

## **1. BEING HONEST WITH THE COURT AND WITH US**

Harrington Family Lawyers pride ourselves on our ethical standards. We want to make sure that you also understand the need to act honestly in your case.

It may seem obvious, but it is absolutely essential that when you are involved in court proceedings or negotiations that you are absolutely honest with us as your lawyers and with the court. If you are not absolutely honest then certain things could happen to you, your children and your property that could have been avoided by your being honest.

At times being honest can be painful or embarrassing. It is essential that our relationship is based on honesty and remains that way.

**If you have been dishonest with us, we may have no choice but to cease acting for you immediately.**

## **2. YOUR OBLIGATION IN GIVING EVIDENCE**

At various stages in court proceedings you will be called to give evidence. This may be in the witness box, but more commonly will occur when you make an oath or swear or affirm an affidavit, either in one of the Family Court forms or as part of your evidence.

If you make a willfully false statement in this form, you most likely have committed the very serious offence of perjury, for which the most likely offence is imprisonment. It is not the only offence for which you could be charged, the others including attempting to pervert the course of justice and compounding a crime. It is essential that you understand clearly the documents that you are swearing or affirming.

**When you swear or affirm a document, the ultimate responsibility for that document is yours.**

If the facts have materially changed after you have sworn an affidavit, you need to tell us so that we or you can tell the court. It is essential that the court is not misled.

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### **3. YOUR OBLIGATION IN MAKING DISCLOSURE**

Your obligation has been set out by the Family Court in judge made law, the Family Law Act and in the Family Law Rules.

#### **A. Your obligation in making disclosure- judge made law**

As long ago as 1986, the Family Court held that it is the duty of a party involved in property proceedings in the Family Court to make a full disclosure of his or her financial affairs.

In Weir and Weir (1993), the Full Court of the Family Court also held that:

- once it has been established that there has been a deliberate non-disclosure the court should not be unduly cautious about making findings in favour of the innocent party.
- The court's jurisdiction to make an order going beyond the identified property arises once there is sufficient evidence to support a finding that a party has not made a full disclosure of his or her assets.

In Weir and Weir the wife was awarded a further \$50,000 plus a substantial order as to costs because of the husband's failure to make a full and frank disclosure.

In other cases, judges have removed children from the care of a parent (or greatly restricted contact) when they have been of the view that that parent is telling lies.

If you have told other people what the value of your property is worth (for example in a finance application), but now say that it is worth considerably less, you may be held to the higher figure.

If there are issues about non-disclosure of tax or Centrelink, read our tax brochure.

#### **B. Your obligation in making disclosure- Family Law Act**

If you have been ordered to disclose documents and you have decided not to comply with those orders, then in addition to any other crime that you may have committed,

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you may be punished (and in the worst cases jailed) for contempt of court. There is no time limit for how long you may be jailed.

If you and your former spouse have reached an agreement as to financial matters, then it is essential that you have made full and frank disclosure of your financial position.

If your agreement has been made by court orders, and the other party later discovers that you have not been honest, that party can apply to the court to set aside the orders. This may have disastrous consequences for you. Even defending one of these claims successfully may cause you to spend many thousands of dollars unnecessarily, which could have easily been avoided by being honest at the beginning.

Section 79A of the Family Law Act enables property settlement orders to be set aside when there has been a miscarriage of justice by reason of:

- fraud
- duress
- suppression of evidence (including failure to disclose relevant information)
- the giving of false evidence or
- any other circumstance

Similar provisions apply if you enter into:

- a binding financial agreement or
- a child support agreement or order.

## **C. Your obligation in making disclosure- Family Law Rules 2004**

Rule 13.01 provides:

### **13.01 General duty of disclosure**

- (1) 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.

*Note* Failure to comply with the duty may result in the court excluding evidence that is not disclosed or imposing a consequence, including punishment for contempt of court. This Chapter sets out a number of ways that a party is either required, or can be called upon, to discharge the party's duty of disclosure, including:

- (a) disclosure of financial circumstances (see Division 13.1.2);
- (b) disclosure and production of documents (see Division 13.2.1); and
- (c) disclosure by answering specific questions in certain circumstances (see Part 13.3).

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- (2) The duty of disclosure starts with the pre-action procedure for a case and continues until the case is finalised.

*Note* The duty of disclosure applies to a case guardian for a child and a person with a disability (see subrule 6.13 (2)).

Rule 13.04 provides:

### **13.04 Full and frank disclosure**

- (1) 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;

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- (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.
- (2) Paragraph (1) (g) does not apply to a disposal of property made with the consent or knowledge of the other party or in the ordinary course of business.
- (3) In this rule:
- legal entity*** means a corporation (other than a public company), trust, partnership, joint venture business or other commercial activity.

*Note* The requirements in this rule are in addition to the requirements in rules 12.02 and 12.05 to exchange certain documents before a conference in a property case.

### **13.05 Financial statement (Form 13)**

- (1) A party starting, or filing a response or reply to, a financial case (other than by an Application for Consent Orders (Form 11)) must file a Financial Statement (Form 13) at the same time.
- (2) If a party is aware that the completion of a Form 13 will not fully discharge the duty to make full and frank disclosure, the party must also file an affidavit giving further particulars.

*Note* The court may order a party to file an affidavit giving further particulars in relation to the party's financial affairs.

### **13.06 Amendment of Financial Statement (Form 13)**

- (1) This rule applies if, before a conciliation conference, pre-trial conference or trial, or at the time of seeking a consent order, a party's financial circumstances have changed significantly from the information set out in the Form 13 or affidavit filed under rule 13.05.
- (2) At least 7 days before the conciliation conference, pre-trial conference or trial, or at the time of seeking a consent order, the party must file:
- (a) a new Form 13 with the amendments clearly marked; or
  - (b) if the amendments are able to be clearly set out in 300 words or less, an affidavit containing details about the party's changed financial circumstances.

Rule 13.07 provides:

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### **13.07 Duty of disclosure — documents**

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.

*Note 1* For documents that parties must produce to the court:

- (a) on the first court date for a Maintenance Application, see rule 4.15;
- (b) on the first court date for a Child Support Application or Appeal, see rule 4.19;
- (c) at a conference in a property case, see Part 12.2; and
- (d) at a trial, see Chapters 15 and 16.

*Note 2* Rule 13.15 provides that a party must file a written notice about the party's duty of disclosure.

*Note 3* Rule 15.76 provides that a party may give another party a notice to produce a specified document at a hearing or trial.

*Note 4* A document disclosed to a party must be used for the purposes of the case only and must not be used for any other purpose without the consent of the other party or an order.

Rule 13.14 provides:

### **13.14 Consequence of non-disclosure**

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 15.76, 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.

Before the pretrial conference, a party must file an undertaking as to disclosure. Rule 13.15 provides:

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### 13.15 Undertaking by party

- (1) A party (except a child representative) must file a written notice:
  - (a) stating that the party:
    - (i) has read Parts 13.1 and 13.2 of these Rules; and
    - (ii) is aware of the party's duty to the court and each other party (including any child representative) to give full and frank disclosure of all information relevant to the issues in the case, in a timely manner;
  - (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 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 Act relating to contempt and the court's power to make an order for costs.

### D. The last word- Luciano (2000)

In this case, the judge held:

- there is an obligation of each party to make a full and frank disclosure of his/her financial circumstances and all relevant matters.
- The obligation arises because of the necessity for the court in such proceedings to consider all aspects of the financial circumstances of each party.
- The obligation is not created by the rules or the practice of the court and the rules simply set out the procedure by which that obligation may be fulfilled.
- If there is a deficiency in the practice adopted for the purpose of making such a disclosure, mere compliance with the requirements of the relevant rules if deficient, is not enough.
- If there is non-disclosure in the relevant sense then the failure to disclose undermines the whole process of adjudication of the proceedings in relation to financial matters.

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- A finding of non-disclosure may in appropriate cases, depending on the circumstances, result in the other party being granted without more, the relief sought.

*Harrington Family Lawyers pride ourselves on our accurate advice to clients. This brochure is of a general nature only, and may not reflect your specific needs. For specific advice in your matter, you should contact us, so as to ensure that the advice for you is accurate.*

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