

# Federal Circuit and Family Court of Australia (Family Law) Rules 2021 – the Survival Kit

By Richard Maurice - Edmund Barton Chambers

*“It’s Complicated” – Meryl Streep (from the 2009 movie of the same name)*



**“When we get married, I’ll only bill you for time actually spent in service as your spouse if you’ll agree to do the same.”**

In this paper references to:

- **FLR** refers to the Federal Circuit and Family Court of Australia (Family Law) Rules 2021;
- **CPD** refers to Central Practice Direction – Family Law Case Management.

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## Overview

1. This survival kit is designed to give you a (relatively) short and handy reference to the practical application of the Family Law Rules (2021). It is not intended to be comprehensive and does not cover, for example, topics like Appeals (Chapter 13), Enforcement (Chapter 11) or Costs (Chapters 12 and 13). The underlying legislation is now even more complex than before with 2 Acts, 2 sets of Rules and over 20 Practice Directions, I have summarised the most important ones in a separate paper.
2. The Court has two divisions
  - a. Division 1: Family Law matters only (old Family Court)
  - b. Division 2: Family and general Federal Law matters (old Federal Circuit Court)
3. All matters coming to Court start in Division 2 . A National Assessment Team will then consider where they will go from there.
  - a. Complex property matters, matters of extreme risk of harm, or otherwise matters whereby **Division 1** of the Court holds exclusive jurisdiction; eg: Hague Convention matters, these will be transferred directly to Division 1.
  - b. Otherwise, the balance of matters, estimated to be 90% of matters coming before the Court would remain in **Division 2**.
4. All existing matters are subject to the new rules and practice directions (subject to transitional provisions). There is a 90 day grace period which expires on 29 November, 2021 during which the old court forms can be used.

### Steps required before filing an Application FLR Part 4.1

4. Under the new system, parties in a family law matter should not file proceedings until they have attended to and exhausted all the pre-action requirements, which include:
  - a. Family Dispute Resolution.
  - b. Exchanging a notice of intention to commence property claim and exploring options for settlement.
  - c. Complying with the duty of disclosure.
  - d. Preparing a Genuine Steps Certificate outlining all the attempts made to settle the dispute.

- e. Family law practitioners are also required to give clients a notice that sets out the genuine attempts needed or taken to resolve the dispute, costs involved and the length of the matter if it goes to hearing.

## **Cases to be completed in 12 months**

5. In the CPD it is stated that the Court's aim is to resolve 90% of matters within 12 months, and which they intend to achieve by:
  - a. Focusing on dispute resolution (private and internal).
  - b. New pre-action procedures whereby a Genuine Steps Certificate must be filed to establish attempts made to resolve the matter.
  - c. Separate lists for different types of matters.
  - d. Contravention Applications triaged within 14 days.
  - e. Costs orders for parties and/or lawyers who do not conduct matters in a way consistent with the Court's overarching purpose.
  - f. Having the first court event and the interim hearing conducted on the same day (if urgent).
  - g. Continuing video hearings where appropriate.
  - h. Having trials not reached heard by video by other Judges who are available in other registries.
  - i. Allocating cases to a Fast Track Hearing list (ie: expedited list) where only short form Judgments are issued, and those matters will be determined on:
    - Filed Affidavit evidence only.
    - Expert reports and material provided to the Court.
    - Written submissions of no more than 10 pages or one hour's oral submissions.
  - j. More court staff including **10 additional judges** (2 appointed to Division 1 and 8 appointed in Division 2), Senior Judicial Registrars, Court Child Experts, and 5 new Indigenous List liaison officers.

## **Mediation, Dispute Resolution and Conciliation Conferences**

6. "Dispute resolution" includes mediation and a conference (including a Conciliation Conference) (rule 1.05).
7. The CPD requires parties to attend dispute resolution within 5 months of the date of commencement of a proceeding unless exceptional circumstances exist (Item 5.26). The CPD requires the court to consider the financial circumstances of the parties to determine whether it is appropriate for them to participate in a privately funded mediation or

court based Dispute Resolution. It is likely that the majority of matters will be referred to mediation.

8. The pre-action procedures are not unlike those in the previous Family Law Rules . Prior to issuing proceedings parties are required, if it is safe to do so, to give a copy of the pre-action procedures to the other prospective parties to the proceeding, make enquiries about dispute resolution services available and invite the other parties to participate in dispute resolution with an identified person or organisation or other person or organisation to be agreed [FLR Schedule 1 Part 1 clause 3(1) and FLR Schedule 1 Part 2 clause (1)].
9. Parties must make a genuine effort to resolve the matter with dispute resolution. The pre-action procedures do not make it mandatory to attend a private dispute resolution service. If a dispute is not resolved after a reasonable attempt to settle by correspondence and following a Notice of Intention to start a proceeding, proceedings can be filed (FLR Schedule 1, Part 2, clause 3(7) and Schedule 1, Pt 2, clause (7)).
10. In practice under the Family Law Rules (2004), the court was satisfied by negotiations between lawyers through correspondence or a roundtable conference amounted to compliance with the dispute resolution requirement of the pre-action procedures for financial cases. While it is not mandatory it is likely that the Court will expect parties to attend private mediation if at all possible.
11. The pre-action procedures do not need to be followed if it is not safe to do so (eg: Family Violence allegations) (see: Schedule 1 Part 1 clause 1(8) and Schedule 2 Part 1 clause 1(8)).
12. For a parenting matter a Dispute Resolution Certificate must be completed by the mediator or Family Dispute Resolution Practitioner after any external dispute resolution Event. The form must be given by the parties to the external mediator or FDRP to be completed.

### **Notice of an intention to start proceedings**

13. Before filing an application a proposed applicant party must give to the other party written notice of an intention to start proceedings. If there is no appropriate dispute resolution available, a party fails or refuses to participate in dispute resolution or the parties are unable to reach agreement by dispute resolution the requirement is satisfied as set out

below. [FLR Schedule 1 Part 1 clause 3(4) and Schedule 1 Part 2 clause 3(4)].

14. The Notice of Intention to start a proceeding must give at least 14 days after the date of the Notice for a reply. A proceeding can then commence if the proposed respondent does not reply or agreement is unable to be reached after a reasonable attempt to settle via correspondence. [FLR Schedule 1 Part 1 clause (7)) and (Schedule 1 Part 2 clause (7)].
15. Pre-action procedures do not have to continue indefinitely if all reasonable attempts to comply with the pre-action procedures have not achieved a satisfactory resolution. [FLR Schedule 1 Part 1 clause 1(8) and Schedule 2 Part 2 clause 1(8)].

### **Consequences of non-compliance**

16. Rule 4.04 sets out that the consequences of failing to comply with Rules 4.01, 4.02 and 4.03 which are that the court may stay the application on its own initiative or on the application of the respondent until the applicant complies with the pre-action procedures [Rule 4.04(1)].
17. The court may take into account a party's failure to comply with rule 4.01, 4.02 or 4.03 when considering whether to make an order as to costs (rule 4.04(2)) and the court may take into account the involvement of a legal practitioner in a party's failure to comply with those rules when considering whether to make an order as to costs against the legal practitioner [rule 4.04(3)].
18. Costs orders against lawyers were more common in the 1980s but became less common thereafter. They did have the effect of ensuring stricter compliance and now may provide a similar incentive for us to ensure that our clients follow the pre-action procedures and comply with the overarching purpose of the rules (Rule 1.04) of the Rules. The obligation on lawyers is contained in rule 1.04(3).

### **Questionnaires – Div 8.2.2 & FLR Rules 6.06(5) & (7)**

19. Each party to a parenting proceeding must file a completed Parenting Questionnaire with the Initiating Application or Response (rule 8.09)
20. The applicant to a financial proceeding must file a completed Financial Questionnaire and Financial Statement with an Application or Response (rule 6.06)(5)(b)

21. The Financial Questionnaire is a joint document. Each party is required to file their own Parenting Questionnaire. The Rules do not provide for or require the Questionnaires to be updated.
22. The Rules do, however, provide for the updating of Financial Statements (rule 6.06)(7)) if a party's financial circumstances have changed significantly.
23. The cover page of the Financial Questionnaire tells the party that the Questionnaire that if their case goes to a hearing when they first give evidence before the judge they will be asked to adopt the facts contained in the Questionnaire as part of their evidence before the court. The Parenting Questionnaire does not require that.
24. In practical terms it is likely the Questionnaire will be permitted to be updated at trial if needed.

### **Affidavits and Interlocutory proceedings**

25. The rules regarding interim affidavit vary between divisions.
26. For an affidavit in support of interlocutory orders an affidavit filed in Division 1 must comply with rules 5.08(2) and (3) and be no more than 25 pages and 5 annexures.
27. An affidavit in support of interlocutory orders in Division 2 is limited to 10 pages and a maximum of 10 annexures; (see Item 7 & 8 of Table 2.1)

### **Senior Judicial Registrars and Judicial Registrars**

28. Senior Registrars are now called Senior Judicial Registrars and Registrars are called Judicial Registrars (not to be confused with the Judicial Registrars in the old rules). They will conduct most, if not all, directions and interlocutory hearings. They will conduct the first day hearing and interim hearing on the same day if it is urgent.
29. FLR Schedule 4 sets out the powers delegated to them. Their decisions are subject to review. Rule 14.05 provides that the **review** must be filed within **21 days** of the decision. Examples of areas where Judicial Registrars have not been delegated authority include:
  - Hague Convention matters
  - Medical procedures

- Maximum costs orders
- Interim matters under item 31.2 of Schedule 2

### **Costs disclosure obligations**

30. Part 12.3 provides that if an offer to settle is made during a property proceeding, the lawyer for each party must tell their client the actual costs, both paid and owing, up to the date of the offer to settle; and the estimated future costs to the end of the proceedings to enable the client to estimate the net amount he or she will receive if it is settled in accordance with the offer.
31. Not less than 1 day before each court event, the lawyer for a party must the client written notice of the client's actual costs up to that time, the estimated future costs up to and including each future court event; and estimated expert witness expenses.
32. Not less than 1 day before each court event a party's lawyer must file with the court, and serve on each other party, a copy of the notice given to the client above and an unrepresented party must file and serve a similar notice.
33. The court may record, by way of notation, on the face of a case management order the terms of any costs notice and any comments it has about costs incurred in the proceeding, including in relation to their consistency with previous costs notices, and their proportionality.

### **Contravention Applications filed prior to 1 September 2021**

30. Contravention applications already underway prior to the Court merger will be fast tracked to the Contravention List as of 1 September 2021, and thereafter within 14 days triaged, in line with the new procedure.

### **Fast Track hearings**

31. There is now a Fast Track (Summary) Hearing list. This is provided for in the CPD at items 5.49 to 5.50.
32. The court has discretion to refer a matter to the Fast Track Hearing list at any stage before to the allocation of a final hearing date but referral will usually happen after the parties have engaged in dispute resolution. Factors the court will consider include:

- a. The parties have been unable to resolve the matter despite making a genuine effort to do so;
- b. the parties have clearly identified the issues in dispute between them;
- c. the issue or issues to be determined are discrete or are of limited scope;
- d. reports from experts have been obtained and any relevant requisitions and conferences have been held with those experts; the parties agree that the matter may be determined:
  - using affidavit evidence without the need for cross examination, and
  - with written submissions of no more than 10 pages setting out the relevant contentions as to law and fact or oral submissions not exceeding one hour in respect to each party;
- e. the parties will be in a position to present their case on the provision of 28 days' notice of the hearing date; and
- f. the parties consent to short form reasons for judgment.

Past experience suggests that short form reasons (which are not defined) are problematic and may either encourage or hinder an appeal.

### **Matters listed for final hearing**

- a. Any matters already listed for trial, ("legacy matters") and prior to 1 September 2021, are likely to proceed as listed. However, where they do not have a further return date before they reach Trial, a further return date is likely to be allocated and to ensure there has been compliance with trial directions and the matter is ready to proceed to Trial, or alternatively to make further trial directions as necessary.
- b. If trial dates will become available (eg: due to a hearing being vacated) and matters already listed for trial could be brought forward and to fill in gaps in the Court's timetable, but also to ensure these matters are resolved as a matter of priority.
- c. This means that legacy matters are not necessarily going to fall within the 12 month hearing target.



## Costs Scales

33. The costs scales fixed for the Court are set out in FLR Schedule 3. Conduct money for witnesses is in Schedule 2. Practitioners ought to familiarise themselves with them.



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### Important Notice

The content of this publication is intended only to provide a summary and general overview on matters of interest. It is not intended to be comprehensive nor does it constitute legal advice. The author has attempted to ensure that the content is current but he do not guarantee its currency. You should seek legal or other professional advice before acting or relying on anything contained herein.

# The most important FLR (2021) Practice Directions Summarised

By Richard Maurice - Edmund Barton Chambers

*“Over complication only confuses the essence of things.”— Steven Redhead*



**“Your proposal is written with clarity and conviction. Send it up to legal for obfuscation.”**

In this paper references to:

- The Family Law Rules or FLR refer to the Federal Circuit and Family Court of Australia (Family Law) Rules 2021;
- FLA refers to the Family Law Act (1975)

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# TRANSITIONAL ARRANGEMENTS

## *General Transition Arrangements*

1. The new rules apply to all proceedings commenced before 1 September 2021 but not finally determined. **There is a 90 day grace period which expires on 29 November, 2021 during which the old court forms may continue to be used.**
2. The Court retains the discretion to dispense with compliance with any provision of the new rules at all times, including where the application of the new rules would operate unfairly or cause injustice.
3. The proceeding must be continued in accordance with the new rules if a proceeding was commenced in accordance with the old rules; and the proceeding was not finally determined;
4. If an act or thing was done or an obligation created under the old rules before the repeal of those rules; and the act or thing or obligation is of a kind that could be done under the new rules then is deemed to have been done under the new rules.
5. If an act or thing was required under the old rules but not done before the repeal of those rules; then is deemed not to have been done under the new rules.
6. The new rules do not operate to revive any period of time for doing an act or thing that was required to be done under the old rules, if the period had expired before the repeal of those rules.
7. Time limits imposed under the old rules continue to run under the new rules.

## *Transitional provisions for Appeals to Division 1*

8. These are found in Part 4 of Schedule 5 of the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021.

## *Application of new Practice directions*

9. The new Practice Directions also apply to all proceedings commenced prior to 1 September 2021 but not finally determined before that date, unless unfair or impractical to do so.

# CENTRAL PRACTICE DIRECTION - FAMILY LAW CASE MANAGEMENT

## *Pre-action requirements (Parenting and Financial)*

10. Prior to commencing proceedings, parties are required to:
  - a. comply with the pre-action procedures for both financial and parenting proceedings (see Schedule 1 and section 60I of the FLA); and
  - b. take genuine steps to attempt to resolve their issues prior to commencing proceedings, unless it is unsafe to do so or a relevant exemption applies.
11. A Genuine Steps Certificate must be filed with an Initiating Application or Response outlining:
  - a. the filing party's compliance with the pre-action procedures; and
  - b. the genuine steps taken to resolve the dispute; or
  - c. the basis of any claim for an exemption from compliance.
11. Other than in urgent circumstances, and subject to any safety concerns, no application for final or interim orders should be filed without appropriate notice being given to the respondent of the intended contents of the application and without genuine steps being taken to avoid the need for the application to be filed.
12. Failure to comply with the relevant pre-action procedures may result in the application being adjourned or stayed until the failure to comply is rectified (see Part 4.1).

## **Court Events**

13. The listing pathway involves the following events:
  - a. First Court Event, which will be listed between 1 and 2 months from the date of filing;
  - b. an Interim Hearing, if needed, will be listed at an appropriate time having regard to urgency and the need for preparation of any required expert and other evidence;
  - c. a Dispute Resolution event (such as mediation etc) which is to be completed either within the Court or externally, as early as possible and usually no later than 5 months after filing.

- d. for matters which remain unresolved following Dispute Resolution and are not allocated to the Fast Track Hearing List, a Compliance and Readiness Hearing will be listed following Dispute Resolution and as close as possible to 6 months after commencement of a proceeding;
- e. if determined appropriate by the allocated trial Judge, a Trial Management Hearing will be held prior to the Final Hearing;
- f. subject to the parties complying with relevant orders and directions, a Final Hearing will be listed on a date earlier than 12 months from the date of filing; and
- g. the Court will endeavour to deliver judgment within 3 months of completion of the trial.

### ***Standard Trial Directions***

1. No later than 21 days prior to the trial date, the Applicant file and serve:
  - a. any Amended Initiating Application;
  - b. an updated single consolidated trial affidavit;
  - c. other witness affidavits upon which they intend to rely; and
  - d. in property proceedings, an updated Financial Statement.
2. No later than 14 days prior to the trial date, the Respondent file and serve:
  - a. any Amended Response;
  - b. an updated single consolidated trial affidavit;
  - c. other witness affidavits upon which they intend to rely; and
  - d. in property proceedings, an updated Financial Statement.
3. No later than 7 days prior to the trial date:
  - a. the Applicant file and serve any affidavit(s) in reply addressing only the evidence presented in the Respondent(s)' affidavits; and
  - b. the Independent Children's Lawyer file and serve any affidavits relied upon.

### ***Case Summary***

4. No later than 2 days prior to the trial date, all parties are to file and serve a case outline document in the approved form which shall not, without leave,

exceed 5 pages in respect of parenting issues and 5 pages in respect of financial issues and shall include:

- a. a list of the material relied upon;
  - b. a brief chronology listing relevant to the issues to be determined by the Court;
  - c. in a parenting case, a summary of contentions as to section 60CC factors relied upon to satisfy the Court that it is the best interests of the child(ren) to make the orders sought;
  - d. in a property case, a table listing all of the assets, liabilities and financial resources claimed to be relevant to the dispute [ie: a balance sheet] with the values contended for by each party and the main contentions on disputes as to:
    - the assets and liabilities available for division;
    - the value of items where the value is in dispute;
    - contributions claimed or contended for and the percentage-based adjustment on contributions contended for;
    - relevant s 75(2) / 90SF(3) factors and the percentage-based adjustment contended for; and
    - any further factors relevant to determining a 'just and equitable' division of property.
5. Lists of Authorities and copies of any unreported decisions should be filed and served not later than two days prior to the hearing.
  6. Each party will be permitted to rely on one consolidated trial affidavit and one affidavit in reply (if applicable) only.
  7. All documents required to be filed or provided (as applicable) in electronic format to the Court and to each other party.

## **PARENTING PROCEEDINGS CASE MANAGEMENT**

### ***Applications, who may apply and who should be joined***

11. A parenting proceeding may only be commenced by a person listed in section 65C of the FLA.
12. An application must include all necessary parties: see Part 3.1.
13. A parenting proceeding is commenced by filing an *Initiating Application (Family Law)*, unless the proceeding involves an application for consent orders only.



14. An *Initiating Application (Family Law)* may include an application for interlocutory orders.
15. The following documents must be filed with an *Initiating Application (Family Law)* in parenting proceedings:
  - a. a certificate given to the applicant by a family dispute resolution practitioner under section 60I(8) of the FLA, unless a party submits that an exemption applies under section 60I(9) of the FLA, which requires an Affidavit – Non-Filing of Family Dispute Resolution Certificate setting out reasons for exception claimed under section 60I(9); see FLR 4.02.
  - b. a Genuine Steps Certificate, confirming the applicant’s compliance with the pre-action procedures listed in Schedule 1;
  - c. a Notice of Child Abuse, Family Violence or Risk;
  - d. a Parenting Questionnaire;
  - e. an Undertaking as to Disclosure in accordance with FLR 6.02;
  - f. a copy of any family violence order affecting the child or a member of the child’s family in accordance with FLR 2.10; and
  - g. if the application seeks interlocutory orders, an affidavit stating the facts relied on in support of the interlocutory orders sought.
16. The applicant must also pay the filing fee or give an undertaking to pay a filing fee before accepting a document for filing.

### ***When is an Affidavit is required to be filed?***

17. An affidavit is not required to be filed with an *Initiating Application (Family Law)* seeking final orders only.
18. Any affidavit must comply with FLR 2.14 (formalities) and 5.08 (Limits on number and length of affidavits).

### ***Urgent applications (applies to parenting & property)***

19. If an application is urgent, the applicant must seek an order that the proceedings be given an urgent listing (**urgent application**). An urgent application must be accompanied by:
  - an affidavit stating the facts making it urgent; and
  - a cover letter as to urgency, outlining the basis upon which an urgent listing is required. It should refer to specific paragraphs.
20. If no application for final orders has been made, the urgent application should be included in the interlocutory orders sought in the *Initiating Application (Family Law)* or *after it is filed* an urgent application should be made by filing an Application in a Proceeding. [ie: Application in a Case].

### ***Notifying the other party/parties***

21. The applicant must serve the following documents on all other parties in accordance with Part 2.6 or Part 2.7 (as appropriate) :
  - a. Initiating Application (Family Law);
  - b. any affidavit filed;
  - c. Notice of Child Abuse, Family Violence or Risk;
  - d. Parenting Questionnaire;
  - e. Genuine Steps Certificate; and
  - f. the Marriage, Families and Separation brochure.
22. If an interlocutory order is sought to be made by the Court without notice being given to the respondent (**application without notice**), [ie: ex parte application] the applicant must satisfy the Court of the requirements set out in FLR 5.11 .

### ***After filing the Initiating Application is filed***

23. Upon filing the *Initiating Application (Family Law)* and supporting documents, the Court will fix a date as soon as practicable for the first Court event.
24. Any application made by a party for an urgent listing will be determined by a Judicial Registrar on the papers.
25. If an *Initiating Application (Family Law)* or *Response to Initiating Application* is filed without a *Genuine Steps Certificate*, or before pre-action procedures have been complied with the application may be stayed, see FLR 4.04.
26. If an *Initiating Application (Family Law)* is filed without:
  - a certificate issued pursuant to section 60I(8) of the FLA;
  - an affidavit setting out the factual basis of the exception claimed under section 60I(9) of the FLA; or
  - an Affidavit – Non-Filing of Family Dispute Resolution Certificate,the Court must stay the application until such time as the applicant complies with the requirements of section 60I: see section 60I(7) of the FLA.
27. Prior to the first Court event, each party must disclose documents which may contain information relevant to a parenting proceeding. This includes documents listed in FLR 6.05(2) .

### ***Responding to an application***

28. A respondent must file a *Response to Initiating Application* if consenting to or opposing any of the orders sought by the applicant, or if seeking any other orders in accordance with Part 2.4 .

29. However, if a respondent does not wish to contest any of the orders sought a *Submitting Notice* should be filed in accordance with FLR 2.22 .
30. The following documents must be filed with a *Response to Initiating Application*:
  - a Genuine Steps Certificate, confirming the respondent's compliance with the pre-action procedures listed in Schedule 1 ;
  - if the respondent opposes any of the interlocutory orders sought by the applicant or seeks interlocutory orders in their Response to Initiating Application, an affidavit;
  - a Parenting Questionnaire; and
  - a Notice of Child Abuse, Family Violence or Risk.
31. A *Response to Initiating Application* must be filed and served within 28 days of service; see FLR 2.18(2).

### ***Response raises a different claim***

32. In the event a *Response to Initiating Application* raises financial proceedings or another type of proceedings not sought by the applicant in the application both Practice Parenting and Financial Directions apply.
33. Where a respondent raises financial proceedings or another type of proceedings for the first time in the *Response to Initiating* the applicant must file a *Reply*; see FLR 2.21.

## **FINANCIAL PROCEEDINGS CASE MANAGEMENT**

34. Each prospective party to the proceeding must comply with the pre-action procedures in Schedule 1 , unless an exception in FLR 4.01(2) applies.
35. A *Genuine Steps Certificate* must be filed.
36. Where a party applies for a consent order which is expressed to bind the trustee of an eligible superannuation plan, the applicant must notify the trustee under FLR 10.06 not less than 28 days before lodging the draft consent order or filing the Application for Consent Orders (unless the trustee provides written consent pursuant to FLR 10.06(4)).

### ***Parties to financial proceedings***

37. An application must include all necessary parties: see Part 3.1 .

### ***Limitation period***

38. Unless the Court grants leave or both parties consent, financial proceedings may only be commenced:

- a. within 12 months of a divorce order taking effect or decree of nullity in relation to a marriage, or
  - b. within two years of the breakdown of a de facto relationship: see section 44 of the FLA.
39. In the event that property proceedings are filed out of time, leave must be sought by the applicant in the application as an interlocutory order, together with an affidavit.

### ***Making an application and documents to file***

40. A financial proceeding is commenced by filing an *Initiating Application (Family Law)*, unless the proceeding involves an application for consent orders only (which requires an *Application for Consent Orders*: see FLR 10.04(4))
41. An *Initiating Application (Family Law)* may include an application for interlocutory orders.
42. The following documents must be filed with an *Initiating Application (Family Law)* in financial proceedings:
- a. a *Genuine Steps Certificate*, confirming the applicant's compliance with the pre-action procedures listed in Schedule 1 ;
  - b. a *Financial Statement*;
  - c. a *Financial Questionnaire*;
  - d. a copy of any family violence order affecting the party in accordance with FLR 2.10 ;
  - e. an *Undertaking as to Disclosure* in accordance with FLR 6.02 ;
  - f. if the applicant is aware that the *Financial Statement* will not fully discharge the duty to make full and frank disclosure, an affidavit providing further particulars: see FLR 6.06(6) ;
  - g. if the application seeks interlocutory orders, an affidavit stating the facts relied on in support of the interlocutory orders sought;
  - h. if the application seeks a search order, an affidavit which includes the required evidence as set out in FLR 5.19(3) ; and
  - i. if the application seeks a freezing order, an affidavit which includes the required evidence as set out in FLR 5.23(3) .
43. The applicant must also pay the filing fee set by regulation, unless an exemption applies. A Judge or Judicial Registrar may require a party to give an undertaking to pay a filing fee before accepting a document for filing.

### ***When an affidavit is required (applies to parenting & property)***

44. An affidavit is not required to be filed with an *Initiating Application (Family Law)* seeking final orders only.
45. Any affidavit must be filed in proper form as outlined in FLR 2.14 (Formal requirements for documents) and FLR 5.08 (Limit on number and length of affidavits).

### ***Urgent applications (applies to parenting & property)***

46. If an application is urgent, the applicant must seek an order that the proceeding be given an urgent listing (**urgent application**). An urgent application must be accompanied by:
  - a. an affidavit stating the facts relied on in support of the urgent application; and
  - b. a cover letter as to urgency referring to specific paragraphs of the affidavit.
47. If no application for final orders has been made, the urgent application should be included in the *Initiating Application (Family Law)*. If an application for final orders has already been made, an urgent application should be made by filing an *Application in a Proceeding*. [ie: Application in a Case]

### ***Notifying the other party/parties***

48. The applicant must serve the following documents on all other parties in accordance with Part 2.6 or Part 2.7 (as appropriate) :
  - a. Initiating Application (Family Law);
  - b. any affidavit;
  - c. Financial Statement;
  - d. Financial Questionnaire;
  - e. Genuine Steps Certificate; and
  - f. the Marriage, Families and Separation brochure.
49. Prior to the first Court event, the applicant must serve certain documents on each other party as listed in FLR 6.06(8) and (9) (as applicable) .
50. Written notice of an application for financial proceedings including the information set out in FLR 1.12(4), must also be served on persons listed in section 79(10) or section 90SM(10) of the FLA if applicable.
51. If an interlocutory order is sought without notice being given to the respondent (**application without notice**), [ex parte application] the applicant must satisfy the Court of the requirements set out in FLR 5.11 .

### ***After initiating application filed***

52. Upon filing the *Initiating Application* the Court will fix a date as soon as practicable for the first Court event.
53. Any application made by a party for an urgent listing will be determined by a Judicial Registrar on the papers.
54. If an *Initiating Application (Family Law)* or *Response to Initiating Application* is filed without a *Genuine Steps Certificate*, or before pre-action procedures have been complied with, and no exemption is applicable, the Court may stay the application until pre-action procedures are complied with; see FLR 4.04 .

### ***Responding to an application***

55. A respondent must file a *Response to Initiating Application* if consenting to or opposing any of the orders sought by the applicant, or if seeking any other orders in accordance with Part 2.4 .
56. However, if a respondent does not wish to contest any of the orders sought a *Submitting Notice* should be filed in accordance with FLR 2.22 .
57. The following documents must be filed with a *Response to Initiating Application*:
  - a. a *Genuine Steps Certificate*, confirming the respondent's compliance with the pre-action procedures listed in Schedule 1 ;
  - b. a *Financial Statement*
  - c. a *Financial Questionnaire*;
  - d. if the respondent opposes any of the interlocutory orders sought by the applicant or seeks interlocutory orders in their *Response to Initiating Application*, an affidavit;
  - e. if the *Response to Initiating Application* seeks a search order, an affidavit which includes the required evidence as set out in FLR 5.19(3) ; and
  - f. if the *Response to Initiating Application* seeks a freezing order, an affidavit which includes the required evidence as set out in FLR 5.23(3)
58. A *Response to Initiating Application* must be filed and served within 28 days of service of the application to which it relates: see FLR 2.18(2) .
59. Prior to the first Court event, each party must serve certain documents on each other party as listed in FLR 6.06(8) and (9) (as applicable) .

### ***Response raises a different claim***

60. In the event a *Response to Initiating Application* raises a different type of claim not sought by the applicant in their application, the relevant Practice Directions for the other applications also apply.
61. The applicant must file a *Reply* if the Respondent seeks other types of relief with respect to those orders: see FLR 2.21.

### ***Superannuation***

62. Where a party applies for a flagging or splitting order which is expressed to bind the trustee the party must serve a copy of the application or response on the trustee of the eligible superannuation plan pursuant to FLR 1.12(5) .
63. Where such a flagging or splitting order binding a superannuation trustee is sought and the proceeding has been listed for final hearing, the applicant must notify the trustee no less than 28 days prior to the final hearing pursuant to FLR 1.12(6) .

## **ARBITRATION CASE MANAGEMENT**

### ***Before an arbitration starts***

64. Each prospective party to a court ordered arbitration must comply with the pre-action procedures in Schedule 1 , unless an exception in FLR 4.01(2) applies [the genuine steps]
65. All arbitrations require an arbitration agreement pursuant to regulation 67F of the Family Law Regulations. An arbitration agreement may be signed by the parties electronically.

### ***Disclosure and Subpoenas***

66. The duty to disclose in a timely manner applies to all arbitrations, being both court ordered arbitrations and private arbitrations: see Part 6.1 .
67. Prior to the first preliminary conference for the arbitration, each party must serve on each other party:
  - a *Financial Statement* or such other equivalent document setting out the parties' respective financial circumstances; and
  - the documents listed in sub-rules 6.06(8) and (9) (as applicable) .
68. Unless otherwise agreed between the parties, the disclosure procedures in Part 6.2 apply to arbitrations.
69. Documents produced for an arbitration must only be used for the purposes of the arbitration and must not be disclosed to any other person without the Court's permission.

70. A party to an arbitration may apply to the Court for leave to issue a subpoena by filing an application as set out below.

### ***Applications relating to arbitrations (except registration)***

71. An application for a court ordered arbitration must be made by all parties to the arbitration: see regulation 67D of the Family Law Regulations.
72. An application seeking orders to facilitate an arbitration and an application to review a registered award may be commenced by a party (or by parties jointly) to the arbitration.
73. An application referring a question of law to the Court may be made by the arbitrator: see section 13G of the FLA.
74. An application must include all necessary parties: see Part 3.1. Unless the arbitrator is an applicant to the application, the arbitrator is not a necessary party.

### ***Making an application and documents to file***

#### **Court ordered arbitration**

75. A court ordered arbitration is commenced by filing a *Form 6 – Application for Arbitration*.
76. You must file with a *Form 6 – Application for Arbitration* in court ordered arbitration:
- a *Financial Statement* from each party to the Arbitration; and
  - an affidavit providing further particulars if needed.
77. An applicant (or applicants jointly) may file an application in the following form:
- in the case of a court ordered arbitration, an Application in an Arbitration; or
  - in the case of a private arbitration, a Form 7 – Application relating to relevant Property or Financial Arbitration; and
  - for either court ordered or private arbitrations, an affidavit stating the facts relied on in support of the orders sought.

#### ***Private arbitration***

78. A private arbitration does not need to be commenced in court.

#### ***Referrals by arbitrator***

79. An arbitrator may apply to refer a question of law to the Court by filing an Application in an Arbitration.



80. An arbitrator may refer any matter under regulations 67H(3)(b), 67K(b) or 67L(1)(b) of the Family Law Regulations to the Court by written notice to the Registry Manager.

### ***Review of registered arbitration award***

81. An applicant (or respondent) may seek to review a registered award pursuant to section 13J of the FLA by filing an *Application in an Arbitration*.
82. The following documents must be filed with an *Application in an Arbitration* seeking to review a registered arbitration award:
- an affidavit stating the facts relied on in support of the orders sought and identifying the question of law on which the applicant seeks to review the arbitration award; and
  - a copy of the award.
83. An applicant may seek to set aside a registered award pursuant to section 13K of the FLA by filing an *Application in an Arbitration*.
84. The following documents must be filed with an *Application in an Arbitration* seeking to set aside a registered arbitration award:
- an affidavit stating the facts relied on in support of the orders sought; and
  - a copy of the award.

### ***When an affidavit is required***

85. An affidavit is not required to be filed with a *Form 6 – Application for Arbitration*.
86. An affidavit must be filed with an *Application in an Arbitration* and a *Form 7 – Application relating to relevant Property or Financial Arbitration*, stating the facts relied on in support of the orders sought.
87. An affidavit must be filed in the proper form as outlined in FLR 2.14 (Formal requirements for documents) and 5.08 (Limit on number and length of affidavits) .
88. An affidavit is not required to be filed by an arbitrator applying to refer a question of law to the Court.

### ***Urgent applications (in Arbitration)***

89. If an application in relation to an arbitration is urgent, the applicant must seek an order that the matter be given an urgent listing (**urgent application**). An urgent application must be accompanied by:
- an affidavit stating the facts relied on in support of the urgent application; and

- a cover letter as to urgency, outlining the nature of the application and the basis upon which an urgent listing is required. The cover letter should refer to specific paragraphs of the affidavit relied upon in support of the urgent application.
90. If the arbitration is a court ordered arbitration, an urgent application should be made by filing an *Application in an Arbitration*.
91. If the arbitration is a private arbitration, an urgent application should be made by filing a *Form 7 – Application relating to relevant Property or Financial Arbitration*.

### ***Notifying the other party/parties***

92. The applicant must serve the following documents on all other parties and the arbitrator in accordance with Part 2.6 or Part 2.7 (as appropriate) :
- any Application in an Arbitration or Form 7 – Application relating to relevant Property or Financial Arbitration (as applicable); and
  - any affidavit filed.
93. Where a party or arbitrator is the applicant, the applicant must serve each other party and the arbitrator within 7 days.
94. Prior to the first Court event, parties seeking a court ordered arbitration must provide to the Court:
- the identity of the proposed arbitrator or the mechanics by which the arbitrator can be nominated;
  - the end date by which the arbitration is to be concluded (not being more than six months from the date of referral to arbitration);
  - the anticipated date of the parties’ first preliminary conference with the arbitrator; and
  - where available, an executed a copy of the parties’ arbitration agreement with their chosen arbitrator.
95. If an interlocutory order is sought without notice being given to the respondent (**application without notice**) [ex parte application], the applicant must satisfy the Court of the requirements set out in FLR 5.11 .

### ***Once the Arbitration Application is filed***

96. The National Arbitration List will run each Friday.
97. Upon filing a *Form 6 – Application for Arbitration*, an *Application in an Arbitration* or a *Form 7 – Application relating to relevant Property or Financial Arbitration* (as applicable) and supporting documents, the Court will fix a date as soon as practicable for the first Court event.
98. Any application made by a party for an urgent listing will be determined by a Judicial Registrar or the relevant NAL Judge on the papers.

99. Where an application cannot be accommodated on a Friday during the regular NAL list, the hearing of that application will be held at such other time and date as the NAL Judge directs, having regard to:
- the length of the application;
  - the state of the arbitration;
  - the urgency of the application; and
  - such other matters as the NAL Judge determines as relevant.
100. All documents, including applications, affidavits, submissions and proposed orders, must be filed by 12:00 noon 2 days prior to the hearing, unless otherwise ordered by the NAL Judge.
101. If a *Form 6 – Application for Arbitration* is filed without compliance with the pre-action procedures and no exception is applicable, the Court may stay the application until such time as the applicant complies with the pre-action procedures: see FLR 4.04.

### ***Responding to an Arbitration application***

102. A respondent must file a *Response to an Application in an Arbitration* if consenting to or opposing any of the orders sought by the applicant in an *Application in an Arbitration* or a *Form 7 – Application relating to relevant Property or Financial Arbitration*.
103. However, if a respondent does not wish to contest any of the orders sought a *Submitting Notice* should be filed in accordance with FLR 2.22.
104. An affidavit must be filed with a *Response to an Application in an Arbitration*, stating the facts relied on in support of the orders sought.
105. A *Response to an Application in an Arbitration* and any supporting affidavit must be filed within 7 days of service of an *Application in an Arbitration* or a *Form 7 – Application relating to relevant Property or Financial Arbitration*.

### ***After an arbitration concludes***

106. The arbitrator must provide a copy of the arbitration award to each party.
107. In a court ordered arbitration, the arbitrator must inform the Court that ordered the arbitration within 7 days when an award is made: see regulation 67P of the Family Law Regulations.
108. In a court ordered arbitration, if the arbitrator terminates the arbitration because the arbitrator considered that a party to the arbitration does not have the capacity to take part in the arbitration, the arbitrator must refer the matter to the Court within 7 days: see regulation 67L of the Family Law Regulations.

109. In any arbitration where subpoenas have been issued by a Court, the arbitrator must inform the Court that issued the subpoenas if the arbitration is suspended, terminated or otherwise ends.

### ***Applications to register an arbitration award***

110. An application to register an arbitration award may be made by any party (or parties jointly) to the arbitration.
111. An application must include all necessary parties: see Part 3.1 . (Not the arbitrator).

### ***Making an application and documents to file***

112. An application to register an arbitration award is commenced by filing a *Form 8 – Application to register arbitration award*.
113. A copy of the award must be filed with a *Form 8 – Application to register arbitration award*.

### ***Notifying the other party/parties***

114. The applicant must serve the following documents on all other parties and the arbitrator in accordance with Part 2.6 or Part 2.7 (as appropriate) :
- Form 8 – Application to register arbitration award; and
  - a copy of the award.
115. The documents must be served within 14 days of filing.
116. The applicant must file an *Affidavit of Service* within 7 days of service.

### ***After Application is filed***

117. Upon filing a *Form 8 – Application to register arbitration award* together with a copy of the award, the Court must register the award if the respondent does not file a response opposing the registration within 28 days of service. The Court will notify the parties of the registration.
118. A registered arbitration award can be enforced as a court order: see regulation 67S of the Family Law Regulations.
119. If the respondent files a *Response to an Application in an Arbitration* within 28 days of service opposing the registration of the award, the Court will fix a date as soon as practicable for the first Court event.

### ***Responding to an application to register an arbitration award***

120. A respondent opposing the registration of an award must file:
- a Response to an Application in an Arbitration; and
  - an affidavit explaining why the award should not be registered.

121. A *Response to an Application in an Arbitration* and any supporting affidavit must be filed within 28 days of service of the *Form 8 – Application to register arbitration award*.

### **New Forms**

122. New forms have been approved by the Chief Justice/Chief Judge for use from 1 September 2021. All approved forms are located on the Court's website at [www.fcfcoa.gov.au](http://www.fcfcoa.gov.au).
123. Where practical, the new forms **should** be used from 1 September 2021.
124. New forms **must** be used from 29 November 2021. After this date, the old forms will not be accepted for filing.



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### **About the Author**

**Richard Maurice** holds degrees in Law and Economics from Sydney University.

He was admitted in 1984 and worked in private practice as an employed solicitor in a general practice and later for the Federal Attorney General's Office representing disadvantaged clients and as a duty solicitor in the Family Court, in NSW State Children's Courts and in many NSW Local Courts.

In 1988, he was called to the private bar. Since then he has practiced mainly in the areas of Family Law, De facto relationships and Child Support, together with Wills and Probate.

He has appeared in a number of significant Family Law cases including seminal cases on Family Law and De Facto property division like *Pierce and Pierce* (1999) FLC 92-844 and *Black v. Black* (1991) DFC ¶ 95-113 and *Jonah & White* [2011] FamCA 221 and more recently *Sand & Sand* [2012] FamCAFC 179 and *Vega and Riggs* [2015] FamCA 797

In recent years his practice has focused on conducting mediations in all types of Family Law matters.

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### **Important Notice**

The content of this publication is intended only to provide a summary and general overview on matters of interest. It is not intended to be comprehensive nor does it constitute legal advice. The author has attempted to ensure that the content is current but he do not guarantee its currency. You should seek legal or other professional advice before acting or relying on anything contained herein.