FAMILY LAW ACT (1975) Cth, s.66. Bettinson v Bettinson (1965) 1 All ER, Short v Short (1974) 22FLR 320 relied upon HEARING SYDNEY, 7 August 1995 (hearing), 3 October 1995 (decision) 3:10:1995 Mr Tregilgas of Counsel (instructed by Messrs Mullane and Lindsay, Solicitors,appeared on behalf of the appellant wife. There was no appearance by or on behalf of the respondent husband. ORDER 1. That the appeal be dismissed. 2. That there be no order as to the costs of the appeal. DECISION ELLIS, FINN AND BROWN JJ This is an appeal by the wife against orders made by Renaud J on 3 April 1995whereby her Honour dismissed the wife's applicationthat the Court should nothear the husband's application for dissolution of marriage, and pronounced adecree nisi of dissolutionof the marriage of the husband and the wife. HerHonour in addition declared that she was not satisfied that proper arrangementshad been made for the one child of the marriage under the age of eighteenyears. Accordingly, the decree nisi pronounced by her Honourhas not becomeabsolute. Essentially this appeal raises the question of whether or not there is any rulewhich prevents this Court hearing, or which conferson this Court a discretionas to whether or not to hear, an application for dissolution of marriage incircumstances where the applicantfor dissolution is, or has been found to be,in contempt, or in breach of, earlier orders of this Court made in financialproceedingsbetween the parties. There was no appearance by or on behalf of the husband at the hearing of theappeal. However, as the presiding Judge advised Counselfor the wife at thecommencement of the hearing of the appeal, we are aware that a letter dated 26July 1995 had been sent to theRegistry by a firm of solicitors, Messrs ColinBaker and Associates, advising that their application on behalf of the husbandfora grant of legal aid had been refused, and that the husband had informedthem that he did not have the means to instruct legal representativesnor didhe have the capacity to represent himself at the hearing of the appeal. The factual background to this matter. The factual background to this matter as found by her Honour can be shortlystated as follows. Both parties were born in Egypt - the husband on 6 June 1923 and the wife on 8October 1938. The husband came to live in Australiain March 1971. The partieswere married in Egypt on 3 December 1972, but then lived in Australia for mostof their married life. They separated in January 1988, according to the wife, or June 1988 accordingto the husband, although they both continued to

occupythe former matrimonialhome until the husband left in October 1991. There were two children of themarriage who were born respectivelyon 7 October 1975 and 23 March 1979. Onlythe younger child was under eighteen at the time of the proceedings before herHonour. On 11 June 1992 orders were made by Mullane J in relation to propertysettlement and child maintenance. By way of child maintenancethe husband wasto pay by 24 June 1992 the sum of $7,000.00 in respect of the older child and$18,000.00 in respect of the younger.By way of property settlement the husbandwas to pay the wife the sum of $176,000.00 and to transfer to her his interestin the formermatrimonial home. The husband appealed against these orders buthis appeal was dismissed on 3 February 1993. Her Honour found thatit wascommon ground that although the husband had transferred his interest in thehome to the wife, he had made no payments pursuantto the orders of 11 June1992. In early 1993 (according to her Honour) the wife brought three applications forthe husband to be dealt with for breach of the twoorders for lump sum childmaintenance and for the property settlement payment. Those applications camebefore Renaud J who foundthat: "... the wife has established that the husband is in breach of theorders as alleged in her three applications and that the husbandhas not givenreasonable excuse for being in breach." Her Honour ordered that the husband serve six months in prison to be releasedbefore that time if he complied with the orders. Thehusband served the sixmonths in prison between 17 August 1993 and 17 February 1994. (We mention herethat we understand from thesubmissions to us of Counsel for the wife, that herHonour's orders were made pursuant to the provisions of s.112AD of the FamilyLaw Act.) In March 1993 the husband obtained a Muslim divorce from the wife in Egypt. On 29 November 1993 the husband filed an application for dissolution ofmarriage in the Family Court of Australia. On 17 January1994 the wife filed anAnswer in which she sought that the husband's application be adjournedgenerally with liberty to restore onlyafter the husband had complied with theorders of 11 June 1992. The proceedings before, and judgment of, Renaud J. The matter came before Renaud J on 28 March 1994. On that occasion each of theparties gave brief oral evidence and the matter wasadjourned for the making ofwritten submissions. Those submissions together with certain supplementarysubmissions were completedin November 1994. On 3 April 1995, her Honourdelivered judgment. In her judgment her Honour

carried out an extensive review of Australian andEnglish authority relevant to the issue of whether ornot a court will hear aperson who is in contempt, and her Honour concluded (at Appeal Book p.19) thatthere was a discretion todo so. Her Honour then considered (at Appeal Bookpp.20-23) the factors which in her opinion were relevant to the exercise of theCourt's discretion in determining whether a contemner should be heard, and sheconcluded that in this case in the exercise of herdiscretion, the Court shouldhear the husband's application for dissolution of marriage despite the factthat the husband was incontempt of orders relating to child maintenance andproperty settlement. Her Honour next considered (at Appeal Book pp.23-25) the operation of s.55A ofthe Act, by virtue of which a decree nisi will notbecome absolute unless theCourt has, by order, declared that it is satisfied: "(a) that there are no children of the marriage who have notattained 18 years of age; or (b) that the only children of the marriage who have not attained 18 years ofage are the children specified in the order and that: (i) proper arrangements in all the circumstances have been made for thewelfare of those children; or (ii) there are circumstancesby reason of which the decree nisi should becomeabsolute even though the court is not satisfied that such arrangements havebeenmade." Then her Honour referred to certain relevant evidence of each party, andconcluded that she was not satisfied that the husband had"made properarrangements for the financial welfare of the children". She also concludedthat there were no "special circumstanceswarranting a declaration that thedecree nisi should become absolute even though" she was "not satisfied aboutthe financial arrangementsfor the children". Finally, the following orders and findings were made by her Honour: "1. That the wife's application filed on 17 January 1994, that thecourt should not hear the husband's application for dissolutionof marriage,be, and is, hereby dismissed. 2. I make the following findings: a] That the parties were married in Cairo, Egypt, on 3 December 1972. b] That the husband wasordinarily resident in Australia for a period of 12months immediately preceding the date of the filing of his application fordissolutionof marriage. c] That the parties separated in January or June 1988 and lived separatelyand apart for a continuous period of notless than 12 months immediatelypreceding the date of the filing of the husband's application for dissolutionof marriage. d] Thatthe marriage has broken down irretrievably. 3. I pronounce a decree nisi of dissolution of

marriage. 4. There is one child to whom the provisions of section 55A apply. He is Mborn 23 March 1979. I am not satisfied that proper arrangements,in all thecircumstances, have been made for his welfare." The Grounds of Appeal. By a Notice of Appeal filed 3 May 1995, the wife appealed from orders 1 and 3.The Grounds of Appeal which were pursued before usare as follows: 1. That Her Honour erred in law in finding that the Court has adiscretion to hear a person in contempt other than that pursuantto Section 66of the Family Law Act. 2. That in the alternative if the Court has a discretion to hear a person incontempt that Her Honour erred as to the factors relevantto the exercise ofthat discretion. 3. That her Honour erred in holding that the balance of convenience was not arelevant factor in exercising the discretion. 4. That Her Honour erred in failing to give sufficient weight to the publicpolicy aspect of the exercise of the discretion. 5. That Her Honour erred in failing to apply an onus on the Husband incontempt to show cause why the court should exercise its discretionto hear theapplication. In the event that the appeal was successful, the wife sought: . that Orders 1 and 3 should be discharged; . that the declaration in Order 4 should be revoked; . that the husband's Application for Dissolution of Marriage be adjournedgenerally; and . that the husband have liberty to restore his Application to the list uponcompliance with Orders of the Family Court of Australiamade 11 June1992. The common law position concerning applications by persons in contempt ofCourt. As already mentioned, Renaud J carried out an extensive review of Australianand English authority relevant to the issue of whetheror not a court will heara person who is in contempt, and she concluded that the issue was now one ofdiscretion. In reaching thisconclusion, her Honour relied on the recent Houseof Lords decision in X Ltd v Morgan-Grampian (Publishers) Limited &Ors (1991) 1 AC 1, which her Honour considered was the most persuasiveauthority so far as this Court is concerned. However, in reaching herconclusion,her Honour adverted to, but did not examine the proposition thatthe rule in question, at least in its modern formulation, is restrictedto thehearing of applications by a contemner in the same proceedings or cause.In her judgment (at Appeal Book p.13) her Honour said: "In Short v Short the Supreme Court of South Australia (InBanco) held, per Bray CJ, that the rule that those in contempt may not be heardhas beenrelaxed and "has been restricted to the same proceedings in whichthe contempt occurs. His Honour cited no authority for

this proposition,which is not enunciated by the majority in Hadkinson's case, although itseems to be assumed by Lord Denning (if, that is to say, "the same proceedings"means the same as "same cause")." Then later (at Appeal Book pp.16-17) her Honour referred to a decision ofDrummond J in Robert James MacLeod and Others (Federal Court ofAustralia, Queensland District Registry No. QG3011 of 1992, unreported) and tohis Honour's citation of Short v Short (1974) 22 FLR 320, as authorityfor the proposition that the operation of the rule is restricted to "the sameproceedings in which the contempt occurs".Renaud J then said (Appeal Bookpp.16-17): "It is not clear from the judgment in Short v Short how orby whom the rule came to be restricted in this way. Nor is it clear to me howthe expression "same proceedings" is to be understood." Then later (at Appeal Book pp.17-18) her Honour said as follows: "If there is a rule subject only to specific exceptions, and if, asit seems to me, the applicant in this case does not come withinany of thoseexceptions then he is not entitled to be heard and that is an end of thematter, (leaving aside the unexamined question of the restriction of therule to "the same cause" or the sameproceeding", which I do not need to answer)." (We have insertedthe underlining.) Accordingly, her Honour did not examine further this issue of whether the ruleis restricted to "the same cause" or "the same proceeding".However, in ouropinion, this question was crucial to a determination of the case before herHonour, and now before us. As her Honour recognized, the leading modern case in relation to the questionof whether a person in contempt will be heard is Hadkinson v Hadkinson(1952) P.285. In Hadkinson the wife had been granted custody of the child of themarriage, but she had been ordered not to take the child out of England. Shedid so, and the husband obtained an order requiring the wife to return with thechild. The wife appealed against that order and,at the commencement of theappeal, a preliminary objection was taken on behalf of the husband that thewife was not entitled to beheard by the Court on the ground that she was incontempt. This objection was upheld by all three members of the Court ofAppeal,but there were differences in the reasoning of Romer LJ, with whomSomervell LJ agreed, on the one hand, and Denning LJ on the other,with theformer holding there was a strict rule against hearing a person in contempt(subject only to certain limited exceptions)and the latter regarding thematter as discretionary. Romer LJ considered that it "is the plain and unqualified

obligation of everyperson against, or in respect of, whom an order ismade by a court of competentjurisdiction to obey it unless and until that order is discharged ..." (p.288)and that two consequenceswill, in general, follow from the breach of thisobligation: the first being that anyone who disobeys an order of the court(otherthan merely procedural orders) is in contempt and may be punished bycommittal or attachment or otherwise; and the second being "thatno applicationto the court by such a person will be entertained until he has purged himselfof his contempt." (p.288.) With reference to this second consequence, Romer LJ then said: "The rule, inits general form, cannot be open to question. Thereare many reported cases inwhich the rule has been recognized and applied ...". (p.289.) However, Romer LJ then went on to refer to "the exceptions to which the ruleis, undoubtedly, subject". The exceptions recognizedby Romer LJ (at p.289)were: . "a person can apply for the purpose of purging his contempt"; . "a person can appeal with a view to setting aside the order on which thealleged contempt is founded"; . "[a] person against whom contempt is alleged will also, of course, be heardin support of a submission that, having regard to thetrue meaning andintendment of the order which he is said to have disobeyed, his actions did notconstitute a breach of it, or that,having regard to all the circumstances, heought not to be treated as being in contempt"; and . "the qualified exception which, in some cases, entitles a person who is incontempt to defend himself when some application ismade againsthim". We note, as did Renaud J, that Romer LJ made no reference to the fact that therule that a person in contempt will not be heard,applies only toapplications in the same proceedings or cause. The judgment of Denning LJ largely comprises a discussion of the history of therule "that a party in contempt will not be heard",which was a rule not of thecommon law but of the ecclesiastical and chancery courts. Following thatdiscussion Denning LJ concluded: "... It is a strong thing for a court to refuse to hear a party toa cause and it is only to be justified by grave considerationsof publicpolicy. It is a step which a court will only take when the contempt itselfimpedes the course of justice and there is noother effective means of securinghis compliance ... . Applying this principle, I am of opinion that the fact that a party to a causehas disobeyed an order of the court is not of itselfa bar to his being heard,but if his disobedience is such that, so long as it continues, it impedes thecourse of justice in thecause,

by making it more difficult for the court toascertain the truth or to enforce the orders which it may make, then the courtmay in its discretion refuse to hear him until the impediment is removed orgood reason is shown why it should not be removed." (p.298.) Subsequently in Bettinson v Bettinson (1965) 1 All ER 102, Plowman Jrecognized that the general rule that the Court would not entertain anapplication by a person in contempt until thatperson had purged the contempt,was confined to proceedings in the same cause, saying as follows (atpp.105-107): "I turn next to the question whether, in these circumstances, thewife is precluded, or ought to be precluded, from pursuing her presentaction.There is a well-settled general rule that the court will not entertain anapplication by a person who is in contempt of courtuntil he has purged himselfof that contempt. In Hadkinson v. Hadkinson ((1952) 2 All ER 567; (1952)P.285) DENNING, LJ, traced ((1952) 2 All ER at p.573; (1952) P.at p.295) theorigin of the rule in Chanceryback to an ordinance of LORD BACON in the year1618, (78th ordinance of LORD BACON of 1618 (BEAMS' ORDERS IN CHANCERY, p.35),whichlaid down that "They that are in contempt ... are not to be here (?heard) neither in thatsuit, nor any other, except the court of special gracesuspend the contempt." The practice of the court in applying the ancient rule changed in course oftime, however, and, as DENNING LJ, pointed out ((1952)2 All ER at p.573;(1952) P. at p.296), it came to be much restricted in scope. Among the ways inwhich it was restricted was this,that the court confined its operation tocontempt in the same suit as that in which the application was made. Thus, inDANIELL'SCHANCERY PRACTICE (7th Edn.) Vol. 1, p.725, the practice is stated asfollows, "a party in contempt for non-obedience to an order in one cause will not bethereby prevented from making an application to the courtin another causerelating to a distinct matter, although the parties to such other cause may bethe same." In OSWALD ON CONTEMPT OF COURT (3rd Edn.) p.248, this is said: "A plaintiff in contempt may, it seems, proceed in other proceedings, eventhough they are between the same parties." As authority for the proposition so stated in DANIELL and in OSWALD, both referto two cases, the first that of Clark v. Dew ((1829)[1829] EngR 748; , 1 Russ. & M.103), and the second Taylor v. Taylor ((1849), 1 Mac. & G. atp.409). In Clark v. Dew ((1829)[1829] EngR 748; , 1 Russ. & M. 103), a party who wasin contempt for disobedience to an order in a cause was held not to beprecluded thereby from

making a motion inanother cause having reference to adistinct subject, though between precisely the same parties. LORD LYNDHURST,LC, said ((1829),1 Russ & M. at p.107) that the practice was the same, heapprehended, in equity as at law, that a party could not move till hehadcleared his contempt; but that the rule must be confined to proceedings in thesame cause; otherwise the consequence would be,that a party, who was utterlyunable to comply with an order of the court, might be prevented from afterwardsprosecuting any claims,however just, against the person who had succeeded inobtaining that order. In Taylor v. Taylor ((1849) [1849] EngR 1138; 1 Mac. & G. 397)... (i)t was held, among other things, that the circumstance of the plaintiffbeing out of the jurisdiction and in contempt for non-compliancewith thedecree made, did not prevent his filing the bill in question. LORD COTTENHAM,LC, said this ((1849), 1 Mac. & G. atp.409): "Then, as to the other point, that the plaintiff is in contempt, that is tosay, that there is a decree against him, I do not apprehendthat that is anyobjection. I had to consider that point in the case of Wilson v. Bates((1838)[1838] EngR 533; , 3 My. & Cr. 197), and I thought that LORD BACON'S order did nottouch an application of this sort. I think, therefore, that the presentapplicationfails on all the grounds, and must be dismissed, with costs." The reference to Wilson v. Bates ((1838)[1838] EngR 533; , 3 My. & Cr. 197) suggests,I think, that LORD COTTENHAM, LC, was probably referring to the argument of Mr.Bethel ((1838), 3 My & Cr. at p.199).This is stated as part of hisargument: "LORD BACON'S ordinance, if construed literally, is not the rule at thepresent day; for it is perfectly settled that a party incontempt in one causemay, notwithstanding, be heard in another." Clark v. Dew ((1829)[1829] EngR 748; , 1 Russ. & M. 103), so far as I am aware, hasstood unchallenged for the last 135 years, since it was decided, and, in myjudgment, it follows fromthose citations that the wife's contempt arising fromthe failure to obey the order of WYNN-PARRY, J, is not of itself a reason forordering a stay of the present action." In 1973 in Australia Bray CJ (with whom the other two members of the Full Courtof the Supreme Court of South Australia agreed) recognizedthe same limitationin respect of the rule when in Short v Short he said (p.330): "The law on the right of a party in contempt to be heard in anyapplication in the same cause as that in which the contempt occurredwasdiscussed in Hadkinson v. Hadkinson (4). It appears from the judgment ofDenning LJ,

as he then was, in that case at p.295 that the rule originated inan ordinance ofLord Bacon in 1618 which laid down that "they that are incontempt are not to be heard, neither in that suit nor in any other, exceptthecourt of special grace suspend the contempt". The rule, however, has been relaxed. It has been restricted to the sameproceedings in which the contempt occurs. The court has adiscretion to hear aparty in contempt, though I do not think, with respect, that the learned judgesin the majority in Hadkinson's case went as far as to concur with LordDenning's proposition (5) that the court should only refuse to hear a party incontempt whenthe contempt itself impedes the course of justice and there is noother effective means of securing his compliance. But clearly therule must bowbefore the paramount claims of the welfare of the children: Schumann v.Schumann (6)." That the rule is now limited to proceedings in the same cause has beenrecognized by leading text writers. In Borrie and Lowe's Law of Contempt(2nd edition. London. Butterworth's. 1983) reference is made at p.460 to therule that a "person who has committed a civil contemptby disobeying the courtorder may be subject to the so-called rule that a party in contempt cannot beheard or take proceedings inthe same cause until he has purged his contempt."It is then stated at p.461 that it "was established, for instance, that theruledoes not operate to bar applications made in other causes, eventhough these other proceedings may actually involve the same party." Thedecision in Bettinson v Bettinson is cited in support of thisproposition. In Miller's Contempt of Court (Clarendon Press. Oxford. 1989.) it issaid at p.454 that there "is a general rule of uncertain scope whereby a partyin contemptmay be disentitled from taking any further steps in the sameproceedings at least where the opposing party takes objection and appliesforthe proceedings to be stayed." (See also Halsbury. 4th edition vol. 9 at 106.) In light of the above authorities and texts we are satisfied that the rule thata party in contempt may not be heard is a discretionaryrule and is limited, atleast in its modern operation, to circumstances in which the person in contemptmakes an application in thesame proceedings or in the same cause in which thecontempt has been committed. For present purposes, the question, therefore,becomeswhat is meant by the expression in the "same proceeding" or "samecause". Before determining this question we consider it necessaryto make briefreference to the decisions in Young v Jackman (1986) 7 NSWLR 97 and XLtd v Morgan-Grampian (Publishers)

Limited & Ors, both of whichdecisions were referred to by Renaud J. In Young v Jackman, Young J in the Equity Division of the Supreme Courtof New South Wales refused an application by the father of an ex-nuptial childfor a re-consideration of the child's custody in circumstances where the fatherhad taken the child out of Australia in breach ofthe mother's previouslydetermined rights of custody. His Honour held that notwithstanding that thiswas a case concerning the welfareof a child, he had no discretion to hear thefather. His Honour's decision was principally concerned with the question as towhena party will be considered to be in contempt for purposes of the operationof the rule that such a party will not be heard, and hedid not have to concernhimself in the circumstances of that case with the issue of the limitation ofthe rule to this same proceedingor cause. We note, however, that inproceedings instituted under the Family Law Act, there is by virtue of s.66 ofthat Act, a discretionto proceed with the hearing of proceedings in relationto a child "notwithstanding that the person by whom the proceedings wereinstitutedhas failed to comply with an order of the Court or another courthaving jurisdiction" under the Act. In the Morgan-Grampian case, which was a case where a journalist, whorefused to comply with an order which would result in revelation of hissources, soughtto be heard on appeal against that order, Lord Bridge inconsidering the question of whether a contemner can be heard, and havingreferred to the judgments of Romer LJ and Denning LJ in Hadkinson wenton to say: "I cannot help thinking that the more flexible treatment of thejurisdiction as one of discretion to be exercised in accordance withtheprinciple stated by Denning LJ better accords with contemporary judicialattitudes to the importance of ensuring procedural justicethan confining itsexercise within the limits of a strict rule subject to defined exceptions. Butin practice in most cases the twodifferent approaches are likely to lead tothe same conclusion, as they did in Hadkinson itself ...".(P.46.) Lord Oliver, in agreeing with Lord Bridge, said as follows: "Whilst, therefore, there must clearly be a strong indication infavour of preserving a litigant's right to appeal, even though hemay be incontempt of court, I am in entire agreement with my noble and learned friendLord Bridge of Harwich in thinking that theremust also be a discretion torefuse to hear the contemnor and in favouring the flexible approach suggestedby the judgment of DenningLJ in Hadkinson v. Hadkinson [1952] P. 285.One can, of course, envisage, as he did in that case,

circumstances in whichthe court would be unlikely to exercise its discretionin favour of hearing acontemnor - he instanced the case of an abuse of the process or of disobedienceto the order impeding thecourse of justice - but I would not be in favour oflaying down any rules for the exercise of discretion, though it can do no harmto give examples which may serve as guidelines. For instance, where the appealis grounded on an alleged lack of jurisdiction tomake the order at all, itwould seem, in general, right that the contemnor should be heard. At the otherend of the scale, if thecontempt consisted of a contumacious refusal to revealthe whereabouts of a ward of court, it would be likely to require a strongcasebefore the court would consider entertaining a contemnor'sappeal." We have quoted the relevant passages from the judgments of Lord Bridge and LordOliver because they make clear that the discretionaryapproach is now thepreferred approach in circumstances where the question arises as to whether ornot a person in contempt shouldbe heard when that person seeks to appeal theorder in respect of which that person is in contempt. We would respectfullyagree thatthis is the correct approach in the circumstances of an appeal or inother circumstances which can be categorized as being in thesame cause or thesame proceedings as that in which the order, which is the subject of thecontempt, was made. The expression "same proceedings" in the context of the Family LawAct. The question, however, for us in this case is whether an application fordissolution of marriage can be said to be in the same cause,or in the sameproceedings, as the proceedings between the parties to the marriage inquestion, in which orders for property settlement,or in which orders for childmaintenance have been made. We consider that the answer to this question mustbe no. We reach this conclusion for the following reasons. Section 4 of the Family LawAct 1975 provides for a range of many different proceedings which aredefined as "matrimonial causes". In addition, Part VII of the Act provides forproceedings concerning the guardianship, custody, welfare or maintenance of, oraccess to, children. Nothingin the Act makes any of the various types ofproceedings included in the definition of "matrimonial cause" or provided forin Part VII, dependent on, or related to, any other proceeding (save, ofcourse, for enforcement proceedings, or for proceedings of a relatedtypereferred to in paragraph (f) of the definition of matrimonial cause). So far asthe expression "same proceedings" as used byBray CJ in

Short isconcerned (and we note in this regard that his Honour appeared to use theexpression "same cause" as synonymous with the expression"same proceedings"),there can be no question, in our view, given the structure and content of thedefinition of matrimonial causein the Act and of Part VII of the Act,but that proceedings between the parties to a marriage for a dissolutionof that marriage are different proceedings to proceedings forpropertysettlement or to proceedings for child maintenance between those parties. Further, the structure and content of the Family Law Rules (in particularOrders 7 and 11) make it clear that an application fora decree of dissolutionof marriage is a separate cause of action from either an application for ordersfor property settlement,or an application for orders for child maintenance. It is of no consequence, in our view, particularly given the structure andrelevant content of the parts of the Family Law Act to which we have referred,that in the registries of the Family Court, an application for a decree ofdissolution of marriage isplaced on the same file and thus given the sameproceedings number as all other applications for other types of orders that maybesought by the parties to that marriage. We note that a contrary view as tothe effect of the same Registry file number on the answerto the question as towhether different applications were made in the same suit was apparently givenby the Full Court of the SupremeCourt of New South Wales in Burnett (1903 NSW R 515). However, the registry practice of the Family Court of givingall applications between the same parties the same filing number cannot,in ourview, override the clear provisions of the Family Law Act, that there aredistinct proceedings depending on the nature of the relief claimed. Conclusion. Accordingly we conclude that the application by the husband in this case forthe dissolution of his marriage to the wife was notan application in the samecause or in the same proceedings as the earlier proceedings between the partiesin which the orders forproperty settlement and lump sum child maintenance weremade and with which orders the husband has not fully complied. Thus in thiscase her Honour should have proceeded to hear the husband's application fordissolution of marriage and no question of the existenceof a prohibitive rule,or of an exercise of discretion, should have arisen. Her Honour, therefore, wasin error in her conclusionthat it was necessary to exercise a discretion indetermining whether or not to hear the husband on his application fordissolution.However, her Honour's error was ultimately of no

practicalconsequence because, having exercised a discretion in favour of the husband,she then proceeded to make the necessary findings for the grant of a decreenisi, and to grant that decree. Notwithstanding the grant of the decree nisi, her Honour was not prepared tomake the declaration under s.55A of the Act either that proper arrangements hadbeen made for the children of the marriage or that there were othercircumstances,such as would have permitted the decree nisi to become absolutein this case. There are no grounds on the basis of which we wouldbe disposedto interfere with her Honour's approach to the s.55A declaration. Therefore,notwithstanding her Honour's misapprehension of the law in relation to thehearing of persons in contemptof Court, her Honour's decree and decision notto make the declaration under s.55A should stand, and the appeal will beaccordingly dismissed. Before concluding we would make the following brief observations. It will beclear from what we have said earlier that we considerthat a court has adiscretion as to whether or not to hear a person who is in contempt of an orderof the Court where that personseeks to be heard in the same proceedingsin which the order was made. It is unnecessary given our conclusion in thiscase that we comment further on the matterswhich should be taken into accountin the exercise of that discretion (beyond endorsing what was said in ourearlier quotation fromthe judgment of Lord Oliver in Morgan-Grampian).Those matters will obviously vary depending on the nature of the applicationmade by the person in contempt. We should, however,make it clear that we donot necessarily agree with the matters which Renaud J considered should orshould not be taken into accountin the exercise of the discretion whether tohear an application for dissolution of marriage. The primary submission of Counsel made on behalf of the wife was that becauseof the provisions of s.66 of the Family Law Act, there is nojurisdiction to hear an application instituted under the Act by a person whohas failed to comply with an order of the Court other than inproceedings in relation to a child. Section 66 of the Act provides: "The court may proceed with the hearing of proceedings in relationto a child notwithstanding that the person by whom the proceedingswereinstituted has failed to comply with an order of the court or of another courthaving jurisdiction under the Act." This submission has little substance when the rule that a person in contempt ofcourt will not be heard is understood as being adiscretionary rule limited toan application

by a contemner in the same cause or proceedings in which thecontempt was committed.In our view, s.66 of the Act must be considered asdoing no more than making clear that a discretion exists to hear theapplicationof a person in contempt in proceedings in relation to a childnotwithstanding that the applicant is in contempt in the sameproceedings or cause. Given the view we have taken of what is in effect the threshold issue of thescope of the rule that a contemner will not be heard,it has been unnecessaryto consider further either the grounds of appeal or the submissions in supportof them. Costs of the appeal. In the event that the appeal was successful the wife, who is legally aided,sought an order for costs against the husband. The appealhas not beensuccessful and there will, therefore, be no order as to costs. Orders. 1. That the appeal be dismissed. 2. That there be no order as to the costs of the appeal. URL: http://www.austlii.edu.au/au/cases/cth/FamCA/1995/106.html