

**LAW INSTITUTE OF VICTORIA
LEGAL SUPPORT STAFF CONFERENCE
27 April 2007**

**ESSENTIALS IN FAMILY LAW
ADMINISTRATIVE PROCEDURE**

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Which Court? Overview of the Family Court and the Federal Magistrates Court

In most locations in Australia, including in Melbourne and Dandenong, these Courts operate from the same registries.

An extremely important thing to remember is that (unlike the flyer for this conference) the Federal Magistrates Court, unlike the State Magistrates' Courts, does not have an apostrophe after the "s".

The Federal Magistrates Court offers simpler and streamlined procedures and an earlier final hearing date than the Family Court. At the Federal Magistrates Court, however, there is less opportunity to sit down with a Court official such as a Registrar to discuss the case and gain input from the Registrar.

Until 1 July 2006 the Federal Magistrates Court could only deal with cases with a monetary limit of \$750,000. This was an increase from the original limit set when the Court was established in July 2000 of \$300,000. The monetary limit is calculated on the gross value of assets.

More than 40% of all family law applications issued are completed in the Federal Magistrates Court. Approximately 80% of that Court's workload is in family law. It also does a wide variety of other matters such as migration, bankruptcy, unlawful discrimination, trade practices and industrial law.

Complex cases involving child abuse, financial disputes relating to businesses and other complex financial issues, are usually issued in the Family Court. There is a 2 day limit for a final hearing in the Federal Magistrates Court and these complex cases could usually not be dealt with within that time.

The Federal Magistrates Court tries to deal with cases on a final basis within 6 months from the date of issuing. The Family Court struggles to list cases for a final hearing within 2 years of the date of issuing. The progress of cases in the Family Court is slowed by:

- The more complex nature of the cases
- The difficulty of finding time to list cases for final hearing which are expected to run 3 to 5 days, or even longer
- The additional work imposed on parties to prepare documents such as Affidavits and Pre-Trial documents
- The extra steps required such as Case Assessment Conference, Trial Notice List and Pre-Trial Conference

Each Court has its own Rules and forms.

Parties

The party who files the application is called the applicant. The other party is the respondent. There can be more than one of either.

A party may be an applicant for the main application, such as parenting issues and the respondent for a particular issue such as an urgent application to enforce an order to spend time with a child.

If parties have been legally married they will be referred to as "husband" and "wife". Unmarried parents are referred to as "father" and "mother". If the parties have not been legally married they will not be arguing about property under the *Family Law Act*, but only about children. Proposals to transfer property disputes between heterosexual de facto couples (but not same sex couples) from the State jurisdiction (the Supreme Court and County Court) to Commonwealth jurisdiction (Family Court and Federal Magistrates Court) are not yet law.

Other parties such as grandparents and banks may be called the second respondent, the third respondent or the second applicant depending on the circumstances. They will usually be third parties to the proceedings. Sometimes the proceedings may involve only one of the parties to the marriage or one of the parents. In those circumstances the other party will often be a relative of the child seeking an order that the child live with them or spend time with them.

Orders

There are three main types of orders:

- *Final orders* bring a matter to a close
- *Interim orders* are usually made in urgent cases. They last until other orders or final orders are made. An application for final orders must usually be on foot or filed at the same time as an application for interim orders.
- *Consent orders* are orders that both parties agree on. The application can be made without going to court. Consent orders can also be made by consent once an application for final orders has been filed. Consent orders can be made at any time during the course of the proceedings either in relation to interim issues or on a final basis.

The Court does not automatically make the orders even if all parties consent. It must make up its own mind taking into account, broadly:

- in parenting cases, the best interests of the child, and
- in financial cases, that the terms are just and equitable.

The Courts are in the process of trialling a joint application to initiate proceedings. The Rules of each Court still require different forms. The operation of the *Family Law Rules* has merely been suspended for the duration of the trial of the forms by a

Practice Direction of the Family Court. At the moment either forms in the Rules or the forms being trialled can be used. The respondent must use the same type of form as the applicant uses.

Family Court

Final orders require:

1. Form 1 - Application for Final Orders
2. Financial Statement (for financial cases only)
3. A photocopy of the marriage/divorce certificate. If the parties are unmarried, a photocopy of the child/ children's birth certificate/s
4. A filing fee, if applicable, or application for exemption or waiver.

Interim orders require:

1. Form 2 - Application in a Case
2. Affidavit.
3. In children's matters, an Affidavit for interim parenting cases

There is no filing fee.

Consent orders, where no application for final orders has been filed:

1. Form 11 – Application for Consent Orders
2. Minutes of Proposed Orders
3. A photocopy of the marriage/divorce certificate. If the parties are unmarried, a photocopy of the child/ children's birth certificate/s.

There is no filing fee.

Federal Magistrates Court

Requires:

1. Application (the same form is used for interim and final orders)
2. Information Sheet
3. Affidavit
4. Financial Statement (for financial cases only).
5. A filing fee, if applicable, or application for waiver or exemption. There is no filing fee for an interim application.

Service and Appearance - Becoming a Party to a Case

Service is the process of sending or giving Court documents to a party after they have been filed, in accordance with the relevant Rules of the Court. Service ensures all parties have received the documents filed with the Court. Service may be personal, by mail, by email, by facsimile or through a solicitor depending on the nature of the document and the circumstances.

A Notice of Appearance is a simple form which notifies the Court and other parties of a person's interest in the case. It must be filed and then copies served on the other parties. Filing it does not make a person a party to the case. To become a party they must be named as a party by the applicant or respondent, or apply to the Court for an Order that they be made a party.

Subpoenas

A subpoena is a legal document issued by a Court at the request of a party to a case. A subpoena compels a person to produce documents or give evidence at a hearing or trial.

There are three types of subpoena:

- a subpoena for production
- a subpoena to give evidence, and
- a subpoena for production and to give evidence

The steps required are:

1. Complete the subpoena, ensuring that it is directed to a person not an organization. The following is correct:

*The Proper Officer
Commonwealth Bank
385 Bourke Street
Melbourne 3000*

2. File the subpoena with any necessary letter explaining its purpose and the right of the party to request the issue of a subpoena.
3. Arrange for the subpoena to be personally handed to the named person. Give the named person as much notice as possible of the hearing or trial date, usually 7 days. If the subpoena is not served personally, the named person is not required to comply with the subpoena.

At the time of serving a subpoena, the following must also be served with:

- conduct money
- if a subpoena for production in the Family Court – a copy of the brochure ‘Subpoena – information for named person (served with a subpoena)’
- a written notice if you want to ask the Court for permission to inspect and copy without the need to attend the court date
- a copy of the subpoena must also be served on the other parties to the proceedings and any affected parties.

Court Fees

Family Court of Australia

\$639 Application for divorce

\$639 Application for nullity (Form 1)

\$639 Application for declaration as to validity (Form 1)

\$191 Application for final orders (Form 1)

\$191 Response to an application for final orders (Form 1A)

\$383 Hearing fee (defended matters)

\$383 Notice of appeal from a court of summary jurisdiction (Form 20)

\$787 Notice of appeal to the Full Court including an appeal from the Federal Magistrates Court (Form 20)

Federal Magistrates Court of Australia

\$405 Application for divorce

\$121 Application for final orders

\$121 Response to an application for final orders

\$364 Hearing fee

- GST does NOT apply to any of the above fees.
- Fees may be waived if the party has a government concession card or can demonstrate financial hardship.

Divorce - How to apply?

A divorce application can be a joint application where both spouses are applicants or one person can be a sole applicant. The parties must have been separated for 12 months or more. The sole ground for divorce is the breakdown of the marriage. Separation for 12 months is the only way to prove this. For some or all of the period, the parties may have been separated under the one roof. If that is the case, affidavits may be required.

An Application for Divorce must be completed. This must be signed or affirmed in the presence of a suitable witness. The original application is then filed at a family law registry along with two copies. Filing fees in the Family Court and Federal Magistrates Court differ greatly so the Federal Magistrates Court is almost always used. The applicable fee must be paid when the application is filed, or the applicant can apply for an exemption or waiver of the fee.

If a person is a sole applicant, a filed copy of the Application for Divorce must be served on the spouse at least 28 days prior to the hearing, or at least 42 days prior if the spouse is overseas.

Applicants do not need to attend Court if there are no children of the marriage under 18. If there are children under 18, but a joint application was made, there is also no need to attend. Ideally a sole applicant should be present at the hearing if there is a child of the marriage under 18.

Property Cases

A few points to note:

- property disputes involving heterosexual de facto couples are dealt with in state courts (though this may change in the next year or so)
- the court will look at direct, indirect and non-financial contributions to the marriage
- the court will look at s 75(2) factors such as age, state of health, etc
- a Form 6 and Declaration may need to be completed in relation to superannuation
- superannuation is property

Children's Cases

A few points to note:

- From 1 July 2007, if orders are sought not by consent, parties must participate in family dispute resolution before taking parenting disputes to court
- Most applicants will need a certificate from a family dispute resolution practitioner stating that the parties have made a genuine effort to resolve the dispute before they can institute court proceedings
- There are some exceptions, eg. where there is family violence
- Family reports are often required before contested proceedings can settle
- There are different procedures for cases dealt with in the Magellan List or under Division 12A

Useful Websites

www.csa.gov.au - Child Support Agency

- simple information in brochure form can be downloaded as PDFs
- The Guide - more technical information
- Calculators to estimate the amount of child support payable given variables such as:
 - Ages of children
 - Incomes of parents
 - Proportion of time each parent has the care of the children

www.familycourt.gov.au - Family Court

- Filing fees
- Family Law Courts file search
- Daily Court Lists
- Recent judgments

www.fmc.gov.au - Federal Magistrates Court

- Filing fees
- Daily Court Lists
- Recent judgments

www.familylawcourts.gov.au

- Joint Family Law Courts website
- The old www.divorce.gov.au is being moved to this site

Research:

- www.scaleplus.gov.au
- www.austlii.edu.au
- www.cch.com.au
- www.aifs.gov.au - Australian Institute of Family Studies

www.familyrelationships.gov.au

- Information about family law
- Locations of the Family Relationship Centres

www.vla.gov.au

- Legal Aid Guidelines
- Basic information about family law

www.relationships.com.au - Relationships Australia (an organisation which provides family dispute resolution services)