



Third parties in family law disputes: to join or not to join – that is the question!

Chair: The Honourable Justice Catherine Carew, Federal Circuit and Family Court of Australia (Division 1)

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THE RULES IN RELATION TO NECESSARY PARTIES – MATTER OF PROCEDURE

- Chapter 3 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* sets out the necessary Rules in relation to the joining of ‘necessary parties’.
 - Rule 3.01 of the Rules states:
 - *A person whose rights may be directly affected by an issue in a proceeding, and whose participation as a party is necessary for the court to determine all issues in dispute in the proceedings, must be included as a party to the proceeding’.*
 - Rule 3.01 of the Rules replaces what was Rule 6.02 of the *Family Law Rules 2004* and Rule 11.01 of the *Federal Circuit Court Rules 2001*.
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- Pursuant to Rule 3.03 a party to a proceeding may include any person as a party by:
 - *A party to a proceeding may include any person as a party by:*
 - Naming the person as a party in the application, response or reply; and
 - Serving on the person a copy of the application, response or reply and all other relevant documents filed in the proceeding.
 - Pursuant to Rules 3.04 of the Rules a person may apply to be included and a party may apply to be removed pursuant to Rule 3.05.
 - After the first court date of a matter a party may only add another party with the leave of the Court (Rule 3.03(4)).
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- A party who relies on subrule (4) must file:
 - *An Application in a Proceeding.*
 - *An Affidavit setting out the facts relied on to support the addition of the proposed new party, including a statement of the proposed new party's relationship (if any) to the other parties.*
 - Pursuant to Rule 3.03 (5) (b) when serving the new proposed party, a copy of the Application in a Proceeding, the Affidavit setting out the facts relied upon and any other relevant documents filed in the proceedings (read the documents as they pertain to the potential interest of the third party) must be served with the Application.
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- Pursuant to Section 90AE of the Act, the Court may make an Order under Section 79 binding a third party.
 - Pursuant to Section 90AE (2) the Court may make any other Order that:
 - *Directs a third party to do a thing in relation to the property of a party to the marriage, or*
 - *Alters the rights, liabilities or property interests of a third party in relation to the marriage.*
 - Relevantly, Section 90AE (3) provides:
 - *The Court may **only** make an Order under subsections (1) and (2) if:*
 - The making of the Order is reasonably, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage, and
 - If the Order concerns a debt of a party to the marriage – it is not foreseeable at the time that the order is made that to make the order result in the debt not being paid in full, and
 - The third party has been accorded procedural fairness in relation to the making of the order, and
 - The court is satisfied that, in all of the circumstances, it is just and equitable to make the Order, and
 - The court is satisfied that the Order takes into account the matters mentioned in subsection (4) which are the taxation effect of the Order on the parties to the marriage, the taxation effect on the third party, the social security effect on the parties to the marriage, the third party's administrative costs in relation to the Order and if the Order concerns a debt of the parties to the marriage, the capacity of a party to the marriage to repay the debt after the Order is made.

THE ACT AND THIRD PARTIES

- The High Court in *Commissioner of Taxation v Tomaras* (2018) FLC 93-874 considered the operation of the provisions of Section 90AE and Section 90AF (which provides for the Court to make an Order of injunction under Section 114 binding third parties) and Justice Gordon held the following:
 - 71 – *Section 70AE was intended to cover, and covers, a range of possible arrangements that a party to the marriage may have which involve a third party, including ownership of life insurance products, shares in corporate entities and the creditors of the parties to a marriage whether they are family, friends or financial institutions. The range of available order was ‘intended to be broad and include[d] substitution of the party liable for a debt, adjusting the proportion of a debt that each party is liable for or ordering the transfer of shares between the parties to the marriage.*
 - 72 – *However, the circumstances in which the orders may be made against a third party are confined. Relevantly for the purposes of this appeal, the court may only make an order concerning a debt of a party to a marriage which binds a third party if ‘it is not foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full’. As will become apparent, this provision is important in applying Section 90AE to a debt owed to the Commonwealth which arises under a taxation law.*

REMOVAL OF A THIRD PARTY

- Pursuant to Rule 3.05 a party may apply to be removed as a party to a proceeding.
- In *B Pty Ltd & ors & K & Anor* [2008] FamCAFC113 the Full Court considered that an Application for joinder was analogous to an Application for summary dismissal for the proposed claim. At [52] the Full Court said the following:
 - *'We do not accept that it is proper to allow joinder of third parties merely upon the formulation of a paragraph in, or to be added to, an Application, on the basis that at Trial facts to support the application may be asserted and proved. Sufficient facts must be asserted to demonstrate that, if proved, the law arguably provides the relief sought.'*

SEPARATE ISSUE HEARING WHEN A THIRD PARTY IS INVOLVED

- The Rules can be utilised by third parties and by the parties to a relationship to dispose of part of the proceedings before the Trial of the matter.
- Rule 10.10 of the Rules allows for a party to apply for a decision on an issue if the decision may:
 - *Dispose of all or part of the proceedings, or*
 - *Make a trial unnecessary, or*
 - *Make a trial substantially shorter, or*
 - *Save substantial costs.*

CONSEQUENCES OF JOINING PARTIES WITHOUT A PROPER BASIS

- Costs is the most obvious.
- Practitioners should be mindful of the delays caused to Trials and the costs consequences in having additional parties to a matter where ultimately the relief sought by or against them is unsuccessful.
- Noting that in some instances the third parties might be unrelated to the main protagonists in the matter, the costs consequences to them in being caused to participate in a proceeding and indeed a trial may sound in a hefty costs Order against the party that joined them, if found to be ultimately unnecessary.
- An example of this is seeking Section 106B relief against someone, where on an interlocutory application, for usually good reasons, Judges will join parties even if on weaker evidence and then ultimately at Trial the relief claimed is unsuccessful or without basis and the party joined will sometimes have greater success in obtaining a costs Order in those circumstances.