FOLEY'S LIST

Non-Disclosure in Financial Cases

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Foleys List

Daze in Court: Episode 2

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Prologue

This is an extract from an article that appeared in the Sydney Morning Herald on 29 March 2013 by journalist Harriet Alexander:

Warring couples pull out all the stops when it comes to winning family law battles[1]
By Harriet Alexander
29 March 2013 — 3:00am

As the sun went down on a remote property in NSW, a private investigator peered through the window of a storage shed and spied his target. Exposed in the afternoon light was about $400,000 of farm machinery - assets the homeowner swore he had sold, before gambling away the profits. Click. The private investigator's client had an interest in those assets. She was the homeowner's wife.

In the game of stealth to which the couple's relationship had descended, each was now plotting to maximise their outcome from the property dispute. He was squirrelling away goods, and she was having him shadowed.

Extraordinarily, in family law circles their tactics are viewed as run of the mill.
Private investigators, secret tapes, the hacking of social media pages and the manipulation of children - nothing is above litigants in the highly charged atmosphere of divorce and custody proceedings in the Family Court.

"It brings out the worst in people," says family lawyer Deborah Searle. "Very occasionally it brings out the best in people, but not often."

[1] Sydney Moring Herald article by Harriet Alexander on 29 March 2013

Searle has been in the game for 25 years, which is longer than most lawyers can handle family law before the emotional disrepair of their clients starts to suffocate them. They deal extensively with litigants who are bitter and spent, and only briefly with those who have resolved their differences amicably.
Most of the time when couples employ dirty tactics, it is met with eye rolling among family lawyers, who have nothing to gain and stand to be penalised if their clients are caught breaking the law.

"Mostly they hide money and assets," Searle says. "And they think they're the first to think of it. We all have a laugh about that one." The women hide it in their sister's account. "The men think they're a lot cleverer than that. They hide it in property in someone else's name and think we'll never find it. It comes out."

One case recalled by family law solicitor Max Meyer involved a wealthy man with an offshore bank account in Fiji who claimed the account belonged to his mate. The pretense backfired when, after the case had concluded, the friend claimed he was entitled to keep the money because it had been sworn to him under oath. The man then had to return to court and confess to perjury so he could at least retain a portion of the money, even if it had to be shared with his wife.

"Sometimes after separation people will go out and buy a new car, because the minute they buy it, it loses half its value, so their wealth is spent in a more enjoyable way [than spousal maintenance]," Meyer says. "It's petty, of course it is. But we only see the worst examples. People who work things out for themselves, we don't see."
Private investigators are common. Searle has engaged them on her clients' behalf when she is looking for something specific. She arranged the private investigator who knew exactly where to find the farm machinery. But often clients engage them on a speculative basis. "Drink-driving with the kids in the car, the boyfriend she claims she doesn't have … they're hoping something useful turns up," Searle says.

Private investigator Guy Oakley has worked on "many, many, many" such cases, and although he often turns up misconduct on the part of his surveillance subject, often the indictment is on his client. He helped one woman retain primary care of her child by confirming that her ex-partner was out taking heroin while the child was staying with him. But on another occasion, Oakley was able to demonstrate to his client that his wife was not having an affair with the son of a Fijian tribal chief, but merely looking for a holiday from their unhappy marriage.

"I was able to go back and say, 'You're just so paranoid it's driving her out the door'," Oakley said. "A year later their marriage was back together, and it was fantastic." Such upbraiding advice is a luxury the Family Court does not have. The couples that come to the Family Court and play out the miserable remnants of their relationships have exhausted all other options and seek the clean certainty of the law. They are destined to be disappointed.

"Family law is different to other areas of the law in that it attempts to effectively legislate what are personal relationships, and people really struggle to accept the boundaries that the law imposes," family lawyer Paul Doolan says. “"There's a lot of bad behavior in personal

relationships that just continues when the relationship breaks down. While they're not common, we do see a lot of instances of people hacking email accounts, of opening mail, of recording personal conversations, recording telephone calls, hiring private investigators and of attaching GPS trackers to cars."

Introduction

The first step a court takes in any application for an adjustment of property between parties pursuant to Section 79 of the Family Law Act is to determine the respective legal and eequitable interests of the parties in property[2]. In other words, the court needs to determine what property is owned by the parties and the value of that property. In most cases it will be a simple to determine the asset pool of the parties and the value of it. In an "average" case this may be a simple exercise where the assets involved are say a house, two cars, banks accounts, some shares and the parties' respective superannuation entitlements. But there will be other cases where that may not be an easy exercise. This may include matters involving businesses, trusts, numerous bank accounts and bank transactions, share trading and other such matters. In many of these cases it may be necessary to hire a forensic accountant to analyse the financial documents and do any necessary tracing of monies or attempt to find where assets have been hidden. But prior to a forensic accountant becoming involved it is the role of the lawyer to obtain all relevant documents to assist in determining the property pool.

The issue of disclosure is now not only covered the new **Federal Circuit and Family Court Rules ('the Rules")** but also the Central Practice Direction in relation to Family Law Case Management of the Court. Both the Rules and the Central Practice Direction impose obligations not only on the parties but on the legal practitioners involved in a matter in relation to disclosure. The rules and the Direction also provide for costs or other consequences to follow if a party or a legal practitioner does not comply with them.

The disclosure obligations are not always met by the parties. How do you know when you have all the relevant information? **More importantly how do you know your client has provided you with all relevant information and documents?** In this paper I will deal with the issues relating to non-disclosure and the role and responsibilities of a party and a lawyer in cases in relation to disclosure and in particular:

[2] Stanford v Stanford [2012] HC 52

- Finding Hidden Wealth;
- Educating the client and dealing with a Dark Knight;
- Lawyers' duties and obligations
- Extent and scope of disclosure obligations;
- Compliance with the Rules

Hidden Wealth

There are a number of ways that a party to family law proceedings may attempt to hide assets. The extract from the newspaper I referred to before gives some examples. The ways that assets can be hidden range from the very simple to the more complex. Trust is an important issue and when a relationship breaks down, so can the trust between the parties. One party may find themselves in a situation where they are suspicious that the other party is hiding assets. This is more common in cases where one of the parties has been in control of the parties' finances during the relationship and the other party has little knowledge of the financial affairs of the relationship. These types of cases which are very common for Family Lawyers present a problem for the lawyer taking initial instructions from the client and advising in circumstances where it is difficult to even ascertain the pool of assets of the parties. It is also common in these type of cases for the other party to not provide full and frank disclosure.

Examples of Hiding Property include:

- Hiding funds in offshore accounts;
- Hiding funds in other non – disclosed accounts;
- Creating a complex set of companies and/or trusts;
- Putting assets in the names of others;
- Not fully disclosing income or earnings or profits from a business;
- Understating sales or assets belonging to a business;

- Restructuring a business;
- Not disclosing pending business contracts;
- A Trust or entity that is a Sham, Puppet or Alter ego of a party;
- Assets and/or income aquired post separation;
- Items stolen post separation;
- Cash;
- Jewellery, furniture and chattels;
- Bonuses;
- Inheritances;
- Redundancy payments;
- Dubious debts/loans to friends or family;
- Sale of Assets pre or post separation to interconnected parties;
- Dealings involving family members;
- Loans to or from Interrelated entities;
- Failure to disclose assets acquired post separation;
- Advances made by Parents during a relationship are claimed to be loans.
- "Fake" Loan agreements

What should you look for in trying to find Hidden Wealth?

As I have already discussed the starting point for trying to ascertain the property of parties in a matter may present great difficulties if your client does not know much about the financial aspect of the relationship. On the same token you should always be mindful of the question of whether your client is providing full disclosure or attempting in any way to hide assets.

Searches

Initially it may be necessary to conduct a number of searches such as:

- Conduct title searches to ascertain what properties are registered in the names of the parties or any associated entities.

- ASIC searches both current and historical to see entities the parties have any interest in as a shareholder, director or secretary.

- Internet Searches can be useful in this social media age – Facebook, Instagram and LinkedIn. I as recently involved in a trial here the main evidence of the Husband's ownership of a Jaguar was in a series of Facebook posts the Husband had put on his page. The Jaguar as registered in the name of the Husband's adult daughter, but the Facebook posts indicated that it belonged to the Husband. Many things can be uncovered via social media in Family Law matters.

- Overseas searches particularly if the other party has a connection with another country.

- Use of Private Investigators.

What documents do you need to obtain and what to look for?

The documents you should seek from your client and other party include the following:

- income taxation returns and assessments;
- documents about any superannuation interest of the party;
- the financial statements of any corporation or Trust including balance sheets, profit and loss accounts, depreciation schedules and taxation returns;
- the corporation's most recent annual return that lists the directors and shareholders;
- the corporation's constitution and any amendments;
- details of trust distributions, loan agreements, Division 7A loans;
- the trust deed, including any amendments;

- business activity statements of the business;
- bank and financial records including copies of any loan applications, bank officer's notes, correspondence, memoranda and any other dealings the other party has had with a bank (these will have to be subpoenaed) – these may disclose what the other party has told the bank they are worth in terms of assets, liabilities and income – examining bank and accountant's records may also indicate who is in control of an entity or trust especially in cases alleging the other party is in effective control of an entity or trust or that it is the person's alter ego or a sham;
- Credit card records may show the level of spending by the other party especially if it is extravagant compared to the person's declared income;
- business and other insurance policies – these are likely to contain details of the assets insured and values of those assets;
- Accountant's files (these may have to be subpoenaed);
- Solicitor's Trust and office ledgers;
- Solicitor's files – conveyancing files, commercial files and tax planning files not related to the family law matter;
- New partner's documents;
- Employment records;
- Documents from any previous Family Law proceedings the party may be involved in – In a trial I as in earlier this year we sought a copy of the Application for Consent Orders and the Property Orders made by consent in the Husband's previous marriage as there as a dispute as to the Husband's assets at the commencement of the relationship;
- Minutes of Director's meetings;
- Documents relating to share-trading including exchange documents and Broker's documents;
- If assets have been sold just prior to or after separation, then all sale documents should be sought including any solicitor's files relating to a sale or a purchase;

Once disclosure has been obtained a lawyer can start to sift through the documents to try and ascertain the extent of the parties' assets. It is at this stage, particularly in complex matters that a forensic accountant may be required to look at the various documents and statements to

assess the pool or attempt to trace monies or other property that have been hidden by the other party.

DISCLOSURE

The first step that a lawyer needs to take in trying to ascertain all of the assets and financial resources of the parties is to obtain full instructions from the client as to what the client believes the asset pool to be. Have your client provide you with all relevant financial documents relating to the matter and carefully consider those documents. In some matter a consideration of those documents may raise questions that require further consideration. For example, when considering bank account statements, there may be transactions to other accounts that are not known to your client which may need to be explored.

It is important to explain to your client their obligations in relation to disclosure pursuant to the Federal Circuit and Family Court Rules and the Central Practice Direction.

The Central Practice Direction

The Federal Circuit and Family Court of Australia commenced operation on 1 September 2021 and on that day the Central Practice Direction of the court also came into operation. The Direction applies to all family law applications filed in or transferred to the court (except appeals, matters arising from arbitration, Divorce applications and Consent Order applications)[3] The purpose of the Direction is to outline the core principles applicable to family law proceedings and to establish a consistent national case management system in the

[3] Federal Circuit and Family Court Family Law Management Central Practice Direction at 2.1 and 2.2

Federal Circuit and Family Court of Australia that[4]:

(a) reduces unnecessary cost and delay in family litigation and facilitates proceedings being conducted with the least possible acrimony in order to minimise harm to children and families;

(b) ensures the safety of families and children; and

(c) achieves the overarching purpose of the family law practice and procedure provisions of the *Federal Circuit and Family Court of Australia Act 2021* (Cth) (**FCFCOA Act**), being to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.

A summary of some of the purpose of the Directions which apply to parties and their lawyers are that:

- **Parties should not commence or take steps in proceedings without first considering the principles set out in this Practice Direction[5]**
- **Parties and their lawyers are expected to fully comply with that statutory obligation in all cases without exception, regardless of the complexity of the case or the issues in dispute[6]**
- **In everything they do, parties and lawyers are expected to approach proceedings in a manner directed towards identifying the issues in dispute and ascertaining the most efficient, including cost efficient, method of resolution or determination. This includes giving proper consideration to identifying the issues in dispute, complying with their obligation to provide full and frank disclosure in a timely manner…. engaging in productive and resolution-focused communication with other parties,**

[4] Ibid at 1.1
[5] Ibid at 1.2
[6] Ibid at 1.3

making appropriate admissions and pressing only issues of genuine significance[7].

- **Any failure to comply with these requirements may attract costs orders against parties and/or practitioners and other consequences including, in appropriate cases, the drawing of adverse inferences, the making of a summary decree pursuant to section 45A of the *Family Law Act 1975* (Cth) (Family Law Act), or orders providing that a matter be heard on an undefended basis[8].**

The Core Principles

There are 10 Core Principles which are set out in the Central Practice Direction. I only propose to set out the Core Principles most relevant to the topic, but I note that **Core Principle 2** sets out Parties', Lawyers' and the Court's obligations and overarching purpose[9]. **Core Principle 6** deals with Non-compliance and this is important for lawyers and parties as there are serious implications and penalties for non-compliance. On that basis I will set out the principle in full here:

CORE PRINCIPLE 6 – Non-compliance[10]

[7] Ibid at 1.4
[8] Ibid at 1.5
[9] Ibid at 3.3 to 3.5
[10] Ibid at 3.10-3.11

- Non-compliance with orders, Practice Directions, the Family Law Rules or the obligations imposed on parties and their lawyers to conduct proceedings in a manner consistent with the overarching purpose will be taken seriously by the Court. Non-compliance may lead to serious consequences for parties and for their lawyers including, if relevant, liberty being granted to the compliant party to proceed on an undefended basis, and/or costs orders being awarded against parties and/or their lawyers.
- If, at any time during the course of proceedings, the Court considers that a party or their legal representatives have pursued or defended an Application, Response or Reply without legal foundation and/or other than in good faith or without making a reasonable and genuine attempt to resolve the issue(s) in dispute where safe to do so, the Court may:

  (d) refer the Application, Response or Reply to a judicial officer for consideration of dismissal or determination on an undefended basis;

  (e) dismiss the Application, Response or Reply;

  (f) dismiss all or part of the case;

  (g) set aside a step taken or an order made;

  (h) prohibit a party from taking a further step in the case until the occurrence of a specified event;

  (i) determine the Application, Response and/or Reply on an undefended basis;

  (j) adjourn the Application, Response and/or Reply to allow a party to file affidavit evidence; and/or

  (k) make such other orders as are appropriate, including orders for costs, **which may include an order for costs against a party's legal representatives**.

Core Principle 8 is relevant to disclosure as it sets out that Issues in the case are to be narrowed to those issues genuinely in dispute. Paragraph (a) sets out as follows:

(a) all parties are required to make full and frank disclosure to assist the Court in the determination of the dispute or the parties in the resolution of the dispute;

<u>Case Management – Pre action requirements</u>

The Central Practice Direction sets out obligations on parties (and in turn their lawyers) that must be met before proceedings are issued in court. The Directions states that:

1. Prior to commencing proceedings, parties are required to:

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

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

2. A Genuine Steps Certificate in the approved form must be filed with an Initiating Application or Response to Initiating Application, outlining:

   (a) the filing party's compliance with the pre-action procedures; and

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

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

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

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

<u>Pre–action Procedures</u>

There are pre-action procedures that must be attempted before any party can commence property proceedings pursuant to the Federal Circuit and Family Court of Australia (Family

Law) Rules 2021. The Rules provide that Subject to subrules (2) and (3), before starting a proceeding, each prospective party to the proceeding must comply with the pre-action procedures.

The purpose of the procedures is for the parties to first make every effort possible to resolve property matters between them without going to court. There can be costs implications for any party who starts proceedings without first undertaking the pre-action procedures (though in practice costs orders are rarely made with regard to non-compliance with pre-action procedures). There are many matters that will settle at this stage without the matter having to go to court. The objectives of the pre-action procedures as follows:[11]

(a) to encourage early and full disclosure in appropriate proceedings by the exchange of information and documents about the prospective proceeding;

(b) to provide parties with a process to avoid legal action by reaching a settlement of the dispute before starting a proceeding;

(c) to provide parties with a procedure to resolve the proceeding quickly and limit costs;

(d) to ensure the efficient management of proceedings in the court, if proceedings become necessary;

(e) to encourage parties, if proceedings become necessary, to seek only those orders that are reasonably achievable on the evidence;

(f) to give effect to the overarching purpose of the family law practice and procedure provisions as provided by section 67 of the *Federal Circuit and Family Court of Australia Act 2021*.

The pre-action procedures[12] provide that each prospective party to a case in the Federal

[11] Federal Circuit and Family Court of Australia (Family Law) Rules 2022 – Schedule 1(4)
[12] Ibid, Schedule 1 Part 1

Circuit and Family Court of Australia is required to make a genuine effort to resolve the dispute before filing an application to start proceedings by following the pre-action procedures which can be summarized as follows:

a) participating in dispute resolution, such as negotiation, conciliation, arbitration and counselling.
b) exchanging a notice of intention to claim and exploring options for settlement by correspondence; and
c) **complying, as far as practicable, with the duty of disclosure**.

The court expects all parties to attempt to resolve their matter, or at least determine the issues in dispute, before filing in court. There are some limited exceptions to this requirement as it is not always appropriate for everyone to complete these procedures[13].

Dispute Resolution

Each prospective party (to the extent that it is safe to do so) must:

(a) cooperate for the purpose of agreeing on an appropriate dispute resolution service; an
(b) make a genuine effort to resolve the dispute by participating in dispute resolution.

Notice Of Intention to start a proceeding

In the event that there is no appropriate dispute resolution service available to the parties, a party fails or refuses to participate or the parties re unable to reach agreement by dispute resolution then a written notice of the Applicant's intention to start a proceeding must be sent. The Notice of Intention to start a proceeding must set out:

(a) the issues in dispute; and
(b) the orders to be sought if proceedings are started; and
(c) a genuine offer to resolve the issues; and
(d) a time (the ***nominated time***) that is at least 14 days after the date of the notice within which the proposed respondent must reply to the notice

[13] Ibid, Schedule 1 (3)

Disclosure

The Schedule[14] provides that the parties to a case have a duty to make full and frank disclosure of all information relevant to the issues in dispute in a timely manner. In attempting to resolve their dispute, parties should, as soon as practicable on learning of the dispute and, if appropriate, as a part of the exchange of correspondence under clause 3 of these pre-action procedures, exchange:

- a schedule of assets, income and liabilities;
- a list of documents in the party's possession or control that are relevant to the dispute; and
- a copy of any document required by the other party, identified by reference to the list of documents.

The schedule encourages parties to refer to the Financial Statement and Rule 6.6 as a guide for what information to provide and documents to exchange.

The documents that the court would consider appropriate to include in the list of documents and exchange in a property settlement case are include[15]:

- copies of the party's 3 most recent taxation returns and assessments;
- documents about any superannuation interest of the party;
- copies of the financial statements of a corporation or Trust for the 3 most recent financial years, including balance sheets, profit and loss accounts, depreciation schedules and taxation returns;
- a copy of the corporation's most recent annual return that lists the directors and shareholders;
- a copy of the corporation's constitution and any amendments;
- a copy of the trust deed, including any amendments;

[14] Ibid, Schedule 1 (4)
[15] Ibid, Rule 6.06 (3) and (8)

- copies of business activity statements for the last 12 months;
- a market appraisal of the value of any item of property in which a party has an interest.

Lawyers' obligations

Part 6 of the schedule sets out a lawyers' obligations pursuant to the pre-action procedures which are as follows:

(1) Lawyers must, as early as practicable:

(a) advise clients of ways of resolving the dispute without starting legal action; and

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

(c) endeavour to reach a solution by settlement rather than start or continue legal action, subject to this being in the best interests of the client and any child; and

(d) notify the client if, in the lawyer's opinion, it is in the client's best interests to accept a compromise or settlement that, in the lawyer's opinion, is a reasonable one; and

(e) in cases of unexpected delay, explain the delay and whether or not the client may assist to resolve the delay; and

(f) advise clients of the estimated costs of legal action (see rule 12.05); and

(g) advise clients about the factors that may affect the court in considering costs orders; and

(h) give clients documents prepared by the court about:

(i) the legal aid services and dispute resolution services available to them; and

(ii) the legal and social effects and the possible consequences for children of proposed litigation; and

(i) actively discourage clients from making ambit claims or seeking orders that the evidence and established principles, including recent case law, indicate is not reasonably achievable.

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

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

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

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

So, the first step for any lawyer acting for a party in a property matter is explain these rules to your client and explain to your client the importance of providing disclosure to the other party as per the Rules. It is extremely important to explain this to your client at the commencement of the matter and the explain to them the full extent of the duty of disclosure obligation. It does not only involve documents they have in their possession. It is common to hear a client say, "I don't have these bank statements or other documents". The duty to disclose is not limited to documents in the client's possession. They may be documents in the power, possession or control of the party. It may be necessary for the client to go to the bank and obtain bank or mortgage statements or to go their accountant to obtain income tax returns or receipts or invoices, or to seek documents from Centrelink or other Government bodies.

The advice you give your client at every stage where disclosure is relevant should be given in conference but also put in writing at every stage. You should also explain to your client that you will be seeking similar disclosure from the other party. If the other party does not provide the documents requested, then the documents should be sought pursuant to the Pre-action procedures.

There is a provision in the rules for costs to be sought against a party that does not comply with the Pre-action procedures. In the past it was rare for a court to make an order for costs in those circumstances but with the Central Practice Direction, the Court will now make orders for costs in circumstances where one party has not complied with the pre-action procedures. This was something that had to change, and the new rules made these provisions stronger.

The objects of these Pre-action procedures are to encourage full disclosure between the parties to avoid the parties having to take legal action in resolving their matters and to have a quick resolution of matters so as to limit costs. In the event that a matter has to go to court then if the procedures have been complied with then it makes it easier for the parties to clearly identify the issue in the matter, to seek only orders that are reasonably achievable and therefore reduce both the duration and cost of any proceedings. It is clear that if all prospective family law litigants complied with the procedures, then it would greatly assist in the efficient management of cases in the Court. It would reduce the amount of potential interim hearings a matter would require (in relation to issues such as disclosure) and possibly reduce the length of trials.

Compliance with Pre-Action Procedures

Part 2 of the pre-action procedures set out the requirements of compliance with the procedures.

(1) The court regards the requirements set out in these pre-action procedures as the standard and appropriate approach for a person to take before filing an application in a court.

(2) If a proceeding is subsequently started, the court may consider whether these requirements have been met and, if not, any consequences.

(3) The court may take into account compliance and non-compliance with the pre-action procedures when it is making orders about case management and considering orders for costs (see subrule 1.33(2) and paragraphs 1.34(2)(b) and 12.15(1)(b)).

(4) Unreasonable non-compliance may result in the court staying the proceeding pending compliance or ordering the non-complying party to pay all or part of the costs of the other party or parties in the proceeding.

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

Note: Examples of non-compliance with the pre-action procedures include the following:

(a) not sending a written notice of proposed application;

(b) not providing sufficient information or documents to the other party;

(c) not following a procedure required by the procedures;

(d) not responding appropriately within the nominated time to the written notice of proposed application;

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

Duty of Disclosure during Family Law Proceedings

Part 6 of the Family Law Rules 2022 sets out the disclosure obligations of each party to a Proceeding. Each party to a case has a duty to the court and to each other party to give full and frank disclosure of all information relevant to the case, in a timely manner. It is important to note that the duty of disclosure applies from the start of the proceeding and continues until the proceeding is finalised[16].

Rule 6.03 provides that the duty of disclosure applies to each document that:

a) is or has been in the possession, or under the control, of the party disclosing the document; and

b) is relevant to an issue in the case.

The duty of disclosure in relation to property or financial matters is set out in Rule 6.06

[16] Ibid, Rule 6.01 (2)

which provides for each party to make full and frank disclosure to the other. A party to a financial case must make full and frank disclosure of the party's financial circumstances, including:

a) the party's earnings, including income that is paid or assigned to another party, person or legal entity;
b) any vested or contingent interest in property;
c) any vested or contingent interest in property owned by a legal entity that is fully or partially owned or controlled by a party;
d) any income earned by a legal entity fully or partially owned or controlled by a party, including income that is paid or assigned to any other party, person or legal entity;
e) the party's other financial resources;
f) any trust:
    (i) of which the party is the appointor or trustee;
    (ii) of which the party, the party's child, spouse or de facto spouse is an eligible beneficiary as to capital or income;
    (iii) of which a corporation is an eligible beneficiary as to capital or income if the party, or the party's child, spouse or de facto spouse is a shareholder or director of the corporation;
    (iv) over which the party has any direct or indirect power or control;
    (v) of which the party has the direct or indirect power to remove or appoint a trustee;
    (vi) of which the party has the power (whether subject to the concurrence of another person or not) to amend the terms;
    (vii) of which the party has the power to disapprove a proposed amendment of the terms or the appointment or removal of a trustee; or
    (viii) over which a corporation has a power mentioned in any of subparagraphs (iv) to (vii), if the party, the party's child, spouse or de facto spouse is a director or shareholder of the corporation.
g) any disposal of property (whether by sale, transfer, assignment or gift) made by the party, a legal entity mentioned in paragraph (c), a corporation or a trust mentioned in paragraph (f) that may affect, defeat or deplete a claim:

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

(ii) since the final separation of the parties; and

h) liabilities and contingent liabilities.

Exceptions to full and frank disclosure

The Rules[17] provide that a party can object to the production of a document if that party claims:

- privilege from production of a document; or
- that the document is not longer in their possession or control;
- that the document has already been provided.

Specific Questions

The Family Law Rules provide for specific questions to be asked of the other party. These can be very useful in ascertaining further information once full disclosure has been obtained from the other party. Rule 6.23 of the Rules provides for Answers to specific questions.

Service of specific questions

After a case has been allocated to a first day before a Judge, a party may serve on another party a request to answer specific questions. The Rules provide that[18]:

- A party may only serve one set of specific questions on another party.
- The specific questions must:
  (a) be in writing;
  (b) be limited to 20 questions (with each question taken to be one specific

[17] Ibid, Rule 6.15
[18] Ibid, Rule 6.22

question); and

(c) not be vexatious or oppressive.

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

Answering specific questions

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

Orders in relation to specific questions[19]

- A party may apply for an order:
  (a) that a party comply with rule 6.23 and answer, or further answer, a specific question served on the party under rule 6.22;
  (b) determining the extent to which a question must be answered;
  (c) requiring a party to state specific grounds of objection;
  (d) determining the validity of an objection; or
  (e) that a party who has not answered, or who has given an insufficient answer, to a specific question be required to attend court to be examined.

- In considering whether to make an order, the court may take into account whether:

[19] Ibid, Rule 6.24

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

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

(i) the specific questions are relevant to an issue in the case.

Compliance with Full and Frank Disclosure

The Rules of both courts set out provisions for each party to make full and frank disclosure to the other and this starts with the pre-action procedures right through to the rules for full and frank disclosure. In both Court there is an overarching obligation to provide full and frank disclosure and that obligation is an ongoing one.

Of course, there will be matters where one of the parties may not provide full and frank disclosure and may not produce to the other party all relevant financial documents. In a matter where one party is attempting to hide assets then that party is not going to be willing to provide those documents or may deny that there any such documents to produce.

There are a number of ways that such non-disclosure or compliance can be dealt with. One is by the use of Subpoenas and the other is to seek compliance pursuant to the Rules. A common problem in many matters where there has not been compliance is that the lawyers acting in the matter do not issue proceedings to enforce the orders or to have the other party dealt with for non-compliance. I am constantly amazed at the number of matters that I am briefed in to do a Final Hearing where there has not been full and frank disclosure by one party, but nothing has been done about it to get that party to comply. It is not appropriate to be seeking such documents at the commencement of a final hearing or to cross examine a party about the location of those documents (of course there are cases where that will be unavoidable).

The Family Law Rules make provision for dealing with non-compliance regarding disclosure. Rule 6.17 under the heading Consequences of non-disclosure which provides that if a party does not disclose a document as required under these Rules:

(a) the party:

(i) must not offer the document, or present evidence of its contents, at a hearing or trial without the other party's consent or the court's permission;

(ii) may be guilty of contempt for not disclosing the document; and

(iii) may be ordered to pay costs; and

(b) the court may stay or dismiss all or part of the party's case.

Note 1: Under rule 6.42 a party who discloses a document under this Part must produce the document at the trial if a notice to produce has been given.

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

Also note that Rule 6.02 provides that a party to proceedings must file a written undertaking with the court that the party has complied with disclosure and will continue to do so. It also sets out penalties for a party that if the party makes a statement or signs an undertaking the party knows, or should reasonably have known, is false or misleading in a material particular.

6.02 Undertaking by party

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

(a) stating that the party:

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

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

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

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

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

Penalty: 50 penalty units.

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

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

(4) A notice under subrule (1) must be in accordance with the approved form and must be filed before the first court date, unless the court otherwise orders.

In effect it may be necessary to issue an application to find the non-disclosing party in contravention of the orders of the court or to have the party found guilty of contempt of court. It is very important to make any such application before the matter proceeds to a Final Hearing as it can be important in the event that the party then continues not to disclose in terms of getting the Judge to find that there has been a deliberate non-disclosure by a party.

Deliberate non – disclosure by a party

The obligation to make full and frank disclosure is fundamental to the operation of the Family Law Act. If there is no disclosure on important and relevant matters then it is impossible to have a just and equitable outcome. In the matter of ***Briese (1986) FLC 91-713,*** Smithers J said:

> *"that in financial proceedings each party must make full and frank disclosure of all material facts and that such obligation is fundamental to the whole operation of the Family Law Act in financial cases and furthermore, that mere compliance with Rules of Court or Practice Directions does not alter the basic principle of the need for full and frank disclosure"*

That passage was later approved by the Full Court in the matter of ***Oriolo and Oriolo (1985) FLC 91-713.*** As a result, if it can be proven that one of the parties in a matter has deliberately not disclosed documents then there can be consequences for the non-disclosing party. In the matter of ***Weir and Weir (1993) FLC 92-338 at para 33*** the Full Court looked at various cases involving non-disclosure and commented that in such cases:

> "the Court *should not be unduly cautious about making findings in favour of the innocent party. To do otherwise might be fraught to provide a charter for fraud in proceedings of this nature"*

The Full Court then went further and said at 35:

> *"We should have thought that the Court's jurisdiction to make an order going beyond the identified property arises once there is sufficient evidence to support a finding that the party has not made a full disclosure of his or her assets*."

In the matter of ***Bateman & Bowe [2013] FamCA 253 at para 26*** Murphy J said:

> *"The importance of disclosure, and the ramifications of a failure to disclose, or disclose adequately, have repeatedly been referred to in decisions of the Full Court. Failure to disclose is always serious and, often, has ramifications for findings generally in respect of credibility and can lead to robust views being taken when evidence ought to be before the Court, but by reason of lack of disclosure, is not."*

The cases establish that once a court makes a finding that a party has deliberately made non-disclosure of assets then the court can either ascribe a particular value to a non-disclosed asset if there is sufficient evidence of the amount or the value of the asset or otherwise make a further adjustment of property to the other party to take into account the non-disclosure. This could be done pursuant to Section 75 (2) (o) of the Family Law Act which provides that amongst all the other factors in that section a court can take into account:

> "any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account"

In ***Lambert v Jackson [2010] FamCA 357*** Watt J made an adjustment in favour of the Wife as a result of the Husband's deliberate lack of disclosure. In discussing making an adjustment his Honour made the following comments referring to the unreported decision of the Full Court in ***Kannis (2002) 30 Fam LR 83***; **FLC 93-135; [2022] FamCA 1150.**

> *347. "I find that the husband, prima facie with the assistance of his current solicitor, contrived to prevent the court and his wife from being aware of something that he knew was relevant, namely, the arrangements he had entered into with Mr. EN.*
>
> *348. As to the quantum of adjustment the lack of financial disclosure should bring by way of example, senior counsel for the wife referred to a judgment of Holdan CJ in Kannis (8.5.2001; unreported). His Honour had made a 10 percent adjustment (in a pool of about $33,000,000) for the non-disclosure by the husband relying upon ss75(2) (o) FLA.*
>
> *349. In Kannis, although the wife did not find the $15,000,000 to $20,000,000, she was asserting was hidden, Holden CJ found she was fully justified in her pursuit of hidden assets, having regard to the husband's non-disclosure. The 10 percent*

> *adjustment made by Holden CJ did not represent a finding as to the amount of the undisclosed assets, but was an adjustment made to do the best his Honour could, given that he did not know how much was undisclosed."*

The Court has been clear and consistent on the implications of non-disclosure by a party. Where the Court considers that non-disclosure has been considerable and can readily conclude that the asset pool is larger than disclosed, it is appropriate to err on the side of generosity to the party disadvantaged by the non-disclosure. In the case of **Tethys & Tethys (2014) 52 Fam LR 110**, the Full Court summarized it as follows:

[40] We have already mentioned her Honour's reference to the well-established authority of Weir and in particular at 79,593 where the court said:

> "It seems to us that once it has been established that there has been deliberate non-disclosure, which follows from his Honour's findings in this case, then the Court **should not be unduly cautious about making findings in favour if the innocent party. To do otherwise might be thought to provide a charter for fraud in proceedings of this nature."**

[41] Further her Honour said after referring to the case of Kannis at [36]:

> "…where the court is satisfied the whole truth has not come out it might readily conclude the asset pool is greater than demonstrated. In those circumstances it may be appropriate to err on the side of generosity to the party who might be otherwise be seen to be disadvantaged by the lack of complete candour."

In the case of **Kannis**, the Full Court applied **Weir** and found that:

> "**Whether the non-disclosure is wilful or accidental, is a result of misfeasance, or malfeasance or nonfeasance, is beside the point. The duty to disclose is absolute.** Where the Court is satisfied the whole truth has not come out it might readily conclude the asset pool is greater than demonstrated. In those circumstances it may be

> appropriate to err on the side of generosity to the party who might be otherwise be seen to be disadvantaged by the lack of complete candour"

In the case of **Trang & Kingsley [2017] FamCAFC 120,** the Full Court again confirmed that the court has wide powers to deal with parties who fail to provide full and frank disclosure.

The facts of that case were set out by Kent J (one of the appeal judges):

- Mr. Kingsley ("the husband") and Ms. Trang ("the wife") commenced cohabitation in 1992, married in 1993 and separated in March 2014. Their marriage produced three children aged 18, 17 and 13 years respectively at trial.

- On 19 September 2016 Cronin J determined property settlement proceedings between the parties pursuant to s79 of the Family Law Act 1975. His Honour found that the property interests of the husband, including prepaid legal fees of $35,000, had a total value of $793,000 and constituted the entirety of the property interests of the parties capable of being both identified and valued, save for the wife's superannuation interest worth approximately $35,000.

- A significant issue at trial was the wife's use of funds in the period immediately prior to separation, and in the post-separation period. The trial judge found that the total sum involved was probably in excess of $250,000.

- Based upon findings, unchallenged on this appeal, as to the wife's abject failure to make full and frank disclosure of her financial circumstances and likewise unchallenged findings as to the wife's failure to provide credible evidence, the trial judge was unable to specifically identify and value the property interests of the wife, including interests in real property in Country A the wife was found to have, save for her superannuation interest.

- His Honour determined that it would not be just and equitable to alter the property

interests of the husband in favour of the wife and dismissed the wife's application for such orders.

The Full Court agreed with Cronin j's approach.

Overarching purpose: Responsibility of parties & lawyers (Rule 1.04)

The Family Law rules set out the overarching purpose of the rules and the responsibility of parties to proceedings and lawyers. Rule 1.04 sets out the following:

1.04 Overarching purpose

(1) The overarching purpose of these Rules, as provided by section 67 of the Federal Circuit and Family Court Act, is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.

Note 1: These Rules must be interpreted and applied, and any power conferred, or duty imposed by them must be exercised or carried out, in the way that best promotes the overarching purpose (see subsection 67(3) of the Federal Circuit and Family Court Act).

Note 2: See sections 190 and 191 of the Federal Circuit and Family Court Act in relation to the overarching purpose of the Rules of the Federal Circuit and Family Court (Division 2). See also the *Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021* which applies these Rules with modifications.

(2) Parties to family law proceedings must conduct the proceeding (including negotiations for settlement of the dispute to which the proceeding relates) in a way that is consistent with the overarching purpose.

Note: See subsection 68(1) of the Federal Circuit and Family Court Act.

(3) A party's lawyer must, in the conduct of a proceeding before the court (including negotiations for settlement) on the party's behalf:

(a) take account of the duty imposed on the party referred to in subrule (2); and

(b) assist the party to comply with the duty.

Note: See subsection 68(2) of the Federal Circuit and Family Court Act.

Costs orders against lawyers (Rule 12.15)

12.15 Costs order against lawyer

(1) The court may make an order for costs against a lawyer if the lawyer, or an employee or agent of the lawyer, has caused costs to be incurred by a party or another person, or to be thrown away, because of:

(a) a failure to comply with these Rules or an order; or

(b) a failure to comply with a pre-action procedure; or

(c) improper or unreasonable conduct; or

(d) undue delay or default.

(2) A lawyer may be in default if a hearing may not proceed conveniently because the lawyer has unreasonably failed:

(a) to attend, or send another person to attend, the hearing; or

(b) to file, lodge or deliver a document as required; or

(c) to prepare any proper evidence or information; or

(d) to do any other act necessary for the hearing to proceed.

(3) An order under subrule (1) may be made on the initiative of the court, or on application by a party to the proceeding or by another person who has incurred the costs or costs thrown away.

(4) An order under subrule (1) may include an order that the lawyer:

(a) not charge the lawyer's client for work specified in the order; or

(b) repay money that the client has already paid towards those costs; or

(c) repay to the client any costs that the client has been ordered to pay to another party or another person; or

(d) pay the costs of a party; or

(e) repay another person's costs found to be incurred or wasted.

12.16 Notice of costs order

(1) Before making an order for costs against a lawyer or other person who is not a party to a proceeding, the court must give the lawyer or other person a reasonable opportunity to be heard.

(2) If a party who is represented by a lawyer is not present when an order is made that costs are to be paid by the party or the party's lawyer, the party's lawyer must give the party written notice of the order and an explanation of the reason for the order.

Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

Paramount duty to the court and the administration of justice (Rule 3.1)

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

Other fundamental ethical duties (RULE 4.1)

A solicitor must also:

1. act in the best interests of a client in any matter in which the solicitor represents the client,
2. be honest and courteous in all dealings in the course of legal practice,
3. deliver legal services competently, diligently and as promptly as reasonably possible,
4. avoid any compromise to their integrity and professional independence, and
5. comply with these Rules and the law.

Frankness in court (RULE 19.1)

1. A solicitor must not deceive or knowingly or recklessly mislead the court.
2. A solicitor must take all necessary steps to correct any misleading statement made by the solicitor to a court as soon as possible after the solicitor becomes aware that the statement was misleading.

Best Practice Guidelines for lawyers doing family law work (2nd edition)

(Family Law Council and Family Law Section of the Law Council of Australia)

Duties to the Court (Guideline 12)

12.1 Lawyers should:

- note that as officers of the Court their duties to the Court may conflict with their instructions from the client. The lawyer may in some circumstances have to cease to act for a client, for example, if a client is unwilling to make a full and frank disclosure of relevant facts or documents;
- ensure that they are not put in a position where they are witnesses in the proceedings, and
- ensure that undertakings made to the court are fulfilled or ensure that undertakings which become inappropriate are discharged.

Disclosure (Guideline 13)

13.1 The parties must make full and frank disclosure of all material facts and relevant documents. This requirement is 'ongoing', that is, if fresh material and relevant documents come to light later in the case, these must also be disclosed.

13.2 The lawyer should advise the client in writing of the obligation of disclosure and explain that the obligation is ongoing.

13.3 The lawyer should direct the client's attention to the relevant provisions of the *Family Law Act*, Rules and Regulations and the relevant case law, and advise the client of the possible consequences of failing in this obligation. The Family Law Rules emphasis the duty of disclosure

13.4 If the client declines to provide appropriate disclosure, the lawyer is bound by both a duty of confidentiality to the client and a duty not to mislead the court. If non-disclosure may result in the lawyer misleading the court, the lawyer should cease to act for the client.

Duties of Lawyers to the Court[20]

Lawyers have an overriding duty to the court which includes[21]:

1. A Duty of Disclosure which includes a duty never to mislead the court.
2. A duty not to abuse the court's process
3. A duty not to corrupt the administration of justice
4. A duty to conduct cases efficiently and expeditiously.

CONCLUSION

It is fundamental in any Family Law case that there be full and frank disclosure by both parties in the proceedings. It is necessary to have such disclosure to be able to establish the property that is available for adjustment by a court. In that event that one party does not disclosure then it is important to go through the various procedures set out in the Family Law Rules to attempt to obtain from the other party. Not only do the Rules provide that parties are to provide full and frank disclosure but there are also implications for a party that does not comply if a court makes findings that they have deliberately not disclosed. More importantly there are obligations on lawyers to comply with the Family Law Rules and to ensure that their client provides full and frank disclosure in a matter. The disclosure rules set out in the Family Law Rules and in particular the Pre-Action procedures if properly complied with and enforced can ensure that matters proceed in a more efficient way where both parties provide disclosure to the other very early in proceedings and even prior to proceedings being issued. It will be interesting to see if the pre-action procedures remain part of the new rules for the "new" court and whether the court will enforce them and push for lawyers and litigants to comply with them (with costs orders to follow against litigants and lawyers who do not comply with them).

[20] Judges on Ethics, The Honourable Justice EDW Alstergen, The Honouble Justice R McK Robson and His Honour Judge Josh Wilson QC at I University, Downtown Campus – 25 February 2019
[21] See Giannarelli v Wraith (1988) 165 CLR 543; Attwells v Lackson Lalic Lawyers Pty Ltd [2016] HC 16