*About the presenter*

1. Michael Hines has been practising as a barrister for over twenty years. He appears in and advises on family law property disputes, wills and estates, equity, commercial, and revenue cases. He has appeared in many reported cases including *Kennon v Spry* in the High Court and *Stephens v Stephens*, a related family law property case in the Full Family Court. He is a past part time senior lecturer and fellow of the Law School of the University of Melbourne teaching post graduate tax, and the author of numerous articles and of the LBC loose leaf service, “Stamp Duties Victoria”. Michael is on Dever’s List.

*Appeals from property orders*

1. At present, the appeal may be from the Federal Circuit Court to a single Judge of the Family Court, or to the Full Court.[[1]](#footnote-1) The appeal may also be from a single Judge of the Family Court exercising its original jurisdiction to the Full Court.[[2]](#footnote-2) There is no further appeal, except to the High Court.[[3]](#footnote-3)

*Changes from 1 January 2019*

1. Under new legislation,[[4]](#footnote-4) the Family Court of Australia and the Federal Circuit Court of Australia will be brought together as the Federal Circuit and Family Court of Australia (FCFC) from 1 January 2019. The FCFC will comprise two divisions: the FCFC (Division 1) will be a continuation of the Family Court, and the FCFC (Division 2) will be a continuation of the Federal Circuit Court. As such, the FCFC will preserve the current cohort of Judges of the Family Court and Federal Circuit Court.
2. A new Family Law Appeal Division in the Federal Court of Australia will be established to hear all appeals in family law matters from the FCFC.
3. Appeals from Division 1 of the Federal Circuit and Family Court of Australia, as a superior court of record, will be heard by the [Full Court](http://en.wikipedia.org/wiki/Full_Court) of the Family Law Appeal Division.
4. Appeals in family law matters from the FCFC Division 2 will ordinarily be heard by a single judge of the Family Law Appeal Division. However, there will be provision for the possibility of the Full Court of the Appeal Division hearing the appeal if a judge considers it appropriate.
5. Whilst there will be changes in the appeals pathway, there will be no changes to the existing rights of appeal, as currently provided for under the *Family Law Act 1975*.
6. There will be saving and transitional provisions to enable the repeal of the Federal Circuit Court of Australia Act 1999 on 1 January 2019, when the new law comes into effect and consequential amendments to the Commonwealth statute book to reflect the continuation of the Family Court as the FCFC Division 1 and the Federal Circuit Court as the FCFC Division 2, to update legislative references, and to provide for the change in appeal location for family law matters.
7. There will be modification of court rules for Divisions 1 and 2 of the Federal Circuit and Family Court of Australia, and amended court rules for the standard rules of court for family law proceedings. We are told they will be harmonised and in place for the court's commencement date of 1 January 2019.

*Character and nature of appeal*

1. An appeal to the Family Court from the exercise of the discretion, is an appeal by way of rehearing. The appeal court will decide the appeal in accordance with the facts in evidence before the court of appeal including facts which have occurred since the trial (if evidence of such facts is admitted), and according to the law in force at the time of the appeal, rather than at the time of the trial.
2. The parties to the appeal do not have a free hand to put in new evidence, or to raise new points.[[5]](#footnote-5) Nor does the appeal court have power to substitute its own discretion for that of the court at first instance merely because it would exercise the discretion differently. It is of the essence of a discretion that opinions may differ as to how it should be exercised. A successful appellant has to show that the trial court’s purported exercise of discretion was not a true exercise of the discretion residing in the court.[[6]](#footnote-6)

*Steps to take after receiving instructions to begin an appeal*

1. You start the appeal by filing Notice of Appeal within 28 days’ after the final orders.[[7]](#footnote-7) That time can be extended by leave.[[8]](#footnote-8) Any interested party, has to be made a respondent to the appeal, whether a party to the proceedings below or not.[[9]](#footnote-9)

*Grounds of appeal*

1. These will identify errors made by the Court below, and (where appropriate) findings which, had there been further evidence, might have been different.
2. It may be likely that the order appealed from would have been made even if the error had not been made, or the further evidence adduced. In such a case, the error or lack of evidence at trial will not provide a good ground of appeal. It is immaterial to the result.
3. Examples of appealable errors are: the failure to take a relevant consideration into account, the taking into account of an irrelevant consideration, the application of a wrong legal test, the misconstruction of a statute, a finding against the evidence.
4. On an appeal, the appeal court may affirm, reverse or vary the decision the subject of the appeal and may make such decision as, in the opinion of the court, ought to have been made in the first instance, or may, if it considers appropriate, order a re-hearing on such terms and conditions, if any, as it considers appropriate.[[10]](#footnote-10)
5. It is well for the orders sought to begin with an order that the appeal be allowed, thereafter, that the orders appealed be set aside and that in lieu thereof the court order as follows, and to finish with such further or other orders as the Court thinks fit.
6. In some cases, it will be appropriate to seek an order for a retrial rather than final orders, perhaps in the alternative to other relief.
7. If amendment of the notice of appeal is required, it should be done as soon as possible in accordance with the Rules and directions given by the Court where possible.[[11]](#footnote-11) In a complex case, it is likely some amendment will be required.

*Stays*

1. Having filed the notice of appeal, the appellant should give thought to whether or not to apply for a stay of the orders. In general, an appeal of itself does not operate as a stay.[[12]](#footnote-12)

*Directions*

1. After the notice of appeal has been filed, there is a number of steps to be taken by each party up to the hearing, such as attendance at directions hearings (these may be done by phone), settling the draft index, filing a summary, and so forth. See Part X of the Act. (Note that the Federal Circuit Court is not a court of summary jurisdiction for the purposes of the Act and Rules.) See also Chapter 22 of the Rules and Practice Direction 1/2017 of the Family Court. See also any directions made by the Court for the conduct or hearing of the appeal.[[13]](#footnote-13)
2. Failure to take any of these steps may cause the appeal to be struck out. An appeal can be reinstated by leave.[[14]](#footnote-14) But the applicant has to show that he or she has an arguable appeal.

*Allowance of further evidence on appeal*

1. The appeal is confined to the evidence before the trial court unless circumstances exist where it can admit further evidence under s93A(2) of the Act, and it decides in the exercise of its discretion to exercise that power.
2. An application for the court to admit further evidence has to be filed together with an affidavit describing or setting out the further evidence.[[15]](#footnote-15) The application is heard on the same day as the appeal.[[16]](#footnote-16)
3. The rules require that the application and affidavits are filed at least 14 days before the hearing of the appeal,[[17]](#footnote-17) but in many cases the court may have made directions requiring these to be filed sooner
4. It will tell against the admission of further evidence, if at or before the trial, the evidence could have been discovered with the exercise of reasonable diligence by the party applying for its admission. On the other hand, the appeal court may more readily admit the evidence where there is no apparent reason to disbelieve it, especially if there can be no serious contention that the evidence could be in dispute. In such a case, the fact that the evidence could have been discovered with the exercise of reasonable diligence may be of little significance: see *CDJ v VAJ* at 203. The court may be readier to admit further evidence when the interests of third parties are involved.

*Summary of argument and list of authorities*

1. Generally, both parties are required to file a summary of argument and a list of authorities to be relied on.[[18]](#footnote-18)
2. Usually, the court will be anxious to limit the hearing time at least to the number of days or parts of days for which the appeal is listed for hearing. Members of the court may have commitments to hear appeals elsewhere, including interstate, after the expiration of that time. It is therefore in yours and the court’s interests to prepare as comprehensive, accurate and persuasive a summary as possible.

Michael Hines is a member of the Victorian Bar Professional Standards Scheme approved under Professional Standards Legislation. His liability is limited under that Scheme. A copy of the Scheme will be supplied on request.

1. See ss28 and 94AAA(1) and (3) of the Act. [↑](#footnote-ref-1)
2. See ss28(3A) and 94 of the Act. [↑](#footnote-ref-2)
3. See ss94AAA(12) and 95 of the Act. [↑](#footnote-ref-3)
4. See the Federal Circuit and Family Court of Australia Bill 2018 and the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018. [↑](#footnote-ref-4)
5. Ibid. [↑](#footnote-ref-5)
6. Ibid. [↑](#footnote-ref-6)
7. See *Family Law Rules 2004* (‘FLR’) 22.03. [↑](#footnote-ref-7)
8. See s94(5) and (10) and s94AAA(1A) and (2D) of the Act and FLR 1.14 and 22.03. [↑](#footnote-ref-8)
9. See FLR 22.04. [↑](#footnote-ref-9)
10. See ss94(2) and 94AAA(1) of the Act. [↑](#footnote-ref-10)
11. See FLR 22.09 (amendment of notice of appeal.) [↑](#footnote-ref-11)
12. See FLR 22.11. [↑](#footnote-ref-12)
13. See ss94(2B) and (2D) and 94AAA(8) and (10) of the Act. There is no appeal from directions made by a Judge: see ss94(2F) and 94AAA(12) of the Act. [↑](#footnote-ref-13)
14. See FLR 22.44. [↑](#footnote-ref-14)
15. See FLR 22.39 and Practice Direction 7/2004. [↑](#footnote-ref-15)
16. Ibid. [↑](#footnote-ref-16)
17. Ibid. [↑](#footnote-ref-17)
18. See FLR 22.22 and 22.26 and Practice Note 1/2017. For the appellant, at least 28 days before the first day of sittings in which the appeal is listed for hearing, unless the court shortens or extends the time. [↑](#footnote-ref-18)