

FAMILY LAW PRACTICE AND PROCEDURE Where the wife seeks leave to proceed on an undefended basis against the husband where the husband has not filed material pursuant to previous orders where the husband has not complied with previous orders application granted. Family Law Act 1975 (Cth) Family Law Rules 2004 (Cth) r 11.02 Tate JRD v Tate MT [2000] FamCA 1040; (2000) FLC 93-047 APPLICANT: Ms Turner RESPONDENT: Mr Turner SECOND RESPONDENT: Turner Pty Ltd FILENUMBER: MLC 5928 of 2013 DATE DELIVERED: 29 October 2014 PLACE DELIVERED: Melbourne PLACE HEARD: Melbourne JUDGMENT OF: Macmillan J HEARING DATE: 24 October 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Mr Sweeney SOLICITOR FOR THE APPLICANT: Taussig Cherrie Fildes THE RESPONDENT: In person COUNSEL FOR THE SECOND RESPONDENT: Mr Dickson QC SOLICITOR FOR THE SECOND RESPONDENT: Kenna Teasdale Lawyers ORDERS IT IS ORDERED THAT Thehusbands Response to Initiating Application filed 4 October 2013 be struck out. The wives Application in a Case filed 21 October 2014, save and except for any applications for costs, be otherwise dismissed. IT IS NOTED that publication of this judgment by this Court under the pseudonym Turner & Turner and Anor 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 5928 of 2013 Ms Turner Applicant And Mr Turner Respondent And Turner Pty Ltd Second Respondent REASONS FOR JUDGMENT This matter was listed for mention before me on 24 October 2014 to ascertain its readiness for trial on 2 December 2014. On 21 October 2014 the wife filed an application in a case seeking that the matter proceed on an undefended basis on such terms as this Honourable Court deems fit. That application was returnable before me on 24 October 2014. On 4 August 2014 I made orders by way of preparation for the trial, inter alia, as follows: By 4.00 pm on 22 September 2014 the applicant file and serve upon all other parties: the affidavits of evidence in chief of all witnesses relied upon (noting that affidavits relied upon for previous hearings cannot be relied upon as evidence in chief); and a financial statement that complies with chapter 13 of the Family Law Rules. By 4.00 pm on 13 October 2014 the respondent file and serve upon all other parties: an amended response setting out with precision the orders to be sought; the affidavits of

evidence in chief of all witnesses relied upon (noting that affidavits relied upon for previous hearings cannot be relied upon as evidence in chief); and a financial statement that complies with chapter 13 of the Family Law Rules. By 4.00 pm on 24 October 2014 the applicant file and serve any affidavit in reply to the affidavits of the respondent. No party file any further material other than as provided by these orders without leave of the Court. ... Should any party fail to comply with these orders or the ensuing amending directions of the docketed registrar, the party who has complied may immediately thereafter file an application in a case supported by an affidavit seeking for the matter to proceed on an undefended basis. ... The time for the husband to comply with paragraph 3 of the orders of this Honourable Court dated 1 April 2014 be extended to 4.00pm on 25 August 2014. The report of [Ms B], the single expert witness, be completed and released by 4.00pm on 17 October 2014. By 4.00 pm on 15 August 2014 the wife file and serve upon the husband and [Turner Pty Ltd] in accordance with the Family Law Rules a further amended initiating application and an affidavit setting out the facts relied upon to support the addition of a new party to the proceedings together with a sealed copy of the order made this day. ... On 22 September 2014 the wife filed and served her affidavit of evidence in chief and a financial statement in accordance with paragraph 3 of the orders of 4 August 2014. The wife has also filed and served a further amended initiating application and an affidavit in support of that application upon the husband and Turner Pty Ltd pursuant to paragraph 17 of those orders. The husband, however, has not complied with the order requiring him to file an amended response setting out with precision the orders that he seeks, his affidavit of evidence in chief, or a financial statement. This is just one example of the husband's failure to comply with orders of this Court or to participate in these proceedings. The proceedings commenced by way of the wife's Initiating Application filed 19 July 2013. The parties attended a case assessment conference on 27 August 2013. Both parties were represented by counsel and orders were made by consent adjourning all extant applications to the Judicial Duty List on 4 October 2013. Those orders also specified particular documents the husband was required to provide to the wife as part of his obligation to provide full and frank disclosure. On 4 October 2013 the husband filed a response to initiating application, an affidavit in support of that application, and a financial statement. On that date,

a further order was made by consent that each party comply with their obligations for disclosure pursuant to the orders made by consent on 27 August 2013. The parties also consented to orders that the wife provide the husband with a draft letter of instruction to Ms B of B Accounting to value the parties' interest in various entities referred to in the husband's affidavit and Turner Pty Ltd collectively referred to as The Turner Group. The husband was to advise as to any amendments to that letter of instruction within 14 days. The parties also agreed to appoint Ms SP to value all rural properties held by or on behalf of the Turner Group and Z Pty Ltd to value all properties in which the wife has an interest in the Melbourne Metropolitan area and those held by or on behalf of the Turner Group. Each of the parties was represented by counsel on that date. On 7 October 2013 Cronin J ordered that by way of interim distribution of property, the wife retain the net proceeds of sale of a property at I Street, K Town, and his Honour dismissed paragraph 2 of the application for interim orders contained in the husband's response filed 4 October 2013 which sought the equal division of the proceeds of sale of the K Town property, and adjourned all other outstanding interim applications to the Judicial Duty List to 10.00 am on 19 December 2013. When the matter came on for hearing on 19 December 2013 all extant interim applications were further adjourned by consent to the Judicial Duty List at 10.00 am on 1 April 2014. There was a notation to those orders that the parties anticipated that the joint valuations provided for in the orders of 4 October 2013 would be completed by the adjourned date. Both parties were again represented by counsel on that date. On 14 March 2014 the wife filed an amended initiating application. In that application the wife sought orders, inter alia, that the husband provide to her solicitors copies of all the documents specified in the orders made 27 August 2013 (other than those previously provided by Saxbys Lawyers) and that the husband do all things as may be required by the wife's solicitors and/or by any single expert witness to facilitate completion of the valuations of the matrimonial assets including but not limited to the valuation to be prepared by Ms B and the valuations of the real property. The wife also sought an order that in the event that the husband failed to comply with the orders providing for full and frank disclosure and the valuations, that she have leave to seek to proceed on the first day of trial on an undefended basis. On 28 March 2014 the husband filed an application in a case seeking orders

as follows: The hearing of the Wives Amended Initiating Application filed 14 March 2014 be adjourned. That on or before the expiration of 14 days, the Wife pay or cause to be paid to the Husbands solicitors, Saxbys Lawyers, for and on behalf of the Husband the sum of \$300,000 by way of interim property settlement, such sum to be used on account of the costs of the Husband prosecuting his claims in this proceeding including the costs of obtaining valuation reports pursuant to paragraphs 4, 5 and 6 of the Consent Orders made on 4 October 2013 and in respect of the Husbands other legal costs and disbursements. Any such further or other order this Honourable Court deems fit[.] The husband relied upon an affidavit sworn by his solicitor Mr Peter Efklides filed 28 March 2014, in which Mr Efklides deposed that he had been informed by the husband that he was unable to finance the legal fees associated with these proceedings, nor able to borrow the funds necessary to do so. Mr Efklides further deposed that he was not prepared to engage the valuers, as ordered, to undertake valuations without having the funds in trust to pay for those valuations. On 1 April 2014 further orders were made by consent which included relevantly for the purposes of the matters I must determine an order that required the husband to provide the wives solicitors with copies of all documents specified in paragraph 2 of the orders made 27 August 2013 (other than those previously provided by Saxbys Lawyers) and that he do all things as may be required by the wives solicitors and/or by any single expert witness to facilitate the completion of the valuations of the matrimonial assets. Each of the parties was represented by counsel at the hearing on that date. All extant interim applications were otherwise dismissed, including the husband's application for interim property settlement. On 27 May 2014 I made orders in Chambers that all extant applications for final orders be listed for a first day of hearing before me at 3.15 pm on 4 August 2014 for the purposes of listing the matter for final hearing. I made further orders requiring the wife to file and serve an amended application setting out with precision the orders to be sought at trial by 4.00 pm on 7 July 2014 and that the husband file and serve an amended response setting out with precision the orders to be sought at trial by 4.00 pm on 21 July 2014. It was further ordered that if discovery and disclosure had not been completed that each party by 4.00 pm on 23 June 2014 provide to the other party a list of all documents required for inspection and within seven days thereafter, subject to

any objection on the grounds of privilege, such documents be made available for and be inspected by the other party. On 4 August 2014 at the first day of hearing the wife was represented by counsel and the husband appeared in person. The solicitor for the wife Ms Larissa Goldberg in her affidavit filed 30 July 2014 deposed that the husband had not as at that date complied with his obligations for disclosure or with the provision of information to the single expert witnesses pursuant to the various orders previously made by consent nor had he complied with the orders made 27 May 2014 requiring him to file an amended response. On the first day of hearing, I explained in some detail to the husband the necessity for him to comply with Court orders and the possible consequences if he did not do so. Notwithstanding that all extant interim applications had been dismissed and that the wife had not filed a further application seeking to proceed undefended, on 30 July 2014 the wife filed and served an affidavit sworn by her solicitor Ms Goldberg which purported to be filed in support of an Application to be made on behalf of the Wife at the First Day listed before the Honourable Justice Macmillan on 4 August 2014 that, subject to further order, this matter proceed on an undefended basis at trial on such terms as this Honourable Court deems fit. Although counsel for the wife did not present this application on the first day of hearing, the husband was on notice, and has been on notice since the wife filed her Amended Initiating Application on 14 March 2014, as to the possibility of the matter proceeding on an undefended basis and the inference that might be drawn against him in the face of his continued non-compliance. On 4 August 2014 Ms B wrote to the solicitors for the wife and the husband providing an estimate of her fees for the preparation of the valuation of the interest held by the parties in the Turner Group, and also setting out documents which she required to complete that valuation. Ms B required an initial payment of \$20,000. Pursuant to the orders made 4 August 2014 the time for the husband to comply with paragraph 3 of the orders made 1 April 2014, being the order requiring him to do all things as may be required by the wife's solicitors and/or by any single expert witness to facilitate the completion of the valuations of the matrimonial assets, was extended to 4.00 pm on 25 August 2014. It was further ordered that Ms B's single expert report be completed and released by 4.00 pm on 17 October 2014. Ms Goldberg in her affidavit filed 30 July 2014 deposes that on 22 April 2014 Saxbys Lawyers, who were representing the husband at that

time, provided BAccounting with Excel spreadsheets containing the financial accounts for TurnerHoldings Limited and its subsidiariesfor the financial years ending 2010, 2011and 2012. By email dated that same day, Ms KC of B Accounting advised that theyhad notreceived any financial information in respect of three of the entitiesincluded in the schedule attached to their correspondencedated 13 January 2013,namely, PLG Pty Limited, BC Pty Ltd and T Pty Limited. Ms KC requested, at aminimum, a copy of the most recentfinancial statements for these threentities. Byletter dated that same date of 22 April 2014, Saxbys Lawyers then queried thedate of valuation for the various entities the subjectof the valuation.Although B Accounting replied by letter dated 30 April 2014, Saxbys Lawyers didnot correspond or communicate furtherwith B Accounting. On25 August 2014 the husband sent an email to Ms KC asserting that PLG Limited, BC Pty Ltd and T Pty Limited should not be includedin the valuation, and thehusband has not, as at the date of the hearing before me, provided the financialstatements that have beenrequested with respect to these entities. Inher affidavit filed 21 October 2014 in support of her application to proceedundefended, the wife deposes that the husband hasalso failed to pay the sum of\$8,745 to Z Pty Ltd on account of his outstanding half share of their fees forthe preparation of valuationsof six properties completed in June 2014 and that,to facilitate their release, she has paid the husbands share and seeksreimbursement of that amount. The wife deposes that the husband has also failedto respond to a request made by the single expertrural property valuer, GAValuers, to pay the sum of \$35,900 on account of his half share of theirestimated fees including disbursementsand GST for the valuation of the variousrural properties owned by Turner Holdings Limited and the one rural propertyowned by TurnerPty Ltd. MsGoldberg in her affidavit filed 30 July 2014 deposes that her office provided MsB with copies of the documents produced to theCourt pursuant to subpoena by theXY Consulting Group, a branch of HF Pty Ltd which had prepared a valuation ofTurner Holdings Limitedto assist Ms B in the preparation of her valuation. Althoughon most of the occasions that the matter was before the Court for interimhearing the husband was represented, there havealso been a number of lengthyperiods during the course of these proceedings when he has chosen to representhimself. Ms Goldberg,who acts on behalf of the wife, deposes that during theseperiods the

husband has failed to respond to communications from her office or the offices of the single expert witnesses and has not co-operated with the requests made by the single expert witnesses. I am satisfied that the wife has complied with the orders made 4 August 2014 for the filing of documents and done all that she can to facilitate the preparation of the valuations by the single expert witnesses. I am also satisfied that the husband has not complied with orders for the filing of documents for the trial, has not provided Ms B with the documents she requires to complete her valuation, has not paid his half share of the initial payment of \$20,000 required by Ms B for the preparation of her valuation or his share of the costs of the real estate valuations. In light of the husband's failure to comply with Court orders, to provide documents as requested by Ms B, and to meet his share of the costs of the various single expert witnesses, the wife was not prepared to meet the estimated cost of \$163,650 for the preparation of the valuation by Ms B and, as at the date of the mention before me, that valuation has not been completed.

**DISCUSSION**

Rule 11.02 of the Family Law Rules 2004 (the Rules) provides that: (1) If a step is taken after the time specified for taking the step by these Rules, the Regulations or a procedural order, the step is of no effect. Note: A defaulter may apply to the court for relief from this rule (see rule 11.03) (2) If a party does not comply with these Rules, the Regulations or a procedural order, the court may: (a) dismiss all or part of the case; (b) set aside a step taken or an order made; (c) determine the case as if it were undefended; (d) make any of the orders mentioned in rule 11.01; (e) order costs; (f) prohibit the party from taking a further step in the case until the occurrence of a specified event; or (g) make any other order the court considers necessary, having regard to the main purpose of these Rules (see rule 1.04). Note: This List does not limit the powers of the court. It is an expectation that a non-defaulting party will minimise any loss. The Explanatory Guide to the Rules describes undefended basis as follows: [T]he court may order that a hearing or trial may proceed, because of the respondent's failure to comply with a rule or order, as if a response has not been filed. The court may make the orders set out in the application on being satisfied by evidence that the orders should be made. The Full Court, in upholding the decision of the trial Judge in striking out the husband's response and refusing him the right to cross-examine the wife based upon what was described as a continual delay; most of it due to

thenon-compliance of thehusband, said in Tate JRD v Tate MT [2000] FamCA 1040; (2000)FLC 93-047 as follows: Inattempting to match the limited resources of the Court to the demands ofincreasing lists, the principles of case management areassuming greaterprominence. Never an end in themselves, they are and must always remain subjectto and never prevail over the attainmentof justice as the paramountconsideration (State of Queensland v J.L. Holdings; supra)(original italics). But justice in matters such as this is due to each party tolitigation (see the comments of Kirby J in Allesch v Maunz [2000] HCA 40at paras 38-40). Case Management guidelines, principles and orders are designedto facilitate the ends of justice by encouraging:full frank and promptdisclosure; settlement; identification of the matters genuinely in disputeneeding the Courts determination;and the expeditious marshalling andpresentation of relevant evidence. ... TheCourt, no less than those who litigate before it, is constrained by theinterplay of competing principles. In the attainmentof justice in individualmatters, which will always remain the paramount consideration, appropriatesanctions are essential to seethat its orders and directions are obeyed in thepursuit of that end. Such a goal overrides any notions of punishment fordisobediencEOF such orders. Where,as here, non-compliance with the orders and directions of the Court will, in theopinion of the trial Judge, defeat the attainmentof justice, then suitable remedies must be found. In this instance the remedy necessarily excluded thehusband from any further participationin the proceedings. Whilst such casesare exceptional, and indeed unusual, no litigant, whether legallyrepresentedor not, should harbour any doubt that a manipulation of the courtprocesses, (as was attempted and indeed partially achieved in thisinstance),through disregard of and deliberate non-compliance with its orders anddirections will attract other than the strongestmeasures from the Court. Indoing justice to both parties, the exclusion of a defaulter, whose defaultsthreaten the achievementof justice, is not only an option, but, in suchcircumstances, becomes a regrettable necessity. Itis in these cases where a party seeks to proceed undefended a matter of weighingup the competing rights of the parties and theinterests of justice generally.The wife in this case is entitled to have her case heard irrespective,ultimately, of whether thehusband chooses to participate, in any meaningfulsense, in that process. Itwas submitted by the husband, in summary,



as follows: that he has been left with no money at all and cannot afford legal representation; that he has been working 10 to 12 hours each day with only one day off in the last three months and has been struggling with what he said was the whole process and which I take to mean these proceedings; that he does not have the necessary knowledge or skills to prepare and conduct the litigation on his own behalf; and that a hearing and the preparation necessary for same, in any event, is unnecessary as the matter is a very simple process to work this out and he is willing to resolve the matter amicably with the wife. Counsel for the wife, by way of reply, submitted that the husband earns approximately \$155,000 per annum and that his new partner earns approximately \$135,000 per annum. Counsel also referred me to a home loan application produced pursuant to subpoena and annexed to Ms Goldberg's affidavit with respect to the property purchased by the husband and his new partner in late 2013, in which the husband disclosed owning shares in Turner Holdings Limited valued at \$861,950. The wife's case is that those shares are worth significantly more than the figure suggested by the husband in that document. Whether the husband does or does not have the capacity to fund the proceedings he cannot simply ignore Court orders or his obligation to provide full and frank disclosure. Legal representation is a privilege and not a right, and the inability to fund the proceedings cannot be used as a means to prevent the Court from determining the matter and the other party to the proceedings attaining justice. Insofar as the husband asserts that he does not have the capacity to deal with these proceedings on his own behalf, there is no evidence which would lead me to conclude that that is the case. Whilst not always the optimal option litigants frequently represent themselves in this Court. The husband in this case is an accounts manager earning by community standards a relatively high income. He is well-spoken and would appear to be better placed than many litigants who, for financial or other reasons, conduct their own proceedings in this Court. The husband has had many opportunities to comply with orders of this Court and to meet his obligations to provide full and frank disclosure. The husband did not submit or make any proposals as to how the matter might proceed or when he might comply with the orders for the filing of documents or provide full and frank disclosure in accordance with various orders and the Rules or how that might impact upon the forthcoming hearing. The husband has not participated in

these proceedings in a meaningful sense and he gave me little confidence that he would do so in the event that I did not accede to the wife's application to proceed on an undefended basis. The difficulty in this case is that the disadvantage to the wife is not one that can be addressed simply by a costs order. The wife is entitled to have her matter heard and a decision made. In all of the circumstances of this case, and weighing up the rights of both the husband and the wife, I propose to accede to the wife's application and will strike out the husband's Response to Initiating Application filed 4 October 2013. I am mindful of the fact that this matter, for reasons not directly related to the husband's conduct of the proceedings, may not be ready to proceed on 2 December 2014. Whilst I am satisfied that the husband's failure to comply with the orders of this Court and his obligations to provide full and frank disclosure should not be permitted to delay the hearing on 2 December 2014, if the matter does not proceed on that date the husband may have the opportunity to apply to have his response reinstated. Any such application would need to be accompanied by an affidavit sworn by the husband setting out in detail his reasons for having failed to comply with the orders of this Court and his obligation to provide full and frank disclosure, the steps he has taken to meet that obligation, and a detailed timetable for the filing of the documents that the orders require him to file. I certify that the preceding thirty-six (36) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Macmillan delivered 29 October 2014. Associate: Date: 29 October 2014 AustLII: Copyright

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