

FAMILY LAW PRACTICE AND PROCEDURE Stay where husband seeks a stay of financial orders pending outcome of appeal where wife opposes sale and seeks to enforce final orders husband seeks to appeal percentage adjustment and the wife's sole occupation of the former matrimonial home whether appeal rendered nugatory wife entitled to fruits of the judgment balance of convenience stay of some orders granted on conditions FAMILY LAW PRACTICE AND PROCEDURE Variation of Final Orders where husband seeks partial property settlement following final orders to meet past and future legal costs where husband submits Court has power to make orders pursuant to ss 80 or s 117 wife opposes husband's application orders sought by husband make no provision for a distribution of funds to the wife sufficient security and conditions of stay Family Law Act 1975 (Cth) ss 80, 117 Family Law Rules 2004 (Cth) r 22.11 Aldridge & Keaton (Stay Appeal) [2009] FamCAFC 106 Friscioni & Friscioni [2009] FamCAFC 43 In the Marriage of Davidson (1994) 17 Fam LR 656 Strahan & Strahan (Appeal Costs) [2009] FamCAFC 225 TWN & PAQ (2005) FLC 93-230; [2005] FamCAFC 677 Trahn & Long (No 2) [2008] FamCAFC 194 Yunghanns and Ors & Yunghanns and Ors [1999] FamCA 64; (1999) FLC 92-836 Zschokke & Zschokke [1996] FamCA 79; (1996) FLC 92-693; (1996) 20 Fam LR 766 APPLICANT: Mr Selwood RESPONDENT: Ms Selwood FILE NUMBER: DNC 359 of 2010 DATE DELIVERED: 14 October 2014 PLACE DELIVERED: Adelaide PLACE HEARD: Darwin JUDGMENT OF: Dawe J HEARING DATE: 9 September 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Mr Norrington SOLICITOR FOR THE APPLICANT: DS Family Law COUNSEL FOR THE RESPONDENT: Ms Farmer SOLICITOR FOR THE RESPONDENT: Withnalls Lawyers ORDERS (1) Pending determination upon appeal paragraphs 23(a), (b) and (d), and 28 of Orders made 18 July 2014 are stayed. (2) That the husband and wife each receive ONE HUNDRED AND FIFTY THOUSAND DOLLARS [\$150,000] from the proceeds of sale of the properties located at L Street, Suburb M, in the Northern Territory and N Street, Suburb P in the Northern Territory. (3) The monies referred to in paragraph (2) be placed and retained in interest bearing trust accounts in the names of each of the respective solicitors for the husband and wife pending further order. (4) That the balance of the proceeds of sale be deposited into and retained in an interest bearing account in the joint

names of the parties pending further order. IT IS NOTED that publication of this judgment by this Court under the pseudonym Selwood & Selwood (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 ADELAIDE FILE NUMBER: DNC 359 of 2010 Mr Selwood Applicant And Ms Selwood Respondent

REASONS FOR JUDGMENT INTRODUCTION On 18 July 2014 I delivered judgment in relation to both parenting and property matters between Mr Selwood (the husband) and Ms Selwood (the wife). The husband subsequently filed a Notice of Appeal seeking to challenge the orders made in relation to injunctions, child maintenance and property. The husband now seeks a stay of those orders pending determination of the appeal. The husband also seeks a variation of the orders to allow for the sale of the property located at N Street, Suburb P (the Suburb P property) with the proceeds of sale to be paid to the husband pursuant to either s 80(1)(h) or s 117 of the Family Law Act 1975 (Cth) (the Act) to enable the husband to meet the ongoing cost of litigation. The property is valued at approximately \$500,000. The wife opposes the husband's application and seeks to enforce the orders. The wife also sought orders that until such time as the issue of the costs of the final hearing are determined that the sum of \$300,000, payable to the husband pursuant to the orders of 18 July 2014, be held in trust until further order.

Brief Background The wife commenced proceedings by way of an Initiating Application seeking property settlement orders in the Federal Magistrates Court of Australia (as it then was) in August 2010. The husband filed a Response seeking both parenting and property orders shortly thereafter. In May 2011 the husband's parents, Ms K Selwood and Mr H Selwood, intervened in proceedings. The final hearing commenced before me on 9 July 2012 and at the conclusion of the hearing on 13 July 2012 orders were made by consent which released the interveners from further participation in proceedings. The trial was adjourned part heard. The hearing continued over a number of days in 2012 and into 2013 before I reserved my judgment on 24 April 2013. The matter was reopened following an Application in a Case filed by the wife in February 2014. Further affidavit material was filed and I heard evidence from both parties in May 2014. Following a total of 21 hearing days I reserved judgment on 15 May 2014. Judgment was delivered in relation to final parenting and property matters on 18 July 2014. On 28 July 2014 the wife

informed the husband that, pursuant to paragraph 23 of the orders made 18 July 2014, she elected to retain the former matrimonial home at O Street, Suburb I, Northern Territory.. The husband filed a Notice of Appeal on 14 August 2014 seeking to challenge the orders in relation to injunctions, child maintenance and property matters. The husband's Notice of Appeal contains 27 grounds of appeal. The husband filed an Application in a Case seeking a stay of orders 22 to 28, inclusive, of the orders made by me on 18 July 2014 pending the conclusion of Appeal of the said orders. An Amended Application in a Case was filed by the husband on 5 September 2014 in which he sought the following orders: 1 That Orders 22-28 (inclusive) of the Orders made 18 July 2014 be stayed pending the conclusion of Appeal of the said Orders. 2 That within 7 days of the date of these Orders, the Husband and Wife do all necessary things and sign all necessary documents to list the property situated at [N] Street, [Suburb P] for sale in the following terms: a) the property to be listed for sale with [LL Real Estate Agents]; b) In the event that the parties are unable to agree upon a listing price, they shall accept the recommendations of the real estate agent appointed pursuant to paragraph 2(a) for sale of the property; c) On completion of the sale the proceeds of the sale should be applied as follows: i. Firstly, to pay all costs, commissions and expenses incurred in respect of the sale; ii. Secondly, to pay all outstanding municipal rates and other levies due in respect of the property; and iii. Thirdly, to pay the balance to the husband; IN THE ALTERNATIVE iv. Thirdly, to pay to the husband \$291,388.33. v. Fourthly, the remaining balance to be paid into the parties joint National Australia Bank, mortgage account, ... . 3 That the sum paid to the husband pursuant to Order 2(d)(iii) or (iv) be by way for Section 117(2) of the Family Law Act 1975 IN THE ALTERNATIVE 4 That the sum paid to the husband pursuant to Order 2(d)(iii) or (iv) be by way for Section 80(1)(h) of the Family Law Act 1975 At the commencement of the hearing the solicitor for the husband identified a typographical error in the orders sought. Where a reference to Order 2(d)(iii) or (iv) appears it is intended to be a reference to Order 2(c)(iii) or (iv). The wife filed a Response on 5 September 2014 seeking to have the stay application dismissed and the husband pay the costs of and incidental to the application. The application came before me on 9 September 2014. Both parties were represented. Following submissions I reserved judgment. The Law Application for a Stay

Pursuant to the Family Law Rules 2004 (Cth) the filing of a Notice of Appeal does not in and of itself stay the operation of an order: RULE 22.11 Stay (1) The filing of a Notice of Appeal does not stay the operation or enforcement of the order appealed from, unless otherwise provided by a legislative provision. (2) If an appeal has been started, or a party has applied for leave to appeal against an order, any party may apply for an order staying the operation or enforcement of all, or part, of the order to which the appeal or application relates. (3) An application for a stay must be filed in the Registry in which the order under appeal was made and be heard by the Judge, Federal Magistrate or Magistrate who made the order under appeal. The making of an order for a stay is wholly discretionary and the circumstances that would justify an order for a stay depend on the circumstances of each case (Friscioni & Friscioni [2009] FamCAFC 43 at [54]). The principles applicable to the granting of a stay are well settled. In Aldridge & Keaton (Stay Appeal) [2009] FamCAFC 106 the Full Court listed the factors relevant to the exercise of discretion: the onus to establish a proper basis for the stay is on the applicant for the stay. However it is not necessary for the applicant to demonstrate any special or exceptional circumstances; a person who has obtained a judgment is entitled to the benefit of that judgment; a person who has obtained a judgment is entitled to presume the judgment is correct; the mere filing of an appeal is insufficient to grant a stay; the bona fides of the applicant; a stay may be granted on terms that are fair to all parties - this may involve a court weighing the balance of convenience and the competing rights of the parties; a weighing of the risk that an appeal may be rendered nugatory if a stay is not granted this will be a substantial factor in determining whether it will be appropriate to grant a stay; some preliminary assessment of the strength of the proposed appeal whether the appellant has an arguable case; the desirability of limiting the frequency of any change in a child's living arrangements; the period of time in which the appeal can be heard and whether existing satisfactory arrangements may support the granting of the stay for a short period of time; and the best interests of the child the subject of the proceedings are a significant consideration. Submissions of the Husband The husband seeks to stay paragraph 22 to 28 of the orders made 18 July 2014, effectively the entirety of the financial orders. Paragraph 27 of the orders requires the husband to indemnify the wife with respect to any taxation

liabilities and other debts. It was the husband's submission that the taxation implications relating to the E Street property, which occurred in October 2013, could not adequately be dealt with at a hearing. Solicitor for the husband, Mr Norrington, submits the husband has an arguable case on appeal. The numerous grounds of appeal cover a variety of issues and include both the identification and distribution of assets and liabilities. While acknowledging the appeal is directed primarily to the exercise of discretion, the husband submits the percentage adjustment in favour of the wife was significantly higher than usual. The husband denies any allegation of a stalling or delaying tactic and maintains that it is a bona fide appeal with merit. Solicitor for the husband argued that the balance of convenience favoured the husband. The wife has had the benefit of free accommodation with family members throughout the four year litigation and there is no pressing need to leave her parents home. In contrast the husband says he does not have the same benefit. He has a poor relationship with his father and is unable to simply move in with his family members. Solicitor for the husband submitted that when weighing up the balance of convenience regard should be had to the real implications for the parties pending appeal. If the husband were to be required to move from the Suburb I property he would face significant disruption to both his personal and professional life. The husband currently stores business and entertainment event equipment at the Suburb I property and says he would be unable to procure another dedicated space without incurring expense. The husband has resided at the former matrimonial home since separation in June 2010. It has always been his case that he sought to retain the asset. The husband submitted that it was not until late in the litigation that the wife altered her position and sought to retain the Suburb I property. The wife's interim application for sole occupation filed in February 2013 was dismissed, noting that the wife had appropriate finance to obtain accommodation. The husband submits that the wife's financial position has not altered, or if it had, her position must have improved after having the benefit of living with her parents and receiving a generous income. Solicitor for the husband argued the appeal would be rendered nugatory should the wife be permitted to take up sole occupation of the former matrimonial home. Relying on the decision of *TWN & PAQ* (2005) FLC 93-230; [2005] FamCAFC 677 the husband submitted that the occupation of the asset will be a relevant factor in determining

the ultimate ownership of the property. Finally, the husband considered the desirability of limiting the frequency of change for the children. It was submitted that the only consistent place of residence has been with their father at the former matrimonial home. The wife's belated change of position, the ability of the husband to store his business equipment, the husband's ability to carry on his employment from the property and the relevance of occupation to the appeal were all factors the husband submitted should weigh in his favour when considering a stay of orders in relation to the former matrimonial home. Submissions of the Wife Solicitor for the wife, Ms Farmer, submitted that the wife was entitled to the benefits of the judgment after four years of litigation. The wife denies she has received a benefit by living with her family during the litigation and submits that she has not received rental income, business income or any income from the entertainment events for the past four years while the husband had the benefit of the former matrimonial home. The wife does not seek to sell the former matrimonial home and as such the asset pool will be maintained pending appeal. The wife questioned the need for the husband to remain at the former matrimonial home for his employment. The wife referred to representations made in Court during the course of the trial that the husband was merely an employee and was not operating a business. The implication was that if he is merely an employee then he should not be concerned with either the availability, or cost, of storage of the business and entertainment event equipment. In any case the wife submits that the Business II premises are large enough to accommodate the husband's equipment. Solicitor for the wife expressed concerns that if a stay was granted whether the wife would ever receive the benefits of the judgment citing the husband's conduct during proceedings and the ability of the husband to meet child maintenance, school fees, medical needs and costs orders into the future if the appeal is unsuccessful. The wife argued there could be little detriment to the children in the wife's occupation of the former matrimonial home as the children spend week about time with each parent. While the father may not be present in the Suburb I property, the mother would be and the children will still retain some stability. When considering the merits of the appeal the solicitor for the wife noted the grounds were repetitive and directed to discretionary matters. The wife submits the balance of convenience favours the wife, who after four years of litigation and judgment in her favour, should be

entitled to appropriate accommodation. Consideration of Stay Application A consideration of the merits of an appeal has been described by the Full Court in *Trahn & Long (No 2)* [2008] FamCAFC 194 as some preliminary assessment of the strength of the proposed appeal. It is not a re-hearing of the merits of the applicants proposed orders but rather an exercise to establish whether the applicant has an arguable case on appeal. While the 27 grounds stated in the Notice of Appeal are repetitive, the grounds disclose an arguable case. I am satisfied that there is an arguable case in the appeal. The wife is undoubtedly entitled to the benefits of the judgment and to assume that the judgment is correct. However, this must be weighed against the risk that the appeal will be rendered nugatory if the stay is not granted. During the course of submissions the husband referred to *TWN & PAQ* (Supra). In that case the Full Court upheld a decision of a trial judge who ordered the wife have sole occupancy citing the fact the wife had residency after separation, the husband's late change of position about seeking the home in specie and that there were no features about the home unique to the husband (see at [133]). I note the Full Court also state that the wife's residency was not a determining factor, per se in the trial judge's reasoning. The ultimate ownership of the former matrimonial home is the subject of appeal. I am satisfied that the husband has established a basis for the granting of a stay in respect of the transfer and occupation of the former matrimonial home pending determination of the appeal. The terms of the stay however should be on conditions which take into account the competing rights of the parties. The husband also sought a stay of paragraph 27 of the order of 18 July 2014 which provided that he indemnify the wife with respect to all and any taxation liabilities or other debts in relation to himself personally and in relation to Selwood Pty Ltd and Q Trust. It was maintained on behalf of the husband that any appropriate adjustment of this order could not be adequately dealt with at any re-hearing. The husband maintained at the trial that Selwood Pty Ltd owed approximately \$120,442 to the Australian Taxation Office. There was little other reliable evidence to indicate the extent of his personal liabilities or that of the trust. Considering the overall value of assets to be distributed the husband has failed to establish any appropriate basis for a stay of this order. The husband has controlled the company and the trust. The wife has had little ability to protect her financial position in relation to these entities. I am not satisfied

that the grounds have been established upon which paragraph 27 of the order should be stayed. Conditions of Stay Paragraph 22 of the orders made 18 July 2014 provide that upon fourteen days notice the husband must transfer his right, title and interest in the Suburb I, Suburb M and Suburb P properties to the wife. The transfer was to be conditional upon the husband receiving the sum of \$591,338.33 from the wife upon settlement. The husband now proposes the Suburb P property be sold and that he receive either the balance of the proceeds of sale, less sale costs, or in the alternative, a sum of \$291,388.33 with the remainder to be deposited in the parties joint National Australia Bank mortgage account. The proposed variation makes no provision for the wife to receive a portion of the proceeds. The husband arrives at this sum by reference to the wife's application for enforcement and costs. The proposed \$291,388.33 is the sum required to be paid to the husband pursuant to paragraph 22 of the orders made 18 July 2014, less the \$300,000 the wife seeks to have held in trust pending the determination of the costs of the trial. It is however the husband's primary application to receive the balance of the proceeds of sale of the Suburb P property. By way of a letter dated 28 July 2014 the wife informed the husband of her election to retain the former matrimonial home at Suburb I. Accordingly it is paragraph 23, not paragraph 22 as suggested by the husband's application, which is the relevant paragraph. Similarly, the wife's election renders paragraphs 22, 24 and 25 of the orders irrelevant. Pursuant to paragraph 23(c) both the Suburb P and Suburb M properties are now to be placed on the market for sale. At trial the Suburb P and Suburb M properties were valued at \$500,000 each. Assuming the properties are each sold for \$500,000 the husband would then be entitled under paragraph 23(d) to receive the sum of \$591,338.33, less the reasonable costs of sale. The husband submits that without this distribution he will be unable to meet his future legal costs. In an affidavit filed 5 September 2014 the husband discloses that he has spent in excess of \$330,000 on legal costs and estimates the cost of his appeal to be in excess of \$130,000. It was the husband's submission that he has exhausted all other avenues of funding his litigation. The husband argued that there would be no prejudice to the wife if the variation was made in the terms proposed by the husband as the amount sought is considerably less than he is due to receive under the orders of July 2014. It was the husband's submission that notwithstanding he



seeks a stay of all property orders, the Court has the power to make the adjustment sought pursuant to s 117(2) or alternatively, s 80(1)(h) of the Act. Solicitor for the wife however, expressed concern over the Court's power to make the orders sought by the husband under s 80. Section 80(1)(h) provides that in exercising its powers under this Part, the Court may do any or all of the following: (h) make a permanent order, an order pending the disposal of proceedings or an order for a fixed term or for a life or during joint lives or until further order; (i) impose terms and conditions; ... (k) make any other order (whether or not of the same nature as those mentioned in the preceding paragraphs of this section), which it thinks it is necessary to make to do justice; and (l) subject to this Act and the applicable Rules of Court, make an order under this Part at any time before or after the making of a decree under another Part. Section 80 is not an independent source of power. The availability of s 80 depends upon the Court exercising power under Part VIII of the Act. The Court must also be satisfied that the proceedings are proceedings truly being of that character namely, proceedings under Part VIII (Yunghanns and Ors & Yunghanns and Ors [1999] FamCA 64; (1999) FLC 92-836 at [118]). Section 80 may be exercised in relation to existing or previous orders for property settlement (see *In the Marriage of Davidson* (1994) 17 Fam LR 656 at 667). The application before me is a stay of final orders made in the proceedings under Part VIII of the Act. Alternatively, solicitor for the husband submitted the Court had power under s 117 to order that assets be sold and the proceeds applied to fund litigation. Section 117(1) of the Act provides that subject to subsection (2), and other subsections not relevant to the current application, each party to proceedings under this Act shall bear his or her own costs. Section 117(2) of the Act provides that if, in proceedings under the Act the court is of opinion that there are circumstances that justify it in doing so, it may make such order as to costs whether by way of interlocutory order or otherwise, as it considers just. In support of his application the husband relied on *Strahan & Strahan (Appeal Costs)* [2009] FamCAFC 225 for the authority that cost orders may be made in respect of both past and future legal expenses. The wife opposes the husband's application to vary the orders and submits that if the husband complied with the orders he would receive \$591,338.33, an amount that would ensure the husband could meet both his outstanding and future legal expenses. I am satisfied that

the Family Court of Australia has jurisdiction as a superior court of record to vary the orders to impose conditions on the stay pending the appeal. Any orders should, as far as possible, be fair to both parties and protect the overall situation pending the appeal determination. The original orders provided for the husband to receive significant assets and funds which would ordinarily provide substantial security and resources for the husband's costs of appeal. The conditions which will be imposed as part of the stay order will provide preliminary interim distribution of some of the proceeds of sale of the properties at L Street and N Street. The balance can be retained in a manner to protect the interests of both parties. Whilst the Court has the power to make an order pursuant to s 117 in relation to the husband's anticipated costs of the appeal, the husband has not established that it is just and equitable to make any order in excess of the orders providing for the distribution of some of the proceeds of sale and the investment of the balance of the monies. For the above reasons I make the orders commencing on page 2 of the judgment. I certify that the preceding sixty-eight (68) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Dawe delivered on 14 October 2014. Associate: Date: 14 October 2014 AustLII: Copyright Policy | Disclaimers | Privacy Policy | Feedback URL: <http://www.austlii.edu.au/au/cases/cth/FamCA/2014/867.html>

