

Commencing an appeal - overview and what to do when you are out of time!

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Foley's List CPD to Geelong Law Association

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1. Introduction to appeals

An appeal is commenced by filing a Notice of Appeal. All appeals go to the Family Court of Australia,¹ and the jurisdiction for appeals set out in *Family Law Act 1975* (Cth) (**FLA**).

- Where it is an appeal from an order of a Judge of the Family Court or Family Court of Western Australia, it goes to the Full Court of the Family Court.
- Where it is an appeal from order of the Federal Circuit Court, it goes to either a single Judge or the Full Court. Appeals from Federal Circuit Court matters are to go to the Full Court of the Family Court,² unless the Chief Judge considers it is appropriate for the appellate jurisdiction of the Family Court to be exercised by a single judge.³

2. Is leave required to appeal?

As an appeal is a creature of statute, it is not necessarily an automatic right.

¹ s 93A *Family Law Act 1975* (Cth) (**FLA**).

² s 94AAA(1) FLA.

³ s 94AAA(3) FLA.

Under the FLA, an appeal may be made *as of right* (that is, no leave is required) from any final order and any interlocutory order regarding a '*child welfare matter*'. A child welfare matter is defined in reg 15A of the *Family Law Regulations 1984* (Cth) (**Regulations**) as a live with order, spend time or communicate order, or any other aspect of parental responsibility.

Leave to appeal is required for appeals regarding:⁴

- interlocutory orders (other than a child welfare order);
- suppression orders or non-publication orders; and
- the dismissing or granting a vexatious litigant's application for leave to commence proceedings.

3. Process to commence appeal

A. *Notice of Appeal*

The appeal process itself is set out predominantly in the *Family Law Rules 2004* (Cth) (**Family Law Rules**). Significantly for the purposes of this presentation, a party has **28 days** from the date of the judgment or order to file the Notice of Appeal.⁵ The notice of Appeal should be filed at the Regional Appeal Registry, together with a copy of the Orders being appealed.

An appeal is from the orders or decision - not the reason for judgment. It is important to remember that the 28 days to file starts from the time the order is made⁶ - not when reasons are received.

⁴ s 94AA FLA; reg 15A *Family Law Regulations 1984* (Cth) (**Regulations**).

⁵ r 22.03 *Family Law Rules 2004* (Cth) (**Family Law Rules**).

⁶ r 17.01 *Family Law Rules* sets out when an order is made.

Where the particular order or judgment was delivered *ex tempore* and a client is considering an appeal, a potential appellant should request the written reasons as soon as practicable. It also may be prudent to prepare a Notice of Appeal awaiting those written reasons, so that it is ready to be filed in the 28 day time limit.

The Notice of Appeal requires the following information;

- (a) the details of the parties;
- (b) whether leave is required;
- (c) if leave is required, the facts relied upon;
- (d) the orders which are being appealed;
- (e) the grounds of appeal; and
- (f) the orders sought.

An appellant must serve the Notice of Appeal on each party to the appeal, including any Independent Children's Lawyer, within **14 days** of filing.

B. *Draft index to appeal book*

An appellant must file a draft index to the appeal book **28 days** after either:⁷

- filing the Notice of Appeal, or
- receiving reasons for judgment.

The draft index is to be filed at the regional appeal registry and be served on all other parties to the appeal.

⁷ r 22.13 Family Law Rules.

This is an important step in the appeal process; please note that sub-r 22.13(3) of the Family Law Rules provides that if a draft index to the appeal book is not filed in time, the appeal is deemed to be abandoned.

C. *Cross-appeals*

A respondent to an appeal may file cross-appeal, including an Independent Children's Lawyer who seeks to vary or set aside an order under appeal.

A cross appeal is made by filing a Notice of Appeal endorsed as a cross-appeal.⁸ The cross appeal is to be filed within **14 days** of service of the Notice of Appeal, or 28 days of the order being appealed; whichever is later.⁹

D. *Stay of orders*

Commencing an appeal does **not** operate as a stay of proceedings.¹⁰ Accordingly, an appellant should consider whether they need to seek a stay of the execution or operation of the order under appeal (in whole or in part) while undertaking the appeal process.

An application for stay may be made by **any** party once an appeal has been commenced, or an application for leave to appeal has been filed.¹¹

The application for stay is to be made to the Judge who made the order. Where he or she is not reasonably available:¹²

⁸ r 22.07 Family Law Rules.

⁹ r 22.08 Family Law Rules

¹⁰ r 22.11(1) Family Law Rules.

¹¹ r 22.11(2) Family Law Rules.

¹² r 22.11 Family Law Rules; see r 1.13 Family Law Rules.

- an application for stay of a Federal Circuit Court Order may be heard by another Judge of the either the Federal Circuit or Family Court .
- An application for stay of a Family Court Order may be heard by another Judge of the Family Court.

There is no specific provision in the Family Law Rules regarding stays where an appellant is seeking leave to appeal from the Full Court to the High Court.

4. Leave to appeal out of time

Where an appellant has failed to file a Notice of Appeal within the 28 day time limit, they would need to seek leave to extend time to appeal. The Family Court has the discretion to extend time to appeal under r 1.14 of the Family Law Rules.

As to the exercise of discretion, there are a number of well-established, guiding principles. The key case in that respect is *Gallo v Dawson* [1990] HCA 30 (**Gallo**). The principles from *Gallo* have been distilled by the Family Court as follows (*Rafter & Rafter* [2011] FamCAFC 46 at [10], citing *Clivery & Conway* [2007] FamCA 1435):

14. *The principles emerging from Gallo v Dawson may be summarised as follows:*
 - *The grant of an extension of time is not automatic.*
 - *The object is to ensure that Rules which fix times do not become instruments of injustice.*
 - *Since the discretion to extend the time is given for the sole purpose of enabling the Court to do justice between the parties, the discretion can only be exercised upon proof that strict compliance with the Rules will work an injustice upon the applicant.*
 - *When determining whether the Rules will work an injustice, it is necessary to have regard to the history of the proceedings, the conduct of the parties, the nature of the litigation, and the consequences for the parties of the grant or refusal of the application for extension of time.*

- *When considering an application for extension of time in which to file an appeal or an application, it is necessary also to consider the prospects of success of that appeal or application.*

The key matters one needs to address in an application for an extension of time to appeal therefore include:

- establishing that strict compliance with the time limit would have worked an injustice on the applicant for the extension of time;
- a consideration of *injustice* involves regard to the history of proceedings, the conduct of the parties, the nature of the litigation and the consequences of the grant or refusal of the extension of time; and
- the applicant's prospects of success in the appeal.

Please note that an application for leave to appeal out of time may also be made from consent orders; the rules in *Gallo* apply equally.

Examples of circumstances where the Court has granted an extension of time include:

- *Gadoury & Koller* [2016] FamCAFC 160: a father asserted that orders pronounced by the primary Federal Circuit Court Judge differed *materially* to the sealed orders published by the Court. Here, the Family Court found that the father's delay in filing was explained by his efforts initially made to resolve the matter, which included seeking an amendment pursuant to the slip rule, amendment by consent of the mother, seeking an explanation from the primary judge and seeking an audio recording of the hearing.
- *Sargent & Selwyn* [2016] FamCAFC 241: orders were not accompanied by reasons and the parties did not receive written reasons until over *14 months* after the orders were made. The father subsequently applied for an extension of time to appeal. The delay in written reasons being provided was described as "*extraordinary circumstances*" by the Court. Note that this matter also involved a question of whether the judgment was given after the primary judge's commission had expired.

- *Leong & Ming* [2017] FamCAFC 272: the husband filed an appeal four months out of time. In this matter, the trial judge had failed to include certain liabilities which amounted to a substantial issue to be raised on appeal. The extension of time to appeal was granted.

Take home message:

- Take steps to avoid filing an appeal out of time (including drafting a Notice of Appeal as soon as practicable).
- If despite your best efforts, you are filing out of time - do not fret! Consider applying for leave to appeal out of time.
- If you are considering filing an application for leave to appeal out of time, but do not know where to start, do not hesitate to contact a barrister for a chat.