

FAMILY LAW PRACTICE AND PROCEDURE Stay of Orders where orders made requiring other parties to producedocumentspursuant to a subpoena where subpoenaed persons have appealedorder for production whether appeal would be renderednugatory prejudice to the husband stay granted. Family Law Act 1975 (Cth) Family Law Rules2004 (Cth) r 22.11 Aldridge & Keaton (Stay Appeal) [2009] FamCAFC 106 Friscioni & Friscioni [2009]FamCAFC 43 Trahn & Long (No 2) [2008] FamCAFC 194 APPLICANTS: Mr F S, Mr C S, Mr E S, Ms D S FIRST RESPONDENT: Mr Hall SECONDRSPONDENT Ms Hall FILENUMBER: ADC 3671 of 2013 DATE DELIVERED: 23 October 2014 PLACE DELIVERED: Adelaide PLACE HEARD: Adelaide JUDGMENT OF: Dawe J HEARING DATE: 17 September 2014 REPRESENTATION COUNSEL FOR THE APPLICANTS: Mr Doyle SOLICITOR FOR THE APPLICANTS: Shaw Lawyers COUNSELFOR THE FIRST RESPONDENT: Mr OShannessy SOLICITOR FOR THE FIRST RESPONDENT: Kennedy Partners COUNSEL FOR THE SECOND RESPONDENT: Mr Ackman QC with Ms Kari SOLICITOR FOR THE SECOND RESPONDENT: Barnes Brinsley Shaw Lawyers ORDERS (1) That paragraph 2 of theorders made 17 June 2014 be stayed pending determination of the appeal (SOA41/2014). IT IS NOTED that publication of thisjudgment by this Court under the pseudonym Sadek and Ors & Hall andAnor 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:ADC 3671 of 2013 Mr F S Mr CS Mr E S and Ms D S Applicants And Mr Hall First Respondent And Ms Hall SecondRespondent REASONS FOR JUDGMENT INTRODUCTION MsHall (the wife) initiated proceedings in this Court on 3 October2013 seeking orders in relation to both propertyand childrens matters. Mr Hall (the husband) filed a Response on 13 November 2013. This judgment concernsan application for a stay of orders requiring thewives mother and brothers to produce documents relating to the estate ofthe wifes late father, Mr Mr G S. On26 November 2013 the husband issued subpoenas to the wifes mother, Ms DS, and the wifes three brothers, Mr F S,Mr C S and Mr E S (theother parties). The subpoenas required the production of documentsrelating to the estate ofthe deceased and a copy of the will. Theother parties each filed a Notice of Objection on 10 January 2014 in which itwas submitted that the subpoenas were oppressive,sought irrelevant documentsand

were the subject of legal privilege and confidentiality. The matter came before me on 14 March 2014. Following submissions from all parties I reserved judgment at the conclusion of the hearing. Judgment was subsequently delivered on 17 June 2014. Orders were made requiring the other parties to comply with the subpoenas within fourteen days (See *Hall & Hall and Anor (Objection to Subpoena)* [2014] FamCA 407). Upon delivery of judgment counsel for the other parties made an oral application for a stay of the orders pending the filing of a Notice of Appeal. The stay was granted on an interim basis, 35 days, to enable the parties to file a formal application. On 11 July 2014 the other parties filed a Notice of Appeal and an Application in a Case seeking a stay of paragraph 2 of the orders made 17 June 2014 pending determination of their appeal. Paragraph 2 is as follows: (2) The subpoenaed persons comply with the subpoenas within fourteen [14] days from today. That application was to be heard on 17 July 2014 but at the husband's request, and with the consent of all parties, the application was adjourned to 17 September 2014. The stay of paragraph 2 continued during the period of the adjournment. The Law 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. Consideration of my orders of 17 June 2014 compelled the production of documents relating to the estate of the wife's late father. It was submitted by counsel for the other parties, Mr Doyle, that there is not merely a risk but rather an inevitable result that the appeal will be rendered nugatory if a stay is not granted. Mr Doyle in both his written and oral submissions noted that as non-parties to the litigation, and not willing combatants, the Court should be mindful not to unduly interfere with their capacity to invoke the Court's processes to protect their privacy and confidentiality. Plainly the production of the documents pursuant to the orders of 17 June 2014 would render the appeal nugatory. However, while the risk the appeal would be rendered nugatory if a stay is not granted is a significant factor in this case, it is but one of a number of factors I must consider. A further consideration is the merits of the appeal. 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 applicant's proposed orders but rather an exercise to establish whether the applicant has an arguable case on appeal. Counsel for the other parties submitted that the grounds as set out in the Notice of Appeal filed 11 July 2014 have about them a degree of complexity in that they raise questions of principle, as opposed to simply contesting an exercise of discretion. The grounds of appeal are in part directed towards whether the Harman undertaking and s 121 of the Family Law Act 1975 (Cth) are

sufficient to address the other parties concerns in relation to the dissemination of confidential and sensitive information. The remaining grounds consider the appropriateness of masking documents, the extent to which a practitioners affidavit deposing to relevance may be accepted and the breadth and relevance of the subpoena. Given the appropriateness or otherwise of masking documents was not argued before me, I question the merits of that ground of appeal. Similarly, I see little merit in the appeal directed towards the terms of the subpoena. However, on a preliminary assessment of the grounds of appeal the other parties have established an arguable case. The other parties prospects of success must be weighed against the disadvantage suffered by the husband if the stay were to be granted. Counsel for the husband, Mr OShannessy, submitted the subject documents were integral to the husbands pending spousal maintenance appeal. Mr OShannessy argued the husband would have no prospect of success without the information contained in the Will and associated documents as he would be unable to identify the wifes property and financial resources. However, counsel for the other parties submitted that there could be no irreversible prejudice to the husband if the stay was granted. If the husband is correct in his assertion that the wife has significant assets, or access to significant financial resources, then the issue can be remedied at the final hearing of the matter. Mr Doyle further submitted that as the husband had earlier estimated his business interests to be worth perhaps \$70 million in an affidavit filed 7 March 2014 the husband would suffer little disadvantage if he was required to continue to meet his spousal maintenance obligations. The husband has subsequently filed affidavits that suggest his financial position has altered. Conclusion I am satisfied the other parties have established a proper basis for the granting of a stay. Accordingly, I intend to stay the operation of paragraph 2 of orders made 17 June 2014 pending determination of the appeal. I certify that the preceding twenty-two (22) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Dawe delivered on 23 October 2014. Associate: Date: 23 October 2014 AustLII: Copyright Policy | Disclaimers | Privacy Policy | Feedback URL: <http://www.austlii.edu.au/au/cases/cth/FamCA/2014/900.html>

