

THE COURT PROCESS



Ideally, separated couples (married or de facto) and parents should endeavor to reach a fully informed, equitable and timely settlement of property adjustment issues, maintenance or parental arrangements. Where this can not be achieved, litigation in either the Family Court of Australia or the Federal Circuit Court usually ensues so that the matter can be determined.

Prior to issuing Court proceedings, it is important to consider and receive advice as to any potential claims together with any available dispute resolution options. Such advice should include a strategy designed to achieve the most effective resolution of the matter, not only taking into account the best possible outcome, but how best to structure such an outcome (including tax, estate or business planning considerations) and potential savings in terms of costs (be it financial costs, lost opportunity costs or emotional costs). Litigation can be a necessary pathway to achieve a just result, but a fully informed decision to issue proceedings, based upon comprehensive advice as to the available options and likely outcomes, is a prerequisite to any successful claim.

Before issuing proceedings as to parental matters, a parent must first possess a “family dispute resolution certificate” (also known as a “FDR certificate” or a “60I certificate”). These certificates are available from family dispute resolution practitioners who must, to the extent that it is consistent with any child’s best interests, discuss the matter with both parents and suggest resolution mechanisms such as parenting plans, parenting courses and various means of dispute resolution. A certificate is not required if there are circumstances of urgency; if there are reasonable grounds to believe that there has been (or there is a risk of) abuse of a child or family violence; or if a party is incapable of participating effectively. Parties can be legally represented at a family dispute resolution session.

While there is no similar certificate that prevents the issue of property adjustment proceedings, the Family Court requires an exchange of particular items prior to property proceedings being filed, including an exchange of relevant documents (such as bank statements, tax returns and the like), particulars of the issues in dispute, the orders to be sought in any proceedings and offers of settlement. These pre-filing requirements do not apply if there are circumstances of urgency.

The Court process varies between the Family Court of Australia and the Federal Circuit Court.

When an application is filed in the Federal Circuit Court, the first hearing date will not conclude the matter. Rather, it is the first Court date where a Judge considers what is to occur in the short term, pending the parties obtaining expert evidence, undertaking an exchange of relevant documents, attending mediation and the Court ultimately scheduling a final hearing.



The type of orders the Court can make on the first date are commonly called “interim” orders, made after considering (the non-contested facts in) each parties’ Affidavits and also submissions from each lawyer (or the parties themselves, should they be unrepresented). Once any interim issues are either agreed or determined, the matter can progress, usually via a mediation or a Conference, with a final hearing to be scheduled later, when the matter is ready to be determined.

When an application is filed in the Family Court of Australia, the first date is a conference (known as a “Case Assessment Conference”) where the parties (and their representatives) meet with a Court Registrar to consider issues such as expert evidence, an exchange of relevant documents, and whether any urgent matter requires determination by a Judge in the short-term. If there are no such urgent matters, the matter will usually proceed via a mediation (scheduled on a later date) with a final trial scheduled at a subsequent date (again, when the matter is ready to be determined).

In the absence of agreement between the parties, both Courts rarely facilitate an immediate resolution to the matter. This is because the Court, when making a final decision, usually requires:

- evidence as to the value of any property (should value be an issue in dispute);
- evidence from both parties as to the issues in dispute;
- evidence as to the best interests of any children, which can involve reports being obtained from independent social workers, medical practitioners and the like;
- the parties to have exchanged any relevant documents;
- the parties to first attend a mediation.

Litigation then, can often continue for months, if not a year or more, depending upon the issues in dispute, the Court’s schedule, and ultimately, the will of the parties to settle, should that be possible. The matter can settle at any time with the consent of the parties (if the Court is satisfied that it should make an order) so that it is not necessarily the case that Court proceedings will result in months or years of litigation.

Both the Family Court and the Federal Circuit Court make decisions after considering the principles of the *Family Law Act*, past cases; the evidence filed by the parties and the legal submissions/argument made in a particular case. Each of these elements (the Act, authorities, evidence and submissions) involve technical, legal knowledge and are best addressed via experienced practitioners and litigators. The Family Law team at Small Myers Hughes Lawyers possess that experience, representing and assisting clients throughout the Court process, working both in and outside the Court room to secure positive outcomes.

Where to next?

The first step would be to arrange an appointment with one of our Family Law team members, which can be arranged via contacting our Client Relationship Manager, Michelle Silipo on (07) 5552 6601. A confidential, initial consultation can then be arranged to discuss your circumstances and any queries that you may have.