar

Vanessa has produced a superb table that we will send out to you all to make life easier!

A registrar has certain powers that MAY be delegated under Section 102 of the Federal Circuit Court of Australia Act 1999

A registrar has certain powers that MAY be delegated under Section 37A of the Family Law Act 1975. The list of powers that may be delegated is much longer

As to what HAS been delegated in the Federal Circuit Court we turn to Rule 20.00 A That rule provides a TABLE of what is delegated and notes that certain powers in that TABLE may only be exercised by an approved Registrar who is also a Registrar (other than a Deputy Registrar) of the Family Court. (It really is not a clear table)

SO I REPEAT THE TABLE BELOW AND HIGHLIGHT THE ITEMS THAT ARE ONLY FOR AN “ APPROVED REGISTRAR” who is also a registrar of the Family Court and is Other than a deputy registrar (Section 37A (1A) and (2a)

Item	Legislative provision	Description of power (for information only)
Act		
1AA	section 39 (but only to the extent that it gives the Court the power to transfer proceedings to the Family Court)	To transfer a proceeding to the Family Court
1AB	subsection 43(2) (but only for a proceeding that is within the power of a Registrar to hear and determine)	To give directions about the practice and procedure to be followed in relation to a proceeding or a part of a proceeding
1AC	section 51 (but only for a proceeding that is within the power of a Registrar to hear and determine)	To give directions about the length of documents required or permitted to be filed in the Court
1	section 52	To order, at any stage, a change of venue
1A	section 55 (but only for a proceeding that is within the power of a Registrar to hear and determine)	To give directions about limiting the time for oral argument in a proceeding
1B	section 56 (but only for a proceeding that is within the	To give directions about the use, or length, of written submissions in a proceeding

Item	Legislative provision	Description of power (for information only)
	power of a Registrar to hear and determine)	
1C	subsection 57(2)	To make an order declaring that a proceeding is not invalid by reason of a formal defect or an irregularity
1D	section 62 (but only for a proceeding that is within the power of a Registrar to hear and determine)	To give directions about limiting the time for giving testimony in a proceeding
1E	subsection 64(2) (but only for a proceeding that is within the power of a Registrar to hear and determine)	To give directions that particular testimony is to be given orally or by affidavit
1F	subsection 66(1) (but only for a proceeding that is within the power of a Registrar to hear and determine)	To direct or allow testimony to be given by video link or audio link
1G	subsection 67(1) (but only for a proceeding that is within the power of a Registrar to hear and determine)	To direct or allow a person to appear by way of video link or audio link
1H	subsection 68(1) (but only for a proceeding that is within the power of a Registrar to hear and determine)	To direct or allow a person to make a submission by way of video link or audio link
1J	section 72 (but only for a proceeding that is within the power of a Registrar to hear and determine)	To make orders for the payment of expenses incurred in connection with giving testimony, appearing, or making submissions, by video link or audio link

Item	Legislative provision	Description of power (for information only)
1K	<p>subparagraphs 102(2)(k)(iv) and (l)(i) (except the reference in subparagraph (l)(i) to an order under section 77 or 90SG)</p>	<p>To do the following:</p> <p>(a) make an order under paragraph 70NEB(1)(a) of the Family Law Act;</p> <p>(b) in family law or child support proceedings--make an order under section 66Q or 67E of the Family Law Act</p>
2	<p>subject to items 19D, 19F, 19Q and 19S of this table, subsection 102(2) (except subparagraph (k)(iv) and the reference in subparagraph (l)(i) to an order under section 66Q or 67E)</p>	<p>All of the following:</p> <p>(a) to dispense with the service of any process of the Court</p> <p>(b) to make orders in relation to substituted service</p> <p>(c) to make orders in relation to discovery, inspection and production of documents</p> <p>(d) to make orders in relation to interrogatories</p> <p>(e) to make an order adjourning the hearing of proceedings</p> <p>(f) to make an order as to costs</p> <p>(g) to make an order about security for costs</p> <p>(h) to make an order exempting a party to proceedings from compliance with a provision of these Rules</p> <p>(i) to exercise a power of the Court prescribed by these Rules</p> <p>(j) to direct a party in family law or child support proceedings to answer particular questions</p>

Item	Legislative provision	Description of power (for information only)
		<p>(k) to make orders under the following provisions of the Family Law Act:</p> <p>(i) sections 11F and 11G</p> <p>(ii) sections 13C and 13D</p> <p>(iii) subsection 65LA(1)</p> <p>(ka) to direct a family consultant to give a report under section 62G of the Family Law Act</p> <p>(l) in family law or child support proceedings-to make:</p> <p>(i) an order under section 77 or 90SG of the Family Law Act or</p> <p>(ii) an order for the payment of maintenance pending the disposal of the proceedings</p> <p>(m) to make an order the terms of which have been agreed upon by all the parties to the proceedings</p> <p>(n) to make orders for the enforcement of maintenance orders under the Family Law Act</p> <p>(o) to make an order exempting a party to family law or child support proceedings from compliance with a provision of regulations under the Family Law Act</p>
<u>Fair Work Act 2009</u>		
2A	paragraph 545(2)(b)	To order a person to pay compensation
2B	subsection 548(4)	To amend the papers commencing the proceeding

Item	Legislative provision	Description of power (for information only)
2C	subsections 548(5) and (6)	To grant leave for a party to a small claims proceeding to be represented by a lawyer
2D	section 570	To order a party to pay costs incurred by another party
Family Law Act		
SO	section 11F	To order parties to attend, or arrange for a child to attend, an appointment (or a series of appointments) with a family consultant
3AB	section 11G	To make a further order because of failure to comply with an order under section 11F of the Family Law Act or an instruction given by the family consultant
3	section 13B	To adjourn proceedings and advise parties to attend family counselling
3A	section 13C	To order parties to attend family counselling, family dispute resolution and other family services and to make other related orders
3B	section 13D	To make a further order because of a failure to comply with an order under section 13C of the Family Law Act
4	sections 13E and 13F	To refer parties to arbitration with their consent and make procedural orders to assist arbitration
5	subsection 44(1C)	To give leave for an application for a divorce order to be filed within 2 years after the date of marriage

Item	Legislative provision	Description of power (for information only)
5A	paragraphs 44(3A)(d) and (3B)(d) (but only if all parties consent to leave being granted)	To grant leave for proceedings to be instituted out of time
5B	subsection 44(6) (but only if all parties consent to leave being granted)	To grant leave to a party to a de facto relationship to make certain applications out of time
6	subsection 45(2)	To transfer a case to another court
6A	subsection 46(3A)	To order that proceedings be removed from a court of summary jurisdiction to the Court
7	section 48	To make a divorce order in undefended proceedings
8	subsection 55(2)	To extend or reduce the time for a divorce order to take effect
9	section 55A	To make a declaration about arrangements for children after a divorce
10	section 57	To rescind a divorce order where the parties have become reconciled
11	subsection 60I(9)	To decide if subsection 60I(7) applies to an application for a Part VII order about a child
12	subsection 60I(10)	To order that a person attend family dispute resolution
13	subsection 60J(2)	To decide if subsection 60J(1) applies to an application for a Part VII order about a child because of a risk of child abuse or family violence
15	subsection 63E(3)	To register a revocation agreement

Item	Legislative provision	Description of power (for information only)
15A	section 63H	To make an order in relation to a parenting plan
15B	section 65D	To make a parenting order (except an excluded child order)
15C	<p>section 65D (but only if:</p> <p>(a) both of the following apply:</p> <p>(i) the order is made in an undefended case;</p> <p>(ii) the order is to come into effect at least 21 days after the order is served on the non-appearing party; or</p> <p>(b) the order is made with the consent of all the parties to the case)</p>	To make a parenting order (except an excluded child order)
15D	paragraph 65G(2)(b)	To make a parenting order by consent in favour of a non-parent even though the parties have not attended a conference with a family consultant
15E	section 65L	To make an order requiring family consultants to supervise or assist compliance with a parenting order
15F	section 66G	To make a child maintenance order
15G	section 66M	To make an order determining that it is proper for a step-parent to have a duty of maintaining a step-child
15H	section 66P	To make an order referred to in subsection 66P(1) of the Family Law Act

Item	Legislative provision	Description of power (for information only)
15J	section 66Q	To make an urgent child maintenance order, pending the disposal of the proceedings for a child maintenance order
15K	section 66S	To make an order discharging, suspending, reviving or varying a child maintenance order
15L	subsection 66W(2)	To discharge or vary a child maintenance order if arrears are due under the order when it ceases to be in force
15M	section 67D	To make an order in relation to the birth of a child, including for financial assistance
15N	section 67E	To make an urgent order in relation to the birth of a child, including for financial assistance
16	subsection 67M(2)	To make a location order
17	subsection 67N(2)	To make a Commonwealth information order
17AA	section 67U	To make a recovery order
17A	subsection 67ZBB(2)	To make procedural orders for allegations of child abuse or family violence
17B	section 67ZD	To order a passport or other travel document to be delivered to the court
17C	subsections 68B(1) and (2)	To make an order or grant an injunction
18	section 68L	To make an order that a child's interests are to be independently represented
18A	subsection 68M(2)	To order a person to make a child available for an examination for the purpose of preparing a

Item	Legislative provision	Description of power (for information only)
		report about the child for use by the independent children's lawyer
18B	section 69V	To make an order requiring any person to give evidence in relation to the parentage of a child
18C	section 69VA	To issue a declaration of the parentage of a child
18D	subsection 69W(1)	To order a parentage testing procedure to be carried out on a person
18E	section 69X	To make orders associated with a parentage testing order
18F	subsection 69ZC(2)	To order a person to appear before the court and give evidence in relation to a report of a parentage testing procedure
19	section 69ZW	To make an order in child-related proceedings requesting a State or Territory agency to provide documents or information
19A	<p>subject to item 19B of this table, Division 13A of Part VII except paragraph 70NFB(2)(e) and only if:</p> <p>(a) the order made is an order until further order; or</p> <p>(b) the power is exercised in an undefended case; or</p>	To make orders to enforce compliance with orders under the Family Law Act affecting children, and to do any other thing referred to in Division 13A of Part VII of the Family Law Act

Item	Legislative provision	Description of power (for information only)
	(c) the power is exercised with the consent of all the parties to the case	
19B	<p>sections 70NBA and 70NFD (but only if the order to be varied or discharged:</p> <p>(a) was made by a Registrar; or</p> <p>(b) is an order until further order; or</p> <p>(c) was made in an undefended case; or</p> <p>(d) was made with the consent of all the parties to the case)</p>	<p>To vary a parenting order, and to vary or discharge a community service order that was made under paragraph 70NFB(2)(a) of the Family Law Act</p>
19C	<p>section 74</p>	<p>To make an order for the maintenance of a party to a marriage</p>
19D	<p>section 74 (but only if:</p> <p>(a) all of the following apply:</p> <p>(i) the order is an order until further order;</p> <p>(ii) the order is made in an undefended case;</p> <p>(iii) the order is to come into effect at least 21 days after the order is served on the other party; or</p>	<p>To make an order for the maintenance of a party to a marriage</p>

Item	Legislative provision	Description of power (for information only)
	(b) the order is made with the consent of all the parties to the case)	
19E	section 77	To make an urgent order for the maintenance of a party to a marriage, pending the disposal of the proceedings
19F	section 77 (but only if: (a) both of the following apply: (i) the order is made in an undefended case; (ii) the order is to come into effect at least 21 days after the order is served on the other party; or (b) the order is made with the consent of all the parties to the case)	To make an urgent order for the maintenance of a party to a marriage, pending the disposal of the proceedings
19G	sections 78, 79 and 79A (but only if: (a) the declaration or order made is a declaration or an order until further order; or (b) the power is exercised in an undefended case)	To make a declaration or order in relation to the property interests of the parties to a marriage, and to do any other thing referred to in section 79 or 79A of the Family Law Act
19H	sections 78, 79 and 79A (but only if: (a) both of the following apply:	To make a declaration or order in relation to the property interests of the parties to a marriage, and to do any other thing referred to in section 79 or 79A of the Family Law Act

Item	Legislative provision	Description of power (for information only)
	<p>(i) the power is exercised in an undefended case;</p> <p>(ii) the declaration or order is to come into effect at least 21 days after the declaration or order is served on the non-appearing party; or</p> <p>(b) the power is exercised with the consent of all the parties to the case)</p>	
19J	<u>subsection 83(1)</u>	To discharge, suspend, revive or vary a spousal maintenance order
19K	<p><u>subsection 83(1)</u> (but only if:</p> <p>(a) all of the following apply:</p> <p>(i) the order to be discharged, suspended, revived or varied is an order until further order;</p> <p>(ii) the order to discharge, suspend, revive or vary is made in an undefended case;</p> <p>(iii) the order to discharge, suspend, revive or vary is to come into effect at least 21 days after the order is served on the non-appearing party; or</p> <p>(b) the order to discharge, suspend, revive or vary is made with the consent of all the parties to the case)</p>	To discharge, suspend, revive or vary a spousal maintenance order

Item	Legislative provision	Description of power (for information only)
19L	<u>subsection 87(3)</u>	To approve, or refuse to approve, a maintenance agreement
19M	<p>subsections 87(8), 90J(3) and 90K(1) (but only if the order is:</p> <p>(a) an order until further order; or</p> <p>(b) made in an undefended case)</p>	To make an order revoking the approval of a maintenance agreement, or after a financial agreement has been terminated, or setting aside a financial agreement or termination agreement
19N	<p><u>subsections 87(8), 90J(3) and 90K(1) (but only if:</u></p> <p>(a) both of the following apply:</p> <p>(i) the order is made in an undefended case;</p> <p>(ii) the order is to come into effect at least 21 days after the order is served on the non-appearing party; or</p> <p>(b) the order is made with the consent of all the parties to the case)</p>	To make an order revoking the approval of a maintenance agreement, or after a financial agreement has been terminated, or setting aside a financial agreement or termination agreement
19P	section 90SE	To make an order for the maintenance of a party to a de facto relationship
19Q	<p>section 90SE (but only if:</p> <p>(a) all of the following apply:</p> <p>(i) the order is an order until further order;</p> <p>(ii) the order is made in an undefended case;</p>	To make an order for the maintenance of a party to a de facto relationship

Item	Legislative provision	Description of power (for information only)
	<p>(iii) the order is to come into effect at least 21 days after the order is served on the other party; or</p> <p>(b) the order is made with the consent of all the parties to the case)</p>	
19R	section 90SG	To make an urgent order for the maintenance of a party to a de facto relationship, pending the disposal of the proceedings
19S	<p>section 90SG (but only if:</p> <p>(a) both of the following apply:</p> <p>(i) the order is made in an undefended case;</p> <p>(ii) the order is to come into effect at least 21 days after the order is served on the other party; or</p> <p>(b) the order is made with the consent of all the parties to the case)</p>	To make an urgent order for the maintenance of a party to a de facto relationship, pending the disposal of the proceedings
19T	section 90SI	To discharge, suspend, revive or vary an order with respect to the maintenance of a party to a de facto relationship
19U	<p>section 90SI (but only if:</p> <p>(a) all of the following apply:</p>	To discharge, suspend, revive or vary an order with respect to the maintenance of a party to a de facto relationship

Item	Legislative provision	Description of power (for information only)
	<p>(i) the order to be discharged, suspended, revived or varied is an order until further order;</p> <p>(ii) the order to discharge, suspend, revive or vary is made in an undefended case;</p> <p>(iii) the order to discharge, suspend, revive or vary is to come into effect at least 21 days after the order is served on the non-appearing party; or</p> <p>(b) the order to discharge, suspend, revive or vary is made with the consent of all the parties to the case)</p>	
19V	<p>sections 90SL, 90SM and 90SN and subsections 90UL(3) and 90UM(1) (but only if:</p> <p>(a) the declaration or order is a declaration or an order until further order; or</p> <p>(b) the power is exercised in an undefended case)</p>	<p>To make a declaration or order, and to do any other thing referred to in sections 90SM and 90SN of the Family Law Act, in relation to the property interests of the parties to a de facto relationship and to make an order after a financial agreement has been terminated or setting aside a financial agreement or termination agreement</p>
19W	<p>sections 90SL, 90SM and 90SN and subsections 90UL(3) and 90UM(1) (but only if:</p> <p>(a) both of the following apply:</p>	<p>To make a declaration or order, and to do any other thing referred to in sections 90SM and 90SN of the Family Law Act, in relation to the property interests of the parties to a de facto relationship and to make an order after a financial agreement has been terminated or</p>

Item	Legislative provision	Description of power (for information only)
	(i) the power is exercised in an undefended case;	setting aside a financial agreement or termination agreement
	(ii) the declaration or order is to come into effect at least 21 days after the declaration or order is served on the non-appearing party; or	
	(b) the power is exercised with the consent of all the parties to the case)	
21	subsection 91B(1)	To request that a child welfare officer intervene in a case
22	subsections 92(1) and (2)	To make an order entitling a person to intervene in a case
23	subsection 97(1A)	To hear proceedings sitting in chambers
24	subsection 97(2)	To make an order about specified persons being present in Court
25	section 98A	To make an order approving an undefended application for divorce without the parties being present
25A	section 100B	To make an order allowing a child to swear an affidavit or be called as a witness in, or be present during, proceedings
26	section 101	To protect a witness in a case
26A	subsection 102A(3)	To give leave for a child to be examined
27	section 106A	To appoint a person to execute a deed or instrument

Item	Legislative provision	Description of power (for information only)
27A	<p>subject to item 27B of this table, Part XIII A (except paragraph 112AD(2)(d) and only if:</p> <p>(a) the order is an order until further order; or</p> <p>(b) the power is exercised in an undefended case; or</p> <p>(c) the power is exercised with the consent of all the parties to the case)</p>	<p>To make orders in relation to imposing sanctions for failure to comply with orders, and other obligations, that do not affect children</p>
27B	<p>subsection 112AK(1) (but only if the order to be varied or discharged:</p> <p>(a) was made by a Registrar; or</p> <p>(b) is an order until further order; or</p> <p>(c) was made in an undefended case; or</p> <p>(d) was made with the consent of all the parties to the case)</p>	<p>To vary or discharge an order made under section 112AD of the Family Law Act in respect of a contravention of an order</p>
28	subsection 114(3)	To grant an injunction
28A	<p>subsection 117(2) (but only for a proceeding that is within the power of a Registrar to hear and determine)</p>	To make an order for costs or security for costs
Family Law Regulations		

Item	Legislative provision	Description of power (for information only)
29	subregulation 4(1)	To make an order about practice and procedure in particular circumstances
30	regulation 5	To direct proceeding is void for non-compliance with the Family Law Regulations, these Rules or procedures related to these Rules
30A	paragraph 6(1)(a)	To relieve a party from the consequences of non-compliance with the Family Law Regulations , a rule of practice or procedure or an order made by a registrar
30B	subregulation 23(6)	To register an overseas child order
30C	subregulation 67Q(4)	To register an award made in an arbitration
<u>Federal Circuit Court</u>		
<u>Rules 2001</u>		
31AA	subrule 1.05(2) (but only to the extent that it gives the Court the power to apply the Family Law Rules)	To apply the Family Law Rules if in a particular case these Rules are insufficient or inappropriate
31AB	subrule 1.06(1)	To dispense with compliance with these Rules
31AC	rule 1.07	To make an order about procedure
31AD	subrule 2.01(1A)	To make orders in relation to compliance with requirements for documents
31AE	subrule 2.04(1)	To make orders in relation to compliance with forms
31AF	paragraph 2.07(5)(b)	To direct that the original of a document or transmission report be produced

Item	Legislative provision	Description of power (for information only)
31AG	subrule 2.07B(3)	To direct that the original of an affidavit or a paper copy of a document be produced
31AH	paragraph 2.09(b)	To direct that the seal of the Court be attached to a document
31AI	subrule 2.10(2)	To direct that the stamp of the Court be attached to a document
31AJ	rule 6.04	To exercise discretion in relation to service of a document
31AK	subrule 6.05(1)	To order evidence of service of a document to be given otherwise than by affidavit
31AL	paragraph 6.06(2)(b)	To direct that an application be served other than by hand
31AM	subrule 6.08(1)	To make an order in relation to the requirements for service by hand on a corporation, unincorporated association or organisation
31AN	subrule 6.14(1)	To make an order dispensing with service of a document or substituting another way of serving a document
31AO	subrule 6.14(2)	To specify the steps to be taken for bringing a document to the attention of the person to be served
31AP	subrule 6.14(3)	To specify that a document is to be taken to have been served on the happening of a specified event or at the end of a specified time
31AQ	rule 6.15	To have regard to certain matters when making an order dispensing with service of a

Item	Legislative provision	Description of power (for information only)
		document or for substituted service of a document
31AR	rule 6.16	To find that a document is taken to have been served on a date specified in an order for substituted service despite failure to comply with a condition of the order
31AS	rule 6.17	To order that a document may be served more than 12 months after it is filed
31AT	rule 6.19	To make an order permitting an application and any document filed with it to be served otherwise than as provided by rule 6.19
31AU	rule 7.02 (but only to the extent that it gives the Court the power to order a party or another appropriate person to make an amendment)	To order a party or another appropriate person to make an amendment to a document
31AV	rule 8.01	To consider an application to have a proceeding heard in another registry of the Court and to have regard to certain matters when considering the application
31AW	subrule 8.02(1) (but only to the extent that it gives the Court the power to transfer a proceeding to the Family Court)	To transfer a proceeding to the Family Court
31AX	subrules 8.02(2) and (3) (but only in relation to a request for transfer of a proceeding to the Family Court)	To make orders in relation to a request for transfer of a proceeding to the Family Court

Item	Legislative provision	Description of power (for information only)
31AY	subrule 8.02(4) (but only in relation to a request for transfer of a proceeding to the Family Court)	To have regard to additional factors in deciding whether to transfer a proceeding to the Family Court
31AZ	subrule 9.03(2)	To give leave to a lawyer to file or serve a notice of withdrawal without satisfying the requirement to serve, within the time specified in subrule 9.03(2), a notice of intention to withdraw on the party for whom the lawyer is acting
31BA	paragraph 10.04(b)	To make consent orders where parties resolve the issues between them following a dispute resolution process
31BB	subrule 10.05(1)	To refer a proceeding , a part of a proceeding or a matter arising out of a proceeding , for conciliation
31BC	paragraph 10.05(2)(c)	To appoint a person to hold a conciliation conference
31BD	subrules 11.01(1) and (2)	To make orders in relation to persons who must be included as parties to a proceeding
31BE	subrule 11.02(2)	To give leave to a party to include a person as a party to a proceeding after the first court date
31BF	subrule 11.02(3)	To order a party who has included a person as a party to file and serve on each other party an affidavit setting out the basis on which the person has been included as a party
31BG	subrule 11.03(2)	To make an order that an application to be included as a party to a proceeding be

Item	Legislative provision	Description of power (for information only)
		supported otherwise than by an affidavit stating the matters referred to in subrule 11.03(2)
31BH	subrule 11.04(1)	To consider an application by a party to be removed as a party
31BI	rule 11.05	To, at any time, order a party, or a person applying to be included as a party, to give notice to any person of certain matters
31BJ	subrule 11.08(2)	To order that a minor in a proceeding is not taken to need a litigation guardian in relation to the proceeding
31BK	subrule 11.11(1)	To appoint or remove a litigation guardian, or substitute another person as litigation guardian, in a proceeding
31BL	subrule 11.11(3)	To remove a litigation guardian at the request of the litigation guardian
31BM	rule 11.14	To make orders for the payment of the costs and expenses of a litigation guardian
31BN	subrules 12.02(1) and (2)	To refer a party to a lawyer for legal assistance and to take certain matters into account when making such a referral
31BO	subrule 13.02(3)	To stay further proceedings until costs are paid by the party bringing the further proceedings
31BP	subrule 13.04(3) (but only if the order is made with the consent of all the parties to the case)	To make such orders as the Court considers appropriate in the circumstances

Item	Legislative provision	Description of power (for information only)
31BQ	subrule 13.07(3)	To stay execution on, or other enforcement of, a judgment until determination of a claim
31BR	subrule 13.08(3)	To give directions for the further conduct of a proceeding in relation to any claim or part of a claim not disposed of by judgment or dismissal and not stayed
31BS	rule 13.10	To order that a proceeding be stayed, or dismissed generally or in relation to any claim for relief in the proceeding
31BT	subrules 13.12(1), (2) and (3)	To order that a proceeding , or a part of a proceeding , be dismissed if a party has not taken a step in the proceeding for 6 months , and to give notice to each party of the date and time when the Court will consider whether to make such an order
31BU	rule 14.04	To order a party to produce to the Court a document in the possession, custody or control of the party
31BV	rule 14.05	To inspect a document for the purpose of determining whether a claim for privilege, or an objection, is valid
31BW	rule 14.06	To order a party to file and serve an affidavit regarding the possession, custody or control of a document or class of document by the party
31BX	rule 14.08	To order otherwise than permitting a party who inspects a document under Division 14.2 to make a copy of, or take an extract from, the document

Item	Legislative provision	Description of power (for information only)
31BY	subrule 15.08(2)	To give a direction in relation to opinion evidence by expert witnesses
31BZ	rule 15.09	To appoint an expert as court expert to inquire into and report on a question arising in a proceeding , and give directions for the purposes of the inquiry or report
31CA	subrule 15.10(3)	To do a thing referred to in subrule 15.10(3) in relation to a report prepared by a court expert
31CB	rule 15.11	To direct otherwise than that the parties are jointly liable to pay the reasonable remuneration and expenses of a court expert for preparing a report
31CC	rule 15.12	To grant leave to a party to adduce evidence of another expert on a question on which a court expert has made a report
31CD	subrule 15A.04(3)	To fix time limits for service of a subpoena otherwise than as required by paragraph 15A.04(3)(a) or (b)
31CE	rule 15A.05	To direct that a party or independent children's lawyer may request the issue of more than 5 subpoenas in a proceeding
31CF	rule 15A.09	To make an order setting aside all or part of a subpoena
31CG	rule 15A.10	To make an order for the payment of any loss or expense incurred in complying with a subpoena
31CH	rule 15A.11	To make orders with respect to the payment of costs incurred by a person in complying with a

Item	Legislative provision	Description of power (for information only)
		subpoena where the person is not a party to the proceedings
31CI	paragraph 15A.12(2)(b)	To permit a person who inspects or copies a document under these Rules to disclose the contents of the document or give a copy of it to another person
31CJ	subrule 21.01(1)	To order the applicant to give the security the Court considers appropriate for the respondent's costs of the proceeding
31CK	paragraph 21.02(1)(c)	To allow further time for an application for an order for costs to be made
31CL	subrule 21.02(2)	To do a thing referred to in any of paragraphs 21.02(2)(a) to (d) in making an order for costs in a proceeding
31CM	subrule 21.03(1)	To specify the maximum costs that may be recovered on a party and party basis
31CN	subrule 21.03(3)	To vary the maximum costs specified if there are special reasons and it is in the interests of justice to do so
31CO	rule 21.04	If costs of a motion, application or other proceeding are reserved, to order otherwise than that the costs follow the event
31CP	rule 21.08	To order otherwise than that interest is payable on outstanding costs at the rate specified in paragraph 21.08(a) or (b) (as applicable)
31CQ	rule 21.10	To order otherwise than that a party is entitled to costs in accordance with Parts 1 and 2 of

Item	Legislative provision	Description of power (for information only)
		Schedule 1 and disbursements properly incurred
31CR	paragraph 21.12(b)	To authorise or approve an amount for attendance by a witness
31CS	paragraph 21.13(b)	To authorise or approve an amount for preparation of a report by an expert
31CT	rule 23.01A	To order that a family report be prepared, make other orders or do any other thing referred to in rule 23.01A
31CU	rule 23.02	To make an order referring any or all of the matters in dispute for family dispute resolution and to do any other thing referred to in paragraphs 23.02(a) to (c)
31	Division 25B.2	To enforce financial orders and obligations
31A	Division 25B.4	To make orders in relation to warrants for arrest and to do any other thing referred to in Division 25B.4
32	rule 29.04	To give a direction for the enforcement or execution of an order
32A	rule 29.11	To make an order, issue a writ or take another step to enforce a judgment or order
33	rule 45.13	To grant leave for a party to a small claims application to be represented by a lawyer
34	rule 46.4	To grant leave for a party to a small claims proceeding to be represented by a lawyer
<u>National Consumer Credit Protection Act 2009</u>		

Item	Legislative provision	Description of power (for information only)
35	section 178	To order a person to pay compensation
36	subsection 199(6)	To amend the papers commencing the proceedings
37	subsections 199(7) and (8)	To grant leave for a party to a small claims proceeding to be represented by a lawyer
38	section 200	To order a party to pay costs incurred by another party
National Credit Code		
39	section 37	To order a credit provider to provide a statement
40	subsection 38(7)	To determine a disputed liability and make consequential orders
41	subsection 74(2)	To make orders changing, or refusing to change, the terms of a credit contract
42	subsection 74(3)	To stay enforcement proceedings or make other orders relating to a debtor's application to change the terms of a credit contract
43	subsection 75(1)	To vary or revoke an order under subsection 74(2)
44	subsection 75(2)	To vary or revoke a stay or order under subsection 74(3)
45	section 76	To reopen an unjust transaction that gave rise to an unjust contract, mortgage or guarantee
46	section 78	To annul or reduce an unconscionable change to a rate, fee or charge
47	subsection 96(2)	To order or refuse to order a postponement

Item	Legislative provision	Description of power (for information only)
48	subsection 96(3)	To stay enforcement proceedings until an application for postponement has been heard
49	subsection 101(1)	To order a person to deliver mortgaged goods to a credit provider
50	subsection 101(2)	To make orders varying the place at which, or time or period within which, mortgaged goods must be delivered to a credit provider
51	subsection 106(1)	To order a credit provider to credit a mortgagor
52	subsection 106(2)	To order a credit provider to compensate a mortgagor or mortgagee
53	subsection 107(3)	To determine the amount of enforcement expenses that may be recovered by a credit provider
54	section 108	To order a credit provider to return possession of goods to a mortgagor
55	section 118	To order a credit provider to pay compensation to a debtor or guarantor
Assessment Act		
55A	Divisions 4 and 5 of Part 7	To make orders in relation to the provision of child support in certain circumstances
55B	Divisions 4 and 5 of Part 7 (but only if the order is: (a) made in an undefended case; or (b) made with the consent of all the parties to the case)	To make orders in relation to the provision of child support in certain circumstances

Item	Legislative provision	Description of power (for information only)
55C	section 139	To order payment of maintenance if a child is in urgent need of financial assistance
55D	section 139 (but only if the order: (a) is made in an undefended case; or (b) is made with the consent of all the parties to the case)	To order payment of maintenance if a child is in urgent need of financial assistance
Registration Act		
56AA	subsection 105(2)	To give directions and make orders to resolve a difficulty arising in the application of subsection 105(1) of the Registration Act in or in relation to a particular proceeding
56AB	section 111B	To do a thing referred to in subsection 111B(1) of the Registration Act
56	section 113	To make orders for the recovery of debts

UNDER THE FAMILY COURT RULES THE following applies

Registrar definitions see Rule 18.01A

Definitions

In this Chapter:

"Deputy Registrar " means a Deputy Registrar of the Family Court of Australia.

"Registrar " means the Chief Executive Officer or a Registrar of the Family Court of Australia.

Powers and Functions see firstly 18.01

Exercise of powers and functions

(1) A power or function expressed by these Rules to be conferred on a Deputy Registrar may also be exercised by a Judicial Registrar or a Registrar.

(2) A power or function expressed by these Rules to be conferred on a Registrar may also be exercised by a Judicial Registrar.

(3) A Judicial Registrar, Registrar or Deputy Registrar exercising a power of the court or performing any function in connection with a power of the court has the same protection and immunity as a Judge or Magistrate.

And then we have for those who are old enough to remember powers delegated to JUDICIAL REGISTRARS (none left in this State and I am pretty sure none anywhere else) See 18.02 and 18.03

Then we have the actual DELEGATION TO REGISTRARS AND DEPUTY REGISTRARS at 18.04 to 18.06

18.04 Application of Division 18.1.3

This Division applies:

(a) to a Registrar or Deputy Registrar who is enrolled as a lawyer of the High Court or of the Supreme Court of a State or Territory; and

(b) subject to any arrangement made under [subsection](#) 37B(2) of the Act.

Note: Under [subsection](#) 37B(2) of the Act, the Chief Executive Officer may direct which Registrars or Deputy Registrars are to perform any functions or exercise any power under the Act, Regulations or these Rules in particular matters or classes of matters.

AND THEN WE GET ANOTHER TABLE!!

I repeat the table below

FAMILY LAW RULES 2004 - RULE 18.05

Registrars

(1) Each power of the court mentioned in an item of Table 18.2 is delegated to each Registrar who is approved, or is in a class of Registrars approved, by a majority of the Judges to exercise the power.

Table 18.2 Powers delegated to Registrars

Item	Legislative provision
<u>Family Law Act</u>	
1AA	subparagraph 37A(1)(e)(iv) and paragraph 37A(1)(f)
1	subsection 46(3A)
2	section 63H
3	section 65D (except an excluded child order)
5	section 65L
6	sections 66G, 66M, 66P and 66Q
7	section 66S
8	section 66W
9	subsection 67D(1) and section 67E
10	subsection 67M(2)
11	subsection 67N(2)
11A	section 67U
12	section 67ZD
13	subsections 68B(1) and (2)
15	sections 69V and 69VA, subsection 69W(1), section 69X and subsection 69ZC(2)
15A	subject to item 15B of this table, Division 13A of Part VII (except paragraph 70NFB(2)(e) and only if:

Item	Legislative provision
	<p>(a) the order made is an order until further order; or</p> <p>(b) the power is exercised in an undefended case; or</p> <p>(c) the power is exercised with the consent of all the parties to the case)</p>
15B	<p>sections 70NBA and 70NFD (but only if the order to be varied or discharged:</p> <p>(a) was made by a Registrar; or</p> <p>(b) is an order until further order; or</p> <p>(c) was made in an undefended case; or</p> <p>(d) was made with the consent of all the parties to the case)</p>
16	sections 74 and 77
16A	<p>sections 78, 79 and 79A (but only if:</p> <p>(a) the declaration or order made is a declaration or an order until further order;</p> <p>or</p> <p>(b) the power is exercised in an undefended case)</p>
17	subsection 83(1)
18	subsection 87(3)
18AA	<p>subsections 87(8), 90J(3) and 90K(1) (but only if the order is:</p> <p>(a) an order until further order; or</p> <p>(b) made in an undefended case)</p>
18A	sections 90SE and 90SG
18B	section 90SI
18C	<p>sections 90SL, 90SM and 90SN (but only if:</p> <p>(a) the declaration or order made is a declaration or an order until further order;</p> <p>or</p> <p>(b) the power is exercised in an undefended case)</p>
18D	subsections 90UL(3) and 90UM(1) (but only if the order is:

Item	Legislative provision
	(a) an order until further order; or (b) made in an undefended case)
19	section 100B
20	section 102A
21	section 106A
21A	subject to item 21B of this table, Part XIII A (except paragraph 112AD(2)(d) and only if: (a) the order is an order until further order; or (b) the power is exercised in an undefended case; or (c) the power is exercised with the consent of all the parties to the case)
21B	subsection 112AK(1) (but only if the order to be varied or discharged: (a) was made by a Registrar; or (b) is an order until further order; or (c) was made in an undefended case; or (d) was made with the consent of all the parties to the case)
21C	subsection 114(3)

Assessment Act

22AA Divisions 4 and 5 of Part 7

22 section 139

Registration Act

23 [subsection](#) 105(2)

23A [subsection](#) 111B(1)

23B section 113

(2) Each power vested in the court by these Rules and mentioned in an item of Table 18.3 is delegated to each Registrar.

Table 18.3 Powers under Rules delegated to Registrars

Item	Provision of Family Law Rules
2	Part 6.3
3	subrule 10.11(5)
3A	paragraphs 10.12(c) and (d)
3B	paragraphs 10.14(d) and (e)
4	rule 13.14
5	rule 15.02
6	Part 15.4
7	paragraphs 17.02(1)(a) to (d) and (f)
8	Division 20.3.2
9	rule 20.37
9A	rule 20.39
10	Part 20.5
11	Part 20.6
12	Part 20.7
13	Part 21.4

THEN THERE IS ANOTHER TABLE FOR DEPUTY REGISTRARS!! I repeat that below

FAMILY LAW RULES 2004 - RULE 18.06

Deputy Registrars

(1) Each power of the court mentioned in an item of Table 18.4 is delegated to each Deputy Registrar.

Table 18.4 Powers delegated to Deputy Registrars

Item	Legislative provision
Family Law Act	
1	section 11F
2	section 11G
3	section 13B
4	section 13C
5	section 13D
6	sections 13E and 13F
7	section 27A
8	sections 33B and 33C
9	subject to items 21, 21A, 21F and 21G of this table, subsection 37A(1) (except subparagraph (e)(iv) and the reference in subparagraph (f)(i) to an order under section 66Q or 67E)
10	subsection 44(1C)
10A	paragraph 44(3A)(d) (but only if all parties consent to leave being granted)
10B	paragraph 44(3B)(d) (but only if all parties consent to leave being granted)
10C	subsection 44(6) (but only if all parties consent to leave being granted)
11	subsection 45(2)
12	section 48 (if the case is undefended)
13	subsection 55(2)
14	section 55A
15	section 57
16	subsection 60I(9)
16A	subsection 60I(10)
16B	subsection 60J(1)

Item	Legislative provision
17	section 62G
18	subsection 63E(3)
18AAA	section 65D (but only if: <ul style="list-style-type: none"> (a) both of the following apply: <ul style="list-style-type: none"> (i) the order is made in an undefended case; (ii) the order is to come into effect at least 21 days after the order is served on the non-appearing party; or (b) the order is made with the consent of all the parties to the case)
18A	paragraph 65G(2)(b)
18AA	subsection 67M(2)
18AB	subsection 67N(2)
18B	paragraphs 67ZBB(2)(a), (b) and (c) (procedural orders only)
19	section 68L
19A	subsection 68M(2)
20	section 69ZW
21	section 74 (but only if: <ul style="list-style-type: none"> (a) all of the following apply: <ul style="list-style-type: none"> (i) the order is an order until further order; (ii) the order is made in an undefended case; (iii) the order is to come into effect at least 21 days after the order is served on the other party; or (b) the order is made with the consent of all the parties to the case)
21A	section 77 (but only if: <ul style="list-style-type: none"> (a) both of the following apply: <ul style="list-style-type: none"> (i) the order is made in an undefended case;

Item	Legislative provision
	<p>(ii) the order is to come into effect at least 21 days after the order is served on the other party; or</p> <p>(b) the order is made with the consent of all the parties to the case)</p>
21B	<p>sections 78, 79 and 79A (except paragraph 79(9)(c) and only if:</p> <p>(a) both of the following apply:</p> <p>(i) the power is exercised in an undefended case;</p> <p>(ii) the declaration or order is to come into effect at least 21 days after the declaration or order is served on the non-appearing party; or</p> <p>(b) the power is exercised with the consent of all the parties to the case)</p>
21C	<p>paragraph 79(9)(c)</p>
21D	<p>subsection 83(1) (but only if:</p> <p>(a) all of the following apply:</p> <p>(i) the order to be discharged, suspended, revived or varied is an order until further order;</p> <p>(ii) the order to discharge, suspend, revive or vary is made in an undefended case;</p> <p>(iii) the order to discharge, suspend, revive or vary is to come into effect at least 21 days after the order is served on the non-appearing party; or</p> <p>(b) the order to discharge, suspend, revive or vary is made with the consent of all the parties to the case)</p>
21E	<p>subsections 87(8), 90J(3) and 90K(1) (but only if:</p> <p>(a) both of the following apply:</p> <p>(i) the order is made in an undefended case;</p> <p>(ii) the order is to come into effect at least 21 days after the order is served on the non-appearing party; or</p> <p>(b) the order is made with the consent of all the parties to the case)</p>

Item	Legislative provision
21F	<p>section 90SE (but only if:</p> <p>(a) all of the following apply:</p> <p>(i) the order is an order until further order;</p> <p>(ii) the order is made in an undefended case;</p> <p>(iii) the order is to come into effect at least 21 days after the order is served on the other party; or</p> <p>(b) the order is made with the consent of all the parties to the case)</p>
21G	<p>section 90SG (but only if:</p> <p>(a) both of the following apply:</p> <p>(i) the order is made in an undefended case;</p> <p>(ii) the order is to come into effect at least 21 days after the order is served on the other party; or</p> <p>(b) the order is made with the consent of all the parties to the case)</p>
21H	<p>section 90SI (but only if:</p> <p>(a) all of the following apply:</p> <p>(i) the order to be discharged, suspended, revived or varied is an order until further order;</p> <p>(ii) the order to discharge, suspend, revive or vary is made in an undefended case;</p> <p>(iii) the order to discharge, suspend, revive or vary is to come into effect at least 21 days after the order is served on the non-appearing party; or</p> <p>(b) the order to discharge, suspend, revive or vary is made with the consent of all the parties to the case)</p>
21J	<p>sections 90SL, 90SM and 90SN (except paragraph 90SM(9)(c) and only if:</p> <p>(a) both of the following apply:</p> <p>(i) the power is exercised in an undefended case;</p>

Item	Legislative provision
	(ii) the declaration or order is to come into effect at least 21 days after the declaration or order is served on the non-appearing party; or
	(b) the power is exercised with the consent of all the parties to the case)
21K	paragraph 90SM(9)(c)
21L	subsections 90UL(3) and 90UM(1) (but only if:
	(a) both of the following apply:
	(i) the power is exercised in an undefended case;
	(ii) the declaration or order is to come into effect at least 21 days after the declaration or order is served on the non-appearing party; or
	(b) the power is exercised with the consent of all the parties to the case)
22	subsection 91B(1)
23	subsections 92(1) and (2)
23A	paragraphs 94(2D)(a), (b), (c), (e), (g), (h), (i) and (j)
23B	paragraph 94(2D)(d) (but only if all parties consent to the orders sought)
23C	paragraphs 94AAA(10)(a), (b), (c), (e), (g), (h), (i) and (j)
23D	paragraph 94AAA(10)(d) (but only if all parties consent to the orders sought)
24	subsection 97(1A)
25	subsection 97(2)
26	section 98A
27	section 101
28	section 106A
30	subsection 117(2)
Family Law Regulations	
31	subregulation 4(1)

Item	Legislative provision
32	regulation 5
33	paragraph 6(1)(a)
33AA	subregulation 23(6)
33A	subregulation 67Q(4)
<u>Bankruptcy Act</u>	
34	section 33
35	section 81
36	section 264B
37	subsection 309(2)
<u>Trans-Tasman Proceedings Act 2010</u>	
38	subsection 31(1)
39	paragraph 32(1)(b)
40	subsections 36(1), (4) and (6)
41	subsection 37(4)
42	section 38
Assessment Act	
43	section 139 (but only if the order is made: (a) in an undefended case; or (b) with the consent of all the parties to the case)
44	Divisions 4 and 5 of Part 7 (but only if the order is made: (a) in an undefended case; or (b) with the consent of all the parties to the case)
Registration Act	
45	subsection 105(2)

Item	Legislative provision
46	subsection 111B(1)
47	section 113

(2) Each power vested in the court by these Rules and mentioned in an item of Table 18.5 is delegated to each Deputy Registrar.

Table 18.5 Powers under Rules delegated to Deputy Registrars

Item	Provision of Rules
1	Part 1.2
2	Part 1.3
3	rule 5.06
4	rule 5.07
4A	subrule 5.11(2)
5	Part 5.4
6	rule 6.04
6A	rule 6.05
6B	Part 6.3
7	rule 6.15
8	Chapter 7
9	rule 8.02
10	rule 10.11
11	Part 10.4
12	rule 11.01 (except paragraphs 3 (d) and (k) of Table 11.1)
13	paragraph 11.02(2)(a), paragraph 11.02(2)(d) (except the reference, by incorporation, in that paragraph to paragraphs 3(d) and (k) of Table 11.1), and paragraphs 11.02(2)(e) and (g)

Item	Provision of Rules
14	paragraph 11.03(1)(a)
14A	subrules 11.06(1) and (2)
15	subrule 11.10(1)
16	rule 11.14
18	Part 11.3
19	Chapter 12
20	Chapter 13 (except paragraph 13.14(b))
21	rule 14.01 (except subrules (2) and (5))
22	rule 15.04
24	rule 15.13
25	Divisions 15.3.1 and 15.3.2
26	Part 15.4
31	Part 15.5
31A	Rule 16A.04
31B	paragraphs 17.02(1)(e), (g) and (h)
32	Chapter 19 (except Part 19.8) and Schedule 6 (except Part 6.8)
33	Chapter 20
34	Part 21.4
36	Chapter 23
37	Chapter 24
38	rule 26.05
39	paragraph 26.12(a)
40	rule 26.13
41	paragraph 26.18(a)

Item	Provision of Rules
42	rule 26.29
43	rule 26.30
45	Part 26B.1
46	Divisions 26B.2.1 and 26B.2.2

Note: Under [subsection 37B\(2\)](#) of the Act, the Chief Executive Officer may direct which Registrars or Deputy Registrars are to perform any function or exercise any power under the Act, the regulations or these Rules in particular matters or classes of matters.

(3) A power of the court mentioned in item 34 of Table 18.5 may only be exercised by a Deputy Registrar when dealing with a case in relation to which a Deputy Registrar has, or has been delegated, the power to exercise the court's jurisdiction.

It is NOT the purpose of this paper to set out what powers the Registrar (we call ours the Senior Registrar) and the Deputy Registrars have as one must CHECK what one is applying for under what section and in what court and apply the relevant table **However we have done a TABLE that we will send to you with the TIME LIMITS!**

Suffice to say the above is a bit of a mine field and one must carefully consider it; particularly now that most matters are more and more “ triaged” by deputy registrars

SO WHAT ARE THE TIME LIMITS FOR REVIEW???

FIRSTLY THE FCC

See Rule 20.01 and 20.02 Time for application for review

20.01 (1) For [subsection 104\(2\)](#) of the Act, application for review of the exercise of a power by a Registrar must be made within:

(a) for the exercise of a power of the Court under the Family Law Act or [Family Law Regulations mentioned in items 3AA to 30C of the table in rule 20.00A--21 days](#); and

(b) otherwise--7 days.

(2) A time prescribed under subrule (1) may be extended in a [proceeding](#):

(a) by the Court or a Registrar on any terms as the Court or Registrar thinks fit; or

(b) with the consent of the parties to the [proceeding](#).

SO I HAVE HIGHLIGHTED the table in Rule 20.00A in Red those delegated powers that have 21 days for filing an application for review the rest of the table are powers that you only have 7 days to make your review application to be within time

The time can be EXTENDED “by a court or a registrar on any terms as the Court or Registrar thinks fit”.

It is my experience that rarely will that application if it is of any substantial matter be heard by a registrar but rather by a Judge

SECONDLY THE FC

See Rule 18.07, and 18.08

18.08 Review of order or decision

(1) A party may apply for a review of an order mentioned in an item of Table 18.6 by filing an Application in a Case and a copy of the order appealed from in the filing registry. **within the time mentioned in the item**

Table 18.6 Orders that may be reviewed

Item	Order	Time within which application must be made
1	Order made by a Judicial Registrar exercising a power delegated under rules 18.02 and 18.03 and subrule 18.05(1)	within 28 days after the Judicial Registrar makes the order
2	Order made by a Registrar exercising a power mentioned in subrule 18.05(1)	within 21 days after the Registrar makes the order
3	Order made by a Judicial Registrar or Registrar exercising a power delegated under subrule 18.05(2)	within 21 days after the Judicial Registrar or Registrar makes the order
4	Order made by a Judicial Registrar, Registrar or Deputy Registrar exercising a power delegated under rule 18.06	within 21 days after the Judicial Registrar, Registrar or Deputy Registrar makes the order
5	Order made by a Judicial Registrar, Registrar or Deputy Registrar in a bankruptcy case	within 21 days after the Judicial Registrar, Registrar or Deputy Registrar makes the order

(2) A party may apply for a review of **any other order or decision** made under these Rules by a Registrar or Deputy Registrar by filing an Application in a Case and a copy of the order or decision appealed from in the filing registry within **28** days after the order or decision is made.

[Note 1:](#) Chapter 5 sets out the procedure for filing an Application in a Case. The application for review **will be listed for hearing by a Judge within 28 days** after the date of filing of the application.

[Note 2:](#) A person may apply for an extension of the time in which an application must be made (see rule 1.14).

SO AGAIN one must check under what power the order was made to tell if the time limit is 21 days or 28 days!!!

And NOTE Rule 18.10

That rule makes it clear that the REVIEW is an original hearing but the Court can receive in evidence all the old affidavits any new affidavits and any transcript or an affidavit if no transcript is available re the first hearing and what was said!

SUMMARY

**There are clear differences in the time limits depending upon which court you are in
This may all change with the courts amalgamating but I cannot imagine that process will be a quick one**

So we need to look at the JURISPRUDENCE REGARDING APPLICATIONS FOR LEAVE TO REVIEW OUT OF TIME and of course if a decision is made not to allow to review out of time to Set aside that decision!

THEN OF COURSE THERE IS THE RULE REGARDING SETTING ASIDE A JUDGEMENT OR ORDER AFTER IT IS ENTERED

See FCC RULES 16.05

Setting aside or varying judgments or orders

(1) The Court or a Registrar may vary or set aside a [judgment](#) or order before it has been entered.

(2) The Court or a Registrar may vary or set aside a [judgment](#) or order **after** it has been entered if:

- (a) **it was made in the absence of a party;** or
- (b) it was obtained by **fraud;** or
- (c) it is **interlocutory;** or
- (d) it is an injunction or for the appointment of a receiver; or
- (e) it does not reflect the intention of the Court; or

- (f) the party in whose favour it was made consents; or
- (g) there is a clerical mistake in the [judgment](#) or order; or
- (h) there is an error arising in the [judgment](#) or order from an accidental slip or omission.

(3) This rule does not affect the power of the Court or a Registrar to vary or terminate the operation of an order by a further order.

Note: See sections 57 and 58 of the Family Law Act in relation to rescission of a divorce order.

There are similar provisions in the Family Law Rules

Rule 1.11

Court may set aside or vary order

The court may **set aside** or vary an order made in the exercise of a power under these Rules.

Rule 17.02

Varying or setting aside orders

- (1) The court may at any time vary or **set aside** an order, if:
- (a) **it was made in the absence** of a party; or
 - (b) it was obtained by **fraud**; or
 - (c) it is interlocutory; or
 - (d) it is an injunction or for the appointment of a receiver; or
 - (e) it does not reflect the intention of the court; or
 - (f) the party in whose favour it was made consents ; or
 - (g) there is a clerical mistake in the order; or
 - (h) there is an error arising in the order from an accidental slip or omission.
- (2) Subrule (1) does not affect the power of the court to vary or terminate the operation of an order by a further order.

An application for Review of a costs assessment under the FLR MUST be heard by a Judge

see rule 19.56

reviewed.

79A FAMILY LAW ACT

Under section 79A property orders can be set aside if the Court is satisfied that there has been a **miscarriage of justice** for a number of reasons including (1)(a)... or **any other circumstance (see discussion below re *Allesch v Maunz*)**

Thus if for instance your client failed to turn up and orders are made in their absence then that might be a reason for the orders to be set aside by the Court (exactly what happened in *Allesch V Maunz*)

BELOW ARE SOME RELEVANT CASES REGARDING THE ABOVE MATTERS

1. BARBEY & TUTTLE (2013) FLC 93-534 per May, Murphy & Kent JJ in a joint judgement A SETTING ASIDE CASE

This was an appeal by a wife from a discretionary decision of a Federal Magistrate dismissing an application under r 16.05 of the Federal Magistrates Court Rules to set aside final property orders made in default of her appearance. The jurisdiction was exercised by the Full Court to determine the appeal.

The wife had initiated the property proceedings in relation to which the Federal Magistrate had made the property orders **in the absence of the wife.**

Their honours said this

This appeal concerns the proper approach of a trial judge when a party fails to appear in Court, comply with orders allowing for the orderly disposition of the case, and orders are ultimately made in their absence. In addition, in this case that litigant then makes

an application to set aside the final orders but fails to provide an acceptable excuse for their default.

18. The wife did not take the solicitor's calls, did not return his messages, and did not reply to his emails. She did, however, email the husband directly on 11 July and 3 August 2011, suggesting to him to settle out of Court. She emailed again on 19 August 2011, apparently to deter the husband from continuing with the litigation. The solicitor's various attempts at contacting the wife, and the wife's emails to the husband are evidenced in annexures (SH1-15) of the solicitor's affidavit filed 24 August 2011.

48His Honour began by stating the rule, and quoted from the case of *Clifford & Mountford* [2006] FMCAfam 450 as authority for the "usual, but not exclusive considerations" for an application under r 16.05(2)(a) (at paragraph 5):

"34. From the abovementioned authorities, it seems to me that the following principles emerge in respect of applications under r.16.05(2)(a):

- *a) The **discretion to be exercised is unfettered**, but nonetheless to be exercised judicially and bearing in mind the public interest in there being an end to litigation.*
- *b) There are three criteria, each of which should usually be demonstrated before*
 - *i) a **reasonable explanation for the applicant's absence at the trial or hearing**;*
 - *ii) **material arguments available to the applicant that might reasonably lead to the making of an order different to that sought to be set aside**; and*
 - *iii) **no prejudice to the party with the benefit of the orders sought to be set aside that is not able to be adequately addressed by the Court**.*
- *b) Matters relevant to the three criteria set out above will include, but will not necessarily be limited to:*
 - *i) **Whether a party with notice of proceedings disregarded the opportunity of appearing at and participating in the trial**;*

- *ii) Delay, if any, in bringing the application to set aside and whether, if during the period of delay the successful party has acted on the judgment, or third parties have acquired rights by reference to it;*
- *iii) the conduct of the applicant since the judgment or order sought to be set aside was made.”*

64. As to the principles to be applied in the determination of a r 16.05 application to set aside orders, the exercise of discretion in considering such an application is **unfettered**, though must be exercised judicially.

65. The High Court in *Allesch v Maunz (2000) 203 CLR 172*, considered whether the Full Court of this Court had been correct (on a re-exercise of discretion), in exercising the **discretion** to set aside an order of a Family Court judge **made in the absence of a party**. The relevant provision in that case (for property proceedings in the Family Court) was s 79A, which enables the Court to set aside an order if satisfied there was a “**miscarriage of justice**”.

66. Their Honours (Gaudron, McHugh, Gummow and Hayne JJ) indicated that a Court will ordinarily be **satisfied a miscarriage of justice has occurred if a person is the subject of an adverse order and their failure to appear is sufficiently explained, unless it is apparent that no different result would be reached on a rehearing, or that a rehearing would work an irremediable injustice to the respondent** (paragraph 28, pages 182–183).

SINGAM & MOFFREY APPEAL AND SETTING ASIDE

(2015) FLC ¶93-641 per Murphy J as appeal judge

An application was made by the de facto wife **for leave to appeal** from orders made in default of her appearance at the final hearing. The de facto wife was self-represented.

The de facto wife challenged the trial judge proceeding by way of default hearing and asserted that her approach was erroneous.

Held: application for leave to appeal granted.

1. I am of the view that a **substantial injustice** has occurred and that leave should be granted and the appeal allowed (at [10]).
2. Her Honour is in error in asserting that no financial statement was filed by the date ordered; it was filed on 5 November as ordered (at [47]).
3. I consider that her Honour erred in the exercise of her discretion by failing to take account of what I regard as **an adequate and indeed persuasive explanation for Ms Singam's failure to attend court** (at [50]).
4. I consider that her Honour erred in failing to take account of a further relevant consideration, **namely the fact that issue had been joined in what counsel for Mr Moffrey had conceded on 17 September was a triable issue, namely the existence of, and if they existed the value of, the two industrial machines** (at [57]).

Subsequent to filing her Notice of Appeal within time, Ms Singam filed an application seeking to set aside the judgment by default pursuant to r 16.05. That application was returned before her Honour on 5 February 2015.

4. At that time, counsel for Mr Moffrey (the de facto husband) indicated to her Honour that the application should be dealt with prior to this appeal. Her Honour disagreed. With respect to her Honour, the approach urged by counsel was entirely consistent with authority; **this appeal should not, in the ordinary course of events, be heard before Ms Singam had exhausted her rights at first instance.** (See for example, *Wilkes and Wilkes* (1981) FLC ¶91-060; *In the Marriage of Smith* (1994) FLC ¶92-494; *Leslighter & Fitzgerald-Stevens* (2012) 47 FamLR 384 at [108] and *Broughton & Broughton* [2014] FamCAFC 206 at [29]–[30]).

5. In *Lorde & Chu* [2014] FamCAFC 228, this Court said (at [36]):

Finally, it may be useful if we take this opportunity to draw attention to the fact that it has long been established in this jurisdiction that where a party seeks to set aside orders made in his or her absence, the proper course is for that party to apply at first instance for a rehearing rather than seek to have the matter dealt with by a way of an appeal (*Wilkes and Wilkes* (1981) FLC ¶91-060). Moreover, Rule 16.05 of the Federal Circuit Court Rules 2011 (Cth) provides for a rehearing at first instance in such circumstances.

We also observe that it is not uncommon, and indeed desirable, that where a judge makes an order in the absence of a party who will be affected by the order, that the judge expressly provide in his or her orders that the party in whose absence the orders were made have liberty to apply, within a specified period of time, to have the orders varied or set aside.

Turner & Turner and Anor ([2016](#)) FLC 93-719,

This case involved significant assets on one view over 25 million dollars

The Husband did not turn up and the court made orders against him and companies

In this case the orders were **Onerous and unfair even though the Husband had been given opportunity to appear and did not appear to have a reasonable excuse**

The court will not allow its rules to be used to create an injustice

ALLESCH, EF v MAUNZ,

(2000) FLC 93-033 [2000] HCA 40

High Court of Australia

Judgment delivered 3 August 2000

Family law — Appeal — Nature of appeal to Full Court of Family Court — Discretion to set aside order made in party's absence — Meaning of "miscarriage of justice" — Party's absence adequately explained — Rehearing — Appellate court seeking to re-exercise discretion by reference to circumstances as they presently exist — Parties must be given opportunity to adduce evidence as to circumstances as they presently exist — Family Law Act 1975, sec 79A;93A(2);94.

In May 1995, a court officer delivered a letter to the husband's home informing him that, if he did not appear or arrange to be represented at a directions hearing the next day, the wife's application for final property settlement could be listed as an undefended matter. The husband, who did not have legal representation, did not appear. The trial

Judge ordered that the wife's application be listed for an undefended hearing. These orders were served on the husband.

At the June 1995 hearing, an affidavit of service disclosed that the husband had informed the court officer who had served the orders that he was "very sick" and ordered that person out of the house. The hearing proceeded on the basis that the trial Judge would "allow a short period of time to elapse after service of the orders on the husband in which he could apply to have the orders set aside". The hearing was on 14 June 1995. The decision, given in July 1995, was that there be a division of property with 55% to the wife and 45% to the husband. Orders were made giving effect to that decision on 10 August 1995.

The 10 August property settlement orders were served on the husband and, on 24 August 1995, he applied to have them set aside. In his affidavit, the husband swore that he had **been in hospital with heart problems for approximately** two weeks from 1 May and had no recollection of the notice served on him in May 1995. He swore that he had a triple valve bypass operation on 5 June and was still recuperating on the hearing date of 14 June. The trial Judge accepted this evidence as to illness. She varied the property settlement order date]but refused to set aside the property settlement orders. The trial Judge accepted that if all, or perhaps even some, of the husband's evidence was accepted in a re-hearing then the result may well be **substantially different than that embodied in the 10 August orders.**

However, the trial Judge took into account the protracted nature of the proceedings and the effect of this on the wife's health as well as the fact that she was not satisfied that the husband did not have the capacity to take the necessary steps to obtain an adjournment.

The husband filed a notice of appeal in October 1995. There was no appearance by the husband and the appeal was taken to have been abandoned. In May 1998, the appeal was reinstated. The majority of the Full Court of the Family Court held that the trial Judge had fallen into error in treating the proceedings as unusually protracted, in making reference to the ease with which the husband could have sought an adjournment and in giving undue emphasis to the wife's mental health. The majority approached the disposition of the appeal on the basis that it was for it to exercise, afresh, the discretion to set aside the property orders of 10 August. Their Honours identified a number of matters which they said militated against the exercise of the discretion in favour of setting aside the orders. Essentially, **those matters were the husband's unexplained delay in the prosecution of his appeal, the fact that the property settlement orders had been substantially executed and that costs orders had**

been made in favour of the wife. Their Honours noted that ``it is not possible for us to make orders which reinstate the parties back to the position they were in prior to 10 August 1995. Thus simply setting aside the orders will leave behind a trail of confusion. The best that could be achieved would be to remit for hearing before a single judge the question of the extent to which it is just and equitable and appropriate to make an order under sec 79 dividing the property of the parties as it exists at the date of that retrial by a fresh application of the criteria set out in sec 79(4). There is no certainty that such a course would lead to a different result than that arrived at by [the trial Judge]".

The husband appealed to the High Court. The only issue was whether the Full Court was correct to dismiss the husband's appeal to that **Court on the basis of the unexplained delay in its prosecution, the costs orders in favour of the wife and the fact that the parties could not be put back in the position they were in before 10 August 1995.**

Held: Appeal allowed, orders of the Full Court of the Family Court set aside and matter remitted to that Court for further hearing and determination. Each party to bear its own costs of the High Court proceedings.

Per Gaudron, McHugh, Gummow and Hayne JJ

29.As earlier mentioned, the Full Court, itself, proceeded to exercise the discretion to set aside the property settlement orders made by Finn J and to do so by reference to circumstances **as they appeared at the time of the disposition of the appeal, rather than by reference to the facts found by Finn J.** In this regard, it is sufficient to note that Finn J found that, if the husband's evidence were accepted there might be a substantially different outcome, whereas the Full Court proceeded on the basis that, given the intervening events, there was no certainty that a fresh application of the principles governing property settlement to the property then owned by the husband and wife "would lead to a different result than that arrived at by Finn J."

30.Although, on an appeal by way of rehearing from a discretionary judgment, an appellate court may, itself, exercise the discretion in question by reference to circumstances as they then exist, it is not bound to do so. It may, instead, set aside the order under appeal and remit the matter for rehearing or, in terms of [s 94\(2\)](#) of the Act "order a re-hearing, on such terms and conditions, if any, as it considers appropriate."
And where circumstances have or are likely to have changed between the

original hearing and the disposition of the appeal, it is not uncommon for an appellate court to remit the matter for rehearing rather than, itself, exercise the discretion in question.

31. **If on an appeal by way of rehearing from a discretionary judgment an appellate court is minded to exercise the discretion in question by reference to circumstances as they exist at the time of the appeal, it is necessary that the parties be given an opportunity to adduce evidence as to those circumstances.** It is not entirely clear that that happened in the present case, particularly as the Full Court indicated that it could only speculate as to the likely outcome of a fresh application of the principles governing property settlement to the property then owned by the parties.

32. Whether or not the parties were afforded an opportunity to lead evidence as to the circumstances as existing at the time of the Full Court's decision in this matter, the Full Court erred in its exercise of the discretion to set aside the property settlement orders. **The matters taken into consideration by the Full Court were relevant to the question whether a rehearing would occasion the wife some injustice that could not be remedied by the imposition of terms, but that question was not answered. Nor did the Full Court determine whether a rehearing might result in some different outcome. These were issues which should have been determined if the Full Court was, itself, to exercise the discretion to set aside the property settlement orders by reference to circumstances as they then existed.** They are not questions which this Court can now determine^[19]. Accordingly, the matter must be remitted to the Full Court.

Per Kirby J

35. **It is a principle of justice that a decision-maker, at least one exercising public power, must ordinarily afford a person whose interests may be adversely affected by a decision an opportunity to present material information and submissions relevant to such a decision before it is made.** The principle lies deep in the common law. It has long been expressed as one of the maxims which the common law observes as "an indispensable

requirement of justice"[\[20\]](#). It is a rule of natural justice or "procedural fairness"[\[21\]](#). It will usually be preceded the common and statute law. **Even the Almighty reportedly afforded Adam such an opportunity before his banishment from Eden**[\[](#)

at para 43 ..(1) **that an explanation, reasonable to the circumstances, is provided for the party's absence or other default; and**

(2) that the party in default has a material argument which, if heard and decided on its merits, might reasonably affect the determination of the rights and duties of the parties in a way different from that in the impugned order[\[43\]](#).

See also Taylor V Taylor [\[14\]](#) [\[1979\] HCA 38](#); (1979) 143 CLR 1 at 4 per Gibbs J referring to *Cameron v Cole* [\[1944\] HCA 5](#); (1944) 68 CLR 571 at 589 per Rich J; *The Commissioner of Police v Tanos* [\[1958\] HCA 6](#); (1958) 98 CLR 383 at 395 per Dixon CJ and Webb J; *Grimshaw v Dunbar* [1953] 1 QB 408 at 416 per Jenkins LJ; at 15-16 per Mason J.