About the presenter

1. Michael Hines has been practising as a barrister for over twenty years. He appears in and advises on family law property disputes, wills and estates, equity, commercial, and revenue cases. He has appeared in many reported cases including *Kennon v Spry* in the High Court and *Stephens v Stephens*, a related family law property case in the Full Family Court. He is a past part time senior lecturer and fellow of the Law School of the University of Melbourne teaching post graduate tax, and the author of numerous articles and of the LBC loose leaf service, "Stamp Duties Victoria". Michael is on Dever's List.

Alteration of property interests

2. Under Part VIII of the *Family Law Act 1975*, the Federal Circuit Court and the Family Court have the discretion to make orders which alter the interests of parties in property of the parties to the marriage.[1] Such orders can be made only if the court is satisfied that, in all the circumstances, it is just and equitable to make the orders.[2]
3. In some cases, whether rightly or wrongly, the court may have made orders which affect the interests of third parties. The extent to which a court can do this is contentious.[3] In any event, a party to the marriage, or a third party, or both, may wish to appeal.

Appeals from property orders

4. The appeal may be from the Federal Circuit Court to a single Judge of the Family Court, or to the Full Court.[4] The appeal may also be from a single Judge of the Family Court exercising its original jurisdiction to the Full Court.[5] There is no further appeal, except to the High Court.[6] So a danger in bringing

[1] See, for example ss79 and 85A of the Act. See also Part VIIIAA of the Act.
[2] See s79(2) of the Act.
[3] See *Kennon v Spry* (2008) 238 CLR 366 and Part VIIIAA of the Act.
[4] See ss28 and 94AAA(1) and (3) of the Act.
[5] See ss28(3A) and 94 of the Act.
[6] See ss94AAA(12) and 95 of the Act.

proceedings before a Federal Circuit Court is that your only right of appeal will probably be to a single judge of the Family Court, who may, like any judge, get it wrong.

Character and nature of appeal

5. An appeal to the Family Court from the exercise of the discretion, is an appeal by way of rehearing. It is not an appeal in the strict sense, or a hearing de novo.[7] An appeal in the strict sense is necessarily confined to what happened at trial. An appeal to the High Court from the Full Court is an appeal in the strict sense.
6. By contrast, in an appeal to the Family Court, the appeal court will decide the appeal in accordance with the facts in evidence before the court of appeal including facts which have occurred since the trial (if evidence of such facts is admitted), and according to the law in force at the time of the appeal, rather than at the time of the trial.
7. But as we shall see, neither do the parties to the appeal have a free hand to put in new evidence, nor to raise new points.[8] Nor does the appeal court have power to substitute its own discretion for that of the court at first instance merely because it would exercise the discretion differently. It is of the essence of a discretion that opinions may differ as to how it should be exercised. A successful appellant has to show that the trial court's purported exercise of discretion was not a true exercise of the discretion residing in the court.[9]

Steps to take after receiving instructions to begin an appeal

[7] See *CJD v VAJ* (1998)197 CLR 172.
[8] Ibid.
[9] Ibid.

8. You start the appeal by filing Notice of Appeal within 28 days' after the final orders.[10] That time can be extended by leave.[11] Any interested party, has to be made a respondent to the appeal, whether a party to the proceedings below or not.[12] In my opinion, this makes it likely that in most appeals where one of the parties is claiming that trust property is property of the parties to the marriage or either of them, that the trustee should be made a respondent if it is not one of the appellants.

Grounds of appeal

9. Before drawing the Notice, it is necessary to read the orders made below and the stated reasons for making them (the reasons for decision) with a view to discerning grounds of appeal. This requires the reader to look for errors, and for findings which, had there been further evidence, might have been different.

10. It may be likely that the order appealed from would have been made even if the error had not been made, or the further evidence adduced. In such a case, the error or lack of evidence at trial will not provide a good ground of appeal. It is immaterial to the result.

11. Examples of appealable errors are: the failure to take a relevant consideration into account, the taking into account of an irrelevant consideration, the application of a wrong legal test, the misconstruction of a statute, a finding against the evidence.

12. A miscarriage of justice may have occurred where, for example, there may be further evidence which should be

[10] See *Family Law Rules 2004* ('FLR') 22.03.
[11] See s94(5) and (10) and s94AAA(1A) and (2D) of the Act and FLR 1.14 and 22.03.
[12] See FLR 22.04.

admitted by the appeal court and that would likely have caused the trial court not to make the orders appealed from. For example, a party's failure to prove part of his case, may have led to an adverse finding as to credit, causing the trial judge to disbelieve his entire story. There may be cogent further evidence which corroborates the party's evidence at trial, making it likely that the adverse finding was based on a mistake of fact. In such a case, even though the trial court's finding may have been justified on the evidence which was before it, there may have been a miscarriage of justice.

13. The other area of difficulty in drawing notices of appeal, besides stating the grounds, is in describing the orders sought in substitution for those to be set aside.

14. On an appeal, the appeal court may affirm, reverse or vary the decision the subject of the appeal and may make such decision as, in the opinion of the court, ought to have been made in the first instance, or may, if it considers appropriate, order a re-hearing on such terms and conditions, if any, as it considers appropriate.[13]

15. It is well for the orders sought to begin with an order that the appeal be allowed, thereafter, that the orders appealed be set aside and that in lieu thereof the court order as follows, and to finish with such further or other orders as the Court thinks fit.

16. In some cases, it will be appropriate to seek an order for a retrial rather than final orders, perhaps in the alternative to other relief. This could be so, if for example, one of the grounds of appeal results from erroneous findings as to credit, or if further evidence should have been admitted, and this could lead to further cross-examination.

[13] See ss94(2) and 94AAA(1) of the Act.

17. For example, at trial, the wife may have led no evidence on an issue at all; yet the court may reject the husband's testimony on the issue. On appeal, the husband applies to adduce documents that corroborate his testimony. But the wife wants to cross-examine the husband about the documents.

18. Like pleadings in civil matters, both parts of notices of appeal, should be expressed with clarity, simplicity and precision.

19. If amendment of the notice of appeal is required, it should be done as soon as possible in accordance with the Rules and directions given by the Court where possible.[14] In a complex case, it is likely some amendment will be required.

20. It is important to confer with the clients as soon as possible after receiving instructions to act, because of the strict timetable likely to be given in directions made by the court and the possibility that there may be further evidence you want to adduce. Further evidence may also be relevant to formulating grounds of appeal, especially if it is available.

21. If you come to the case for the first time on appeal, there is a real danger of being unaware of possible further evidence. Unfortunately, it seems to be commonplace in family law matters for parties not to make full or proper disclosure as required by the legislation or court order. In some cases, this may be deliberate, but in many cases it is the result of ignorance or carelessness. Enquire after particular categories of documents that could help. Draw up a list of issues, and of the further evidence that could be relevant. Often, in my experience, clients need to be spoon fed with this sort of thing.

[14] See FLR 22.09 (amendment of notice of appeal.)

Stays

22. Having filed the notice of appeal, the appellant should give thought to whether or not to apply for a stay of the orders. In general, an appeal of itself does not operate as a stay.[15]

Directions

23. After the notice of appeal has been filed, there are a number of steps to be taken by each party up to the hearing, such as attendance at directions hearings (these may be done by phone), settling the draft index, filing a summary, and so forth. See Part X of the Act. (Note that the Federal Circuit Court is not a court of summary jurisdiction for the purposes of the Act and Rules.) See also Chapter 22 of the Rules and Practice Direction 7/2004 of the Family Court. See also any directions made by the Court for the conduct or hearing of the appeal.[16]

24. Failure to take any of these steps may cause the appeal to be struck out. An appeal can be reinstated by leave.[17] But the applicant has to show that he or she has an arguable appeal.

Allowance of further evidence on appeal

25. The appeal is confined to the evidence before the trial court unless circumstances exist where it can admit further evidence under s93A(2) of the Act, and it decides in the exercise of its discretion to exercise that power.

26. Under that section, in an appeal the Family Court shall have regard to the evidence given in the proceedings out of which the appeal arose and has power to draw inferences of

[15] See FLR 22.11.
[16] See ss94(2B) and (2D) and 94AAA(8) and (10) of the Act. There is no appeal from directions made by a Judge: see ss94(2F) and 94AAA(12) of the Act.
[17] See FLR 22.44.

fact and, in its discretion, to receive further evidence upon questions of fact.

27. An application for the court to admit further evidence has to be filed together with an affidavit describing or setting out the further evidence.[18] The application is heard on the same day as the appeal.[19]

28. The rules require that the application and affidavits are filed at least 14 days before the hearing of the appeal,[20] but in many cases the court may have made directions requiring these to be filed sooner. If the further evidence is extensive, it may take several weeks to draw the affidavits. If not filed within the required time, an application to allow late filing will have to be made.[21] On the return of a contested application, it will be necessary for the applicant to show the relevance of the evidence and that the balance of prejudice favours allowing the application.

29. The principal purpose of s93A(2) of the Act is to give to the Appeal Court a discretion to admit further evidence where that evidence if accepted, would demonstrate that the orders were erroneous: *CJD v VAJ* (1998)197 CLR 172 at 201.

30. Further evidence may be of several different types. It may be evidence of facts which happened after the trial. It may be evidence which could not with the exercise of reasonable diligence have been produced at trial. It may be incontrovertible evidence, such as bank statements, or at the other end of the scale, it may be self-serving, or apparently unreliable.

[18] See FLR 22.39 and Practice Direction 7/2004.
[19] Ibid.
[20] Ibid.
[21] See FLR 1.14.

31. A range of factors may influence the appeal court's decision on whether or not to admit further evidence. Factors telling against the admission of further evidence include the public interest in the finality of proceedings, and the interest of the successful litigant below in enjoying the fruits of his judgment and in not being put to further trouble and expense. It will tell against its admission, if at or before the trial, the evidence could have been discovered with the exercise of reasonable diligence by the party applying for its admission. On the other hand, the appeal court may more readily admit the evidence where there is no apparent reason to disbelieve it, especially if there can be no serious contention that the evidence could be in dispute. In such a case, the fact that the evidence could have been discovered with the exercise of reasonable diligence may be of little significance: see *CDJ v VAJ* at 203. The court may be readier to admit further evidence when the interests of third parties are involved.

Summary of argument and list of authorities

32. Generally, both parties are required to file a summary of argument and a list of authorities to be relied on.[22]

33. The list of authorities is to be divided into two parts in accordance with Practice Direction 7/2004.

34. The summary must not exceed ten pages in length.[23] Pursuant to the Rules,[24] it must set out each ground of appeal and, for each ground of appeal, a statement of the arguments setting out the points of law or fact and the authorities relied

[22] See FLR 22.22 and 22.26. For the appellant, at least 28 days before the first day of sittings in which the appeal is listed for hearing, unless the court shortens or extends the time.
[23] See FLR 22.39.
[24] Ibid.

on. Pursuant to the Practice Direction,[25] the Summary must contain:- an outline of each contention of law or fact to be relied upon in no more than one or two sentences, being sufficient only to identify each point, not to argue it or elaborate upon it; all necessary references to the appeal book (if any), statutes, principal authorities and affidavits; where necessary a list of the dramatis personae and a glossary of terms; and a reference to any extrinsic material to which it is intended to refer (see section 15AB of the *Acts Interpretation Act 1901*) together with copies of such material. Further, pursuant to the Direction, the summary must address the grounds of appeal identified in the Notice of Appeal and Notice of Cross-Appeal if applicable. The Summary will not in any way inhibit the development of argument; it may be departed from if counsel sees it as necessary to do so.[26]

35. The summary must also set out the orders sought.[27]

36. Usually, the court will be anxious to limit the hearing time at least to the number of days or parts of days for which the appeal is listed for hearing. Members of the court may have commitments to hear appeals elsewhere, including interstate, after the expiration of that time. It is therefore in yours and the court's interests to prepare as comprehensive, accurate and persuasive a summary as possible.

[25] Practice Direction 7/2004.
[26] Ibid.
[27] FLR 22.26.