

***FAMILY LAW AMENDMENT (ARBITRATION AND OTHER MEASURES)  
RULES 2015***

**EXPLANATORY STATEMENT**

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FAMILY LAW AMENDMENT (ARBITRATION AND OTHER MEASURES) RULES 2015  
**EXPLANATORY STATEMENT**

**Issued by the authority of the Judges of the Family Court of Australia**

Section 123 of the *Family Law Act 1975* (the Act) provides that the Judges of the Family Court of Australia, or a majority of them, may make Rules of Court providing for the practice and procedure to be followed in the Family Court and some other courts exercising jurisdiction under the Act. The Judges of the Court made the *Family Law Rules 2004* (the Rules), which commenced on 29 March 2004. These amending Rules, the Family Law Amendment (Arbitration and Other Measures) Rules 2015 have now been made by the Judges to amend the *Family Law Rules 2004*.

Section 123(2) of the Act provides that the *Legislative Instruments Act 2003* (apart from sections 5-7, 10, 11 and 16) applies to Rules of Court. In this application, references to a legislative instrument in the Act are to be read as references to Rules and references to a Rule maker as references to the Chief Justice.

Section 9 of the *Legislative Instruments Act 2003* provides that the Rules of Court made for the Family Court of Australia are not legislative instruments for the purposes of that Act. As a result the *Human Rights (Parliamentary Scrutiny) Act 2011* does not apply to any such Rules of Court and no statement of compatibility for the purposes of that latter Act is included in this Explanatory Statement.

## **1. GENERAL OUTLINE**

### **Schedule 1 — Amendments relating to arbitration**

To date arbitration in family law has rarely been utilised notwithstanding that ss 10L(2)(b) and 13E of the Act provide for consensual arbitration of certain types of financial disputes supplemented by

the provisions in Part 5 of the *Family Law Regulations 1984* (the Regulations) in relation to the conduct of arbitration and the registration of awards.

To facilitate effective and timely arbitration between people who wish to arbitrate rather than litigate their financial disputes the Judges have exercised their rule making powers to address certain gaps, in particular in relation to disclosure and subpoenas, which were seen as impediments to efficacious arbitration.

In addition to the general rule making power conferred on the Judges of the Court (or a majority of them) pursuant to s 123(1) of the Act, the judges are conferred with specific powers in relation to arbitration. Subsections 123(1)(sa), (sb), (sc), (sdc) (i)-(iii) and (sf) variously underpin these rules.

## **Schedule 2 — Amendments relating to subpoenas**

The amendments harmonise the approach to the production of documents under subpoenas with the approach of the *Federal Circuit Court Rules 2001* (the Federal Circuit Court Rules) to streamline the process and reduce the number of court appearances. While previously the Rules facilitated the automatic release of subpoenaed documents in certain circumstances, the approach nevertheless required the listing of a subpoena for hearing on a court date at the time of issue and the procedure was rarely utilised. The amendments are based on the provision of an administrative production day consistent with the approach of the Federal Circuit Rules rather than listing the subpoena for hearing at the time of issue. The approach is contingent upon service, compliance by the named person, the absence of any objection and the issuing party filing a notice of request to inspect. Child welfare, criminal, medical or police records are precluded from automatic copying, notwithstanding that there is no objection, but may be inspected. A person whose medical records are subpoenaed may inspect the documents prior to inspection by the parties, lawyers or independent children's lawyer in order to determine whether to object to inspection or copying of the records. Objections are listed for hearing by the court.

The general rule making power conferred on the Judges of the Court (or the majority of them) by s 123(1) of the Act provides the source of the power for the amendments.

### **Schedule 3 — Amendments relating to surrogacy**

The incidence of surrogacy arrangements is increasing and surrogacy cases are complex cases. In order to facilitate the determination of applications for parenting orders in relation to children born under surrogacy arrangements the court requires appropriate evidence. The amendments made pursuant to s 123(1) of the Act ensure that the court has sufficient evidence to determine these proceedings. In addition to evidence about the circumstances of the applicant, evidence is required about the circumstances of the birth mother including evidence about informed consent, counselling and legal advice and a copy of any surrogacy agreement. Evidence is also required about the identity of the child including the relevant law in the birth country where the child was born.

### **Schedule 4 — Costs**

The Joint Costs Advisory Committee (JCAC) was established in 2007 to review annually and recommend variations in the quantum of costs contained in the Rules made by the High Court of Australia, the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia. It comprises representatives of those courts. In conducting its reviews, the JCAC applies a formula which has regard to movements in wages and salaries and other costs of solicitors' practices.

Following its annual review, the JCAC provided a report in September 2015 to the High Court of Australia, the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia recommending an increase of three per cent (3%) to the lawyers' costs provided for in the Rules of each Court. Issues raised in consultations were addressed in the report.

The Judges are conferred with specific powers in relation to costs by s 123(1)(g) of the Act.

## **Schedule 5 — Miscellaneous amendments**

Following the amendments to the Federal Circuit Court Rules and the creation of the prescribed form ‘Notice of Risk’, the Form 4 ‘Notice of Family Violence or Risk of Family Violence’ required review and has been updated. Unless otherwise stated the amendments are made pursuant to s 123(1) of the Act.

The miscellaneous amendments also provide for the filing of any variation of a family violence order to ensure current information is before the court.

The amendments state when proceedings may be heard in chambers and also provide for judgment to be pronounced in open court and for written reasons to be published in open court.

The amendments state when an order must be entered and how an order is entered. The amendments also state when an order may be varied or set aside and when reasons for judgment may be varied or set aside. The amendments harmonise with the *Federal Court of Australia Rules 2011* (Federal Court Rules) and the Federal Circuit Court Rules to introduce the concept of entry of orders. The amendments clarify the circumstances in which a judgment or order may be varied or set aside after it has been entered to achieve a common approach of superior federal courts.

The amendments extend the time for filing a lawyer’s itemised costs account in relation to party and party costs to reduce applications for extension of time and are pursuant to ss 123(1)(g), (t) of the Act.

The amendments repeal the prescription of the format of short reasons in relation to decisions to dismiss appeals that do not raise any question of general principle. S 94(2A) of the Act provides that if an appeal does not raise any question of general principle the Full Court may give reasons for a decision to dismiss the appeal in short form is unaffected by the amendments.

## **Schedule 6 — Transitional provisions**

The amended Chapter 27 provides for transitional provisions in relation to the amendments about increasing the itemised scale of costs; arbitration and subpoenas.

## **2. CONSULTATION**

The *Legislative Instruments Act 2003* provides for certain consultation obligations when Rules are made. The Chief Justice has authorised the Court's Rules Committee to undertake consultation on Rules matters on her behalf. The consultation undertaken in relation to the amendments was as set out below in relation to the various schedules.

### **Schedule 1 — Amendments relating to arbitration**

The court commenced consultation about the proposed amendments with the legal profession about the rules two years ago and it was a standing item for meetings between the Rules Advisory Committee and Law Societies, Bar Associations and Legal Aid Commissions in various States. Advance copies of the draft rules were provided to the Law Council of Australia as the representative of the legal profession at a national level, the Australian Institute of Family Law Arbitrators and Mediators and other key individuals. Responses received have been considered.

### **Schedule 2 — Amendments relating to subpoenas**

The Court consulted with the Family Law Section of the Law Council of Australia as well as most State and Territory Law Societies and Legal Aid Commissions at meetings of the Rules Advisory Committee about the proposed harmonisation of the approach to the production of documents under subpoenas with the approach of the *Federal Circuit Court Rules 2001* to streamline the process and reduce the number of court attendances.

### **Schedule 3 — Amendments relating to surrogacy**

The sole purpose of the amendments is to specify the requirements for an application for parenting orders about a child born under a surrogacy arrangement (in addition to the general requirements for an Initiating Application (Family Law)). The objective of the amendments is to ensure that better evidence is placed before the court in such applications and to specify the evidence required. The submissions of the Human Rights Commission in *Ellison & Anor & Karnchanit* [2012] FamCA 602 (1 August 2012) in relation to the desirability of formulating Rules of Court (or a Practice Direction) were considered as was the report of the House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Roundtable on Surrogacy* (2015).

### **Schedule 4 — Costs**

In its 2015 annual review (as in previous reviews), the JCAC wrote to the Commonwealth Attorney-General's Department, the Law Council of Australia, the National Association of Community Legal Centres, The Law Society of NSW and National Legal Aid inviting them and their respective constituent bodies to make submissions. A notice of the review was also placed on the website of each court.

### **Schedule 5 — Miscellaneous amendments**

Minimal consultation occurred after the 12 January 2015 amendments to the *Federal Circuit Court Rules 2001* came into effect which included the creation of a prescribed form, the 'Notice of Risk'. This changed the previous consistent approach as between the courts regarding notifications pursuant to the Act. Consequently the prescribed Form 4 in sch 2 became outdated and required amendment together with the Rules. Issues about the prescribed form have been discussed with the Family Law Section of the Law Council of Australia and various professional bodies.

The amendments replace references in the Rules to the prescribed form number ('Form 4') with the title of the prescribed form ('Notice of Child Abuse, Family Violence or Risk of Family Violence'). The amendments replace any references to the prescribed form number with the title of the form. The overriding obligation to file is not affected. Otherwise the amendments are technical in nature, designed to achieve a common approach between superior federal courts; or administrative in nature. The amendments have been discussed with the Family Law Section of the Law Council of Australia.

The amendment to require that any variation of a family violence order affecting the child or member of the child's family be filed as soon as possible after the variation by any party affected by the variation, is consequential upon the existing obligation of a party to file a copy of a family violence order when a case starts or as soon as practicable after it is made (r 2.05) and ensures that current information about any family violence order is provided to the court.

The amendments providing that proceedings in the court (other than a trial) may be heard in chambers, that judgment must be pronounced in open court and that written reasons must be published in open court, and when and how an order is entered and also in relation to when an order may be varied or set aside and when reasons for judgment may be varied or set aside, are of a technical nature to achieve a common approach of superior federal courts.

The amendment to the Rules extending the time for the filing an itemised costs account does not affect the overriding right to request an itemised costs account and is a technical change.

There was minimal consultation in connection with the amendment repealing the requirement prescribing the format of short reasons for decision to dismiss an appeal. The change does not affect the circumstances in which the Full Court may provide reasons for decision in short form when dismissing an appeal that does not raise any question of general principle. It is administrative in nature.

## **Schedule 6 — Transitional provisions**

No consultation occurred or was required in connection with the transitional provisions which are technical drafting amendments.

### **3. SUMMARY OF MAJOR CHANGES**

The major changes introduced by the amendments to the Rules are set out below in relation to each of the schedules.

## **Schedule 1 — Amendments relating to arbitration**

To set out rules in Chapter 26B relating to arbitration, in particular rules about disclosure and subpoenas, which are additional to the requirements relating to arbitration in Part 5 of the Regulations. The principal amendments are:

### **Disclosure:**

1. To state that each party has a duty to the arbitrator and each other party to give timely full and frank disclosure of relevant information including financial information.
2. To specify the process for the production, inspection and copying of documents.
3. To specify the use of the documents produced.
4. To specify the process for objection to production due to claim of privilege or inability to produce the document.
5. To specify the process for applications by a party or an arbitrator for orders relating to disclosure.
6. To provide for disclosure of documents by electronic communication.
7. To permit an application for a court order if the cost of complying with the duty of disclosure would be oppressive.

### **Subpoenas:**

8. To state the process for issuing a subpoena in an arbitration.

9. To specify the requirements for service of a subpoena.
10. To state the obligation to pay conduct money sufficient to meet reasonable expenses of compliance, witness fees and substantial losses or expenses.
11. To state when compliance is not required.
12. To provide for the duration of a subpoena.
13. To specify the process of objection when orders that a subpoena be wholly or partly set aside or other relief are sought.

**In relation to a subpoena for production:**

14. To specify the process for production, inspection and copying of documents in relation to a subpoena for production.
15. To specify the process for objecting to the production or inspection or copying of documents.
16. To state when a person may inspect documents produced in compliance with a subpoena.
17. To specify the process for seeking the production of documents in the possession of another court.
18. To provide for the return or destruction of documents produced.

**Other rules and amendments relating to arbitration:**

19. To provide for the consequences of non-compliance with a subpoena.
20. To state the procedure for an arbitrator to refer a question of law under s 13G of the Act to the court for determination.
21. To state the requirements for referral of other matters to the court that ordered the arbitration.
22. To require an arbitrator to notify the court that ordered the arbitration of certain matters when an arbitration has ended and an award has been made.
23. To specify the requirements for service of a Form 8 application to register an arbitration award pursuant to reg 67Q(2) of the Regulations.
24. To provide for a process to enable a respondent to an application made to the court in relation to an arbitration to respond to the application.
25. To require that if a subpoena is issued in relation to a relevant property or financial arbitration the arbitrator inform the court if the arbitration is suspended, terminated or otherwise ends.

26. To delegate to Deputy Registrars the power vested in the court by Divisions 26B.2.1 and 26B.2.2 in relation to subpoenas in arbitration.
27. To provide that an arbitrator may search and copy the court record relating to the case.

## **Schedule 2 — Amendments relating to subpoenas**

### **Generally:**

1. To regulate the use of subpoenaed documents.
2. To specify the requirements in relation to manner and time of service.
3. To provide for the obligation to pay conduct money sufficient to meet reasonable expenses of compliance, witness fees and substantial losses or expenses.
4. To state when compliance is not required.
5. To specify the process of objection when orders that a subpoena be wholly or partly set aside or other relief are sought.
6. To specify the manner of complying with a subpoena for production.

### **In relation to a subpoena for production:**

7. To specify the process of production, inspection and copying documents produced in compliance with a subpoena for production.
8. To specify the process for objecting to the production or inspection or copying of documents.
9. To state when a person may inspect a document produced in compliance with a subpoena.

## **Schedule 3 — Amendments relating to surrogacy**

To require additional evidence in support of an application for a parenting order in relation to a child who was born under a surrogacy arrangement and in particular:

1. To provide a copy of any surrogacy agreement.
2. To include evidence of the personal circumstances of the applicant including in relation to the surrogacy arrangement

3. To include evidence of the personal circumstances of the surrogate mother including in relation to the surrogacy arrangement.
4. To include evidence of the identity of the child.
5. To include evidence about the relevant law in the child's birth country.

#### **Schedule 4 — Costs**

1. To increase by three per cent (3%) the costs allowable for work done and services rendered by lawyers and itemised in the itemised scale of costs in sch 3 of the Rules.

#### **Schedule 5 — Miscellaneous amendments**

1. To replace references to the prescribed form number 'Form 4' with the form title 'Notice of Child Abuse, Family Violence or Risk of Family Violence'.
2. To require that a copy of any variation of a family violence order affecting the child or member of the child's family be filed as soon as possible after the variation by any party affected by the variation.
3. To provide that proceedings in the court (other than a trial) may be heard in chambers.
4. To provide that a judgment must be pronounced in open court and reasons for judgment must be published in open court.
5. To provide that if an order is made other than when it is pronounced by the judicial officer in a hearing or trial, it is made when it is signed.
6. To state when an order must be entered and when it need not be entered.
7. To specify how an order is entered.
8. To specify the circumstances when a court may vary or set aside an order.
9. To provide that the court may vary or set aside reasons for judgment.
10. To extend the time for service of an itemised costs account by a person entitled to party and party costs upon a person liable to pay the costs from 28 days to 4 months after the end of the case.

11. To repeal the prescription of the form of short reasons in relation to a decision to dismiss an appeal that does not raise any question of general principle.

## **Schedule 6 — Transitional provisions**

1. To state the transitional provisions in relation to the costs, arbitration and subpoena amendments.

## **4. DETAILS OF AMENDMENTS**

### **Rule 1 Name of Rules**

The name of the rules is the *Family Law Amendment (Arbitration and Other Measures) Rules 2015*

### **Rule 2 Commencement**

Schedule 1 commences on 1 April 2016. Schedules 2–5 commence on 1 January 2016. Schedule 6, Part 1 commences on 1 January 2016 and Schedule 6, Part 2 commences on 1 April 2016.

### **Rule 3 Authority**

The Rules are made under the *Family Law Act 1975*.

### **Rule 4 Schedules**

Schedules 1–6 amend the *Family Law Rules 2004*.

## **Schedule 1 — Amendments relating to arbitration**

### **Part 1 — Main amendments**

#### **[1] Chapter 26B — Arbitration**

Chapter 26B introduces Part 26B.1 about disclosure, Part 26B.2 about subpoenas and Part 26B.3 about other rules relating to arbitration.

### **Part 26B.1 — Disclosure relating to arbitration**

In relation to Part 26B.1 about disclosure **@26B.01** sets out the duty of each party to the arbitrator and to each other party to give timely full and frank disclosure of all information relevant to the arbitration, including information about the party's financial circumstances.

**@26B.02** states that the duty of disclosure also applies to relevant documents that have been in the possession or control of a party and that the duty does not affect certain other rights of access to documents or access to documents by agreement between parties.

**@26B.03** requires a party who inspects or copies the documents produced to use them only for the purpose of the arbitration and not to otherwise disclose the contents or give copies of them to any other person without the permission of the court.

**@26B.04** and **@26B.05** provide that a party may by written notice require a copy of a document or a document to be produced for inspection. The disclosing party must comply unless pursuant to **@26B.06** there is an objection because of a claim of privilege or because of an inability to produce the documents. The arbitrator must determine the objection unless it involves a question of law.

**@26B.07** states the circumstances of, and requirements for, disclosure by giving a list of documents and **@26B.08** states the requirements for the production of documents for inspection and for the copying of disclosed documents.

**@26B.09** states when a party to an arbitration or an arbitrator may apply for an order of the court relating to disclosure, how an application is to be made and what circumstances the court must take into account when making an order.

**@26B.10** states that if the costs of complying with the duty of disclosure would be oppressive, the court can order another party to pay, contribute to or give security for the costs.

**@26B.11** states that the court may make an order for disclosure of documents by electronic means.

### **Part 26B.2 — Subpoenas**

In relation to Part 26B.2 about subpoenas **Division 26B.2.1** sets out the general provisions about subpoenas. The provisions are generally consistent with the rules about subpoenas in court proceedings.

**@26B.12** states that the Part applies to subpoenas in relation to an arbitration.

**@26B.13** contains definitions for the Part.

**@26B.14** states the circumstances in which the court may issue a subpoena to give evidence, produce documents or give evidence and produce documents and states that if production would be sufficient then the issue of a subpoena must not be requested by a party to an arbitration.

**@26B.15** provides that a subpoena must not be issued by the court in certain circumstances, namely by a self-represented party without the permission of a Registrar or for production of documents in the custody of a court.

**@26B.16** provides that a subpoena that has not been served may be amended.

**@26B.17** establishes requirements for the manner and timing of service of subpoenas. A named person must be served with the subpoena and the brochure approved by the Principal Registrar by hand and the other parties and each interested person must be served by ordinary service. A

subpoena for production or a subpoena for production and to give evidence must be served at least 10 days before the production day and a subpoena to give evidence must be served at least 7 days before the day on which attendance is required. A subpoena must not be served upon a child without the permission of the court.

**@26B.18** provides for the obligation of the issuing party to pay conduct money, witness fees and substantial losses or expenses to the named person in relation to the subpoena.

**@26B.19** states that compliance with a subpoena is not required if service is not in accordance with the Rules or conduct money is not tendered or the issuing party releases the named person. **@26B.20** states that a subpoena remains in force until it is complied with or the named person is released from compliance or the arbitration ends.

**@26B.21** states how and when a named person or an interested person can object to a subpoena and apply to the court for orders in relation to the subpoena.

**Division 26B.2.2** provides for the production of documents and access by parties to the documents. It applies to subpoenas for production (**@26B.22**).

**@26B.23** states the requirements for production in compliance with a subpoena.

**@26B.24** provides for the automatic release, inspection and copying of subpoenaed documents in certain circumstances. It is contingent upon service in accordance with the Rules, no objection being made, compliance by the named person and a notice of request to inspect being filed by the issuing party. Documents may then be inspected. Documents may also be copied with the exception of child welfare, criminal, medical or police records.

**@26B.25** states when and how a named person, interested person or another party may object to producing or inspecting or copying documents. Also a person whose medical records are subpoenaed

may inspect the records before any other person in order to determine whether to object to inspection and copying. Objections must be referred to the court for hearing.

**@26B.26** requires that documents produced in compliance with a subpoena for production not be inspected or copied unless the requirements for automatic release have been complied with or the court gives permission.

**@26B.27** sets out how a party arranges production to the court of documents in the possession of the court or another court in order to obtain orders for inspection and copying of the documents.

**@26B.28** provides for the return or destruction at the end of the arbitration of documents produced.

**Division 26B.2.3** provides for the consequences of non-compliance with a subpoena.

**@26B.29** provides that the court may issue a warrant for the arrest of the named person and make an order for costs if the named person does not comply with a subpoena.

### **Part 26B.3 — Other rules relating to arbitration**

**@26B.30** specifies the requirements for referral of a question of law to the court by an arbitrator and **@26B.31** states the requirements of referral of certain other matters, namely, costs of arbitrations, suspension of arbitrations for failure to comply with directions and termination of arbitrations for lack of capacity to the court.

**@26B.32** requires the arbitrator to inform the court about awards made in court ordered arbitrations.

**@26B.33** states the time for service of a copy of an application to register an arbitration award and requires an affidavit of service to be filed.

**@26B.34** states how and when a response to an application in relation to arbitration may be made.

**@26B.35** requires an arbitrator inform the court if an arbitration is suspended, terminated or otherwise ends if a subpoena is issued in a relevant property or financial arbitration.

## **Part 2 — Other amendments**

### **[2] New subrule 5.01 (4A)**

This amendment provides that the restrictions in r 5.01 on applying for interim, procedural, ancillary or other incidental orders do not apply to restrict the filing of an application for an order by a party or an arbitrator in relation to an arbitration.

### **[3] Subrule 18.06(2) (at the end of table 18.5) add**

This amendment delegates to Deputy Registrars the powers vested in the court by Division 26B.2.1 in relation to subpoenas in an arbitration generally and by Division 26B.2.2 in relation to subpoenas for the production of documents.

### **[4] After subrule 24.13(1) insert (1A)**

### **[5] Subrule 24.13(2)**

These amendments provide that an arbitrator conducting an arbitration relating to a case may search the court record relating to the case and inspect and copy documents forming part of the court record.

### **[6] Schedule 4 (note to Schedule heading)**

This amendment is of a technical drafting nature and updates a note in sch 4, which stipulates amounts of allowances for conduct money and fees for witness fees, to include a reference to **@26B.18** (conduct money and witness fees in relation to subpoenas in an arbitration). The note cross references the relevant rules.

**[7] Dictionary**

This amendment inserts a definition of *arbitration agreement* into the Dictionary.

**[8] Dictionary (at the end of the definition of case)**

This amendment adds a note at the end of the definition of *case* stating that *case* does not include arbitration and referring to the definitions of *arbitration* and *proceedings* in the Act.

## **Schedule 2 — Amendments relating to subpoenas**

**[1] Rule 7.03 (table 7.1, item 9)**

This amendment is of a technical drafting nature and replaces the reference to r ‘15.28(1)’ with ‘15.22(1)’ because the provisions in relation to service are now in r 15.22 and r 15.28 of the Rules has been repealed.

**[2] Rule 13.07 (note 4)**

**[3] After r 13.07 insert r 13.07A**

These amendments repeal the note about the use of subpoenaed documents and insert r 13.07A which states that subpoenaed documents must be used for the purpose of the case only and must not be disclosed or copied without the court’s permission.

**[4] Subrule 15.16(1) — repeal definition of *court date***

This amendment repeals the definition of court date.

**[5] Subrule 15.16(1) — insert definitions of *interested person* and *subpoena for production***

This amendment defines an interested person to be a person who has a sufficient interest in the subpoena. The amendment also defines subpoena for production by reference to r 15.17(1)(a) of the Rules which provides that the court may issue a subpoena for production.

**[6] Repeal and substitute sub r 15.16(2) (note)**

This amendment repeals and substitutes the note because of an amendment to the definition of document previously located in s 25 of the *Acts Interpretation Act 1901*.

**[7] After subrule 15.17(1) insert subrule 15.17(1A)**

This amendment requires that a subpoena for production, a subpoena to give evidence or a subpoena for production and to give evidence must be in the approved form.

**[8] After subrule 15.17(3) insert subrule 15.17(3A)**

This proposed new subrule states that a person must not request the issue of a subpoena for production and to give evidence if production would be sufficient.

**[9] At the end of rule 15.17 add subrules 15.17(7), (8)**

These new subrules state that a subpoena to give evidence must specify where and when the named person must attend court to give evidence and a subpoena for production and to give evidence must identify the document to be produced and state where and when the named person must attend court to produce the document and give evidence.

**[10] Repeal and substitute rule 15.22**

The substituted rule replaces the existing rules about service of subpoenas. The issuing party must serve the named person by hand. Each other party, each interested person and the independent children's lawyer must be served by ordinary service. A subpoena for production must be served at least 10 days before the production day. A subpoena for production and to give evidence must be

served at least 10 days before the day on which production is required. A subpoena to give evidence must be served at least 7 days before the day on which attendance is required.

**[11] Repeal and substitute paragraphs 15.24(1)(a) and (b)**

These paragraphs address when compliance with a subpoena is not required. The amendments are of a technical nature. The amendments also add the requirement that compliance is not required if conduct money is not tendered at a reasonable time before the day on which production is required.

**[12] Repeal and substitute rule 15.26**

This amendment replaces the existing rule about objection to a subpoena where an order is sought by a named person or interested person to set aside a subpoena in whole or in part or seeks other relief. The amendment is technical in nature. The reference to a 'person having a sufficient interest' is replaced by 'interested person'. The new rule also requires that a person seeking relief must apply to the court in writing before the day when attendance or production is required.

**[13] Subrule 15.27(1)**

**[14] Repeal subrule 15.27(2)**

These amendments are of a technical nature consequential upon r 13.07A now providing for use of documents.

**[15] Repeal rule 15.28**

This amendment is consequential upon the substitution of r 15.22.

**[16] Repeal and substitute subrule 15.29(1)**

This amendment replaces the requirement to attend on a court date to comply with a subpoena for production with a requirement to provide subpoenaed documents to the court before the day on which production is required in accordance with the subpoena.

**[17] Subrule 15.29(2)**

This amendment is of a technical nature consequential upon the amendment of r 15.29(1).

**[18] Subrule 15.29(4) (paragraph (a) of the definition of *copy*)**

**[19] Subrule 15.29(4) (at the end of the definition of *copy*) add paragraph (c)**

These amendments extend the definition of *copy* to add any other electronic form acceptable to the issuing party.

**[20] Repeal and substitute rules 15.30 and 15.31**

These amendments provide for the automatic inspection and copying of subpoenaed documents in certain circumstances. This is contingent upon the issuing party serving the named person and each other relevant person with the subpoena and brochure at least 10 days before the production day. There must be no r 15.31 objection by the production day and there must be compliance by the named person. The issuing party must file a notice of request to inspect and any affidavits of service on or after the production day. Each party and any independent children's lawyer may then inspect and copy the documents with the qualification that child welfare, criminal, medical or police records are precluded from automatic copying but may be inspected.

Written notice of any objection to production, inspection or copying of documents must be given to the Registry Manager, the named person, each other party and the independent children's lawyer before the production day.

A person whose medical records are subpoenaed may inspect the documents prior to inspection by the parties, lawyers or independent children's lawyer in order to determine whether to object to inspection or copying of the records. Written notice of the request to inspect must be given to the Registry Manager before the production day. The potential objector may then inspect and any

objection must then be given within 7 days of the production day. Unless the court orders otherwise, no other person may inspect medical records until the later of 7 days after the production day or the determination of any objection.

Objections are listed for hearing by the court. The court may compel production to rule on an objection.

**[21] Subrule 18.06(2) (table 18.5, items 24A to 30)**

This amendment repeals the items and substitutes item 25. Item 25 delegates to Deputy Registrars the power vested in the court by Division 15.3.1 in relation to subpoenas generally and by Division 15.3.2 in relation to the production of documents and access by parties.

**[22] Repeal and substitute Schedule 4 (Note to Schedule heading)**

This is a technical correction to the numbering in the note from r 19.18 to r 19.19.

**[23] Part 1 of Schedule 4 (table item 101)**

This amendment increases the minimum amount of conduct money specified in sch 4, Part 1, item 101 from \$10 to \$25.

**[24] Dictionary**

This amendment inserts in the Dictionary a definition of *child welfare record* to mean a record relating to child welfare held by an agency mentioned in sch 9 to the Regulations.

**Schedule 3 — Amendments relating to surrogacy**

**[1] Rule 2.01 (Table 2.1, item 1, column headed “Kind of application”)**

**[2] Rule 2.01 (after paragraph (b) of note 2)**

**[3] Rule 2.02 (Table 2.2, at the end of the cell at item 2A, column headed “Documents to be filed with application”)**

These amendments provide that an application for a parenting order in relation to a child who is born under a surrogacy arrangement is made by way of Initiating Application (Family Law) filed together with an affidavit which also complies with the additional requirements of the amendments in Division 4.2.8.

**[4] At the end of Part 4.2 “Division 4.2.8—Children born under surrogacy arrangements”**

These amendments insert Division 4.2.8 which specifies the additional evidence to be provided in support of an application for a parenting order in relation to a child who is born under a surrogacy arrangement.

**Rule 4.34** requires evidence from the applicant and surrogate mother. The evidence must include a copy of any surrogacy agreement. The evidence must include the personal circumstances of the applicant before during and after the surrogacy arrangement. Evidence is also required of the personal circumstances of the surrogate mother including personal circumstances before during and after the surrogacy arrangement; whether the surrogacy arrangement was made with her informed consent and whether she received prior counselling and legal advice.

**Rule 4.35** requires evidence regarding the identity of the child including evidence regarding the surrogacy arrangement; a certified copy of the child’s birth certificate; a parentage testing report; if the child is an Australian citizen — proof of citizenship; if a court has made an order of the kind referred to in s 60HB of the Act under a prescribed law of a State or Territory — a copy of the order.

**Rule 4.36** requires evidence regarding the law in the country where the child was born in relation to the surrogacy arrangement; the rights of the surrogate mother and the rights of the surrogate mother’s husband (if any) or de facto partner (if any) in relation to the child.

**Rule 4.37** provides that on the first hearing date of an application the court must make procedural orders; consider an order for the appointment of an Independent Children’s Lawyer; consider ordering a family consultant to prepare a family report or undertake other functions of s 11A of the Act and consider whether a condition in s 65G(2) of the Act have been met.

**[5] After subrule 10.15(2)**

This amendment provides that the provisions of r 10.15(1) of the Rules for applying for a consent order do not apply to an application for a parenting order in relation to a child born under a surrogacy arrangement. An application for such a parenting order must be made by Initiating Application (Family Law).

**[6] Subrule 18.02 (Table 18.1, after item 2)**

This amendment provides that the powers in Division 4.2.8 of the Act are not delegated to Judicial Registrars.

## **Schedule 4 — Costs**

**[1] Schedule 3**

The amendments increase by 3 per cent (3%) the amounts which lawyers, who are entitled to practise in the Family Court, may charge in respect of work done and services performed on or after 1 January 2016 in accordance with the sch 3 of the itemised scale of costs.

## **Schedule 5 — Miscellaneous amendments**

**[1] Sub-rule 2.04D(1)**

**[2] Sub-rule 2.04D(2)**

**[3] Sub-rule 2.04D(2)**

**[4] Sub-rule 2.04E(1)(c)**

**[5] Sub-rule 2.04E(2)**

**[6] Sub-rule 2.04E(3)**

These amendments are of a technical drafting nature and identify the prescribed form by the title 'Notice of Child Abuse, Family Violence or Risk of Family Violence' or 'notice' rather than by the title 'Form 4' which is omitted.

**[7] At the end of r 2.05 add sub-r 2.05(3)**

The new subrule requires that a copy of any variation of a family violence order affecting the child or member of the child's family be filed by any party affected by the variation as soon as practicable after the variation.

**[8] Repeal r 11.16 and substitute**

The substituted rule provides that proceedings in the court (other than a trial) may be heard in chambers and requires that if a judgment is given in proceedings the judgment must be pronounced in open court. The amendment also provides that if the reasons for judgment are reduced to writing they must be published by delivering them to the Registrar or an associate in open court.

**[9] Paragraph 17.01(1)(b)**

This amendment is consequential upon the repeal and substitution of r 11.16. It provides that if an order is made other than when it is pronounced by the judicial officer in a hearing or trial, it is made when it is signed.

**[10] Repeal r 17.01(2) (note)**

This amendment is consequential upon the amendment to paragraph 17.01(1)(b). It repeals the note which states that after an order made the order issued by the court embodies the terms of the order made in a documents that is signed and sealed.

**[11] Repeal sub-r 17.01(5)**

This amendment is consequential upon the repeal and substitution of r 11.16.

**[12] Repeal r 17.02 and substitute rr17.01A, 17.01B, 17.02, 17.02A**

The new **Rule17.01A** sets out when an order must be entered and when it need not be entered. It must be entered if it takes effect on the signing of the order; if the order is to be served; if it is to be enforced; if an appeal or application for leave to appeal has been made; if a step is to be taken under the order or if the court directs that the order be entered. It need not be entered if it only (in addition to costs) makes an extension or abridgment of time; if it grants leave or makes a direction amending or filing a document or for an act to be done by an officer of the court other than a lawyer or if it gives directions about the conduct of proceedings.

The new **Rule 17.01B** sets out how an order is entered. It is entered by the court; a person at the direction of the court or a Registrar attaching a seal of the court to the order and by a judicial officer signing the order. It may be entered in a registry, a court or in chambers. The order may be signed by electronic means.

The new **Rule 17.02** sets out the circumstances when a court may vary or set aside an order, namely, if it was made in the absence of a party; if it is obtained by fraud; if it is interlocutory; if it is an injunction or for the appointment of a receiver; if it does not reflect the intention of the court; if the party in whose favour it was made consents; or if there is a clerical error from an accidental slip or omission.

The new **Rule 17.02A** provides that the court may vary or set aside reasons for judgment if issued by mistake or correct a clerical mistake in reasons for judgment or an error arising in reasons for judgment from an accidental slip or omission.

**[13] Sub-rule 18.06(2) (table 18.5, after item 31A)**

This amendment is consequential upon the repeal and substitution of r 17.02. The amendment includes in the powers under the rules delegated to Deputy Registrars the power to vary or set aside an order if there is a clerical mistake in the order. It replaces r 17.02(2) which provided that a Registrar may rectify an error obvious on reading the order.

**[14] Sub-rule 19.21(1)**

This amendment extends the time for the service of an itemised costs account by a person entitled to party and party costs upon a person liable to pay the costs from 28 days to 4 months after the end of the case.

**[15] Sub-rule 19.41(2)(b)**

This amendment acknowledges that there is currently one prescribed form only in sch 2.

**[16] Repeal sub-r 22.33**

This amendment repeals the prescription of the form of short reasons in relation to a decision to dismiss an appeal that does not raise any question of general principle.

**[17] Repeal sub-r 24.04(2) and substitute**

**[18] Sub-rule 24.04(3)**

**[19] Repeal sch 2 and substitute**

The amendments are of a technical drafting nature and identify the prescribed Form 4 by title 'Notice of Child Abuse, Family Violence or Risk of Family Violence' or 'notice' instead of by form number. The revised Notice of Child Abuse, Family Violence or Risk of Family Violence is inserted in sch 2.

## **Schedule 6 — Transitional provisions**

The amendments are of a technical nature and deal with the operation of certain of the new or amended Rules in relation to existing matters.

### **Part 1 — Transitional provisions commencing 1 January 2016**

#### **[1] Repeal Parts 1 and 2 of Chapter 27 and replace with Part 27.1**

**27.01** provides that the three per cent (3%) increase in the sch 3 (itemised scale of costs) applies to work done on or after 1 January 2016.

**27.02** provides that the sch 2 amendments in relation to subpoenas apply to subpoenas issued or to be issued on or after the date of commencement of the rules. The rule is repealed at the start of 1 February 2016.

### **Part 2 — Transitional provisions commencing 1 April 2016**

#### **[2] At the end of Part 27.1 add 27.02**

**27.02** provides that the Chapter 26B (arbitration) applies to arbitrations that start or that started but had not ended after the commencement of the rules. The rule is repealed at the start of 1 May 2016.