

**EVIDENCE**

# Subpoenas—more changes to procedures in the Family Court

JACKY CAMPBELL, JANUARY 2016

## **Subpoenas - More changes to procedures in the Family Court**

**Jacky Campbell**

**Forte Family Lawyers**

A new year always brings changes to the *Family Law Rules 2004*. The year 2016 is no exception. The *Family Law Amendment (Arbitration & Other Measures) Rules 2016* reform three major areas of the *Family Law Rules*:

1. A new Chapter 26B dealing with arbitration.
2. Amendments with respect to subpoenas.
3. A new Division 4.2.8 dealing with children born under surrogacy arrangements.

This article only covers the amendments regarding subpoenas.

The new Rules apply to subpoenas issued, or to be issued on or after 1 January 2016.

### **Simplified procedure for production of documents**

Rule 15.30 has been replaced with a simpler procedure for production and inspection of documents pursuant to a subpoena which also aligns with the procedure under the *Federal Circuit Court Rule 2001*. Rather than requiring service of the subpoena for production 21 days prior to the date production is required, service is only required 10 days prior.

Provided an Affidavit of Service is filed and the documents are produced, a Notice of Request to Inspect can be filed in an approved form and unless the court otherwise orders, an inspection by each party to the proceedings and any Independent Children's Lawyer can take place by appointment and without an order of the court (r 15.30).

### **Objections**

Under r 15.26(1)(b), the named person or a person with sufficient interest in a subpoena who seeks an order that the subpoena be set aside in whole or in part or seeks any other relief in relation to the subpoena, must "before the day on which attendance or production in accordance with the subpoena is required, apply to the court, in writing, for the relevant order". The previous rule required that the person attend court on the court date to apply for the order.

The application must be "referred to the court for the hearing and determination of the application" (r 15.26(2) and r 15.31(5)).

## **Use of subpoenaed documents**

The former r 15.27(2), which restricted the use of subpoenaed documents, has been repealed.

This issue is now covered by the new r 13.07A which states:

"A person who inspects or copies a document, in relation to a case, under these rules or an order:

- (a) Must use the document for the purpose of the case only; and
- (b) Must not otherwise disclose the contents of the document, or give a copy of it, to any other person without the court's permission."

In any event this is a codification of the common law.

## **Copies**

The definition of "copy" of a document has been expanded to accord with the definition under the *Federal Circuit Court Rules*. In addition to "photocopy" and "a PDF copy on a CD-ROM", it can be "a copy in any other electronic form that the issuing party to the subpoena has indicated is acceptable" (r 15.29(4)).

## **Medical Records**

Rule 15.31(3) and (4) deals with medical records. The person whose medical records are subpoenaed may apply before the production day to inspect them "for the purpose of determining whether to object to the inspection or copying of the records". Within 7 days of the production day, the potential objector can give written notice of the objection and the grounds for the objection to the Registry Manager. There is no express requirement to give such notice to the party who issued the subpoenas or other parties. No other person may inspect the medical records until the latter of 7 days after the production day or, if an objection is made, at the end of that hearing and determination of the objection (r 15.31(4)). The effect of this rule is that even if no objection is made, there will be a 17-day lead time before medical records can be inspected, not the current 7 days.

## **Registrars' powers**

The Registrars' powers in Table 18.5 of the Rules have been changed. Deputy Registrars now have wider powers with respect to subpoenas including the production of documents and access by parties, but still do not have power to deal with non-compliance.

## **Conduct money**

Importantly the minimum conduct money in schedule 4 item 101 has been increased from \$10 to \$25. Again this aligns the *Family Law Rules* with the *Federal Circuit Court Rules*.

## **Other matters**

The Rules clarify a number of other matters:

- a subpoena must be in the approved form (r 15.17(1A))
- a subpoena to give evidence must specify the time and place at which the person must attend court (r 17.7(7)) and a subpoena to give evidence and produce documents must specify the time and place at which the person must attend court to produce the documents and give evidence (r 15.7(8));
- the reference to the service of the brochure - *Subpoena - Information to Named Person*, is now included in r 15.22 rather than in the service section of the Rules.

## **Conclusion**

In summary, the amendments to the *Family Law Rules* which commenced on 1 January 2016, simplify the procedure for production of documents and align the procedures in the Family Court more closely with those in the Federal Circuit Court.

January 2016