

## SESSION OVERVIEWS

As at 24 July 2022

### MONDAY 15 AUGUST 2022

0900-1030

#### Plenary 1: State of the Nation

This important session is the traditional way in which each National Conference is opened.

The Chair of the Family Law Section, Di Simpson, will formally open the conference and address issues of importance to FLS members and the challenges ahead for our profession.

The Head of Jurisdiction, the Honourable Justice Alstergren, will then review the work of the Courts especially in light of the 2021 amendments and will outline his vision for the future operation of the Court and the family law system.

The Commonwealth Attorney-General will present his plans for the new Government's engagement with the Court and the family law system and will highlight any policy issues that are of interest to the Government.

This is an essential session for every delegate who wants to better appreciate what the future may hold for all of us.

1100-1200

#### Plenary 2: Peter Nygh Memorial Lecture: Family Law and Equity - Friends, Enemies or Frenemies?

This plenary is named in honour of the late Dr Peter Nygh AM, an outstanding academic and highly respected former judge of the Family Court of Australia, who passed away in 2002. The Lecture has been delivered in his memory and honour since 2004.

Justice Michelle Gordon of the High Court of Australia will deliver a paper entitled, "Family Law and Equity - Friends, Enemies or Frenemies?"

The High Court has considered the interplay between common law and equitable principles and those arising in proceedings pursuant to the Family Law Act 1975 in a number of recent judgments, including *Stanford*, *Thorne & Kennedy*, *Clayton & Bant* and *Hsiao and Fazarri*, and this session is a wonderful opportunity to learn from one of the country's leading jurists.

The following summary has been prepared by Her Honour:

Equity has increasingly been used over the last decade by courts to soften the property settlement provisions of the Family Law Act 1975. There is an historical irony to this state of affairs - the statutory provisions were originally enacted to address the shortcomings of equity, particularly in relation to the recognition of non-financial contributions to property. Most property settlement disputes, of course, are resolved outside the courts where there may be little scope for equitable principles to play a part. What is the role of equity in family law? What is the role of equity in the Family Law Act? Are the answers the same and if not, why not? What impact, if any, might recent proposals for family law reform have on equity's influence in family law and under the Family Law Act? Is it a new world or merely the next stage of a longstanding dialogue between equity and statute in family law and under the Family Law Act?

1200-1300

### Plenary 3: Wellbeing Session - Coping with being a Family Lawyer

The law is not an easy profession. The reality of being a lawyer is very different to perception. Long hours, competing deadlines and managing clients information can often be challenging and all add to the stress that practitioners feel.

However family lawyers experience a unique level of stress, given they are assisting people through the most personal and difficult of experiences; often overlaid with impossible complexities including mental health issues, drug and alcohol addiction and family violence.

It would be remiss to think that dealing with all of these stressors does not leave a mark in some way.

The adversarial nature of the law, combined with the high achieving nature of those that practice within it, often leaves little room for self-reflection, balance and an admission that things are, perhaps, not ok.

The panel, led by the indomitable Fran Kelly, will have an open and frank discussion as to the challenges and stressors of working in the family law jurisdiction.

More than that, however, the panel wish to promote meaningful cultural changes, which can only be achieved by advocacy, education and hands-on pastoral care.

The discussion will focus on the important of employers adopting a systemic and practical approach to institutional/corporate/individual wellbeing.

The message to both family lawyers and their employers is that an ad hoc approach to wellbeing does not work, or certainly does not work as effectively as a policy driven systemic approach.

1400-1500

### Plenary 4: Resist and Refuse - When Children Won't Go

Most family lawyers have been asked "do I have to make the children go?" or the flip side "what can I do to make the children see me?". Children resisting or refusing to see one of their parents after separation is not uncommon. It often occurs in the context of serious allegations made by one or both parents, complex dynamics, difficult personalities and a multitude of factors pre and post separation.

While there are arguments from parents and sometimes their lawyers around one parent 'alienating' the children or the children having good reason for rejecting their relationship with one parent including family violence, the situation can often be complex.

In this plenary session, American forensic psychologist Dr Robert Simon and clinical psychologist Dr Jennifer Neoh explore the complex factors which may be contributing to a child's resistance to a parent and some insights into how you might assist your client and the court in protecting children from family violence and determining best interests.

1530-1630

### Concurrent Sessions

#### Concurrent Session 1A: Banging Down the Rice & Asplund Door - How Hard is it?

The 1979 decision of in Rice v Asplund would have to be one of the most well-known decisions in family law.

However, as is often said each case will turn on its own particular set of facts.

In this session, Justice Alice Carter will discuss:

- Cases where the court has found there to be a significant change of circumstances, warranting a revisiting of previous parenting orders, and those that have not.
- The indicia that might give rise to a successful application to vary or discharge previous parenting orders.
- The evidence you should consider putting before the court if you are acting for a parent wanting to revisit previous parenting orders.
- The evidence you should consider putting before the court to successfully argue that the rule in Rice v Asplund should apply.

## Concurrent Session 1B: The Rise and Rise of Cryptocurrencies - are there Pitfalls Ahead for Family Lawyers?

Cryptocurrency is increasingly common in family law matters. But what is it, and how do you buy, use, value, secure or transfer it?

In this session, our speakers Barbara Vrettos and Jamie Burreket will provide a family law guide to digital cash and relieve your block chain and binary data bamboozlement.

## Concurrent Session 1C: The End of Family Lawyers: Artificial Intelligence - *Interactive Session*

Artificial Intelligence is no longer the province of science fiction. It is being used in various professions and industries to successfully predict patterns of behaviour and outcomes.

The law is one field where artificial intelligence is being used globally to assist in the giving of advice and predicting judicially decided outcomes.

In Australia, National Legal Aid have developed the online platform called AMICA, to assist separating couples resolve their parenting and financial disputes with the use of artificial intelligence.

In this session Professor Tania Leiman will discuss the big picture as to how AI is being used in the law; the pitfalls and the benefits. While Gabrielle Canny will discuss the development of AMICA, and how it is being used by separating couples.

## Concurrent Session 1D: When Family Law and Criminal Law Collide

It is common for the family law and criminal law jurisdictions to collide when proceedings are issued. This session looks at the interplay between the two areas of law including the use of aspects of the criminal proceedings, such as the verdict, reasons and evidence, in child related proceedings; domestic violence Intervention Orders; Certificates pursuant to section 128 of the Evidence Act and the use of recordings obtained without a party's consent.

1630-1730

## Concurrent Sessions

### Concurrent Session 2A: Forensic Interviewing of Children

Children's views are an essential part of the Court's decision making process.

Their views are primarily obtained through interviews with a report writer, but the quality and reliability of the information obtained may be impacted by a range of variables. The approach and style of interview adopted by the report writer is a vital element to consider when assessing the weight to place upon the children's views.

In this session Dr Catherine Boland discusses the art of conducting forensic interviews with children. Her insight and analysis is essential for practitioners seeking to increase their ability to critically evaluate reports involving children and will also assist practitioners involved in child welfare matters.

### Concurrent Session 2B: The Use and Abuse of Documents and Information

The *Harman* rule and its application to family law cases.

This paper reviews the basis for the rule in *Home Office v Harman*, the adoption of the rule in Australia, especially the decision of the Court in *Hearne v Street* and its application generally. It considers the scope of the rule, when it might be relieved against and whom might relieve a recipient from the strictures of its operation.

Later, the paper and the presentation will consider the special circumstances arising by reason of the Family Law Act and the recently revised Rules of Court.

Finally, we consider a simple matrix that might assist a practitioner or a Court to determine if the rule applies, when it can be relieved against and on what terms, if any.

## Concurrent Session 2C: Superannuation, Valuing Defined Benefits, Non-Compliant SMSFs and the effect of *Bulow*

The first step in the process of dealing with a superannuation interest by way of court order or a financial agreement is valuation of the superannuation interest. In most cases, this is clear from a recent member's statement. But what happens when the self-managed superannuation fund is not compliant or where the interest is a defined benefit interest in the growth phase? A defined benefit interest in the growth phase differs from an accumulation interest in several important respects. Therefore, examining the nature, form and characteristics of a superannuation interest is particularly important when a defined benefit interest is involved, both for the member and the non-member spouse. Those differences include the method by which the ultimate benefit is calculated, the risk to the member inherent in each and the effect of a s90XT(1)(a) FLA order (an order which allocates a base amount to the non-member spouse). As the Full Court said in *Bulow v Bulow (2019)* "Each and all of those differences can, and very often do, have a dramatic impact upon the justice and equity of a proposed splitting order and, in turn, its place within just and equitable orders for settlement of property"

## Concurrent Session 2D: Demystifying Digital Forensics - Are there any Secrets Anymore?

Digital Forensics can provide an evidentiary shield or a sword in family law matters.

In this session, former senior digital evidence specialist at SAPOL, Mar Noordin and Briston Talbot, from Duncan Powell DEM, explain how digital investigations can play a crucial role in the outcome of a disputed matter, including matters involving allegations as to:

1. The authenticity of documents including social media posts and photographs
2. Stalking; and
3. Accessing a party's personal information

This session will also assist in revealing:

- The secrets that lie in the metadata of Word documents.
- Information that can be gleaned from smart phones, laptops, wearable devices, voice controlled smart home appliances, and social media accounts, including information about a party's location.

The unintended consequences of family internet accounts and the sharing of email addresses to set up personal devices.

## TUESDAY 16 AUGUST 2022

0900-1030

### Plenary 5: Death of Contributions and is Stanford Being Ignored? Mini Debate - *Interactive Session*

Are arguments about the weight to be given to different kinds of contributions really dead or are they just having a little nap? When did Parliament amend the Family Law Act to provide that marriages and de facto relationships are partnerships, and equal partnerships at that? Why is a windfall not a contribution? When is a contribution really a windfall? What is a windfall and what section of the Act say that? When is an inheritance not a contribution? Is there a presumption of equality of all contributions, and has anyone told the High Court about the change?

Sheridan Emerson from Sydney and Dr Robin Smith from the Melbourne Bar go head to head to try and persuade you about the merits of these controversies and more, and there will be some fact scenarios presented on which the audience will be polled.

We guarantee that by the end of this session, all questions you have ever had about alteration of property interests, will be completely resolved. No really. Robin and Sheridan guarantee it.

1100-1230

### Plenary 6: Understanding Family Violence - What all Family Lawyers Need to Know

The Federal Circuit and Family Court of Australia is undeniably a family violence jurisdiction with approximately 60% of applications involving allegations of family violence.

With increased willingness on the part of Government to provide resources such as for the Lighthouse Project, the Court is focussed on providing a more comprehensive and individualised response to families in which family violence is an issue. The current challenge for both family lawyers and the Court is to better understand and deal with the subtle dynamics of coercion and control where there may be little or no physical violence.

This important plenary will assist in providing family lawyers with a deeper understanding of family violence and what is required to assist the Court in the pursuit of the legislatively weighted primary consideration of protecting children from harm from family violence.

1400-1500

### Concurrent Sessions

#### Concurrent Session 3A: So you are appealing? Be guided on what to do, and what not to do, by two leading appeal Court Justices

Practitioners will often be confronted with a decision as to whether to advise a client to appeal. This is often a difficult decision and must be guided by clear thinking and a precise understanding of the proper process of appeal and the risks of an unsuccessful appeal. Different considerations apply to appealing against an interlocutory, as opposed to a final, judgment. Further, particular care is required in drafting Notices of Appeal.

Practitioners will be assisted by the contribution of two very experienced appeal court justices. The Honourable Justice Murray Aldridge is now the court's most experienced appellate justice, having been a member of the previous appeal division since 2015 and he continues to deal with a significant number of the appeals in the FCFCoA. The Honourable Justice Mark Livesey is the President of the Court of Appeal of the Supreme Court of South Australia and will bring a different perspective upon the jurisprudence of appeals and highlight valuable lessons for all practitioners who need to advise their clients as to whether to appeal and, similarly, on how to defend an appeal.

The chair of the session is Peter Cummings SC of Waratah Chambers, Sydney, an experienced appellate advocate.

#### Concurrent Session 3B: Drug Testing Analysis - How Much is too Much?

Hair analysis is an objective method of detecting drug exposure over periods of time up to many months. This contrasts with blood and urine analyses which typically detect drug use in the previous day or days prior to sample collection. Interpretation of hair analysis results needs to consider a range of factors, including the drug of interest and its incorporation into hair; the time period of interest and hair growth rates; the concentration of drug and level of drug use; the possibility of external contamination; and hair colour and treatment. These various considerations will be discussed and then considered in case studies to better understand the benefits and limitations of hair analysis for use in family law proceedings.

	<p><b>Concurrent Session 3C: Indigenous Language and the Law</b></p> <p>Predictable Miscommunication: Linguistic strategies for improving legal communication with people who speak English as an additional language.</p> <p>This session will unpack the concept of ‘first language interference’; that is, the way that a person’s first language impacts the way they speak and understand additional languages. The session will identify a number of known areas of miscommunication by looking at 4 levels of language - sounds, words, grammar and discourse - with particular reference to speakers of Aboriginal languages and Aboriginal English. The session will then articulate and apply strategies for re-phrasing legal information to suit the linguistic needs of people engaging with courts through an additional language.</p> <p>These strategies also will have relevance when working with interpreters in court.</p>
	<p><b>Concurrent Session 3D: How to Run and Defend Financial Claims Arising from Family Violence</b></p> <p>This session is firstly about how to run and deal with a “Kennon” argument in an application for a property settlement order. The session then reviews the often overlooked and important civil and criminal remedies and compensation schemes available to victims of family violence. It next explores whether what has formerly been called “accrued jurisdiction” and now “the application of state law” in a federal matter can be relied upon to prosecute a claim in tort in the FCFCOA when pursuing an application for a property settlement order.</p> <p>Finally there will be consideration of the creative recommendation for reform in the final report by the Australian Law Reform Commission in 2019 and the Government’s response in 2021.</p>
1530-1630	<p><b>Plenary 7: Family Law - Not the Poor Relation</b></p> <p>For many years family law has been regarded by some practitioners in other jurisdictions as “the poor relation”. There has been a perception in some parts of the legal fraternity that family law is perhaps less important, less difficult and less prestigious than some other areas of the law. Whilst all family law practitioners will understand that is not the case, this session will highlight the significance and relevance of family law matters, its importance to the community and the unique challenges presented by family law.</p> <p>Justice Nicholas Mostyn of the High Court of Justice (Family Division) of England and Wales is now the United Kingdom’s most experienced High Court Justice in family law matters. Prior to his appointment to the bench, His Lordship was the leading silk in family law matters, having conducted a significant number of high profile matters. His Lordship presented at the conference in Adelaide in 2008 and was widely acknowledged as the star of the conference for his utterly engaging presentation. Whilst he will be presenting remotely, this session promises to be similarly compelling and highly entertaining. In addition to dealing with the overall importance of family law, His Lordship will also take us on a journey of some of the matters which have come before the English courts, which highlight that many matters are anything but “the poor relation”.</p>

1630-1730

## Concurrent Sessions

### Concurrent Session 4A: Negotiating Parenting Matters - How Best to Prepare Your Client for the Reality of Negotiation

Preparing and supporting clients to negotiate the resolution of parenting disputes is one of the most crucial functions of family lawyers, and when done well, the role of lawyers can foster long term positive change for clients and families.

Meaningful pre-negotiation preparation by lawyers extends well beyond taking instructions, preparing a mediation paper and drafting orders. This session will explore the value of legal practitioners adopting a broader, client-centric approach in preparing for negotiations, including helping clients digest family reports, understanding the parties' emotional drivers in the dispute, and supporting client voice and agency in the resolution of their parenting matter.

Dr Phelan will contribute her expertise as a family report writer, and will share her insights for interpreting and implementing report recommendations in the context of preparing for negotiation. Ms Lane, as experienced counsel and mediator, will introduce practical tips and tools that can be implemented by legal practitioners in their "tool box" for negotiation preparations and to enhance the professional offering to clients more generally.

This session promises to be insightful, informative and engaging, and a conference highlight for practitioners that undertake parenting matters.

### Concurrent Session 4B: Binding Financial Agreements - Drafting Effective Clauses and When to be Worried - the landscape post *Thorne & Kennedy*

It's been 21 years since Financial Agreements were introduced into the Family Law Act and they continue on as the mainstay available to parties seeking to protect wealth in a relationship breakdown.

The demand for Financial Agreements is strong and the resistance from risk averse practitioners may be waning.

But where are we now? Are we still debating technical adherence to the requirements of S90G and ineffective drafting or has the focus shifted to fairness in agreements and the pre agreement process?

In this session, His Honour Judge McGinn and barrister Paul Bullock bring us up to date with the necessary tools to undertake the search for the Holy Grail of a bullet proof agreement and to identify the pressure points in the formation of, and in, agreements that may lead to the effect of agreements being undone.

### Concurrent Session 4C: Beware the Boundaries of your Retainer and Be Aware of the Risks of a Task Driven Retainer

The Ethics and Practice Unit of the Law Society of South Australia has advised that this session qualifies for allocation of one (1) CPD Ethics and Practice point.

Practitioners from jurisdictions other than SA should make their own enquiries with their professional bodies as to qualification.

Lawyers are now often asked by clients to act for them for a limited purpose (perhaps to prepare initiating or answering documents which the client will then file themselves, or to assist with preparation of discovery or trial affidavits, or other tasks arising during litigation) rather than being the lawyer formally acting on file.

A 'task driven' or limited retainer has been seen as a useful tool to address access to justice issues caused by spiralling legal costs, especially in family law. But do they actually work, or are they more trouble than they are worth? What are the risks for lawyers in agreeing to do so? And where does the lawyer's professional obligations start and finish? And what of the lawyer's obligation to the Court? If you accept such a retainer, might a Court direct you to keep acting?

This session will examine 'task driven' retainers from the point of view of a Legal Professional Indemnity insurer and provide practical tips so that you can maximise the advantages of a limited retainer and avoid the pitfalls. It will also assist lawyers to better understand their professional obligations, and hopefully to avoid a subsequent complaint from a disgruntled litigant"

## Concurrent Session 4D: When the Same Words Mean Something Entirely Different - Language and Cultural Issues

This session will unpack the concept of ‘first language interference’; that is, the way that a person’s first language impacts the way they speak and understand additional languages. The session will identify a number of known areas of miscommunication by looking at 4 levels of language - sounds, words, grammar and discourse - with particular reference to speakers of Aboriginal languages and Aboriginal English. The session will then articulate and apply strategies for re-phrasing legal information to suit the linguistic needs of people engaging with courts through an additional language. These strategies also will have relevance when working with interpreters in court.

## WEDNESDAY 17 AUGUST 2022

0900-1000

### Plenary 8: Effective Resolution of Parenting Matters - A Canadian Perspective

We are honoured to have The Hon. Madam Justice Marriott, Court of Queen’s Bench of Alberta, in person, in Adelaide and in conversation with the Hon. Rodney Burr AM, to provide insights into the judicial resolution of parenting matters in Canada.

Delegates will have the benefit of hearing Justice Marriott discuss the role of the judiciary in dispute resolution including binding and non-binding Judicial Dispute Resolution (JDR), Early Intervention Case Conferences (JDR on steroids), innovative alternatives to expensive family assessment reports, different options for ascertaining the “voice of the child” including the role of Judges in communicating with children, and the universal difficulties associated with determining relocation cases.

1000-1100

### Plenary 9: Family and Other Trusts - the New Zealand Experience and Lessons for Australia

*Six months in a leaky boat:* In the context of a trans-Tasman fact pattern, Lady Deborah Chambers QC, Geoff Wilson and Alison Ross will undertake a comparative review of the court’s approach to trusts in New Zealand and Australia, highlighting a number of practical issues in for practitioners including an overview of the courts’ jurisdiction in property matters with an emphasis on:

- the treatment of trusts in NZ and Australia;
- the place of “nuptial” settlements in each jurisdiction;
- third parties in the mix; and
- inevitable forum disputes including a consideration of the Trans Tasman Proceedings Acts.

1130-1230

### Concurrent Sessions

#### Concurrent Session 5A: The Resilient Lawyer

Practitioners are drawn to the law for its intellectual rigour, meaningful work, and opportunity to help clients navigate stressful life events, yet these very circumstances present inherent risks to the personal well-being of lawyers.

The development and maintenance of resilience is critical for lawyers and judicial officers to survive and thrive in this environment. Directed towards practical tools and tips, this session will deliver proactive well-being strategies to strengthen resilience in the face of adversity and share helpful teachings from other jurisdictions. The session takeaways will include an understanding of stress from a neuroscience view, the value of self-care and suggestions for supporting others who are struggling.



**Concurrent Session 5B: Third Parties - How to Run and Defend a Third Party Claim - Beware Costs and When is the Risk Worth Taking?**

In an increasing number of matters, third parties are involved, often in cases involving family farms or other sorts of family business or commercial enterprises where one of the parties' parents are in control of the trust or other structure which owns an asset that has been developed during the course of the marriage. Equitable claims will often arise and great care needs to be taken as to whether to decide to join third parties to the proceedings. Alternatively, you may be involved in matters in which you are acting for a third party who has been joined to the proceedings, probably unwillingly.

If proceedings are taken against a third party unsuccessfully, then the third party is likely to have costs remedies against your client, which could well be substantial, given the nature of these sorts of matters.

Justices Suzanne Christie and Andrew Strum are both recent appointments to Division 1 of the Court and, whilst in practice, both were involved in a significant number of matters involving third party claims. They are eminently well-qualified to highlight the challenges, pitfalls and possible tactical approaches to matters involving third parties.

The chair of the session is a senior Adelaide solicitor, Andrew Barnes, who has similarly been involved in a significant number of difficult matters involving third parties.

**Concurrent Session 5C: Focussing on the Best Interests of the Child in Surrogacy Arrangements in Australia. Is it Merely Lip Service?**

The format for this session will be a short national overview of surrogacy legislation in Australia by lawyers Sarah Jefford and Simone Cureton who both provide legal support for surrogates and intending parents. Their personal experiences as surrogate mothers will inform this presentation. They will also provide insights into drafting Recognised surrogacy agreements for clients.

Following this presentation a panel comprising Sarah, Simone, Jessica Webster (an accredited infertility psychologist), and surrogate parents Jake and Arron Leach will participate in an interactive discussion on the journey of having a child by surrogacy. They will consider how the best interest of the child remains the primary focus in the preparation required prior to entering a surrogacy arrangement, during pregnancy, following the birth of the child and as they seek parenting orders from court.

Questions from attendees will be invited prior to the commencement of the concurrent session.

1230-1330

**Concurrent Sessions**

**Concurrent Session 6A: Child Support Agreements - Drafting Guidance, 'Prevention is better than cure!'**

Child Support Agreements can appear deceptively simple but are often devilishly complex depending upon what you are seeking to achieve. Beware the trap of obligations in favour of parents with less than 35% care and learn how you might draft to take account of certain "undertakings" that can't be captured as "obligations". Be wary also of the pitfalls of vague termination clauses based on income thresholds and changes in care arrangements and clauses that seek to create obligations that continue beyond a child's 18th birthday.

In this session, child support guru, Brett Walker-Roberts identifies some of the stumbling blocks and provides guidance on how to overcome them.

**Concurrent Session 6B: Arbitration 2022 Update - Recent Cases and Future Plans**

Arbitration is becoming an increasingly popular ADR option for parties and the Court encourages its consideration by practitioners.

This session will provide practitioners with a snapshot of the leading cases in family law arbitration, an insight into how an arbitration works, and what arbitration might look like into the future.

## Concurrent Session 6C: Intersection with the Corporations Act, Bankruptcy, Insolvency and Administration - How to Navigate these Issues for Family Lawyers

What happens when distinct areas of law meet and interact? This is a common scenario in family law where spouses are often also directors, shareholders, bankrupts, partners, trustees, or parties to contracts. Third parties such as other company directors, employees, lenders and insolvency practitioners frequently find themselves embroiled in property disputes. Timing can often be key in these intersection cases, as can understanding the original and accrued jurisdiction of the FCFCoA.

In this session, Kerry Clark SC (assisted by Marita Pangallo) will examine how the court responds when family law intersects with other areas of law including corporate law, bankruptcy and insolvency and discusses various different practical scenarios arising from the case law.

1430-1530

## Plenary 10: Ethics Hypothetical

See out the conference with this Geoffrey Robertson QC inspired ethics hypothetical, moderated by leading Adelaide silk, Andrew Harris QC.

The hypothetical will feature a scenario that will develop and build over the course of the session, fleshing out ethical conundrums that you might have already, or might one day encounter.

Intended to be a serious, yet entertaining way of seeing the ethical dilemmas that family lawyers encounter from different angles.

A great way to finish the Conference by collecting your ethics point.