

FAMILY LAW PRACTICE AND PROCEDURE Wives application to adjourn final hearing of property and parenting proceedings adjournment opposed by the husband where the family consultant was not available as a witness at the time of the trial consideration of the costs and time implications for the parties in the event of a split hearing consideration of the effect of adjournment on third parties and rule 6.02 of the Family Law Rules 2004 application for adjournment of property matters acceded to. Family Law Act 1975 (Cth) Family Law Rules 2004 (Cth) r 6.02 APPLICANT: Mr MacDougal FIRST RESPONDENT: Ms Benson SECOND RESPONDENT: Mr Benson INDEPENDENT CHILDRENS LAWYER: Victoria Legal Aid FILE NUMBER: MLC 1674 of 2013 DATE DELIVERED: 3 October 2014 PLACE DELIVERED: Melbourne PLACE HEARD: Melbourne JUDGMENT OF: Macmillan J HEARING DATES: 8 & 23 September 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Ms Stoikovska SOLICITOR FOR THE APPLICANT: Forte Family Lawyers COUNSEL FOR THE FIRST RESPONDENT: Mr St John QC SOLICITOR FOR THE FIRST RESPONDENT: Lennon Mazzeo Lawyers COUNSEL FOR THE SECOND RESPONDENT: Mr Puckey SOLICITOR FOR THE SECOND RESPONDENT: HWL Ebsworth Lawyers COUNSEL FOR THE INDEPENDENT CHILDRENS LAWYER: Ms Dowler SOLICITOR FOR THE INDEPENDENT CHILDRENS LAWYER: Ms Jenkins, Victoria Legal Aid ORDERS IT IS ORDERED THAT All applications for final property orders be adjourned for hearing before Justice Macmillan as the first matter at 10.00 am on 16 March 2015 (as a five day matter). The matter be listed for mention before Justice Macmillan at 9.30 am on 10 February 2015. By 4.00 pm on 27 October 2014 the wife file and serve upon all other parties any further affidavit in reply to the affidavits of the husband. On or before 28 days from the date of these orders the husband, the wife and the second respondent file and serve upon all other parties a statement setting out with precision the orders they seek upon each other party and any person whose interest may be affected by the orders they seek or an issue in the case. On or before 14 days thereafter the husband, the wife and the second respondent file and serve upon all other parties any application in a case seeking to join any other party to the proceedings upon any person whose rights may be affected by the orders they seek. No party file any further material other than as provided by these orders without leave of the Court. The husband pay

all setting down and trial fees by 4.00 pm on 16 February 2015 or obtain the requisite waiver thereof. The practitioners for the husband and the wife and/or the parties in the event that they are not legally represented file and serve electronically to ... by 4.00 pm on 2 March 2015 the following: a concise set of orders to be sought if different from those already filed; a list of the applications and affidavits to be read and, if not the whole affidavit, the relevant paragraphs relied upon; a list of the parties respective legal and equitable interests in property and liabilities; a list of objections to evidence upon which rulings are required, if any; and a bullet-point summary of argument in relation to the legal and factual issues in dispute. By 4.00 pm on 10 March 2015 the husband file and serve electronically to ... any amended case outline containing the matters set out in paragraphs 8(a) to (e) hereof. The question of whether the second respondent should be required to file a further case outline pursuant to paragraph 8 hereof is reserved to the mention of the matter on 10 February 2015. IT IS NOTED that publication of this judgment by this Court under the pseudonym MacDougal & Benson and Anor (No. 2) has been approved by the Chief Justice pursuant to s 121(9)(g) of the Family Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT MELBOURNE FILE NUMBER: MLC 1674 of 2013 Mr MacDougal Applicant And Ms Benson First Respondent And Mr Benson Second Respondent And Independent Children's Lawyer REASONS On 8 September 2014 I acceded to the application of the wife, supported by the second named respondent, to adjourn the final hearing in relation to both parenting and financial issues to a date to be fixed, subject to availability in early 2015. I reserved my reasons for having acceded to the wife's application for an adjournment. These are those reasons. Having indicated that I intended to accede to the wife's application for an adjournment the parties spent some time attempting to resolve some issues that arose as a consequence of the proposed adjournment. Ultimately, the parties resolved the outstanding parenting issues and I made final orders and removed the parenting proceedings from the list of cases awaiting hearing. A number of possible dates were considered for the final hearing, including 9 March 2015 and 16 March 2015, and having further reviewed the available dates I propose to adjourn the matter to 16 March 2015, noting that the case is now estimated to take five days. On 6 May 2014 I set this matter down for final hearing as a 10 day matter. It was listed for mention before me on 4 July 2014.

On that date I made orders, in anticipation of that final hearing, that the husband file and serve the affidavits of evidence in chief of all witnesses relied upon by 4.00 pm on 18 July 2014, the wife and the second named respondent and the Independent Children's Lawyer file and serve the affidavits of evidence in chief of all witnesses relied upon by 4.00 pm on 8 August 2014, and the husband file and serve any affidavits in reply to the affidavits of the respondents by 4.00 pm on 22 August 2014. The orders also required the parties to file and serve a concise set of the orders to be sought if different from those already filed, the list of the applications and affidavits to be read, and if not the whole affidavit, the relevant paragraphs relied upon, a list of the parties' respective legal and equitable interests in property and liabilities, a list of objections to evidence upon which rulings are required, if any, and a bullet-point summary of argument in relation to the legal and factual issues in dispute by 4.00 pm on 3 September 2014. I further ordered that no party file any further material other than as provided by these orders without leave of the Court and reserved liberty to the parties to approach the docketed registrar, in this case Registrar Field, to vary their obligations pursuant to my orders. On that same date, I reserved the question of whether or not an updated family report should be prepared by the family consultant Ms R, whether or not leave should be granted to issue subpoenas addressed to any psychiatrist, psychologist or like medical facility treating the children or any of them, and the question of expert evidence in relation to parental alienation to the mention of the matter before me on 4 July 2014. On 4 July 2014 I listed the matter for further mention before me on 29 July 2014. On that date Counsel for the husband, the wife and the Independent Children's Lawyer made submissions with respect to the issue of whether the parties and the children should be required to attend upon Ms R for the purposes of the preparation of an updated report. Judgment was reserved and on 10 July 2014 I made orders, inter-alia, as follows: The husband, the wife, and the children of the marriage [S] born ... 1998, [C] born... 2001 and [M] born ... 2006 attend upon [Ms R] for the purposes of the preparation of an updated family report SAVE THAT: the child [Ss] attendance be subject to his wishes and/or the recommendations of his treating mental health professionals; and the children not be brought into contact with the husband for the purposes of the preparation of the report. Ms [R]'s report be completed and released to the parties by no later than 4.00 pm on 19

August 2014. Ms[R] be at liberty to speak to the childrens treating medicalpractitioners and/or any medical professional who has or ispresently treatingthe children and/or any teacher and/or other staff member involved with thechildren at their respective schoolsand to inspect the Court file and alldocuments produced under any subpoena which the Court has ordered be released. Thequestion of payment for the preparation of Ms [Rs] report be reserved tothe mention of this matter on 29 July 2014. Thematter was listed for further mention, in my absence before Johns J, on 1August 2014. On that date, Johns J made orders by consent which included ordersfor the payment of Ms Rs fees for the preparationof her updated reportand the payment of accountants for the preparation of tax returns inanticipation of the hearing, orders forthe issue of subpoenas to the parties'medical or mental health professionals, and orders for the release of documentsproduced pursuantto subpoena, and leave was granted to the wife to amend herresponse for final orders and any such amended response be filed andserved by4.00 pm on 8 August 2014. Her honour granted leave to the husband to file anyfurther amended application for final ordersand/or reply by 4.00 pm on 15August 2014. On15 August 2014 the husband filed an application in a case seeking to proceed onan undefended basis which was listed for mentionbefore me at 9.30 am on 29August 2014. On that date, I made orders permitting the IndependentChildrens Lawyer to provide copies of thereports prepared by Dr Aand Ms R to the Department of Human Services and reserved the parties andthe Independent Childrens Lawyerscosts in relation to theapplication to proceed undefended and the response thereto. At2.49 pm on 29 August 2014, following the mention before me on that date, thesolicitor for the husband sent an email to the solicitorsfor the wife, secondrespondent and the Independent Childrens Lawyer asfollows: Dear Colleagues It was not clear to us this morning whether [h]er Honour was aware that Ms [R]is not available for cross-examination in the twoweeks beginning 8 September2014. If you believe she is aware, could you please let us know? Her Honour mentioned that she is on leave next week, so if the issue is raisednext week, she will not have an opportunity to considerthe options. Perhaps a joint letter should be sent to [h]er Honours Associate todayconfirming that this is the case and that the partiespropose that the day begiven another listing when Ms [R] is back from leave, and advise [h]er Honour ofthe dates of Ms [Rs]leave? We do not

know the precise dates of Ms [Rs] leave. What are your views? On 1 September 2014 the wife's solicitor replied to all the parties' solicitors as follows: Dear colleagues, We refer to the email from Forte Family Lawyers dated 29 August 2014. Prior to receipt of that email, we were unaware of Ms [Rs] unavailability at the final hearing. We do not believe we have received any correspondence to that effect. We would be pleased to be referred to any such correspondence. Mr [Z] of our office spoke with Mr [AB] of Forte Family Lawyers late on Friday, 29 August 2014. Mr [Z] was advised the fact of Ms [Rs] unavailability essentially arose in conversation with the [I]ndependent [C]hildren's [L]awyer. In the circumstances, we consider it almost certain Justice [Macmillan] is unaware of Ms [Rs] unavailability. As to Forte Family Lawyers (sic) request that we jointly write to [h]er Honour to request the final hearing be split, we do not agree. We refer to comments by [h]er Honour at the mention on Friday, 29 August 2014, relating to evidence as to the parenting aspect of the proceeding, particularly evidence as to the effect on the children of any change of residence. In that respect, Ms [Rs] evidence is crucial to [h]er Honour's consideration of what is in the best interests of the children. We take the view that [h]er Honour will want to have regard to Ms [Rs] evidence early in the final hearing. Ms [Rs] evidence may affect the conduct of the proceeding because it will inform [h]er Honour about that crucial evidence. We take the view it would be inappropriate for Ms [Rs] evidence to be heard a number of weeks after the main body of the hearing. We note also that, if the final hearing is split, there will be significant further costs to the parties (including the [I]ndependent [C]hildren's [L]awyer and the second respondent). It is our view, if Ms [R] is not available for cross-examination of the final hearing as listed, then it should be adjourned. We propose jointly writing to [h]er Honour's Associate first to confirm whether she is available for a telephone mention, and secondly, if she is, to request such a mention. Enclosed is a joint letter to the Family Court, for execution by each of the parties. We await your urgent responses. The proposed joint letter to the Court was not sent however there was further correspondence passing between the respective solicitors as to whether or not it would be appropriate for there to be a split hearing, whether or not the matter needed to be adjourned, and whether or not the matter should even be listed for a mention prior to the date fixed for the commencement of the final hearing to advise the Court of Ms Rs

unavailability. It would appear that notwithstanding there having been a contested hearing with respect to the question of whether Ms R should even prepare an updated report and a number of mentions of the matter, the fact that Ms R would not be available to give evidence and be cross-examined during the two weeks commencing 8 September 2014 and would not be available until after 22 October 2014 was not made known to the Court. It was only when the final hearing commenced on 8 September 2014 that the Court was made aware for the first time that Ms R was not available for cross-examination and that she would not be available until after 22 October 2014. It is conceded by the Independent Children's Lawyer that she knew of Ms R's unavailability by 4 July 2014 and instructed counsel appearing on her behalf to inform the parties and the Court accordingly. There is no evidence before me as to exactly when it might have been that the husband's solicitor became aware of Ms R's unavailability. Counsel for the Independent Children's Lawyer accepted responsibility and apologised to the Court for not having advised the solicitors for the wife and, perhaps more importantly, the Court of Ms R's unavailability. Although I find it somewhat difficult to understand why, if the solicitors for the husband were aware that Ms R would be unavailable, it would not have been referred to either in correspondence passing between the solicitors or raised at the various mentions of the matter, in the circumstances, the question of who is responsible for the Court not being made aware of Ms R's unavailability is ultimately immaterial to the question of whether or not the adjournment should be granted. It is Ms R's unavailability in itself rather than its cause or whether or when the parties knew of her unavailability that is the real issue. Counsel for the husband submitted that the matter should proceed in the absence of Ms R on the basis that she give her evidence and be cross-examined at a later date. In the course of correspondence passing between the respective firms it was suggested by the solicitor for the husband that all that would be required was a further day of hearing. Counsel for the wife submitted that the matter would be likely to require a further four days allowing for final submissions. Counsel for the husband, whilst not conceding that it would take four days, did concede that it would require more than the suggested one day. In my view the case, if split, could quite easily have taken up to a further four days to conclude. Although the possibility of the parties filing written final submissions was raised, that would, in my view, have only

added to the parties costs. The time required to complete the case raised a significant issue as to my having the time to conclude the matter irrespective of Ms R's availability, and the likelihood, given the matters already listed before me, that I might not be able to return to the matter in any event until early next year. The likely delay given the number of issues in dispute, the complexity of the matter, and the fact that the matter involves a third party who is not a party to the parenting proceedings was of particular concern to me. I was also aware that splitting the hearing had the potential to add further to the parties costs which are already significant. There were a number of other matters which led me to conclude that I should adjourn the final hearing to a date to be fixed. They included the following matters: that the orders sought by the husband with respect to property settlement, in particular with respect to the default provisions, purport to affect the interests of third parties who are not on notice as to those proposed orders. I refer in particular to properties registered in the name of the wife and her two brothers, one of whom is the second respondent. Although one of the wife's brothers is a party to the proceedings and has been served with a copy of the orders or been given notice of the orders, that is not the case in relation to the wife's other brother, Mr BB Benson; and that the tax owed by Company U is as yet unquantified but is likely to exceed \$300,000, which represents a significant proportion of the asset pool in this case. Whilst the parties each blame the other for the delay in preparation of the returns for the company that is not relevant for the purposes of my determination as to whether or not the proceedings should be adjourned. Counsel for the wife also submitted that notwithstanding the orders made with respect to T Pty Ltd it appeared to be the husband's case that the wife had an equitable interest by way of constructive trust in property or properties owned by T Pty Ltd and that in those circumstances the registered owner must be joined as a party to the proceedings. In my view, these are matters that will all need to be addressed. Although counsel for the husband submitted that the matter could proceed on the basis of the wife's brother Mr BB Benson being given notice prior to judgment being delivered, that in my view would not afford Mr BB Benson procedural fairness. In addition, notwithstanding the orders made for the preparation of the matter for final hearing, the parties were filing affidavits in the week leading up to the hearing and at the commencement of the hearing the wife had not filed a case outline pursuant to my orders

setting out the orders she sought. I had, on those occasions when the matter was listed for hearing before me, repeatedly expressed my concern as to the necessity for this matter to be finalised, particularly with respect to that part of the proceedings relating to the children. On that basis, it was with great reluctance that I ultimately concluded that the matter should be adjourned. However, weighing up all of the circumstances of the case, that was in my view the most appropriate course. Although the parenting proceedings were ultimately finalised on the first day of the hearing, neither party submitted that I should then commence to hear the property proceedings nor in the circumstances do I consider that it would be appropriate to have done so. I propose to list the matter, now as a five day matter, for final hearing before me commencing at 10.00 am on 16 March 2015. I will also list the matter for mention at 9.00 am on 10 February 2015 in order to confirm that the matter is in fact ready for hearing. Counsel for the wife seeks leave to file a further affidavit in reply to the affidavits filed on behalf of the husband since she filed her last affidavit. That is not opposed and I propose to make that order on the basis that it avoids the necessity of the wife having to give oral evidence by way of reply to those affidavits. Rule 6.02 of the Family Law Rules 2004 provides that a person whose rights may be directly affected by an issue in a case, and whose participation as a party is necessary for the Court to determine all issues in dispute in the case, must be included as a party to the case. It appears that in this case there are such persons affected by an issue in the case who have not been either given notice of the orders or joined as a party to the proceedings. So as to avoid any further difficulties that might arise, I propose to make an order that on or before 28 days from the date of my orders each of the husband, the wife and the second respondent file and serve a statement setting out with precision the orders that they seek upon each other party and any person whose interests may be affected by the orders they seek or an issue in the case. They will then have a further 14 days thereafter in which to file and serve any application in a case seeking to join any other party to the proceedings upon any person whose rights may be affected by those orders. This will hopefully ensure that any procedural steps that may be required can be attended to well prior to the date fixed for final hearing so that any further delays are avoided. I also propose to order that the husband and the wife file and serve their case outlines at least two weeks prior to the final

hearing. Although the husband filed an outline of case, it may be that the orders he seeks will have been further amended and in those circumstances it is appropriate that he file a further case outline. The wife has, as I have already mentioned, not filed a case outline and it is only fair, the wife having been served with the husband's case outline prior to the hearing on 8 September 2014, that the husband have some additional time to consider the wife's case outline. I propose to allow the husband some further time to file any amended case outline after he has had the opportunity to consider the wife's case outline. The second named respondent did not appear and was not represented at the mention before me on 23 September 2014. The issues with respect to the case against him are clearly defined and he has already filed and served an outline of case addressing those issues. However, it is possible that further issues may arise. In those circumstances I will reserve the question of whether the second named respondent should be required to file and serve a further case outline to the mention of this matter on 10 February 2015. I certify that the preceding twenty-eight (28) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Macmillan delivered on 3 October 2014. Associate: Date: 3 October 2014 AustLII: Copyright

[Policy](#) | [Disclaimers](#) | [Privacy](#)

[Policy](#) | [Feedback](#)

URL:

<http://www.austlii.edu.au/au/cases/cth/FamCA/2014/858.html>

