FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA

Before you file – pre-action procedure for financial cases

This brochure provides information for people considering applying to the Federal Circuit and Family Court of Australia (the Court) for financial orders.

In particular, it provides information about pre-action procedures required before starting a case. For more information, see Rule 4.01 and Schedule 1 of the Federal Circuit and Family Court of Australia (Family Law) Rules 2021 (Family Law Rules).

Pre-action requirements also apply to parenting disputes. For more information see the separate brochure Before you file – pre-action procedure for parenting cases.

What is required?

The aim of the pre-action procedures is to explore possibilities for resolution and, where a dispute cannot be resolved, to narrow the issues that require a court decision. This should control costs and if possible, resolve disputes quickly, ideally without the need to apply to a court.

The pre-action procedure applies to:

• anyone considering starting a case • anyone named as a respondent if a case is started, and

• their lawyers (if any).

The Family Law Rules requires prospective parties to genuinely try to resolve their dispute before starting a proceeding in the Court. This is called taking 'genuine steps' to resolve the issues in dispute. Except for those situations listed under the heading 'What applications are exempt?,' all prospective parties must:

1. read the pre-action procedures

2. make inquiries about, invite the other parties to and where it is safe to do so, participate in dispute resolution services, such as family counselling, negotiation, conciliation or arbitration

3. if dispute resolution is unsuccessful, write to the other parties, setting out their claim and exploring options for settlement, and

4. comply, as far as practicable, with the duty of disclosure by exchanging relevant documents (see page 6).

Anyone who does not comply (unless exempt) risks serious consequences, including costs penalties. See Compliance on page 3.

What applications are exempt?

You may be exempt from complying with the pre-action procedures if one of the following applies:

• in an application for parenting orders – if there are allegations of child abuse or family violence, or of a risk of child abuse or family violence

• in an application for financial orders – if there are allegations of family violence, or a risk of family violence

• for applications that are urgent

• if the applicant would be unduly prejudiced if required to comply with pre-action procedures

• if a previous family law application has been filed by one of the parties in the last 12 months

• if the proceeding is an application for divorce only

• if the proceeding is a child support application or appeal, or

• if the proceeding involves a court's jurisdiction in bankruptcy under section 35 or 35B of the Bankruptcy Act 1966.

You must indicate which exemption is applicable in your Genuine Steps Certificate, which must be filed at the time of filing your Initiating Application (Family Law) (if you are the applicant) or your Response to Initiating Application (if you are the respondent). You will also be required to explain why this exemption applies in the affidavit filed in support of your Initiating Application (Family Law) or Response to Initiating Application. The Court will then review your Genuine Steps Certificate and assess compliance with the pre-action procedures on the first court date. For more information, see Compliance on page 3.

General information and parties' responsibilities

Pre-action procedure objectives

The objectives of the pre-action procedures are to:

• encourage early and full disclosure through the exchange of information and documents about relevant issues

• help people resolve their differences quickly and fairly, and to avoid legal action where possible. This will limit costs and hopefully avoid the need to start court proceedings

• where an agreement cannot be reached out of court, to help parties identify the

real issues in dispute. This should help reduce the time and costs involved in court proceedings, and

- encourage parties to seek only those orders that are realistic and reasonable on the evidence.

Your obligations as a prospective party to a case

At all stages during the pre-action negotiations and during any proceedings in the Court, you must keep in mind:

- the importance of identifying issues early and exploring options for settlement at all stages
- the need to avoid protracted, unnecessary, hostile and inflammatory exchanges
- the impact of correspondence on the reader, particularly on the other party/ies
- the need to seek only those orders that are realistic and reasonable on the evidence and that are consistent with current law
- the principle of proportionality with respect to costs – it is unacceptable for the costs of any case to be disproportionately high compared with the financial value of the subject matter of the dispute, and
- the duty to make full and frank disclosure of all material facts, documents and other information relevant to the dispute – see page 6 for more on disclosure.

Parties must not:

- use the pre-action procedure for an improper purpose; for example, to harass the other party or to cause unnecessary cost or delay, or
- in correspondence, raise irrelevant issues or issues that might cause the other party to adopt an entrenched, polarised or hostile position.

The Court expects parties to take a sensible and responsible approach to pre-action procedures.

Compliance

If a proceeding is then started, the Court will consider whether the pre-action procedures have been complied with and, if not, what the consequences should be (if any).

The Court may:

- where there is unreasonable non-compliance, order the non-complying party to pay all or part of the costs of the other party or parties in the case, and/or
- take compliance or non-compliance into account when making orders about how your case will progress through the Court. (See for example, rules 1.33, 1.34, 4.04, 12.15 and 12.16 of the Family Law Rules)

The Court may also ensure that the complying party is in no worse a position than they would have been if the other party had complied with the pre-action procedures. Examples of non-compliance with pre-action procedures include:

- not sending a written notice of proposed application to the other party
- not providing sufficient information or documents to the other party
- not following a procedure as required by the pre-action procedures
- not responding appropriately within the nominated time to the written notice of proposed application, and
- not responding appropriately within a reasonable time to any reasonable request for information, documents or other requirements of this procedure.

The pre-action procedure - step-by-step

STEP 1: Invite the other parties to participate in dispute resolution

A person who is considering filing an application in the Court must:

1. Give a copy of this brochure and the pre-action procedures (from Schedule 1 of the rules) to the other prospective parties Invite the other parties to participate in
2. dispute resolution.
   For more information about dispute resolution or to find an agency near you:

- go to www.familyrelationships.gov.au, or
- call 1800 050 321.

STEP 2: Agree on a dispute resolution service and attend the service

Each prospective party must:

- agree on an appropriate dispute resolution service, and
- make a genuine effort to resolve the dispute by participating in dispute resolution.

If an agreement is reached, you and the other party can formalise your agreement by either:

- entering into a financial agreement, with the assistance of a lawyer, or
- applying to the Court for consent orders.

For more information, or to get an Application for Consent Orders Kit, go to www.fcfcoa.gov.au, call 1300 352 000 or visit your nearest family law registry.

STEP 3: Written notice of issues and future intentions

If:

- no dispute resolution service is available
- a person refuses or fails to participate, or
- agreement is not reached through dispute resolution,

a person considering applying to a court must give the other person/s written notice of the intention to start a proceeding (called a notice of intention), setting out:

- the issues in dispute
- the orders to be sought if a case is started
- a genuine offer to resolve the issues, and
- a nominated time (at least 14 days after the date of the letter) within which the other person must reply.

This brochure should be attached to the notice of intention.

STEP 4: Reply to the notice of intention

If you receive a notice of intention, you must reply in writing stating whether the offer is accepted within the nominated time.

Where agreement is reached, you and the other party should consider formalising your agreement by entering a financial agreement or filing an Application for Consent Orders. If you do not accept the offer, you must set out in a letter:

- the issues in dispute
- the orders you will seek if a proceeding is started
- a genuine counter offer to resolve the issues, and
- a nominated time (at least 14 days after the date of the letter) within which the initiating party must reply.

If you do not respond, the initiating party's obligation to follow the pre-action procedures ends.

STEP 5: Taking other action

Where an agreement is not reached after reasonable attempts to resolve it by correspondence, other appropriate action may be taken to resolve the dispute, including filing an application in the Court.

Disclosure and exchange of correspondence

Parties have a duty to make timely, full and frank disclosure of all information relevant to the issues in dispute. There may be serious consequences for failing to disclose, including punishment for contempt of court. The Court's Duty of Disclosure brochure provides more information.

In summary, parties should promptly exchange copies of documents in their possession or control relevant to an issue in the dispute at all stages, including before starting court proceedings. Examples of documents include:

- a schedule of assets, income and liabilities
- a list of documents in the party's possession or control that are relevant to the dispute, and
- a copy of any document required by the other party, identified by reference to the list of documents.

In particular, parties are encouraged to refer to the Financial Statement and Rules 6.03 and 6.06 of the Family Law Rules as a guide to what information to provide and documents to exchange. Rule 6.15 of the Family Law Rules sets out documents that do not need to be produced. These include documents where there is a claim for privilege from disclosure or documents that have already been disclosed and where there has been no change likely to affect the result of the case.

The documents that the Court would consider as appropriate to be exchanged include:
In a maintenance case

- the party's taxation return and taxation assessment for the most recent financial year
- the party's bank records for the previous 12 months
- if the party receives wage or salary payments, the party's most recent pay slip
- if the party has an Australian Business Number, copies of the last four business activity statements lodged, and
- any other document relevant to determining the income, expenses, assets, liabilities and financial resources of the party.

In a property settlement case

- the party's three most recent taxation returns and assessments
- documents about any relevant superannuation interest, including:
  - the completed Superannuation Information Form
  - for a self-managed superannuation fund, the trust deed and the last three financial statements
  - the value of the superannuation interest, including how the value has been calculated and any documents working out the value
- if the party has an Australian Business Number, the last four business activity statements lodged
- for a corporation (business), trust or partnership in which the party has an interest, copies of the three most recent financial statements (including balance sheets, profit and loss accounts, depreciation schedules and taxation returns) and the last four business activity statements lodged by each corporation, trust or partnership.
- for any corporation, its most recent annual return, listing directors and shareholders; and the corporation's constitution
- for any trust, the trust deed
- for any partnership, the partnership agreement, including amendments, and
- unless the value is agreed, a market appraisal of any item of property in which a party has an interest.

Where a party is unable to produce a document for inspection, it is reasonable for the party to be required to provide written authority authorising a third party (for example, an accountant) to provide a copy of the document to the other party, where this is practicable.

Parties should agree to a reasonable place, time and format for the documents to be exchanged, inspected and/or copied at the cost of the person requesting the copies.

Parties must not use a document disclosed by another party for any purpose other than to resolve or determine the dispute for which it was disclosed. That is, in seeking the documents through the pre-action procedures, the party receiving them is considered by the Court to have given an undertaking that they will be used for the specific purposes of the case only.

Where there are disagreements about disclosure, it may be appropriate for an application to be filed with the Court.

Expert witnesses

As part of the pre-action procedures, you or the other parties may require information from an expert witness. There are strict rules about instructing and obtaining reports from an expert.

In summary:

- An expert must be instructed in writing and must be fully informed of his or her obligations.
- Where possible, parties should seek to retain an expert on an issue only where an expert's evidence is necessary to resolve the dispute.
- Where practicable, parties should agree to obtain a report from a single expert instructed by both parties.
- If separate experts' reports are obtained, the Court requires the reports to be exchanged.

Lawyers' obligations

Lawyers have a duty, as officers of the Court, not to mislead the Court. In complying with this duty, lawyers must, as early as practicable:

- advise clients of ways of resolving the dispute without starting legal action
- advise clients of their duty to make full and frank disclosure, and of the possible consequences of breaching that duty
- endeavour to reach an agreement rather than start or continue legal action, provided this is in the best interests of the client and any child
- notify the client if, in the lawyer's opinion, it is in the client's best interests to accept a compromise or settlement where, in the lawyer's opinion, the compromise or settlement is a reasonable one
- in cases of unexpected delay, explain the delay to their client and whether or not the client may assist to resolve the delay
- advise clients of the estimated costs of legal action at all stages
- advise clients about the factors which may affect the Court's consideration in ordering costs
- actively discourage clients from making ambit claims or seeking orders which the evidence and established principles, including recent case law indicates, is not reasonably achievable, and
- provide clients with documents prepared by the Court about:
  - the social and legal effects of separation
  - the services provided to families by the courts and by government, community and other agencies, and
  - the obligations created by an order and the consequences for failing to comply with an order.

The Court recognises that the pre-action procedures cannot override a lawyer's duty to their client. It is accepted that it is sometimes impossible to comply with a procedure because a client may refuse to take advice. However, if a client does not wish to disclose a fact or document which is relevant, a lawyer has an obligation to take appropriate action, that is, cease to act.

Legal advice

You should get legal advice before deciding what to do. A lawyer can help you understand your legal rights and responsibilities, and explain how the law applies to your situation. A lawyer can also help you reach an agreement with the other party without going to court.

You can get legal advice from a:

- legal aid office
- community legal centre, or
- private law firm.

Court staff can help you with questions about court forms and the Court process, but cannot give you legal advice.

Personal safety

If you have any concerns about your safety while attending court, please call 1300 352 000 before your court appointment or hearing. Options for your safety at court will be discussed and arrangements put in place. By law, people must inform the Court if there is an existing or pending family violence order involving themselves or their children. More detail may be found in the fact sheet Do you have fears for your safety when attending court?

Family Relationship Services

For help resolving a dispute out of court, go to www.familyrelationships.gov.au or call 1800 050 321. These services provide assistance to anyone who is affected by family relationship or separation issues.