

# BEST PRACTICE GUIDELINES

FOR LAWYERS DOING FAMILY LAW WORK

FOURTH EDITION

Prepared by the Family Law Council and  
Family Law Section of the Law Council of Australia



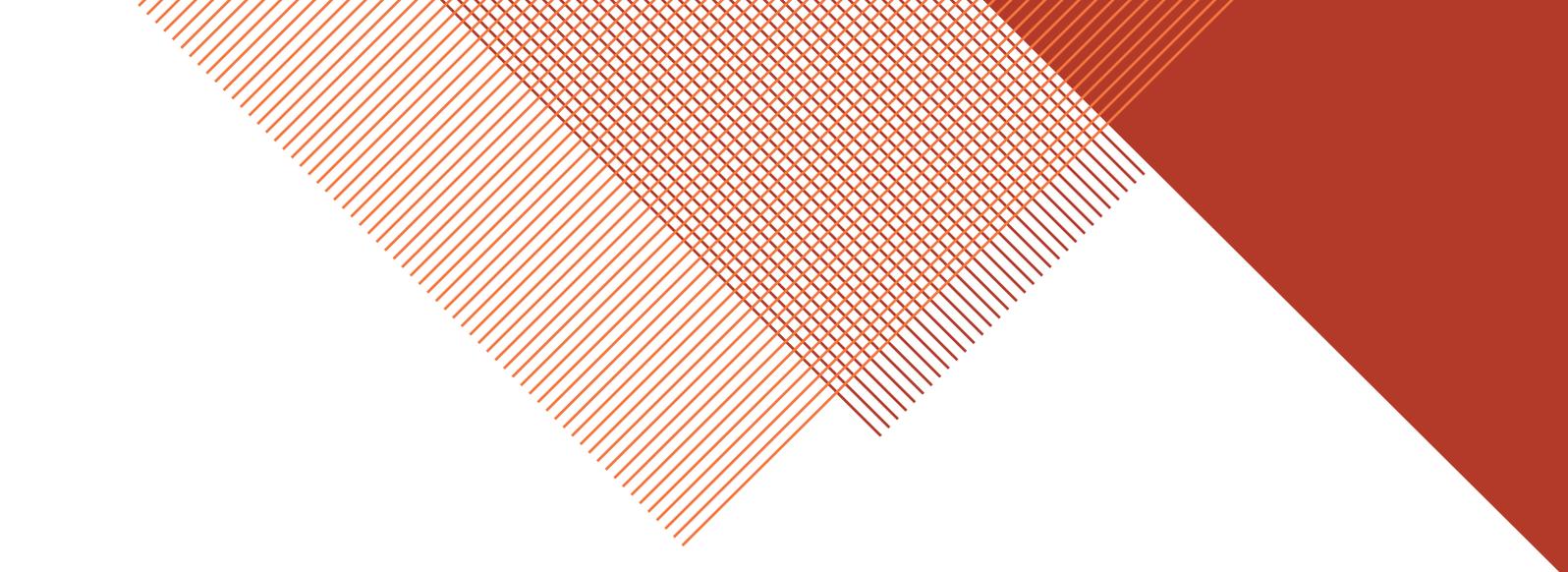
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Family Law Section



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# PREFACE

*The Best Practice Guidelines for Lawyers Doing Family Law Work* were prepared by a joint committee of the Family Law Section of the Law Council of Australia and the Family Law Council in 2001. The Family Law Section of the Law Council of Australia represents the views of family lawyers on a national basis. The Family Law Council is a statutory authority established under s115 of the *Family Law Act 1975* to advise and make recommendations to the Attorney-General concerning family law.

The Guidelines arose from a recommendation made by the Family Law Pathways Advisory Group in their 2001 Report, *Out of the Maze*. The Report proposed a document which would satisfy a number of criteria. It would be useful for lawyers practising family law. It would reflect the principles set out in the Report and would include a commitment to actively promote non-adversarial dispute resolution and other good practices. In addition, the Report proposed that lawyers who observed these practices should be readily identifiable to clients and service providers.<sup>1</sup>

This recommendation, along with several others from the Pathways Report, was provided as a reference to the Family Law Council by the then Commonwealth Attorney-General, The Hon Daryl Williams AM QC MP. Terms of reference were agreed and the joint committee began to consider the matter.

The committee examined models from several Australian and overseas jurisdictions. It saw merit in several of the documents and decided that an appropriate model could be found in the publication from the Law Society of the United Kingdom, *Family Law Protocol* (The Law Society 2001). The committee obtained the Law Society's permission to base its work on the *Family Law Protocol*, and then brought together the material needed to adapt the United Kingdom content to reflect Australian circumstances.

This document is the result. It is made up of a series of guidelines designed to assist lawyers doing family law work. This fourth edition of the Guidelines reflects the law at June 2017.

- PART 1** | Outlines communication with the client and the other party.
- PART 2** | Covers Alternative Dispute Resolution (ADR), including screening and the role of lawyers during ADR processes.
- PART 3** | Deals with costs.
- PART 4** | Provides material relating to self-represented litigants.
- PART 5** | Looks at matters to be considered in proceedings for divorce.
- PART 6** | Sets out the approach to be taken in cases involving children.
- PART 7** | Provides guidelines for property and spousal maintenance.
- PART 8** | Provides guidelines on child support and child maintenance.
- PART 9** | Applies to family violence and includes advice on screening, making needs assessments, carrying out safety planning, and proceedings to ensure personal protection.
- PART 10** | Provides material about injunctions.
- PART 11** | Deals with experts in family law, and
- PART 12** | Deals with trials and appeals.
- APPENDIX** | Includes notes on children's contact services.

**These guidelines reflect the law as at June 2017.**

<sup>1</sup> Recommendations relating to legal practice and model litigant standards were also made by the Australian Law Reform Commission in its report, *Managing Justice: A review of the federal justice system* (Report No 89, 2000), see Section 3 page 14.

# AIM OF THE GUIDELINES

These Guidelines aim to encourage current best practice in family law. Best practice in family law is characterised by:

- 1 A constructive and conciliatory approach to the resolution of family disputes.
- 2 The minimisation of any risks to separating couples and/or children by:
  - i. alerting separating couples to treat safety as a primary concern
  - ii. avoiding arguments in front of children, and
  - iii. keeping children out of conflicts arising between separating couples.
- 3 Having regard to the interests and protection of children and encouraging long-term family relationships.
- 4 The narrowing of the issues in dispute and the effective and timely resolution of disputes.
- 5 Ensuring that costs are not unreasonably incurred.

# SCOPE OF THE GUIDELINES

The first edition of the Guidelines was prepared by a joint committee of the Family Law Section of the Law Council of Australia and the Family Law Council. This fourth edition has been revised by the Family Law Section of the Law Council of Australia to reflect changes in the law and to update references to the Federal Circuit Court of Australia.

The Guidelines do not create new duties, or override lawyers' duties to their clients or their duties as officers of the court. These duties are set out in the *Family Law Act 1975* ('*Family Law Act*') and in case-law. It may sometimes be impossible to comply with the Guidelines because clients refuse to take advice or it may not be possible to meet ideals because of the circumstances of the particular case. Family matters are so diverse in content that any final decision on how to deal with a particular matter must remain at the discretion and judgement of lawyers themselves.

The Guidelines reflect the views of experienced family lawyers as to what constitutes best practice. They set out the principles of best practice that all family lawyers should aim to follow in family law proceedings and in pre-application negotiations.

Many experienced family lawyers will undoubtedly find that their present practice is already up to the standard outlined in the Guidelines, but even they may find it a helpful reference. Newly qualified or less experienced lawyers will find much in this document to assist their professional development in the practice of family law.

Members of the public who are representing themselves in situations of family breakdown may also find the document helpful, by showing how matters should be approached and dealt with to minimise dispute and distress.

Lawyers who subscribe to and observe these Guidelines are encouraged to identify this to clients and service providers. A lawyer who has Specialist Accreditation in family law<sup>2</sup> will already seek to meet the standards set out in these Guidelines.

Note that the Guidelines do not attempt to deal with situations where a lawyer's duty to a client may conflict with their duty to another client or former client. Lawyers are expected to familiarise themselves with the relevant case-law on these matters.

The *Family Law Act 1975*, the rules of court, the *Family Law Regulations 1984* ('the Regulations'), and obligations arising because of a grant of legal aid, together with any other relevant legislation and any applicable practice directions, constitute the mandatory requirements for practice that the Guidelines set standards to aim for.

These Guidelines are intended to apply to proceedings in the Family Court of Australia, the Family Court of Western Australia and the Federal Circuit Court of Australia. They may have some application to proceedings under state and territory legislation, but their application is necessarily limited because of the varying nature of the legislation and the differences in the practice and procedure of the various state and territory courts.

In drafting the first edition, the committee consulted lawyers and other interested parties to ensure the views were taken into account, intending the Guidelines to form an attainable benchmark of best practice, that all lawyers practising family law in Australia should aim to reach. Each relevant professional body will need to decide how best to promote adherence to these Guidelines by their members.<sup>3</sup>

The Guidelines will be updated regularly to accommodate changes in the law and practice. The Family Law Section of the Law Council of Australia welcomes comments from users of the document on how the Guidelines work in practice.

<sup>2</sup> A Family Law Specialist Accreditation Scheme is administered by the relevant professional bodies in several states. To be accredited a lawyer must undertake an examination and other assessments, have been admitted to practice for five years, and 25 per cent of their work in the previous three years must have been family law matters. References are also required. Once accredited, they must satisfy continuing legal education requirements.

<sup>3</sup> Note that states may have their own Codes.

# ACKNOWLEDGEMENTS

The first edition of the Guidelines was drafted by the following joint committee members:

**Professor John Dewar**

Convenor, Chairperson of the Family Law Council

**The Hon Justice Garry Watts**

Immediate Past Chairperson Family Law Section, Law Council of Australia, Family Law Council Observer

**Mr Martin Bartfeld QC**

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Family Law Council Observer (*until April 2003 and from January 2004*)

**Mr Jonathan Dobinson**

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**Ms Susan Holmes**

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**The Hon Justice Anne Rees**

Family Law Council Observer/Law Council of Australia

**The Hon Justice Judy Ryan**

Family Law Council Member (*until August 2003*)

**Mr Matthew Osborne**

Family Law Council Secretariat

# TERMS OF REFERENCE

- 1 That Council, as part of the Government response to recommendation 4 of the report of the Family Law Pathways Advisory Group, *Out of the Maze*,<sup>4</sup> in cooperation with the Family Law Section of the Law Council of Australia:
  - i. Draft national guidelines for lawyers practising in family law which reflect best practice for family lawyers in all aspects of family law practice, including the principles outlined in the Pathways Report; and
  - ii. Develop a scheme for readily identifying lawyers who subscribe to and observe the guidelines to prospective clients and service providers.
- 2 That the Council and Family Law Section ensure that the national guidelines for lawyers practising in family law are developed in the light of international best practice as evidenced by existing guidelines or Codes of Conduct in Australia and relevant overseas jurisdictions.
- 3 That Council in cooperation with the Family Law Section of the Law Council, and taking account of the progress with implementing other relevant Pathway recommendations, propose a timetable and means of implementation for:
  - i. Promulgating the national guidelines for Australian family lawyers; and
  - ii. A campaign to achieve a significant level of recognition amongst lawyers, prospective clients and service providers concerning the meaning of and benefits arising from adopting the guidelines.

The draft Guidelines (2003) were distributed to more than fifty government and non-government agencies and bodies for their consultation comments. The Committee would like to express its appreciation for the time and effort devoted to developing valuable commentaries and suggestions on the draft. The fourth edition has been updated by the Family Law Section of the Law Council of Australia.

<sup>4</sup> Recommendation 4: That all professionals and key staff working in the family law system adopt a multidisciplinary approach to resolving issues for families, and that priority be given to the following strategies to support such a holistic approach: (a) development of a national code of conduct for lawyers practising in family law to reflect the principles outlined in this report and to include a commitment to actively promote non-adversarial dispute resolution and other good practices. Lawyers who subscribe to and observe the code should be readily identifiable to clients and service providers.

## 1. BEST PRACTICE

- 1.1 Best practice in family law is characterised by:
- a constructive and conciliatory approach to the resolution of family disputes;
  - the minimisation of any risks to separating couples and/or children by:
    - alerting separating couples to treat safety as a primary concern;
    - avoiding arguments in front of children; and
    - keeping children out of conflicts arising between separating couples.
  - having regard to the interests and protection of children and encouraging long-term family relationships;
  - the narrowing of the issues in dispute and the effective and timely resolution of disputes; and
  - ensuring that costs are not unreasonably incurred.

## 2. CONDUCT

- 2.1 Lawyers should show courtesy and be professional in all their dealings.
- 2.2 Lawyers should:
- retain professional objectivity at all times;
  - focus on the identification of issues and their resolution;
  - communicate clearly and free of jargon;
  - avoid protracted, unnecessary, hostile and inflammatory exchanges; and
  - consider the effect of correspondence upon clients and other family members.

## 3. COMMUNICATING WITH YOUR CLIENT

- 3.1 Lawyers should:
- consider sending any substantive items of correspondence to clients for checking initially, particularly if that correspondence contains proposals for settlement; and
  - forward copies of important letters to clients for their records as a matter of course, unless there is specific reason not to do so.
- 3.2 Lawyers should:
- ensure that clients understand the contents and meaning of documents they sign. This is particularly important when clients swear or affirm an affidavit; and
  - ensure clients understand they may be cross-examined on the accuracy and truth of documents they have signed, and that any errors in these documents may diminish a client's credibility as a witness, which could have adverse effects on the outcome of their case.
- 3.3 Family lawyers will encounter many clients who are exhibiting symptoms of high anxiety and distress. While much initial distress may abate with time and appropriate support, lawyers need to be mindful that such symptoms may indicate a more serious underlying mental health issue.
- 3.4 Research clearly indicates that relationship breakdown is a significant risk factor for mental health problems and suicide.

- 3.5 Lawyers should treat clients suffering emotional distress in a similar manner to clients suffering physical distress or illness, namely they should assist those clients to obtain support and professional help through referral to General Practitioners, counsellors, social workers and psychologists.
- 3.6 In extreme or crisis situations, lawyers should contact or assist the client to contact a mental health crisis service or Lifeline.
- 3.7 Lawyers should:
- consider whether a client requires an interpreter or other assistance to communicate effectively with the lawyer. This is especially important where clients:
    - do not speak English;
    - are illiterate; or
    - suffer from a disability that would affect communication, such as a vision or hearing impairment.
  - maintain a list of approved translators to make appropriate translations; and
  - consider whether an independent interpreter is preferable to a family member.<sup>5</sup>

## 4. COMMUNICATION INVOLVING CHILDREN

- 4.1 Lawyers need to be aware that when and how children are told about their parents' separation may influence how well the children cope. There is specialised advice available from counselling and mediation services and clients should be encouraged to consider their assistance.

Details of services are available through Family Relationships Online at [www.familyrelationships.gov.au](http://www.familyrelationships.gov.au).

- 4.2 Where children are involved, lawyers should ensure that a client is asked to refrain from:
- arguing in the presence of, or within earshot of the children;
  - discussing the family law proceedings with anyone, and in particular their lawyer, within earshot of children;
  - showing children any court or other documents pertaining to the proceedings;
  - discussing court events with children; and
  - involving children in any way in the family law proceedings, e.g. by using a child as an interpreter of court documents.
- 4.3 Lawyers should:
- encourage the client to be courteous to their former partner and not to make derogatory remarks about one another in the presence of, or within earshot of, the children;
  - encourage the client to adhere to arrangements and to be punctual in respect of 'change over' dates and times;
  - ensure the client understands that children are not to be drawn into disputes arising between separating couples;
  - encourage separating couples to take just as much interest, if not more interest in their children's lives at this difficult time, and to foster their father/child or mother/child relationships.
- 4.4 Lawyers should inform clients that child-minding arrangements may be available in some registries. Clients should check the courts' website. ([www.familycourt.gov.au](http://www.familycourt.gov.au) or [www.federalcircuitcourt.gov.au](http://www.federalcircuitcourt.gov.au))
- 4.5 Clients should be encouraged to provide an appropriate level of support for their children. Lawyers should be familiar with the provisions of the child support assessment system (see Part 8).

<sup>5</sup> Translating and Interpreting Services (TIS) of the Department of Immigration and Border Protection provides a national 24 hours, seven days a week, telephone interpreting service on a national telephone number: 131 450. TIS provides interpreting on a fee-for-service basis to private sector businesses. Special nation-wide facilities allow a three-way conversation between the English-speaking and non-English-speaking parties and the TIS interpreter. Further information is available at [www.tisnational.gov.au](http://www.tisnational.gov.au).

## 5. LEGAL AID

- 5.1 Lawyers should:
- before proceeding with formal instructions, consider whether their client would be eligible for a grant of legal aid from the relevant authority and if so inform the client accordingly; and
  - keep up to date with relevant legal aid guidelines.
- 5.2 Lawyers have no obligation to accept a grant of legal aid as the basis of their acting, but should ensure that they inform the client of whether or not they are prepared to accept the matter on legal aid terms. If a lawyer does not undertake legally aided work, they should give the client the option of being referred to other lawyers who do.
- 5.3 If lawyers accept a legal aid referral they should discuss with the client any conditions attached to the referral, including contributions, and any charge which the legal aid body may require. Lawyers who agree to act for a client on the basis of a grant of legal aid are not entitled to charge extra for work covered by that grant.
- 5.4 Lawyers should be familiar with obligations they have to the Legal Aid Commission, under the relevant legislation, or by the terms of the grant of legal aid.
- 5.5 If lawyers receive monies on behalf of a client in a legally aided matter, they may be compelled to hold those funds pending the determination by the legal aid office concerning its charge over those funds to meet any reassessed contribution. Lawyers should retain such amounts as are necessary to meet any reassessed contribution.

## 6. FIRST LETTER

- 6.1 Clients' circumstances are so varied that it would be difficult to prepare a specimen first letter to the other party. However, the tone of the initial letter is important. It should briefly address the issues and avoid protracted, unnecessary arguments or assertions. In drafting the first letter, lawyers should:
- where appropriate, obtain the client's approval of the content of the letter in advance;
  - when writing to unrepresented parties, recommend that they seek independent legal advice; and
  - where appropriate, explain that their client wishes to resolve the issues arising out of the breakdown of the relationship without the emotional and financial strain of protracted court proceedings.

## 7. EMAIL

- 7.1 Lawyers should:
- take clear instructions as to the postal address and telephone numbers they should use to communicate with clients, and also whether email is acceptable;
  - not use email to correspond with clients unless the client has given an express or implied authority to do so;
  - be aware of the risks of sending email correspondence to a client whose spouse or partner might know and use their email password; and
  - not use email as a sole means of correspondence with other lawyers.

## 8. ABORIGINAL AND TORRES STRAIT ISLANDER CLIENTS

- 8.1 There is considerable diversity between Aboriginal groups, and between Aboriginal and Torres Strait Islander groups, and hence clients should not be treated by lawyers as one cultural group.

### Concept of family and responsibility for children

- 8.2 Lawyers should be aware that 'family' may consist of the extended family, or quite distant members of the family, and that responsibility for children may fall within the extended family or wider social group.

### Cultural barriers to effective communication

- 8.3 Kinship relationships may prevent an Aboriginal or Torres Strait Islander person from giving particular kinds of evidence, especially if it involves implicating a relative.<sup>6</sup>
- 8.4 Attention needs to be paid to protocols of traditional communication. For example, asking a closed question, one which suggests only a 'yes' or 'no' answer, may predetermine the answer given, because in some contexts it may be considered impolite to disagree.

## 9. WHERE SEPARATING COUPLES HAVE REACHED AGREEMENT

- 9.1 Separating couples may have reached an agreement on a matter before seeing a lawyer. The agreement may have been reached in direct negotiation between separating couples, in mediation, or by some other method. As a general rule lawyers should seek to support the client's wish to enter such agreements unless they have been reached as a result of duress, incomplete disclosure, or family violence has been involved, or the agreement is unworkable and cannot be made workable.

### In particular lawyers should:

- inform separating couples that they can only act for one party and that the other party should obtain independent legal advice;
- establish that the client fully understands the terms and effect of the agreement and the alternative options available if the agreement is inappropriate or inadequate;
- advise the client on the implications of the agreement reached and whether it is in the client's best interests, both in the short term and the long term. The implications include the benefits attached to settling on an amicable basis and the cost, risks and time involved in further negotiations, mediation or litigation (especially if the agreement is within the range that the court might order);
- leave their client in no doubt about the benefits to children of separating couples being able to agree on future parenting arrangements, and the early resolution of future parenting arrangements;
- ensure that clients are focused on the children's best interests in making any agreement about parenting matters;
- establish whether the agreement has been reached on the basis of full and frank disclosure and emphasise the dangers of incomplete disclosure. This is of particular importance in financial matters. A clear warning should be given to clients of the consequences of the making of financial orders;
- discuss with the client any omissions or points that need clarification; and
- consider sending a disclaimer letter to the client for signature and return by the client in cases where the lawyer is concerned that there are inadequate written instructions, disclosure, or a clearly inadequate settlement.

<sup>6</sup> The Australian Institute of Judicial Administration has produced an Aboriginal Cultural Awareness Benchmark for Western Australian Courts which summarises information on this topic. It can be found on the AIJA website at [www.aija.org.au](http://www.aija.org.au).

- 9.2 Lawyers should consider whether duress or undue influence have been brought to bear on their client to enter an agreement. They should question the client about how the agreement has been reached and confirm this in writing. If the client has revealed that violence was an issue in the relationship, the circumstances of reaching agreement should be scrutinised with particular care, and the client should be asked if the agreement presents risks to anybody's safety, or if failure to proceed with the agreement would involve risks to anybody's safety.
- 9.3 Lawyers should advise clients on the most appropriate way to record the agreement and, as appropriate, draft and present to the court any necessary consent order or prepare any necessary agreement/documents.
- 9.4 If a financial agreement under Part VIIIA or Part VIIIB of the *Family Law Act* is selected as the method of recording a settlement, a lawyer should take particular care that the requirements of s90G or s90JJ of the Act have been followed. It is good practice to give the advice in writing and have the client acknowledge receiving it by signing a duplicate of the letter.

## 10. PROCEEDINGS

### Before commencement of proceedings

- 10.1 Before filing court documents, lawyers acting for applicants should make a determined effort to explore options for settlement. Court proceedings should normally only be commenced if all other reasonable avenues for resolution have been considered and found to be inappropriate or unworkable. However, there may be cases where, because of the pressing or urgent nature of the issues, it is necessary to file the court documents immediately. Applications for parenting orders cannot usually be commenced until the parties have participated in family dispute resolution.
- 10.2 Except in special cases, such as those involving urgency, family violence, fraud or a genuinely intractable dispute, the Family Court of Australia requires parties to follow pre-action procedures.

This requires that a party, before starting a case, make a genuine effort to:

- participate in alternative dispute resolution such as negotiation, conciliation, mediation, family dispute resolution and arbitration;
  - provide to the other party a list of all documents in that party's possession that might be relevant to the dispute between the parties; and
  - provide to the other party a written notice of a proposed court application which sets out:
    - the issues in dispute;
    - the orders to be sought if a case is started;
    - a genuine offer to resolve the issues; and
    - a time in which the other party should reply (at least 14 days).
- 10.3 The various family law courts have published materials for children and parents affected by relationship breakdown. The materials are available from the Family Court of Australia website: [www.familycourt.gov.au](http://www.familycourt.gov.au), the Federal Circuit Court website: [www.federalcircuitcourt.gov.au](http://www.federalcircuitcourt.gov.au), and the website of the Family Court of Western Australia: [www.familycourt.wa.gov.au](http://www.familycourt.wa.gov.au). The Department of Human Services also has a range of materials regarding child support available at [www.humanservices.gov.au](http://www.humanservices.gov.au). Lawyers are encouraged to keep copies of appropriate materials in their office for clients, and to refer their clients to the relevant websites.

### Conduct of proceedings

- 10.4 Lawyers should advise their clients on the most appropriate forum in which to commence proceedings (Family Court, Family Court of Western Australia, Federal Circuit Court, Local or Magistrates Court) bearing in mind the complexity of the issues in dispute, the availability of services in each court, the expected duration of a trial associated with the case, and differences between the respective court fees and anticipated legal costs. Clients should be advised that the filing of a court application does not rule out continuing negotiations. At all times when acting for a client the lawyer should continually assess what negotiations should take place and advise whether to enter into appropriate dialogue with the other party.
- 10.5 When proceedings have been filed, the lawyer should ensure that the *Family Law Act* and *Family Law Rules* or the *Federal Circuit Court Rules* (as the case may be) are complied with.
- 10.6 The lawyer should provide the client with copies of:
  - correspondence to and from the other parties;
  - documentation filed for the client and by the other parties; and
  - documents issued by the court including Orders and Judgments.
- 10.7 For the purposes of the trial, the lawyer should ensure that:
  - the client is kept informed at all stages about the progress of the trial;
  - the client is advised that the commencement of the trial does not rule out continuing negotiations; and
  - the separating couple and witnesses are treated with courtesy.

## 11. COURT-BASED INFORMATION SESSIONS

- 11.1 Lawyers should:
  - advise their clients to attend court-based information sessions (if available); and
  - give their clients as much notice of a court date(s) as possible. In this way, clients can make alternative work or child care arrangements, to ensure they attend court on the necessary date(s).

## 12. DUTIES TO THE COURT

- 12.1 Lawyers should:
  - note that as officers of the court, their duties to the court may conflict with their instructions from the client. The lawyer may in some circumstances have to cease to act for a client, for example, if a client is unwilling to make a full and frank disclosure of relevant facts or documents;
  - ensure that they are not put in a position where they are witnesses in the proceedings; and
  - ensure that undertakings made to the court are fulfilled or ensure that undertakings which become inappropriate are discharged.

## 13. DISCLOSURE

- 13.1 The parties must make full and frank disclosure of all material facts and relevant documents. This requirement is 'ongoing', that is, if fresh material and relevant documents come to light later in the case, these must also be disclosed.
- 13.2 The lawyer should advise the client in writing of the obligation of disclosure and explain that the obligation is ongoing.

- 13.3** The lawyer should direct the client's attention to the relevant provisions of the *Family Law Act, Rules and Regulations* and the relevant case law, and advise the client of the possible consequences of failing in this obligation. The *Family Law Rules 2004* emphasise the duty of disclosure (see for example Schedule 1 Part 1(4); Part 2(4); Rules 12.02, 12.05, 13.04 and 13.07)
- 13.4** If the client declines to provide appropriate disclosure, the lawyer is bound by both a duty of confidentiality to the client and a duty not to mislead the court. If non-disclosure may result in the lawyer misleading the court, the lawyer should cease to act for the client.

## 14. APPLICATIONS IN A CASE

- 14.1** In some cases, it is important for particular issues to be resolved on an interim basis. Other issues may have a degree of urgency that require them to be looked at before a court can resolve them finally. Interim determinations can be altered by a court at any time before or at final hearing.
- 14.2** Before commencing interim proceedings (known in the Family Courts as an 'Application in a Case'), the lawyer should discuss with the client whether a request for negotiations or an informal conference may resolve the relevant interim matter without the need for litigation.
- 14.3** The lawyer should ensure that the interim application specifies the relief sought with sufficient detail and that any affidavits filed in support of the interim application contain sufficient relevant evidence to enable the other party and the court to be sure of what is in dispute.
- 14.4** Before beginning proceedings, the lawyer should discuss with the client the cost/benefit involved in preparing, filing, and litigating interim matters, taking into account:
- the advantage or otherwise of interim proceedings, including the opportunity to discuss settlement proposals in a court setting;
  - the likely outcome of the interim proceedings and the relevant appeal process and any enforcement issue;
  - the question of costs, and the likelihood of costs orders being made; and
  - the appropriateness of filing an offer to resolve the proceedings.

## 15. APPLICATIONS WITHOUT NOTICE

- 15.1** Lawyers should only bring applications without notice<sup>7</sup> in circumstances where bringing the matter to court quickly and serving papers on the other side before going to court would be inappropriate. For example, where a child was about to be taken out of Australia without the required consent of a parent or where property/money is about to be wasted or removed from Australia.

## 16. AFTER THE PROCEEDINGS HAVE CONCLUDED

- 16.1** Lawyers should:
- ensure clients fully understand the implications and obligations arising from court orders. Lawyers should write to clients confirming the outcome of proceedings;
  - remind clients of restrictions on the dissemination of information about the existence of proceedings, and information contained in documents produced for the purposes of proceedings; and
  - advise clients of the mechanism for review of decisions and, unless clearly inappropriate, remind them of the possibility of alternative dispute resolution services as a means of resolving further disputes (see Part 12 – Trials and Appeals).

## 17. COSTS INFORMATION

- 17.1** Lawyers are expected to understand their relevant obligations under state and territory legislation.
- 17.2** Lawyers should:
- give clients the best information possible about likely overall costs, including a breakdown between fees and disbursements, and referring to the GST payable. It is recognised that this may involve giving a broad estimate, particularly when both solicitors' and barristers' costs may be incurred;
  - discuss with clients how, when, and by whom, any costs are to be met and consider whether clients may be eligible for legal aid
  - discuss with clients, and keep in mind at all times, the principle of proportionality between the likely outcome and the probable expense of resolving the dispute, having regard also to the impact of any possible costs orders; and
  - keep clients regularly updated about the level of costs.
- 17.3** In the Family Court of Australia, lawyers are required to regularly inform their clients as to the amount of costs incurred to date in a matter, and the prospective costs in the matter.
- 17.4** The detailed requirements of the Family Court of Australia regarding the duty to inform clients about costs, and the timing of when to provide clients with written notices about costs, are contained in Rules 19.03 and 19.04 of the *Family Law Rules 2004*. Notifications are required before each court event and if an offer of settlement is made in a property case. The *Family Law Rules* deal with costs in the Family Court and contain a detailed Scale of Costs. The *Federal Circuit Court Rules* provide information on costs in the Federal Circuit Court, including a Scale of Costs. Neither court is involved in the regulation of solicitor/client costs.
- 17.5** In addition to the requirements referred to above, in some states lawyers are required to disclose to their clients particulars of fees likely to be incurred at the commencement of their engagement. Lawyers should ensure that they comply with the particular statutory rules applicable in the state or territory in which they practise.
- 17.6** Lawyers who enter into a Costs Agreement with their clients should ensure that they comply strictly with the relevant statutory rules in the state or territory in which they practise.

## 18. CLIENT RECORDS

- 18.1** Where appropriate lawyers should encourage their clients to:
- list the dates and significant events which have occurred in their lives. This list should begin with the full names, dates and places of birth of separating couples, dates of cohabitation and marriage, children's full names and dates of birth, and details of any financial contributions each party has made to the marriage and the sources of those contributions. This list should be given to the lawyer before, or at, the initial meeting between the client and the lawyer;
  - arrange and make copies of their own financial and other personal documentation, and to categorise and label the documents so that that the lawyer can quickly and clearly understand the information presented to them; and
  - maintain their own file of relevant correspondence and other documents in date order.

<sup>7</sup> Commonly referred to as ex parte applications. See further information in Part VIII on Injunctions.

## 1. WHAT IS ALTERNATIVE DISPUTE RESOLUTION?

1.1 Alternative Dispute Resolution (ADR) in the practice of Australian family law includes counselling, mediation, family dispute resolution, conciliation, arbitration and collaboration. At an early stage, unless it is clearly inappropriate to do so, the lawyer should explain the various ADR processes and advise clients on the benefits and/or limitations of these processes in their particular case, as well as the role of lawyers in supporting each process. There is sometimes confusion of terms for the various processes but essentially, all facilitate the resolution of disputes and represent alternatives to litigation.

1.2 Lawyers should note that clients involved in proceedings in the Federal Circuit Court or the Family Court may use different terminology in referring to the same ADR service. Counselling, mediation, family dispute resolution, and conciliation, may all be terms applied to methods used or encouraged by the courts to resolve matters without recourse to trial.

### Counselling

1.3 Counselling is a process in which separating couples and other family members attempt, with the help of a counsellor, to discuss both the practical and emotional issues to do with their relationship and ongoing co-parenting arrangements. They may wish to improve their relationship, clarify whether the relationship should continue, whether reconciliation should take place or how to deal with the emotions and practicalities arising out of separation. This process examines the under-lying emotions and their causes, and attempts to bring about change in the relationship and individuals. The relationship is the primary focus of this intervention. Counsellors usually hold qualifications in Psychology or Social Work and are available in both community-based agencies and in private practice. Relationship counselling which focuses on family dynamics may be called family therapy.

### Mediation

1.4 Mediation is a process in which separating couples, whether or not they are legally represented or there are court proceedings on foot, agree to the appointment of an impartial third party to facilitate discussions. The mediator does not have an advisory role and has no authority to make any decisions with regard to separating couples' issues (which may relate to separation, divorce, children's issues, property and financial questions or any other issues that may arise). Separating couples are assisted to reach their own informed decisions through negotiation without adjudication. This is a practical problem solving approach which may be focused on future issues as well as dealing with past and current issues.

1.5 Save as may be required by law, including in relating to the reporting of abuse, discussions at mediation are entirely confidential.

### Family Dispute Resolution

1.6 Family Dispute Resolution ('FDR') is a process in which a family dispute resolution practitioner ('FDRP') helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes regarding parenting matters. FDR operates in a similar vein to mediation and is compulsory in all non-urgent parenting matters before proceedings can be commenced.

1.7 The key distinguishing factor from mediation is that, if the matter cannot be resolved at FDR, the FDRP may issue a certificate pursuant to s60I of the *Family Law Act* which will enable one of the parties to commence court proceedings.

1.8 The FDRP must be registered with the Commonwealth Attorney-General's Department in order to provide the certificate and must, at the outset, assess the people involved in the dispute to determine whether FDR is appropriate. The FDRP must be satisfied that this assessment has considered whether the ability of a person to negotiate freely in the dispute is affected by:

- a history of violence (if any) among the people involved in the dispute;
- the likely safety of the people involved;
- the equality of bargaining power;
- the risk that a child may suffer abuse;
- the emotional, psychological and physical health of the people involved; or
- any other matter that the FDRP considers relevant to the proposed FDR.

1.9 If, after considering these matters, the FDRP is not satisfied that FDR is appropriate, the FDRP must not facilitate FDR.

1.10 Where FDR begins but part way through the practitioner decides it is no longer appropriate to continue because of the above matters, the practitioner may stop providing FDR. A certificate can then be issued stating the person attended FDR but part way through the practitioner decided it was not appropriate to continue.<sup>8</sup>

1.11 If, at the conclusion of the FDR, the matter has not been resolved (or if one of the parties has refused the invitation to attend FDRP), either of the parties may request that the FDRP issue a certificate pursuant to s60I. There is some discretion for the FDRP to indicate in the certificate whether both parties attended and/or made a genuine attempt to resolve the matter.

1.12 Apart from assessment about suitability for FDR, the FDRP has no authority to make any decisions with regard to separating couples' parenting issues, but rather has a duty to assist parents to reach their own informed decisions through negotiation, with access to information about the basic developmental needs of children, including the negative impact of exposure to ongoing conflict between parents. This is an awareness raising and practical problem solving approach which is often focused on improving communication between parents while discussing future issues during the development of a parenting plan as well as dealing with past and current issues.

1.13 The FDR itself is governed by the same confidentiality as mediation. The intake sessions conducted prior to the commencement of the FDR property do not attract the same level of confidentiality.

1.14 To find a list of approved FDRPs go to [www.ag.gov.au](http://www.ag.gov.au).

### Conciliation

1.15 Conciliation is the process best known to family lawyers and has been traditionally offered by the Family Courts' Registrars dealing with property matters and the Family Consultants dealing with children's matters. This was formerly called 'conciliation counselling'. Conciliation is also akin to mediation, and is a process in which the parties to a dispute develop options, consider alternatives, and endeavour to reach agreement. The conciliator may have an advisory role on the content of the dispute or its resolution, or give expert advice on likely court outcomes, but does not determine what the outcome will be.

<sup>8</sup> Fact Sheet on s60I certificates, Family Dispute Resolution Practitioner Obligations, [www.ag.gov.au](http://www.ag.gov.au), September 2012.

## Arbitration

**1.16** Arbitration is a process similar to judicial determination. Separating couples agree to refer the claim to an independent third party and to accept the decision which is then registered with the court. It is a formal process in which the Arbitrator assesses the facts presented by each party and determines the dispute according to law. Legally binding arbitration can only be used for property and spousal maintenance disputes. To find a list of approved Arbitrators, see below at 6.4.

## Collaboration

**1.17** Collaboration is a process where both parties, their lawyers and any other required professional advisors, such as child welfare experts or financial experts, commit to resolve the dispute between the parties in dedicated meetings. The focus is on the parties underlying “interests”, rather than positional bargaining. An important aspect is that at the beginning of the collaboration the parties sign a contract and agree that if their dispute is not resolved and one of them takes the matter to court, each party must retain new lawyers.

## 2. COUNSELLING

- 2.1** As outlined above, counselling usually refers to a therapeutic process aimed at resolving emotional issues which may or may not be associated with family law matters.
- 2.2** For counselling services in your locality refer to details available through Family Relationships Online at [www.familyrelationships.gov.au](http://www.familyrelationships.gov.au).

## 3. MEDIATION/FAMILY DISPUTE RESOLUTION (FDR)

- 3.1** Not all cases are suitable for mediation/family dispute resolution. All Government funded and accredited mediation/family dispute resolution agencies and/or practitioners have a procedure for assessing the suitability of the clients for mediation/family dispute resolution. For mediation/family dispute resolution services in your locality refer to details available through Family Relationships Online at [www.familyrelationships.gov.au](http://www.familyrelationships.gov.au).
- 3.2** Mediation/family dispute resolution would not be appropriate in the following circumstances:
- at a time when there are child protection issues or a risk of child abduction;
  - where clients do not have the willingness or capacity to mediate or their mental competence is in question;
  - before urgent applications;
  - where a particular issue can only be adjudicated upon by the court, for example, in paternity cases;
  - financial proceedings where either party is bankrupt; or
  - where bail conditions or a family violence order are in place restricting one party having contact with the other party.
- 3.3** Mediation/family dispute resolution may also not be appropriate in the following circumstances:
- where domestic violence has occurred or is still occurring. If clients still want to mediate in such cases, the lawyer should discuss the risks and what can be done to make them feel safe during the mediation (for example, separate appointments, shuttle mediation (defined below), teleconferences). Any intervention or restraining orders need to be examined to establish if separating couples are able to be seen together or whether separate appointments must be arranged;
  - where the position of one party is so much stronger than the other that the difference is likely to be beyond the capacities of mediators/practitioners to address; or

- where reconciliation may be possible and counselling or marital therapy may be more appropriate.

- 3.4** Mediation/family dispute resolution usually involves the separating couple meeting with the mediator/family dispute resolution practitioner at the same time. However, alternatives may be determined at the assessment stage, for example shuttle mediation where separating couples meet separately with the mediator.
- 3.5** From time to time the dispute between a couple may involve a wider group of family members including step-parents, grandparents, aunts, uncles, children, elders and significant others. Any of these people may participate in the mediation, provided that this has the agreement of the couple and the mediator.
- 3.6** Children do not usually attend mediation sessions with their parents, but can participate in a variety of ways. For example, they may be interviewed separately by a person (usually a child psychologist or social worker) or a Child Consultant who is specifically trained to work with children and who may provide the children’s views as input to the mediation/family dispute resolution. This process is known as child inclusive mediation and usually involves the children meeting with a practitioner separate from the mediator. That practitioner then shares the child’s views with the parties and the mediator.

### The Benefits of mediation/family dispute resolution

- 3.7** Lawyers should explain to their clients the potential benefits of mediation/ family dispute resolution. These include:
- when a family law dispute arises, it is generally better if the couple can jointly sort out the practical arrangements for the future;
  - the aim of mediation/family dispute resolution is to help separating couples find a solution that meets the needs of all involved, especially any children, and is one that they both feel is fair. At the end of mediation/family dispute resolution, those involved should ideally feel that there has been no ‘winner’ or ‘loser’ but that together they have arrived at sensible, workable arrangements;
  - mediation/family dispute resolution can help to reduce long term tension, hostility and misunderstandings and so improve communication between separating couples. This is especially important if children are involved, as separating couples may need to cooperate over their care and upbringing for some years to come; and
  - mediation/family dispute resolution is not only more cost effective and timely than litigation, it may also reduce emotional stress and improve communication between parties.

### Timing of mediation/family dispute resolution

- 3.8** Mediation/family dispute resolution can take place at any time. Couples who are thinking about separation may want to use the process to explore the options in relation to parenting or finances. Separating couples engaged in the litigation process may want to attempt a settlement to avoid the final hearing. The process is generally most effective when both parties are committed to resolving issues without recourse to litigation.

### Lawyer assistance during mediation/family dispute resolution

- 3.9** Mediation/family dispute resolution generally works best when the parties attend with, or have access to, resolution focussed legal representatives. Separating couples may consult their lawyers at any stage in mediation/family dispute resolution, but the ability to do so is particularly important when disclosure and settlement proposals are being considered. When referring clients to mediation/family dispute resolution, and while clients are going

through mediation/family dispute resolution, lawyers should:

- explain that the mediation/family dispute resolution process should be supported by independent legal advice;
- confirm that any agreement about financial matters is not directly binding between the separating couple until it has been approved by the court as a consent order or documented in a binding financial agreement;
- explain the significance of parenting plans and confirm that any written, dated and signed document that refers to arrangements for children meets the statutory definition of a parenting plan;
- suggest that seeking advice from lawyers between mediation/family dispute resolution sessions can be helpful in seeing whether proposals are appropriate;
- assist clients to provide disclosure where necessary and assess any disclosure which takes place in mediation. The use of a Financial Statement as a standard for disclosure in mediation/family dispute resolution is recommended;
- give advice about settlement proposals as and when required, bearing in mind the long-term interests of clients and/or any children;
- bear in mind the cost of mediation/family dispute resolution as opposed to negotiation through lawyers or court proceedings;
- give advice about any untenable position either clients or their partners may be adopting;
- assist clients to reach a decision and encourage clients to raise issues in mediation/family dispute resolution as appropriate;
- emphasise that proposals made in mediation/family dispute resolution are not binding between the separating couple. It is very helpful for separating couples to have access to independent legal advice when proposals are made;
- draft and lodge consent orders, or draft a financial agreement, where agreements about financial matters have been reached;
- implement the consent orders or financial agreement;
- following mediation/family dispute resolution where the client has reached no firm proposals, discuss the reasons for stopping the mediation/family dispute resolution process, note what if anything has been achieved so far, and discuss the options;
- where separating couples have produced interim proposals, discuss the position and any potential difficulties, including whether there is a need to apply for any interim orders; and
- advise as to the availability of Legal Aid for mediation/Family Dispute Conferencing.

#### 4. CONCILIATION CONFERENCE

- 4.1 Where separating couples may need stronger direction to reach agreement they may be referred to a conciliation conference, convened by a registrar of the court. This occurs in the court setting, in an increasingly limited number of cases, mostly where the parties or asset pool cannot afford the costs of private mediation.
- 4.2 An assessment will be made as to whether there are issues of safety and, if so, whether the conciliation conference should proceed with the couple in the same room or be run by way of shuttle (with parties in different rooms). Frequently, there is benefit in the registrar having the legal representatives in the same room even when the parties are not prepared to do so.
- 4.3 Separating couples can benefit from a conciliation conference in that there is a saving of time and costs. The input from the registrar, particularly as to the needs and best interests of children, and likely range of outcomes should the matter proceed to trial, may assist the settlement.

- 4.4 The courts' resources do not extend to conciliation conferences in parenting matters.
- 4.5 Court matters can also be adjourned to enable parties to participate in private mediations.
- 4.6 A court may order a property conciliation conference after a property application is lodged in the court registry. Lawyers attend, and all court documents are exchanged before the conference. At the conclusion of a successful conference final orders can be drafted and lodged with the court as consent orders. The matter will usually return before the judge or registrar quickly after the conciliation conference so that it can progress to trial where necessary.

### 5. ARBITRATION

- 5.1 Arbitration offers a number of benefits to clients. These include:
  - choice of an independent arbitrator;
  - choice of venue and time for the arbitration;
  - an opportunity to determine a single issue (or limited number of issues) which is (or are) preventing the settlement of the whole dispute;
  - an opportunity to decide on the procedure required in the determination of the dispute, since limiting procedural complexity may reduce the cost of the proceedings considerably; and
  - certainty of a decision within a predetermined time frame.
- 5.2 When referring clients to arbitration, lawyers should explain that:
  - an arbitration is a determination of the dispute by an independent third party;
  - the award made by the arbitrator is binding unless one of the separating couples seeks to review the award (available only on a point of law) or seeks to set aside the award on one of the restricted bases permitted under the *Family Law Act*; and
  - being legally represented at an arbitration may be of considerable benefit.

#### The role of lawyers during arbitration

- 5.3 When clients have elected arbitration, their lawyers have an active role to play in:
  - assisting the client to negotiate the arbitration agreement with the other party or their lawyer, and attending the preliminary meeting to establish the procedure to be followed;
  - ensuring the correct documents are delivered to the arbitrator and to the other party; and
  - instructing counsel or acting as the client's representative at the hearing.
- 5.4 After the hearing the lawyer may have a number of roles. The award may need to be registered, advice may be required regarding an appeal, and the decision may require legal expertise if it is to be properly effected.

### 6. WHICH MEDIATOR, FAMILY DISPUTE RESOLUTION PRACTITIONER, CONCILIATOR, OR ARBITRATOR?

- 6.1 All family dispute resolution practitioners, mediators or conciliators who deal with children's matters are required by the *Family Law Act* to promote an outcome which is in the best interests of the child and therefore will not be 'neutral' in this regard.
- 6.2 Lawyers who refer clients to alternative dispute resolution should refer their clients to family dispute resolution practitioners,

mediators, conciliators, and arbitrators who have undertaken appropriate training and have relevant experience.

- 6.3** A list of accredited family dispute resolution practitioners is available at [www.familyrelationships.gov.au](http://www.familyrelationships.gov.au). A list of private mediators is maintained by various organisations including the Australian Institute of Family Law Arbitrators and Mediators at [www.aiflam.org.au](http://www.aiflam.org.au).
- 6.4** A list of approved arbitrators is also maintained by the Australian Institute of Family Law Arbitrators and Mediators, pursuant to the Family Law Regulations. This list is available at [www.aiflam.org.au](http://www.aiflam.org.au). Only arbitrators who are on that list are permitted to conduct arbitrations under the *Family Law Act*.

## 7. COLLABORATION

- 7.1** Collaboration works best where neither party has any fixed view or position at the beginning of the collaboration about the outcome that they want to achieve. It is thus best suited to cases where there have been no other formal negotiations between the parties and where parties have not, at the outset, received advice about likely entitlements.
- 7.2** There are a number of trained collaborative lawyers (and other professionals such as child welfare experts and financial planners) across Australia. Practice groups of collaborate professionals exist in most states and territories. A collaboration should only take place involving professionals trained in collaborative practice. The International Academy of Collaborative Professionals maintains a list of qualified practitioners, including those members located in Australia (see [www.collaborativepractice.com](http://www.collaborativepractice.com)).

## 8. TIMING OF MEDIATION, FAMILY DISPUTE RESOLUTION AND ARBITRATION

- 8.1** It is important that lawyers carefully consider and give advice on the timing of any referral to mediation, family dispute resolution or arbitration. Under pre-action procedures in the Family Courts alternative dispute resolution will normally happen prior to the filing of an application. However, even if the case is unsuitable for mediation at the outset, the possibility of a later referral should be kept under review.
- 8.2** The timing of the referral is a matter for careful consideration, depending on the facts of the case and the attitude of the separating couple to early resolution. For example, it may be appropriate to refer children's disputes to mediation/family dispute resolution early on. On financial matters it may sometimes be appropriate to deal with disclosure before referral to arbitration, mediation or family dispute resolution.

## 9. LEGAL AID REQUIREMENTS FOR ALTERNATIVE DISPUTE RESOLUTION

- 9.1** The Commonwealth funds all state and territory Legal Aid Commissions (LACs) to provide legal assistance in family law matters. The use of those funds must comply with the guidelines set by the Commonwealth as part of each Commonwealth-State funding agreement.
- 9.2** The Commonwealth guidelines require applicants for legal aid to use an alternative dispute resolution process in appropriate circumstances before any grant of legal aid is made for court proceedings.
- 9.3** The Commonwealth guidelines set out circumstances in which alternative dispute resolution would not normally be appropriate.
- 9.4** As a general rule, grants of aid are made in accordance with a 'stage of matter' model set out in the funding guidelines. Stage 1(a) is for

alternative dispute resolution as a first step in resolving a dispute. Stage 1(b) is for alternative dispute resolution at any stage in the litigation pathway.

- 9.5** Once a grant of aid is made, the guidelines provide that a LAC will refer the recipients of the grant to an alternative dispute resolution process at any stage.
- 9.6** The Commonwealth guidelines are administered differently by different LACs. In some states the majority of grants of aid are for alternative dispute resolution, and aid for litigation is less common. In other states the proportion of grants of aid for alternative dispute resolution is significantly lower and grants for more traditional legal services higher.
- 9.7** The two main forms of alternative dispute resolution procedures offered by LACs are as follows:
- alternative dispute resolution support for clients attending mediation/ family dispute resolution, conciliation, or arbitration run either by the LAC or an outside agency; and
  - Legal aid conferencing. Conferences usually take the form of mediation or conciliation, convened by an experienced mediator or conciliator. A feature of legal aid conferencing is that, when the conference is over, the convenor will report to the LAC about the conference. This report may be used by the LAC to inform its decision about whether to grant, or continue to grant, legal aid to any of the participants.
- 9.8** Depending on the availability of funds, some LACs offer other alternative dispute resolution services. For example, Legal Aid Queensland currently offers arbitration for small property disputes which would be uneconomic to litigate fully.

## 1. LAWYERS' RESPONSIBILITIES REGARDING COSTS

- 1.1 Lawyers should be familiar with the statutory rules relating to informing clients about costs and to the recovery of costs. These are set out in the laws of each state and territory which regulate the legal profession.<sup>9</sup> Those laws apply to all lawyers, and family lawyers must comply. They cover all aspects of legal practice, and in particular:
- costs disclosure – setting out the lawyer's obligation to inform their client as to certain matters at the time that they are first instructed and during the conduct of the case;
  - the manner in which lawyers must render bills to their clients and the clients' right to seek review of bills;
  - the requirements to enter into a valid and binding costs agreement, and the grounds for cost agreements to be set aside.
- 1.2 In particular, lawyers should:
- ensure that in making disclosure they give their clients a proper expectation about the likely costs in the matter;
  - ensure that the costs forecasts are updated as the matter progresses;
  - within a reasonable time after a client's request, provide a bill of costs covering all work performed for that client to which the request relates;
  - not charge the client for the preparation of an itemised bill of costs;
  - not bargain with the client for a share of the proceeds of the outcome of the case, nor for a payment proportionate to any amount that may be recovered by the client in the proceedings;
  - be aware that they are entitled to require security for costs to secure eventual payment of fees but should advise their client that they are entitled to seek independent advice about any document prepared for their signature;
  - be aware that they are entitled to hold documents created for a client until fees are paid, and the circumstances in which that entitlement does not apply;
  - explain to clients whether there are any prospects of recovering costs in the proceedings;
  - if the matter is being litigated in the Family Court, comply with the *Family Law Rules* in relation to advising their clients as to their costs to date, and prospective costs, at the time that they receive or make offers of settlement, or at various stages in the course of a matter, as provided in chapter 19 of the *Family Law Rules*;
  - ensure that clients understand that there is a difference between "lawyer and client" costs on the one hand, and "party and party" costs on the other. The lawyers should explain that, should a costs application be successful, there is a difference between the amount a lawyer might charge a client and the amount paid by the other party, and the client is still liable to pay the difference;
  - inform clients that if they are well organised and have all their questions written down and all their documents organised, the time with their lawyer will be used most cost efficiently;
  - inform clients that lawyers are entitled to charge for every attendance upon them and for every telephone call;
  - be aware that costs are a major source of complaints.

## 2. COSTS ORDERS

- 2.1 Lawyers should consider and explain to clients the factors which the court will take into account when considering making an order for costs, under s117 of the *Family Law Act*, including:
- the financial circumstances of each of the separating couple;
  - whether either party had legal aid;
  - the conduct of the litigation, for example, irrelevant material, failure to disclose delay, non-compliance with court directions;
  - offers of settlement;
  - whether the proceedings are caused by a failure to comply with previous orders; and
  - the overall outcome.
- 2.2 Lawyers should ensure that clients understand that if they settle a matter, the agreement will be on the basis that each party pay their own costs (unless otherwise agreed).
- 2.3 Lawyers should advise their clients of any exposure they may have to costs orders which may arise from litigation and in particular, non-compliance with orders or directions of the court.
- 2.4 Lawyers should ensure that clients understand the ramifications of making or receiving 'without prejudice save as to costs' offers, or offers of settlement under s117C of the *Family Law Act*, including the costs up to the date of the offer to settle and estimated future costs to complete the case if the matter is not settled.

## 3. INSTRUCTING COUNSEL

- 3.1 If a lawyer proposes to instruct counsel (namely, a barrister) in respect of any aspect of work on a case, the costs implication of doing so should be explained to the client and authority to instruct counsel secured from the client. That authority should be written and could form part of the original costs agreement.
- 3.2 If counsel proposes to charge cancellation fees the client should be advised that there may be other counsel who do not do so.
- 3.3 The following points should be kept in mind:
- the lawyer should ensure that counsel's fees are collected in trust, remembering that the obligation to pay counsel is a personal one, unless counsel agrees otherwise;
  - the lawyer should discuss fee arrangements with counsel. The lawyer should seek the client's approval as to the amount of counsel's fees. If senior counsel is to be briefed, or if more than one counsel is to be briefed, the client should authorise that in writing;
  - in legal aid cases, lawyers should be aware that the level of counsel's fees will be fixed by the LAC and be part of the total of costs which it has committed to the matter; and
  - where counsel is to appear the client should be aware, save in exceptional circumstances, of the identity of the barrister concerned and what arrangements are being made for attendance by the instructing lawyer or any other person to instruct counsel.

<sup>9</sup> *Legal Profession Act 2007* (Qld); *Legal Profession Uniform Law* (NSW); *Legal Profession Uniform Law Application Act 2014* (NSW); *Legal Profession Uniform Law Application Act 2014* (Vic); *Legal Profession Act 2006* (ACT); *Legal Profession Act 2007* (Tas); *Legal Practitioners Act 1981* (SA); *Legal Profession Act 2008* (WA); *Legal Profession Act 2006* (NT).

## 1. INTRODUCTION

- 1.1 Generally, cases involving self-represented litigants are more difficult and require more interpersonal skills, including patience and adaptability, on the part of the lawyer. Lawyers should keep the following matters in mind:
- the client will be disadvantaged if consent orders or a judgment in defended proceedings are obtained that are capable of being the subject of a successful appeal on the grounds that there was some procedural unfairness to the self-represented litigant; and
  - lawyers should be familiar with decisions which define the duties of the court in proceedings involving a self-represented litigant.
- 1.2 Lawyers should be aware of, and take steps to avoid, the risk that they may, by their dealings with a self-represented litigant, become a witness in the proceedings.
- 1.3 The numbers of litigants representing themselves in family law proceedings has risen significantly in recent years. There appears to be a greater willingness by separating couples to engage lawyers for specific parts of a matter, leading to the phenomenon of ‘partial self-representation’.
- 1.4 The guidance offered is divided into three sections:
- first, to lawyers who find themselves acting against an unrepresented party;
  - second, to those who are engaged by an otherwise self-representing litigant for specific aspects of a matter; and
  - third, to lawyers acting as Independent Children’s Lawyers in matters in which either or both parents are self-represented.
- 1.5 The issue has proved equally taxing for the courts, for whom an important question has been the extent to which a judicial officer is obliged to intervene in proceedings involving a self-represented litigant to ensure a fair hearing. The overriding task of the judicial officer is to ensure procedural fairness to both sides. That may include intervening on behalf of an unrepresented party if necessary to achieve that overriding objective.

## 2. ACTING AGAINST SELF-REPRESENTED LITIGANTS

- 2.1 Lawyers owe duties of fidelity and confidence to their clients and a duty of honesty to the court. They do not owe specific duties to the other party beyond those already owed to the court. This combination of duties may not provide a clear answer to all the questions arising when acting against self-represented litigants.
- 2.2 Nevertheless, some conclusions can be drawn about appropriate professional conduct in such cases. For example, the lawyer’s duty to a client includes a duty to ensure that there is no possibility of procedural unfairness in proceedings likely to render the outcome vulnerable to a successful appeal. To that extent, it is consistent with a lawyer’s duty to their own client to ensure that the self-represented party receives procedurally fair treatment.
- 2.3 A lawyer’s duty of honesty includes a duty to volunteer information favourable to a self-represented litigant’s case, if not doing so would mean that a court would form an erroneous view of the evidence or the law. A lawyer is also obliged to correct concessions made by self-represented litigants where it is known or obvious that a concession has been wrongly made. These duties extend to settlement negotiations as well as to proceedings in court. However, a lawyer is not otherwise obliged to do anything on behalf of a self-represented litigant, such as making submissions to their case. The duty of honesty is confined to correcting the self-represented litigant’s obvious mistakes of law or fact.
- 2.4 Dealing directly with a self-represented litigant may present lawyers with difficulties under relevant state or territory professional codes

of conduct. The extent to which a lawyer communicates with a self-represented litigant will depend in a particular case on the lawyer’s assessment of the nature of the case, the self-represented litigant’s level of understanding of it, the stage of the matter reached, and an assessment of the lawyer’s own client’s interests.

- 2.5 The available research suggests that it is common for self-represented litigants to use court-based pathways in preference to various modes of alternative dispute resolution as a way of resolving a dispute. This may present difficulties where a lawyer seeks to encourage separating couples towards a non-court solution.
- 2.6 The lawyer should be familiar with the resources available to self-represented litigants from the Family Court and Federal Circuit Court, and particularly from the Family Court’s and Federal Circuit Court’s websites. If the self-represented litigant is unaware of these resources, it may assist all concerned if they are directed to them.
- 2.7 Lawyers should be aware that self-represented litigants frequently experience high stress levels, frustration, desperation, anger, fear, anxiety and bitterness. Self-represented litigants may also be suspicious of the independence of judicial officers and lawyers, and may think there is collusion between lawyers and a judicial officer. This places great demands on the interpersonal skills and patience of the lawyer. Lawyers should therefore maintain a professional and courteous demeanour at all times, and avoid giving the impression of being too friendly with a judicial officer, or speak in language that the self-represented litigant is unable to understand. All of this can be justified in terms of the lawyer’s duty to his or her own client.
- 2.8 Where a matter is proceeding to a hearing, a lawyer may need to alert a client to features of cases involving a self-represented litigant. These might include:
- the fact that the client may find themselves being cross-examined by their former partner, when the lawyer may need to counsel them about how to react to particular lines of questioning;
  - the fact that a judicial officer is required to ensure procedural fairness and may give the appearance of assisting the other side significantly; and
  - the possible role of a person who the judicial officer may agree can attend at court to assist a party to proceedings (known as a ‘McKenzie Friend’).
- 2.9 Where a litigant has been represented but later ceases to be, the lawyer should clarify the status of any undertakings given on behalf of the client.
- 2.10 Where a self-represented litigant shows signs of not complying with case management directions, it is advisable for the lawyer to immediately notify the self-represented litigant of the orders not complied with, the impact on the litigation and the parties of the non-compliance, and the likely impact on costs orders. Any communications of this sort should be in writing by open letter.
- 2.11 Lawyers should be careful to explain to self-represented litigants that a discussion in the course of furthering negotiations to settle a dispute is not to be repeated in court.

## 3. ACTING FOR A SELF-REPRESENTED LITIGANT IN DISCRETE TASKS

- 3.1 Research suggests that most self-represented litigants are represented for parts of a matter and not for others. In some cases, lawyers may be requested specifically to act only for a part of a matter, or to discharge a particular task; some lawyers may advertise their willingness to provide services in this way. This is sometimes called ‘unbundling’ of legal services or ‘discrete task representation’.

- 3.2 Discrete task representation may leave a lawyer exposed to potential liabilities for the advice given. This may arise because the lawyer's advice may be based on inaccurate, false or incomplete information. The issue has yet to be tested in Australian courts, but it is suggested that there are ways of reducing exposure to liability in such cases.
- 3.3 For example, in some states and territories, it is open to lawyers to specifically limit the scope of their liability by joining professional limited liability schemes and using certain wording in client engagement letters, or their equivalent. Even where there is no legislation specifically authorising such exclusions or limitations of liability, it is open to lawyers to limit their liability by expressly defining in writing the work that the client has asked the lawyer to carry out and the information the lawyer requires from the client before the work is carried out. Lawyers should be wary of signing an Application for Consent Orders where there is insufficient information to provide the advice as described.
- 3.4 In most cases, a lawyer will not be able to totally control the limits set on their involvement in a case. In such cases, the liability issues described above may still arise and may need to be anticipated in any letter of engagement or retainer. The lawyer should be able to immediately terminate the contract between the lawyer and the client once the task has been completed.

#### **4. ACTING AS AN INDEPENDENT CHILDREN'S LAWYER WHERE ONE PARTY IS A SELF-REPRESENTED LITIGANT**

- 4.1 Research and anecdotal evidence suggests a reasonable likelihood that a lawyer engaged as an Independent Children's Lawyer will be the only lawyer involved in the proceedings. This presents the lawyers concerned with particular challenges.

Further resources are available at [www.icl.gov.au](http://www.icl.gov.au).

## 1. INTRODUCTION

- 1.1 Lawyers should always bear in mind that divorce often goes to the heart of people's religious, cultural and/or personal beliefs. Whilst the procedure for a divorce is usually relatively routine, it is nonetheless very often a very significant step for a party, and should be dealt with sensitively by lawyers (whether acting for the applicant or respondent).
- 1.2 The cultural and/or religious implications of divorce should be considered where relevant, for example the question of obtaining a 'gett' (Jewish divorce) or a 'talaq' (Islamic divorce).
- 1.3 Lawyers should be aware that the contents of an application for divorce and related correspondence might have consequences that impact on other issues arising between the parties, such as parenting issues and financial issues. Issues that are not relevant to the divorce should be dealt with in separate correspondence.

## 2. BEFORE STARTING PROCEEDINGS

- 2.1 Before filing an application for divorce, lawyers should obtain a copy of the client's marriage certificate and a translation where necessary. Lawyers should have access to a list of approved translators so that an accurate translation can be obtained expeditiously when required. A copy of the marriage certificate (and a proper translation if necessary) will usually be required to be filed with the application (unless it has already been filed and proceedings already instituted).
- 2.2 Lawyers should be aware of the evidence that is necessary to establish marriage where the marriage certificate is not available.
- 2.3 If the marriage has taken place overseas, the lawyer should check that the marriage is recognised in Australia.
- 2.4 Where relevant, and so far as is practicable, the lawyer should consider whether a divorce granted in Australia will be recognised in the country where the parties or either of them intend to live or remarry.
- 2.5 Where relevant, and so far as is practicable, the lawyer should consider whether Australia is the appropriate jurisdiction in which to apply for a divorce, as a divorce in this country may have serious implications on the parties' rights to apply for other relief in overseas jurisdictions. For example, a couple divorced in Australia who own property in another country may not be able to institute proceedings for property settlement in that other country as the law of that country may require that proceedings for property settlement be linked to an application for divorce. If necessary, the lawyer should recommend to the client that advice be obtained from a lawyer practising in the relevant overseas jurisdiction(s).

## 3. THE APPLICATION FOR DIVORCE

- 3.1 A divorce application is filed in the Federal Circuit Court of Australia. A filing fee is payable to the Court (unless the Applicant is entitled to a remission of the fee).
- 3.2 Lawyers should explain to their clients that, under Australian law, one party can unilaterally bring about a separation and so long as there is a separation of at least 12 months, either party can apply for a divorce. Separation can occur even though the parties continue to reside under the one roof. Lawyers should be familiar with the law in relation to what constitutes a separation and ensure that their clients can establish the requisite period of separation. When there has been separation under the one roof, lawyers should consider what evidence is available to corroborate separation and whether such evidence should be filed. Where a divorce application relies on a period of separation under the same roof, the court will usually require evidence of corroboration (for example, a friend or family member who can attest to the fact that the parties were living separate lives).

- 3.3 Information about the arrangements for children under the age of 18 years is an important part of the application for divorce, as the court has a statutory obligation to consider the arrangements for the care, welfare and development of the children. The information must be provided in sufficient detail to enable the court to make a declaration that it is satisfied that there are proper arrangements in place for the care, welfare and development of the children, or that there are reasons why the divorce should take effect even though the court is not so satisfied.
- 3.4 Lawyers should advise clients that the relevant children for the purposes of a divorce application are not only the children of the parties but also any other children who were treated as a member of the family immediately before the parties separated.
- 3.5 The court will usually require the attendance at court of the Applicant on the hearing of the application, if there are children under 18. If the client cannot attend the hearing, the lawyer should file an affidavit of the client as to the inability to attend (for example, by reason of ill health, employment, child care obligations or remoteness).
- 3.6 Where a lawyer is aware that the arrangements for the care, welfare and development of the children may not be regarded as proper, the lawyer should encourage the client to take steps to improve those arrangements, such as talking to the other party, attending counselling or mediation/family dispute resolution, and/or ensuring that child support obligations are complied with. Clients should be encouraged to provide an appropriate level of financial support for their children. Lawyers should be familiar with the provisions of the child support scheme and its interaction with the Family Tax Benefit system (administered by Centrelink).
- 3.7 Where the respondent to an application for divorce is legally represented in other family law matters, the lawyer acting for the applicant should enquire whether the respondent's lawyer has instruction to accept service of the divorce application before arranging personal service of the application on the respondent. The lawyer for the applicant should not assume that the lawyer for the respondent has instructions to accept service.
- 3.8 Lawyers should discourage a client who is the respondent to a divorce application from filing a response opposing the application, unless there are proper legal grounds for doing so. For example, it is not a proper response that the client does not wish to be divorced (if the grounds otherwise exist).
- 3.9 Lawyers should advise their clients that, on hearing of the divorce application, the court will make the divorce order if all the requirements have been satisfied. However, clients must be advised that the divorce order does not become final until a month and a day after the hearing of the divorce application, and a person is not permitted to remarry until that person's divorce order has become final.

## 4. TIME LIMITS FOR THE FILING OF PROPERTY AND SPOUSE MAINTENANCE APPLICATIONS AFTER DIVORCE

- 4.1 Lawyers should advise their clients that if property settlement and/or spousal maintenance issues have not been resolved before the divorce is granted that they must either resolve those matters by obtaining consent orders or signing a financial agreement, or issue an application for a property settlement and/or spousal maintenance within one year after the divorce takes effect. The lawyers should advise the client that if they do not, they will have to obtain the leave of the court before filing such an application.
- 4.2 Such advice to clients should always be in writing (by letter and/or email).

### 1. INTRODUCTION

- 1.1 This part applies to lawyers representing clients in family law cases involving children. Lawyers appointed by the court as Independent Children's Lawyers should refer to the *Guidelines for Independent Children's Lawyers* (2013) endorsed by the Chief Justice of the Family Court of Australia, the Chief Judge of the Family Court of Western Australia, and the Chief Judge of Federal Circuit Court of Australia, and available on those courts' websites. A National ICL website was launched on 19 February 2016 (see [www.icl.gov.au](http://www.icl.gov.au)).
- 1.2 The legislation and the courts' Practice Directions make provision for the mandatory reporting or disclosure of any history of, or risk of, family violence or child abuse; and full disclosure of any factors which may directly impact on the safety and best interests of children. For example, see *Family Law Act* s67ZBA; 60J; and 10D(4); *Federal Circuit Court Rules* 13.04; *Family Law Rules* Division 2.3.1.
- 1.3 When determining the best interests of children, the court must give greater weight to the need to protect children from physical or psychological harm, from being subjected to or exposed to abuse, neglect or family violence, as opposed to the benefit to the child of having a meaningful relationship with both of the child's parents (s60CC(2)).
- 1.4 When advising clients with respect to parenting matters, lawyers have statutory obligations to ensure that their clients are advised that the best interests of the child is the paramount consideration. They must be encouraged to act on the basis that whilst a child's best interests are best met by the child having a meaningful relationship with both of the child's parents, the need to protect a child from the effects of abuse or family violence needs to be given greater weight (s60D).
- 1.5 Advisors have a further statutory obligation to advise clients that they could enter into a parenting plan and, if so, when they ought to consider the concepts of equal time, significant and substantial time, and the allocation of parental responsibility (s63DA).
- 1.6 In appropriate cases lawyers should encourage their clients to provide culturally-specific information relevant to their children's best interests, for example information relating to the maintenance of the child's cultural identity (see Part 1 – Aboriginal and Torres Strait Islander clients).
- 1.7 Lawyers should warn clients about the potentially damaging effects of involving their children in disputes between their parents or encouraging them to take sides.
- 1.8 Lawyers should make clients aware that negotiations in relation to children are separate from negotiations in relation to other issues. Clients should be made aware that the courts treat issues concerning money, even if they relate to children, separately and independently from issues concerning children.
- 1.9 Lawyers may occasionally receive instructions from clients to bring applications for parenting orders which are motivated by considerations other than the children's welfare. Examples are applications made from spite, from a wish to 'teach the other party a lesson' or from a perception that the application would result in a more favourable outcome financially. The Legal Profession Uniform Rules now operating in some states (and various states' barristers' rules of practice, practice rules and the like) contain various provisions to ensure that lawyers are not mere mouthpieces for their clients, but instead have a duty to exercise forensic judgment; and ensure that assertions are not made unless there is evidence to support them. Clients should be advised that whilst the starting point is that each party bear his or her own costs, there are

circumstances in which a court may order that one party pay the other's costs (*Family Law Act* s117). When preparing applications and affidavits, clients ought to be reminded that this is their evidence; and a later claim that "the lawyer put it in there" or that they did not read it carefully, will not absolve them of falsehoods in any document deposed to by them. Omissions can be equally damaging.

### 2. ALTERNATIVE DISPUTE RESOLUTION

- 2.1 Lawyers should recognise that counselling and alternative methods of dispute resolution such as mediation or family dispute resolution can be particularly helpful in dealing with disputes concerning children, especially where there are no welfare concerns and the issue is limited to how much time the children will spend with each parent.
- 2.2 Lawyers need to be aware of the legislative requirement that parties make a genuine effort to resolve their issues through family dispute resolution, prior to the filing of an application for parenting orders (including contravention applications). Lawyers should be familiar with the provisions in relation to certificates that parties have attended family dispute resolution and they should be able to refer clients to appropriate accredited family dispute resolution practitioners. They should also be aware of the exceptions to the requirement for a certificate and the procedures for satisfying the court that the exception applies.
- 2.3 Further discussion of the use of alternative dispute resolution in family proceedings can be found in Part 2 of these guidelines.

### 3. CHILD SUPPORT

- 3.1 Clients should be encouraged to provide an appropriate level of financial support for their children (see Part 8 Child Support and Child Maintenance). Lawyers should be familiar with the provisions of the child support scheme and encourage clients to reach their own agreement in relation to the financial support of their children, where this is appropriate. Clients may also need to be referred to other government agencies, including the Child Support Agency and/or Centrelink, for advice in relation to the financial support of the family.
- 3.2 A child support assessment takes into account the arrangements for the care of children as well as their parents' incomes.<sup>10</sup> The amount of child support payable pursuant to an assessment may be reduced depending on the number of nights that the children spend with each parent. This may cause particular difficulty for clients who link their entitlements and obligations in relation to child support with their rights and obligations pursuant to parenting orders.
- 3.3 Clients should be advised that the law relating to parenting issues is separate and distinct from the law relating to child support. Clients should be discouraged from attempting to manipulate arrangements for the care of their children so as to achieve a more favourable outcome in terms of child support entitlements or obligations, rather than structuring those arrangements so as to achieve the best outcome for the children.

### 4. TELLING CHILDREN ABOUT SEPARATION

- 4.1 Lawyers should encourage clients to consider what, when, and how they intend to tell their children about a parental separation and encourage them to consider doing so with the other parent. In difficult cases separating couples may find that counselling, mediation or family dispute resolution on this issue can be helpful. Further resources that may assist parents in explaining separation to their children are available from Family Relationships Online<sup>11</sup> and the Department of Human Services.<sup>12</sup>

<sup>10</sup> The Child Support Agency website has further information: <https://www.humanservices.gov.au/customer/dhs/child-support>

<sup>11</sup> <http://www.familyrelationships.gov.au/BrochuresandPublications/Pages/ChildrenAndSeparationBooklet.aspx>

<sup>12</sup> <https://www.humanservices.gov.au/customer/dhs/child-support> <sup>12</sup> <https://www.humanservices.gov.au/customer/subjects/parents-guide-child-support>

## 5. REFERRING CHILDREN

- 5.1 During the course of a case concerning children, lawyers should be sensitive to suggestions from clients that a child is showing signs of serious emotional disturbance. Lawyers may need to refer their clients to other professionals, such as health professionals or counsellors, who can provide assistance to the child in these circumstances. Generally, children should not be referred to other professionals for assistance of this type without the knowledge and consent of the other parent or a court order. If there is an Independent Children's Lawyer appointed in court proceedings concerning a child or children, then that person should be consulted in relation to any proposed referral.

## 6. CHILD ABUSE: PROTECTIVE MEASURES AND CONFIDENTIALITY

- 6.1 In cases where the lawyer becomes aware that a child is at risk of abuse, whether physical, sexual or emotional, the lawyer should, wherever possible, encourage clients to inform the appropriate child welfare authority. Lawyers should consider this paragraph in conjunction with the paragraph below dealing with professional obligations concerning confidentiality. Conversely, clients should be advised about the courts' attitude to repeated vexatious notifications made in the context of parenting litigation.
- 6.2 Lawyers should be aware of local support agencies (for example counselling agencies) and be able to direct clients to agencies that may be of assistance to them or their children.
- 6.3 Lawyers should be aware of and, where appropriate, should make clients aware of, the exceptions to a lawyer's professional obligation of client confidentiality and the circumstances in which a lawyer should consider revealing confidential information to an appropriate authority. Lawyers are reminded that they are obliged to disclose the whereabouts of a child who is the subject of a location order, regardless of the rules of client confidentiality.
- 6.4 Given the variations in state and territory legislation, lawyers should inform themselves as to their statutory obligation to report concerns that a child is at risk.
- 6.5 In all states and territories, the relevant legislation addresses the issue of protection, enabling lawyers and other professionals to make a report to the relevant child welfare authority without breaching their professional obligations. Again, given the variations in state and territory legislation, lawyers should inform themselves as to the statutory protection that may apply to them.
- 6.6 However, lawyers should always bear in mind that they owe a duty of confidentiality to their clients and may have to justify any breach of that duty to the client and their professional body. The lawyer should consider whether the threat to the child's life or health, both mental and physical, is sufficiently serious to justify a breach of the duty of confidentiality. It may be advisable to seek advice from senior lawyers, and from the relevant professional association (most of which have ethics advisory services).

## 7. CHILD ABUSE ALLEGATIONS AND FAMILY VIOLENCE

- 7.1 Clients may allege that a child has been abused or is at risk of abuse or that a child has been exposed to, or is at risk of being exposed to, family violence. Lawyers should be aware of the provisions of the *Family Law Act* and the *Family Law Rules* in relation to the mandatory filing and service of notice of such allegations, including the requirements for service on the alleged perpetrator of abuse. If a lawyer considers a child to be at imminent risk of abuse, the lawyer should encourage the client to report the allegation directly to the relevant child welfare authority. Clients should be aware that any Independent Children's Lawyer appointed in the proceedings

has a similar duty to file a Notice of Risk should he or she become aware of such allegations.

- 7.2 When a notice is filed in a court alleging child abuse or family violence, the court has an obligation to serve a copy of that notice on the relevant child welfare authority. This will not necessarily result in an investigation by the welfare authority and will rarely result in direct intervention by the authority in the family proceedings. In states and territories where there are protocols in place between the court and the welfare authority, matters will be managed in accordance with the relevant protocols.
- 7.3 Lawyers should be aware that in many cases involving abuse allegations, the court may require special management of the case. These cases are likely to require an order for the preparation of a family report or other expert's report and/or the appointment of an Independent Children's Lawyer.
- 7.4 The court gives serious consideration to the impact on children of family violence, where it is directed at the child, when the violence is committed in the child's presence, and even when family violence exists but is not committed in the presence of the child. Clients should not be pressed into agreeing on parenting arrangements in circumstances where they genuinely believe those arrangements are not in the best interests of the children. The effect on children of seeing someone being subjected to violence or of being alone with the perpetrator of violence should be borne in mind. Advice should be realistic but sufficiently robust to support clients should their individual circumstances raise questions about the appropriateness of proposed parenting arrangements. (Refer to Part 9 - Family Violence, for further information).

## 8. ABDUCTION

- 8.1 Urgent steps may need to be taken if a child is abducted. Lawyers should know how to apply for a location order and a recovery order. Lawyers should appreciate that a location order (an order requiring a person or authority to provide information about the whereabouts of a child) may be directed to persons who are not parties to the proceedings in which the order is made. A recovery order (an order for the return of a child) can direct a person to use force, if necessary, to find and deliver a child to the appropriate person.
- 8.2 Lawyers should be aware of the differences in law and procedure between abduction cases within Australia and international abduction cases.
- 8.3 Steps can be taken to prevent wrongful removal of a child from Australia. If necessary, a specific order can be sought from the Family Court or the Federal Circuit Court restraining the other party from removing the child from Australia and requesting the Australian Federal Police to place the child on the Family Law Airport Watch List Alert. Once that order is obtained the child's details can be registered on the Airport Watch List and the Australian Federal Police will then intervene to prevent the unlawful removal of the child from Australia. A court order is necessary to obtain the removal of a child's details from the Airport Watch List. Clients should be informed that they need to obtain such an order, or an order permitting specific travel, if they wish to take the child out of Australia. Lawyers should refer to the Family Law Kit published by the Australian Federal Police which can be found on their web site ([www.afp.gov.au](http://www.afp.gov.au)).
- 8.4 Court orders can be sought to secure storage of passports of parents and children. Clients can lodge a Child Alert Request with the Australian Passport Office if they are concerned that there may be an attempt to obtain a passport for a child fraudulently. Court orders are not required for requests to restrict the issue of passports for children and information about this is available from the Department of Foreign Affairs and Trade web site ([www.passports.gov.au](http://www.passports.gov.au)).

- 8.5 Lawyers should recognise that international child abduction is a specialist area of law and that they may need to take specialist advice.
- 8.6 If a client's child is abducted (or is suspected to have been abducted) from Australia to another country which is party to The Hague Convention on the Civil Aspects of International Child Abduction, the client's lawyer should assist the client to complete and lodge an application for the return of the child without delay. The application form and instructions on how to complete the form are available on the Attorney-General's Department's website ([www.ag.gov.au](http://www.ag.gov.au)). Once the application is lodged, the Commonwealth Central Authority will forward the necessary forms to the relevant country so that an application may be made in that country for the return of the child.
- 8.7 In the event that a child is abducted (or is suspected to have been abducted) from Australia to another country which is not party to The Hague Convention, the lawyer should check whether Australia has a bilateral agreement with that country in relation to child abduction. This information is available on the Attorney-General's Department's website. If the country to which the child has been abducted is not party to The Hague Convention and there is no bilateral agreement in place, then proceedings must be privately initiated in the relevant country. This can be more complicated, time-consuming and expensive than the process under The Hague Convention or a bilateral agreement.
- 8.8 Financial assistance may be available under the Overseas Child Abduction Scheme, operated by the Legal Assistance Branch of the Commonwealth Attorney-General's Department. This may assist a parent of a child abducted from Australia to cover expenses related to legal representation overseas. It may also cover reasonable costs associated with securing the return of the child, for example, travel and accommodation costs for the parent in Australia to travel overseas and accompany the child back to Australia. Financial assistance in relation to legal costs may also be available from a state or territory legal aid body.
- 8.9 Lawyers should be aware that if a child is abducted from overseas into Australia, Central Authorities in Australia will assist in progressing a Hague application for return of the child but will not reimburse legal expenses where an applicant chooses to instruct a private lawyer.
- 8.10 The Family Law Section of the Law Council of Australia has published the *International Parental Child Abduction Legal Resource* which brings together a comprehensive collection of helpful and practical information to enable legal practitioners to assist their clients navigate all aspects of the issues which accompany international parental child abduction proceedings. The Resource is designed to be a valuable tool for any lawyer confronted with the challenges of advising appropriately in this often complex and always challenging area. The Resource is available from the Family Law Section website at [www.familylawsection.org.au/publications](http://www.familylawsection.org.au/publications).

## 9. REFERRAL TO CHILDREN'S CONTACT SERVICES

- 9.1 Children's Contact Services (CCSs) are child-focused services which promote safe and positive arrangements for children to spend time with their parents. As such, CCSs are a valuable resource to assist with these arrangements where a high level of parental conflict or other difficulties make self-management difficult or unreliable.
- 9.2 All Commonwealth funded CCSs have screening and assessment procedures, including face-to-face interviews with all adult parties prior to being accepted for use of the service. Clients should be made aware that they will be required to provide information regarding their circumstances and copies of any current parenting plans or orders. If they refuse to supply the required information the service may not be offered. For further information on referral to, and use of, CCSs see Appendix 1.

## 10. INJUNCTIONS

- 10.1 See the information on Injunctions in Part 10.

## 11. FAMILY REPORTS

- 11.1 A family report is a professional assessment from a behavioural science perspective, prepared for the purpose of assisting the court to make a decision about parenting issues. A family report may also assist a separating couple to resolve their parenting dispute before final determination. Family reports are obtained by a court order under s62G of the *Family Law Act*, and are prepared by a specially appointed family consultant.
- 11.2 Lawyers should be aware of the relevant criteria applied by the court when considering whether to make an order for the preparation of a family report, including the timing of such a report. These criteria should be borne in mind when advising a client whether to apply for a family report. The court may order a general report or a report covering specific issues of relevance to the proceedings.
- 11.3 When seeking an order for a family report, lawyers should consider what issues need to be addressed in the report. It is also important for lawyers to consider whether 'significant others' in relation to the child should be involved in the report writing process. In the context of particular cultural backgrounds these relationships may have special significance.
- 11.4 To assist the report-writing process, and make the process as efficient as possible, lawyers should ensure the family consultant has the client's correct contact details.
- 11.5 It is usual for the report writer to be called to give evidence and to be treated as a witness of the court. The court does not arrange to have family consultants available for cross-examination. Lawyers must advise the court if they wish to have the family consultant available for cross-examination. The lawyer should also advise the court if a decision is subsequently made that the family consultant will not be required for cross-examination.
- 11.6 Clients should be encouraged to cooperate with the family consultant and advised that failure to do so could prejudice their case. Clients should be made aware that what they say to the family consultant is not confidential.
- 11.7 Family reports are reports to the court. Separating couples will usually be given access to the report, but the court may impose conditions on this access. Lawyers should be very careful to note the restrictions on the release of the report before showing it to, or providing a copy of the report to, the client or any other person.
- 11.8 Clients should be encouraged to consider who might provide information relevant for the preparation of the report. There may also be a need to consider cultural issues, such as those relating to indigenous separating couples.
- 11.9 In some cases, a report by some other expert, such as a psychiatrist or psychologist, may be more appropriate than a family report due to the issues to be considered. (Note that in the Family Court, reference should be made to Chapter 15.5 of the Family Law Rules and in the Federal Circuit Court, to Division 15.2 of the *Federal Circuit Court Rules*). The comments above in relation to family reports are relevant to other experts reporting on parenting issues. Where there is to be another expert, then lawyers need to ensure that proper arrangements are in place for the payment of the expert's fees.
- 11.10 The courts publish brochures to explain the role of family report consultants, and what litigants may expect from the family report preparation process. Brochures written for children are also available on line and at the registries.

## 12. INDEPENDENT CHILDREN'S LAWYERS

- 12.1 Lawyers should become familiar with the role of the Independent Children's Lawyer and remember to serve court documents on the Independent Children's Lawyer (see guidelines on the National Legal Aid website [www.nationallegalaid.org](http://www.nationallegalaid.org)).
- 12.2 Lawyers should be aware of and, where appropriate, advise clients of the possibility of applying to have an Independent Children's Lawyer appointed by the court to represent the child or children separately in the proceedings. Lawyers should be familiar with and consider the criteria applied by the court (see *Re K (1994) FLC 92-461; 17 Fam LR 537*) and by the relevant legal aid body in considering such an appointment. In the event that legal aid funding is not granted, the client may have the option of funding their own Independent Children's Lawyer.
- 12.3 Where an Independent Children's Lawyer is appointed (either as a result of the client's application or otherwise), the lawyer should explain to clients the role of the Independent Children's Lawyer and the relationship that they can be expected to have with the child. Clients should be informed that any communication between the Independent Children's Lawyer and the client should be undertaken through the client's lawyer. Clients should also be informed that direct communications with the Independent Children's Lawyer are not privileged. Lawyers should explain to their clients that the Independent Children's Lawyer will need to communicate directly with an unrepresented party, and that the represented party should not feel disadvantaged by the fact that this occurs.
- 12.4 When an Independent Children's Lawyer is appointed, the lawyer should contact them to provide a summary of the issues and confirm the next court date.
- 12.5 Lawyers should be aware of the possibility that the relevant legal aid body responsible for funding the Independent Children's Lawyer may request that a party contribute towards their costs, and that the court has the power to order that the parties to the proceedings pay part or all of the Independent Children's Lawyer's costs.
- 12.6 Parents should be told that they have the right to oppose the appointment of an Independent Children's Lawyer.

## 13. CHILDREN'S VIEWS

- 13.1 Clients should be advised that the court will have regard to the ascertainable views of the child concerned, and consider them in light of that child's age and maturity. The child's views are normally made known to the court through a family report or evidence presented by the Independent Children's Lawyer. Clients should understand the role of the Independent Children's Lawyer.
- 13.2 When acting for one of the separating couple, lawyers should not interview children unless they have obtained leave of the court to interview a child for the purpose of preparing an affidavit. Lawyers should be aware that such leave is rarely granted and that making an application for leave may have adverse consequences for the client.
- 13.3 Lawyers should avoid conducting interviews in the presence of their client's children.

## 14. AFTER THE CONCLUSION OF PROCEEDINGS

- 14.1 Lawyers should consider with their clients and with the Independent Children's Lawyer (if there is one) how the child is to be told the outcome of proceedings, particularly when the court has made orders which are inconsistent with views expressed by the child.

- 14.2 Lawyers should advise the client of options, including the use of alternative dispute resolution techniques, that are available to the client where the other parent fails to comply with an agreement or court orders regarding parenting. Lawyers should explain to their clients the consequences of non-compliance with parenting orders made by the court.

## 15. MEDICAL PROCEDURES

- 15.1 Lawyers should be aware that there are special requirements with respect to certain medical procedures to be performed on children. In particular, in some circumstances the parents' consent is not sufficient and a court order approving the medical procedure should be obtained before the procedure is carried out. Guidelines and protocols for medical procedure applications can be found on the Family Court's website [www.familycourt.gov.au](http://www.familycourt.gov.au).

**1. INTRODUCTION**

- 1.1** All negotiations should be conducted in a manner designed to promote as good a continuing relationship as possible between the separating couple and with any children who are affected by the circumstances.
- 1.2** In respect of matters relating to financial issues, the principle of proportionality should be borne in mind at all times. It is undesirable for the legal costs involved in any case to be disproportionate to a separating couple's financial position.
- 1.3** Before starting any financial case for property settlement or spousal maintenance in the Family Court, a lawyer must comply, except in special circumstances, with pre-action procedures (see Part 1 at 10.2).
- 1.4** When advising a client who has been in a de facto relationship or there is a dispute arising from an alleged de facto relationship, lawyers should pay particular attention to whether or not that person falls within the jurisdiction of the *Family Law Act* or whether State or Territory laws apply (including equitable remedies).
- 1.5** The lawyer should ensure that there has been compliance with uniform costs disclosure requirements when first engaged, and at all other relevant times with any costs notification requirements imposed by the court or tribunal in which litigation is being conducted (see Part 3 Costs).
- 1.6** Most cost agreements setting out a lawyer's charges focus on charging for the time that it takes a lawyer to undertake work. Therefore, clients should be encouraged to organise their documents and questions in such a way as to make the most efficient use of the lawyer's time.
- 1.7** Before commencing a case in any court, consideration should always be given to engaging in dispute resolution, and the lawyer should consider assuming the role of adviser, guiding the client to an overall negotiated settlement if this is appropriate in the circumstances of the case. (See section on alternative dispute resolution at Part 2).
- 1.8** Separating couples should be encouraged by their lawyers to:
- read brochures published by the courts on pre-action obligations;
  - consider voluntary conciliation;
  - consider mediation or arbitration; and
  - consider convening an informal conference to negotiate in respect of all issues.
- 1.9** The Family Court's pre-action procedures require a lawyer to provide a list of all documents in a client's possession that might be relevant to an issue in dispute between the parties.
- 1.10** Before commencing a case in any court, consideration should be given to the option of pre-application disclosure of relevant documents and information to aid effective negotiations or mediation.
- 1.11** However, lawyers should also be aware of the risks of expenditure and delay which uncontrolled pre-trial procedures and protracted negotiations can create. Sometimes the prospect of impending legal proceedings imposes greater discipline and efficiencies on separating couples. Lawyers should advise clients in light of their client's financial resources. In all cases lawyers should ensure that clients are in a position to make an informed decision about the pathway to be followed.

**Correspondence**

- 1.12** No correspondence should be written without the client's specific or general instruction. Specific instructions should be obtained before any offers of settlement are communicated on behalf of a client.
- 1.13** The client should be given copies of all correspondence received by the lawyer, and the lawyer should encourage the client to retain a file of copies of all relevant documents.
- 1.14** The lawyer should encourage the client to adopt a conciliatory stance in the course of correspondence and the lawyer should use temperate language.
- 1.15** Lawyers writing to a self-represented party should recommend that the party seek independent legal advice.
- 1.16** See also Part 1 in relation to communications.

**2. PRE APPLICATION NEGOTIATIONS****Identifying issues**

- 2.1** As a priority, the lawyer should assist the client to identify the relevant issues for resolution.
- 2.2** The lawyer should encourage the client to provide full and frank disclosure of material facts, information and documents to enable proper negotiation to take place to settle the dispute.

**Disclosure**

- 2.3** Before proceedings commence lawyers should encourage parties to exchange sworn Financial Statements and Information from Trustees in relation to Superannuation Interests and complying with Rules of court concerning 'Financial Circumstances'.
- 2.4** Where a process of voluntary disclosure proves protracted or unfruitful, lawyers should consider issuing an application to take advantage of the formal disclosure procedure provided in the *Family Law Rules* and/or to seek specific orders for disclosure under the *Federal Circuit Court Rules*.
- 2.5** The client should understand the nature and significance of swearing/affirming a document and should also be warned of the consequences of swearing/affirming a document or providing information that is false, misleading or deficient. The same applies to a Statement of Truth.
- 2.6** Lawyers should advise clients of the potential adverse consequences of negotiating in cases where there is unsworn/non-affirmed material, or where there appears to have been no disclosure or incomplete disclosure.

**Expert evidence**

- 2.7** The guidance on experts and valuations relevant to this section is contained in Part 11 - Experts.

**Summary**

- 2.8** The aim of all pre-application negotiations must be to assist separating couples to resolve their differences promptly and as cost effectively as possible.

### 3. CONSENT ORDERS/FINANCIAL AGREEMENTS

- 3.1 The lawyer should ensure that consent orders provide a comprehensive record of the agreement between the separating couple. Clients should be aware that when the order is to be interpreted or enforced it will be interpreted on its face without looking at any underlying agreement which gave rise to the order. Therefore, if there is any deficiency in the drafting of the order, the client may suffer loss which may give rise to a negligence claim against the lawyer.
- 3.2 The lawyer should be aware of the taxation and stamp duty implications of a settlement and, if appropriate, advise the client to seek further advice as to the taxation implications of the settlement. The client should also be made aware that the lawyer is not fulfilling the role as a financial adviser.
- 3.3 The lawyer should explain to the client the nature and enforceability of any undertaking given in orders or agreements.
- 3.4 The lawyer should ensure that the client understands and accepts the provisions of any consent order and that the client signs each page of any consent order and any undertaking.
- 3.5 Financial agreements can be entered into before, during, or after a de facto relationship or marriage.
- 3.6 The lawyer should provide the required level and content of independent legal advice as required by the *Family Law Act* in relation to a financial agreement.
- 3.7 If a splitting superannuation order is sought or agreed to, then information should be obtained from the Trustee of the superannuation fund so that a valuation in accordance with the *Family Law (Superannuation) Regulations* can be completed. The Trustee must also be afforded procedural fairness in relation to the orders sought.
- 3.8 Lawyers may wish to advise their clients that spousal maintenance can be collected through the Child Support Agency (see Part 8) as an alternative to private collection.

### 4. CONSENT ORDERS

- 4.1 The lawyer should explain to the client the consequences of not properly completing the relevant information required by the Application for Consent Orders and explain the effect of setting aside of orders altering property interests.
- 4.2 When an Application for Consent Orders is prepared, the lawyer should ensure that all relevant parts of the document requiring provision of financial information are completed and checked by the client for accuracy. The lawyer has to give independent legal advice on the meaning and effect of the draft consent orders and explain the client's rights, entitlements and obligations. The lawyer should advise the client that failure to make full and frank disclosure at this stage may lead to subsequent litigation seeking to set aside the order made.

### 5. FINANCIAL AGREEMENTS

- 5.1 When advising a client in relation to entering into a financial agreement the lawyer should ensure that the relevant provisions of the Act are explained to the client.
- 5.2 The lawyer should also advise the client of the potential consequences of the client failing to make full and frank disclosure of their financial position.
- 5.3 It is good practice to record the advice in writing and have the client sign an acknowledgment of having received that advice.

- 5.4 The lawyer should ensure that the provisions of the *Family Law Act* have been complied with to ensure enforceability of the agreement.

- 5.5 The lawyer should explain to the client the options available for the recording and storage of the agreement in particular and whether the client requires a copy of that agreement to be retained.

### 6. INSTITUTING PROCEEDINGS

#### Instituting proceedings in financial matters

- 6.1 When instructed to commence proceedings, a lawyer should advise the client of the following:
  - whether it may be more desirable to continue negotiations without filing a court application;
  - whether to file the proceedings in the Family Court, the Federal Circuit Court or in a Local Court;
  - the possible outcome of the proceedings, based upon the information then available;
  - to provide proof of evidence before proceedings commence (this also applies to any other material witness or witnesses);
  - the likely nature of the evidence that the client may need to provide, including expert evidence and likely cost of obtaining such evidence;
  - the likely time frame involved in obtaining a date for the trial, the likely length of the trial and the likely time frame in the event of either party lodging a Notice of Appeal;
  - the requirement of full and frank disclosure and the penalties involved in non-disclosure;
  - the possibility that judgment may not be delivered on the completion of the trial and may be reserved, and the consequences of any such reservation of judgment;
  - the obligation of the client to attend financial mediation conferences, court ordered alternative dispute resolution, interim and some procedural hearings, (unless excused) and the trial;
  - the relevance of offers of settlement to future possible cost orders;
  - the relevant provisions of the *Family Law Act*, *Family Law Regulations*, associated statute law, and the relevant court rules that may apply;
  - whether any third party is potentially affected by proceedings and whether that party ought to be served or involved in the proceedings;
  - the need to attend, give evidence and be cross examined in the event of a trial; and
  - issues relating to enforcement.
- 6.2 In the Family Court, clients should be told that before a hearing or trial they will be required to give a written undertaking to the court that they have fulfilled the client's duty to give full and frank disclosure of all information relevant to an issue in the case (Rule 13.15 *Family Law Rules 2004*). Breach of this undertaking may mean the client is guilty of contempt of court.

### 7. EXPERTS

- 7.1 See Part 11 for information on Experts.

## 8. FIRST COURT DAY

### Family Court

- 8.1 The lawyer should advise the client in advance of the date of any Case Assessment Conference and request that the client attend, unless there is a special reason why that may not be appropriate. The Case Assessment Conference provides separating couples with an opportunity to settle their dispute after documents have been filed.
- 8.2 The client should attend the Case Assessment Conference even if that causes personal inconvenience. The client must be ready to give instructions, particularly if settlement discussions take place, and offers are made to settle the whole proceeding.
- 8.3 The lawyer should ensure, where possible, compliance with the relevant Rules in relation to the Case Assessment Conference and:
- identify for the court the issues in dispute between the separating couple and the issues which require resolution by the court;
  - provide appropriate draft directions for the progress of the matter;
  - certify whether the costs directions have been complied with; and
  - report to the client as to the outcome of the Case Assessment Conference and provide a copy of any orders made.
- 8.4 The lawyer should provide the client with copies of documents filed by the other party in respect of the Case Assessment Conference.

### Federal Circuit Court

- 8.5 The Federal Circuit Court conducts a system known as the docket system. This means that on the first court date each case will be allocated to a particular judge's docket. The *Federal Circuit Court Rules* require that when applications are filed, a supporting affidavit and, when relevant, a financial statement, must be filed simultaneously.
- 8.6 Lawyers should advise their clients that they should come to court on the first court date. Because the court has some details of the evidence that underpins the applications, the docket judge will expect the lawyer to be able to discuss the realistic parameters of the matter, provide a draft balance sheet, and the separating couple will be expected to try and resolve their matter.
- 8.7 If the matter does not resolve, the case will receive directions for mediation, or the allocation of counselling and/or conciliation conferences. The lawyer should therefore be able to address:
- the style of alternative dispute resolution process most appropriate for the separating couple;
  - whether a conciliation conference should be ordered or dispensed with;
  - how many witnesses are to be called and the likely duration of the hearing;
  - the need for orders concerning discovery and for specific questions;
  - if counsel is to be briefed, counsel's available dates; and
  - whether the trustee of eligible superannuation funds has been given notice of any application for a splitting order and/or flagging order.

## 9. COSTS

- 9.1 See Part 3 on Costs.

### 1. CHILD SUPPORT

- 1.1 Lawyers can refer to the Child Support Guide issued by the Department of Social Security.<sup>13</sup> The Guide has been designed as a web publication (HTML) and is not available in a single electronic file or in paper format.
- 1.2 Lawyers should ensure that clients understand that child support is not, at first instance, a matter to be determined by the court, but is governed by a statutory formula laid down in the *Child Support (Assessment) Act 1989* (Cth). If applicable, lawyers can assist a client to prepare material for an internal review and any subsequent objection or Administrative Appeals Tribunal review. Lawyers should be aware that an application to the court for departure from the statutory formula can only be made in some limited circumstances.
- 1.3 In appropriate cases, clients can be told to contact the Child Support Agency (Department of Human Services) for guidance on their entitlements and obligations as soon as possible.
- 1.4 Some matters may involve complex issues. Lawyers may consider accessing the CSA Solicitor's Hotline for advice. The national Solicitor's Hotline numbers are:
  - Australian cases 1800 004 351;
  - International cases 1800 180 272.
- 1.5 Legal Aid Commissions may also be able to provide legal advice and assistance with child support matters. This service is available to people that pay child support and those that are receiving or seeking child support.

### 2. CHILD SUPPORT AGREEMENTS

- 2.1 Lawyers should consider, in appropriate cases, advising clients to enter into child support agreements and, if appropriate, advise regarding the procedure for acceptance by the Child Support Agency. Lawyers should also be aware of any family payment (namely, Centrelink benefits) implications.
- 2.2 Lawyers should advise clients of the difference between binding and limited child support agreements. If a binding child support agreement is to be entered into, lawyers should ensure that they provide the advice required to their client, as set out in the solicitor's certificate provisions. It is good practice to confirm that advice in writing.
- 2.3 The current legal position (2016) is that it is very difficult to successfully apply to vary or discharge a binding child support agreement. Accordingly, lawyers should carefully advise clients of the legal hurdles to later applying to set aside a binding child support agreement. Simply put, a subsequent change of circumstances of the payer or the payee is unlikely to be a sufficient ground to set aside a binding child support agreement.
- 2.4 Lawyers should therefore consider whether a limited child support agreement will meet the needs of the client (either the payer or the payee).

### 3. CHILD MAINTENANCE

- 3.1 Nearly all children are covered by the provisions of the *Child Support (Assessment) Act 1989*. Those children that are not covered by this Act are covered by the *Family Law Act*. Most usual child maintenance applications under the *Family Law Act* are made for children whose parents do not fall within the *Child Support (Assessment) Act* (for instance the paying parent is a resident of a non-reciprocating jurisdiction) or for children over the age of 18 who are undertaking tertiary education or suffering from a disability. These applications are dealt with on the basis of the children's needs and the parents' capacity to pay.
- 3.2 One of the most common situations that arises is the responsibility to pay (and receive) child support for a child over 18. This is dealt with pursuant to s66L of the *Family Law Act*. An application can be made by the carer of the child or the child himself/herself.
- 3.3 In such applications, the formula assessment applicable under the *Child Support (Assessment) Act* does not apply, although the amount which would have been payable under the formula can be taken into account by a court in deciding such an application.

<sup>13</sup> <http://guides.dss.gov.au/child-support-guide>

# PART 9

## Family Violence

### 1. WHAT IS FAMILY VIOLENCE?

1.1 The term ‘abuse’ is defined, for the purposes of Part VII of the *Family Law Act 1975* (Cth), in s4(1) of the Act, as follows:

**Abuse** in relation to a child, means:

- an assault, including a sexual assault, of the child;
- a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person;
- causing the child to suffer serious psychological harm, including when that harm is caused by the child being subjected to, or exposed to, family violence; and/or
- serious neglect of the child.

The term **family violence** is defined in s4AB(1) of the Act as meaning violent, threatening or other behaviour by a person that coerces or controls a member of the person’s family or causes the family member to be fearful. Examples of behaviour that might constitute family violence are set out in s4AB(2) and include:

- an assault;
- a sexual assault or other sexually abusive behaviour;
- stalking;
- repeated derogatory taunts;
- intentionally damaging or destroying property;
- intentionally causing death or injury to an animal;
- unreasonably denying a family member the financial autonomy they would otherwise have had;
- unreasonably withholding financial support needed to meet the reasonable living expenses of the family or child, at a time when the family member is entirely or predominantly dependent of that person for financial support;
- preventing a family member from making or keeping connections with family, friends or culture; and/or
- unlawfully depriving a family member their liberty.

The term **member of the person’s family** is defined in s4(1AB) and includes persons related by blood, marriage or who are living together in a de facto relationship.

The term **a child is exposed to family violence** is also defined in s4AB(3) as being the child seeing or hearing family violence or otherwise experiencing the effects of family violence. Section 4AB(4) sets out a number of examples of situations where a child might be exposed to family violence such as:

- overhearing threats of death or personal injury by one member of the child’s family to another;
- seeing or hearing an assault of a member of the child’s family by another member of the child’s family;
- comforting or providing assistance to a member of the child’s family who has been assaulted by another member of the child’s family;
- cleaning up a site after a member of the child’s family has intentionally damaged property of another member of the child’s family; or
- being present when police or ambulance officers attend an incident involving the assault of a member of the child’s family by another member of the child’s family.

1.2 ‘Family violence’ and ‘abuse’, as defined, are relevant to assessing the child’s best interests in applications under Part VII of the *Family Law Act* (see ss60CC(2)(b) of the primary considerations in determining best interests and ss60CC(3)(j) and (k) of the secondary considerations). When considering the primary considerations in s60CC(2), the court is to give greater weight to the considerations in s60CC(2)(b), being the need to protect a child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

1.3 Family violence may be a single act or a number of acts forming a pattern of behaviour, even though some or all of these acts when viewed in isolation may appear to be minor or trivial.

1.4 Family violence or child abuse rebut the presumption of equal shared parental responsibility when making parenting orders (see s61DA(2)(a) and (b)) if there are reasonable grounds for believing that a parent of a child (or a person who lives with a parent of a child) has engaged in abuse of the child or family violence.

1.5 Family violence or child abuse, or the risk of family violence or child abuse, can be grounds for finding that a person is not required to attend Family Dispute Resolution before the issuing of parenting proceedings.

### 2. BEING PREPARED FOR FAMILY VIOLENCE

2.1 Family violence may be relevant in a number of ways including:

- the way in which the case is handled in terms of negotiations—including issues such as whether parties should be kept separate or attend meetings together;
- the sorts of legal remedies the client may seek, for example, injunctions or protection orders, sole use and occupation orders, supervision of ‘time with’ parenting orders, property settlement orders; and
- the relevant documents that may need to be filed such as a Notice of Risk and copies of all relevant state protection orders.

2.2 The role of lawyers is to:

- i. recognise that family violence is a serious problem;
- ii. screen all clients for a history of family violence;
- iii. be sensitive to different needs and experiences of clients from different backgrounds and cultures;
- iv. provide the client with an opportunity to talk about violence issues if they wish;
- v. not be judgmental;
- vi. have information about other sources of help and support available within the local area, preferably in the form of pamphlets that the client can take, and keep such information up to date; and
- vii. consider whether the client should obtain a family violence protection order (terminology varies in the different states and territories) to discourage any violence.

2.3 Even where family violence does not emerge as an issue at the initial interview, the possibility of violence should be kept under review at all times. Many forms of family violence are hidden by clients, may not be openly discussed by clients or may not be recognised by clients as being relevant.

- 2.4 Lawyers should be conscious of the possibility that clients (both victims and perpetrators) may be reluctant to divulge a history of abuse or violence. While lawyers must not ‘put words into the client’s mouth’, they should develop skills that will help them to facilitate a client speaking openly about family violence. Lawyers should be on the lookout for instructions that do not make sense or appear to be contradictory. Some acts or abuse by a perpetrator upon a victim may be highly significant to a case, but may be seen by the victim as humiliating, degrading or embarrassing, or by a perpetrator as shameful. Lawyers should develop techniques and attend courses if necessary, that will equip them to develop the trust of their clients and facilitate open discussion about family violence.

### 3. CLIENT SAFETY

- 3.1 Safety of the client victim needs to be a foremost consideration. As soon as family violence is revealed as an issue, lawyers should consider the safety of clients and any children and, in appropriate cases, consider early referral to a specialist service. The following should be considered:
- lawyers should explain their duty of confidentiality to their clients, and that this duty gives the clients the opportunity to speak openly without fear of disclosure. However, it is very important to explain clearly the limits of that confidentiality, particularly in relation to the court’s powers to order disclosure of information about the whereabouts of a child. It should also be made clear that the duty of confidentiality does not extend to information about the commission of a crime, including child abduction, or about harm or the threat of harm to a child (see Part 6 – Children – section 6 for further discussion);
  - when clients are in hiding from their partners, lawyers should discuss with them the possible risk that their whereabouts may be disclosed once proceedings are issued; and
  - lawyers need to consider carefully whether an injunction is appropriate in such circumstances.
- 3.2 In appropriate cases, lawyers should consider ways in which a client’s location can be kept confidential and the client’s safety enhanced, such as:
- asking the court for leave to withhold the client’s addresses from documentation and when giving oral testimony;
  - constant vigilance about the contents of documents;
  - vigilance about the posting of letters and documents to an agreed safe address; and
  - the court’s powers in relation to disclosure of the location of a child.
- 3.3 Note that under the Information Privacy Principles set out in the *Privacy Act 1988* (Cth) there are strict rules about the disclosure of personal information, such as the whereabouts of a party, held in Commonwealth records.
- 3.4 In some cases, lawyers also need to take other steps to ensure the safety of their clients, for example, by:
- making notes of which telephone numbers it is safe to ring;
  - ensuring that clients’ names on files are not visible to casual observers, for example, in court, court premises or other offices; and
  - ensuring that all staff in the office are aware of these protocols.

### 4. LEAVING HOME

- 4.1 If clients are still living with violent partners, lawyers need to discuss whether clients need to leave the house for their safety and the safety of any children of the relationship.

- 4.2 If so, or if clients are considering leaving the family home in any event, temporarily or permanently, it is important to discuss the implications of this action and the effect it may have on the children, including financial aspects.
- 4.3 Consideration should be given to the tactical advantage of moving out immediately or remaining in the property, bearing in mind any potential property adjustment claim at a later stage. However, safety of clients and children is always the first priority.
- 4.4 Lawyers should also discuss with clients the possibility of taking with them irreplaceable and important items such as photographs, legal documents and personal items of monetary or sentimental value. Clients may need to remove some of these items before leaving the home themselves. Again, personal safety is the priority.
- 4.5 Lawyers should discuss the possibility of clients returning home with the police to collect belongings if the police are willing or able to assist. Specific orders for this purpose may be available under state and territory legislation.
- 4.6 Lawyers should advise clients that if they leave their children with their partners, they must not assume the children will be returned to them automatically by the court.

### 5. USE OF STATE OR TERRITORY FAMILY VIOLENCE PROCEEDINGS

- 5.1 Legislation in all states and territories provides for the immediate protection of victims of family abuse, usually by means of protection orders (terminology varies). Lawyers should check whether there are violence protection orders in place.
- 5.2 Protection orders are intended to confer immediate protection on a client and should not be used to obtain an advantage in Family Court or Federal Circuit Court proceedings.
- 5.3 Section 60CC(3)(k) of the Family Law Act provides that in considering the best interests of a child the court must consider any relevant inferences that can be drawn from a family violence order. Lawyers should be aware that the existence of a family violence order is not, in itself, evidence that family violence has occurred.
- 5.4 Lawyers should consider advising clients as to the use of orders relating to the occupation of the home, and should consider the relative merits of state and territory legislation and the relevant provisions of the *Family Law Act*.

### 6. COMPILING A RECORD OF EVIDENCE

- 6.1 Lawyers should discuss with clients the need to protect existing evidence of violence or harassment and the need to think about gathering evidence in the future. In considering the following possible courses of action, lawyers will need to be aware of the client’s circumstances and in particular whether the client is still living with the perpetrator. Possible steps may include:
- urging clients to visit their GPs to have a record made of any injuries;
  - advising clients to obtain photographs of any injuries immediately after any violent episode (preferably with some evidence of the date on which the photographs were taken);
  - asking clients for the names and addresses of any witnesses to the violence or harassment and taking statements from them or asking the client to obtain written statements from them; and
  - encouraging clients to keep a diary or record of events which has been contemporaneously signed and dated.

## 7. OTHER PROCEEDINGS AND NEGOTIATIONS

- 7.1 Where family violence is an issue, great care should be taken to ensure that the client's safety is not compromised by meetings arranged by third parties (for example, in Legal Aid conferencing, counselling or mediation) and that clients are not pressured into face-to-face meetings with their ex-partners for the purpose of 'door of the court' negotiations. Safety issues should be raised with relevant officers.
- 7.2 Any safety issues within the confines of the court building should be discussed with court staff in advance and not left until the day proceedings are to commence.
- 7.3 Lawyers should investigate, in appropriate cases, the option of using separate court entrances or exits well in advance of the hearing date. Where this service is available this option should be raised with clients.

The court may also be able to arrange for the client to be escorted to and from the car park. The court should also be informed of any difficulties that may perhaps occur upon arrival at court and asked that, if possible, separate rooms be made available for a conference so that the client does not have face-to-face contact with the other party before entering the court.

- 7.4 Lawyers should be aware of relevant Family Court, Federal Circuit Court, or Legal Aid protocols relating to family violence.

# PART 10

## Injunctions

### 1. INTRODUCTION

- 1.1 Injunctions are orders of the court which are regarded very seriously and which are not made lightly.
- 1.2 The object of an interlocutory injunction is to preserve matters pending the trial of issues in dispute. A perpetual injunction is based on a final determination of the rights of the parties and is intended permanently to prevent the infringement of those rights. In essence an injunction can serve either of two functions:
  - they can be a form of relief in their own right (e.g. a non-molestation order); or
  - they can be a secondary form of relief (i.e. used to aid the relief sought).
- 1.3 Interim injunctions will only be granted to remedy an imminent problem. The court needs to be satisfied that harm may be done if the injunction is not granted. If there is an alternative to the application for an injunction, it should be considered.
- 1.4 Applications for injunctions must be supported by evidence. For example, a party who fears being assaulted may be successful in obtaining an injunction if there is evidence of previous violence. Fear on the part of one of the separating couple that something may happen will not suffice, if it is not based on other evidence of inappropriate behaviour. However, applications under state or territory law may be possible.
- 1.5 The principle of 'clean hands' has particular relevance where the court is being asked to invoke its discretionary jurisdiction.<sup>14</sup>

### 2. INJUNCTIONS FOR THE PERSONAL PROTECTION OF A PARTY OR CHILD

- 2.1 When a client is or has been the victim of family violence, lawyers need to ensure that the process of obtaining legal protection is as supportive, effective and quick as possible.
- 2.2 Lawyers need to consider whether a non-molestation order would be a more appropriate alternative to an order for exclusion from the matrimonial home. The Family Court, Federal Circuit Court, and the courts of summary jurisdiction are reluctant to exclude a party from the matrimonial home. The court will only grant such orders with caution, as it is a very serious matter to turn a person out of their home.
- 2.3 Once a lawyer has determined that their client requires an order for exclusive occupancy or personal protection, they must decide whether to proceed under state or territory law or the *Family Law Act*. If proceedings are instituted under state or territory law, the client is precluded from seeking protection under Commonwealth law in respect of the same matter unless the state or territory proceedings have lapsed or have been dismissed (see s114AB, *Family Law Act*). That said, there is no bar to a client who is seeking, or has obtained, a *Family Law Act* injunction to apply for a protection order under state or territory law. The prohibition under s114AB only extends to the same party using both procedures and then only when the state or territory procedure has been used first.
- 2.4 Whilst there are avenues available to clients under the *Family Law Act*, the process for seeking a protection order under state and territory family violence legislation is generally quicker and cheaper than an application for an injunction under the *Family Law Act*.
- 2.5 If clients have taken some time to seek help about a violent incident, the lawyer must give particularly careful consideration as to whether it is appropriate to apply for an ex parte order. The seriousness of a threat should not be dismissed simply because of

delay, as any delay may not indicate the level of fear which clients may feel. Many victims of family violence take some time to report the violence. However, where possible, lawyers should make a clear legal judgment about whether the court is likely to grant an ex parte injunction and advise the client accordingly.

- 2.6 In cases where clients fear for their safety and are particularly anxious, consideration should be given to how clients arrive at and leave court, and where they are to wait at or in the court.

### 3. APPLICATIONS WITHOUT NOTICE

- 3.1 An application for an injunction may be made by one party without notice to the other (an 'ex parte' application). In such a case, the applicant's lawyer is under a duty to inform the court of any matters within the lawyer's knowledge which are not protected by legal professional privilege and which would support an argument against the granting of an injunction or limit the terms of the injunction adversely to his or her client.
- 3.2 If an injunction is appropriate, an ex parte application should be discussed. The issues to consider are:
  - whether the client may be in danger, whether valuable property is about to be dissipated, or whether vital evidence is about to be destroyed or removed if proceedings are not instituted on an ex parte basis;
  - the seriousness of the threat to the client, property, or evidence, including whether it is urgent and imminent;
  - the likelihood of the court granting an ex parte order, which it will only do if there is a real and urgent need to protect a person or property;
  - whether proceedings ex parte may escalate the danger to the client; and
  - the court's preference for alternative measures, such as permission to bring the application on short notice.
- 3.3 In some cases, involving property, a court may require the applicant to give an undertaking as to damages. The lawyer should seek specific instructions on whether or not the client is prepared to give such an undertaking (see paragraph 8.4).
- 3.4 Lawyers acting for the Applicant should ensure that the application is filed with an affidavit. For proceedings in the Family Court, r5.12 *Family Law Rules 2004* sets out the issues which the affidavit should cover.
- 3.5 Lawyers should be aware of the procedure for making after-hours contact with the various courts. This procedure should only be followed when a matter is judged by the lawyer to be exceptionally urgent. Lawyers should remember that in urgent circumstances the court is placing a lot of faith in the word of the lawyer, and that faith must not be abused.
- 3.6 Lawyers should advise their client that if an injunction without notice is issued, the respondent will be given an opportunity to be heard at the earliest opportunity.

### 4. LENGTH OF ORDER

- 4.1 Lawyers should give careful consideration to the proper duration of any order to ensure that clients have protection over a reasonable time.
- 4.2 Lawyers should be aware that where an injunction concerns the protection of a child or parent of a child, the court may grant the injunction unconditionally or on whatever terms the court considers appropriate.

<sup>14</sup>This requires the person seeking an injunction to have acted properly. Should the person be guilty of any impropriety, in the legal sense, in a matter relevant to the injunction, the court may refuse the injunction sought.

## 5. POWERS OF ARREST

- 5.1 Lawyers should bear in mind that a person may be arrested if a police officer has reasonable grounds to believe they have breached an injunction.

## 6. EVIDENCE FROM THE COMMONWEALTH DEPARTMENT OF FAMILIES, HOUSING, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS AND OTHER AGENCIES

- 6.1 Lawyers should be aware that special conditions attach to Commonwealth records, and some state records. The records of the Child Support Agency, Centrelink, the Health Insurance Commission, the Australian Taxation Office, and various state departments are protected by legislation from production on subpoena, and their officers are similarly protected from giving evidence. The *Family Law Act* makes a specific exception to those rules when a location order is sought.

## 7. AFTER THE HEARING

- 7.1 Lawyers should advise clients of the order that has been made. Lawyers should ensure that clients understand the meaning and effect of the order and the consequences of breaching it.

## 8. INJUNCTIONS IN RELATION TO PROPERTY

- 8.1 Interim injunctions are intended to protect the assets until such time as the court can hear the substantive issues. Before making an application for an injunction restraining the disposal of property, lawyers should consider whether the injunction is necessary or whether there is sufficient other property to satisfy any order which their client may seek. The purpose of the injunction is to enable the order to be satisfied, not to tie up the property of the respondent unnecessarily. To that end, lawyers should be apprised of the Full Court of the Family Court decisions of *Waugh & Waugh* (2000) FLC 93-052 and *Norton & Locke* [2013] Fam CAFC 202.
- 8.2 If third parties are to be affected by the operation of the injunction, lawyers should exercise great caution. It should be remembered that any person who is to be affected by an order of the court should be served with an application and supporting material and given a chance to be heard. Where third parties are involved in business transactions that affect a claim or may defeat it, their position needs to be taken into the lawyer's consideration.
- 8.3 If third parties are to be involved in the proceedings, the length, complexity and costs of the proceedings will almost certainly increase. Lawyers should carefully explain these issues to clients and obtain from them specific instructions if they wish to involve third parties. Clients should be told that an unsuccessful application against a third party will almost certainly result in a costs order against the person who brought the application.
- 8.4 Lawyers should take careful instructions in relation to the undertaking for damages that are expected to be given. An undertaking for damages is a promise that, if the applicant ultimately fails to get substantive relief sought, they will pay compensation to the person who is restrained from dealing with its assets or exercising its rights. The lawyer should consider an application to the court for the client to be relieved of the undertaking in appropriate cases.

### 1. EXPERTS IN THE FAMILY COURT

- 1.1 Lawyers should be familiar with Part 15.5 – Expert Evidence – of the *Family Law Rules 2004* ('FLR 2004').
- 1.2 Part 15.5 does not apply to family consultants employed by the Family Court. Nor does Part 15.5 apply to a treating expert (unless that expert is appointed to provide an opinion for the case).
- 1.3 All instructions to an expert must be in writing and the report must be in writing.
- 1.4 The expert must be provided with a copy of Part 15.5 and have signed an affidavit saying that the expert has read and understood it.
- 1.5 The rules set out in detail what has to be contained in the expert's report (r15.62 FLR 2004)
- 1.6 The Family Court adopts the basic premise that an expert's function is to assist the court.
- 1.7 Lawyers should agree on a joint letter of instruction to the single expert.
- 1.8 Rule 15.51(2) prohibits a party from calling their own witness unless the court gives permission to do so.
- 1.9 In a case with two competing experts (where leave has been granted), lawyers should be familiar with the way a conference between those experts should be conducted (r15.69).
- 1.10 Lawyers should understand and make their client aware that:
  - no instructions should be given to the expert as to the opinion they might express; and
  - no directions should be given to the expert as to the agreement they might reach with the other party's expert.

### 2. EXPERTS IN THE FEDERAL CIRCUIT COURT

- 2.1 The Federal Circuit Court has not adopted Part 15.5 *Family Law Rules*. The Federal Circuit Court has its own rules dealing with evidence from expert witnesses, including that the expert should be guided by the Federal Court practice direction guidelines for expert witnesses (see Division 15.2 of the *Federal Circuit Court Rules*).

### 3. EXPERTS IN CHILDREN'S MATTERS

- 3.1 Lawyers should explain to clients the role of the expert in children's matters.
- 3.2 It has always been normal to employ single experts in children's matters.
- 3.3 Expert evidence is given in children's cases by:
  - a family consultant employed by the Family Courts who writes a family report (see Part 6 – Children – section 11 on Family reports);
  - a single expert ordered by the court; and
  - a single expert agreed upon by the parties.
- 3.4 In the Family Court, legal professional privilege is abolished for reports in parenting cases (r15.55). So, for example, a report obtained critiquing an adverse single expert report has to be disclosed to the other party.

- 3.5 Judges involved in the management of a case, particularly relating to children, and specifically those under the Magellan project,<sup>15</sup> may insist on settling the terms of reference for the expert.

### 4. EXPERTS IN FINANCIAL MATTERS

- 4.1 The use of single experts in financial matters, by consent, has always been common for non-commercial real estate, motor vehicles and household furniture.
- 4.2 When attempting to resolve a property matter, a separating couple should, wherever appropriate, consider agreeing to an assessment of the value of an asset rather than requiring sworn or formal valuation. The cost of formal valuation should be compared with the likely value of the asset.
- 4.3 The requirements of written instructions, reading and understanding Part 15.5 and formal report, do not apply to a market appraisal or opinion as to value of property obtained for a case conference or conciliation conference.

<sup>15</sup>The Magellan project is a collaborative arrangement to manage residence and contact disputes in the Family Court of Australia where child abuse allegations are involved.

# PART 12

## Trials and Appeals

### 1. PREPARATION FOR TRIAL

- 1.1 The lawyer should advise the client of any relevant provisions of the *Family Law Act*, Rules and Regulations, and any other relevant legislation applicable in relation to the filing of relevant documentation including:
  - affidavits for the client, witnesses and expert evidence;
  - any amended application;
  - an updated Financial Statement filed by the client, with relevant schedules containing additional financial information where the matter is complex;
  - the particular court's requirements, such as a list of documents to be relied upon, summary of argument, list of objections, reply to objections, list of documents intended to be tendered and (if ordered) a joint Case Summary Document and any particular directions that have been made; and
  - in children's matters, the principles for conducting child related proceedings in Division 12A of the *Family Law Act*.
- 1.2 Lawyers should advise clients on the need (if any) for witnesses, and should discourage clients from a proliferation of witnesses who add nothing to the case.
- 1.3 Lawyers should avoid drafting or expressing subjective opinions. It is important that clients understand the language used in their affidavits. They should ensure that statements drafted reflect as closely as possible the client's own words, particularly in words understood by the client. The client should be reminded that they are to give a truthful account of events and warned of the consequences of swearing a document that is false, misleading or deceptive. Language difficulties should be taken into account.
- 1.4 Lawyers should ensure that only relevant and necessary documents are annexed or exhibited to affidavit material. It is not usually necessary to do so to simply corroborate the evidence of the deponent. It is important to be aware of the rules applicable in the particular court to the volume of material which is permitted to be filed and the manner in which documents are to be annexed or exhibited. See for example Division 2.1 *Federal Circuit Court Rules 2001*.
- 1.5 The lawyer should ensure that, where possible, the client meets the deadline for the filing and service of affidavits and other relevant documentation required for the trial, and should explain to the client the possible consequences of failing to comply with these requirements. In the Family Court, any step taken out of time is of no effect unless relief is granted (rs11.02; 11.03 *Family Law Rules 2004*).
- 1.6 The lawyer should ensure that the client is provided with copies of all of the documents filed by either side.
- 1.7 Any application to vacate the trial should be made as soon as possible.

#### Briefing Counsel

- 1.8 In circumstances where counsel has been briefed to appear at the trial, the lawyer should:
  - ensure that counsel is briefed in sufficient time to allow conferences to be conducted for the preparation of the trial;
  - ensure that the financial arrangements for briefing counsel have been discussed with the client, and proper arrangements made in respect of counsel's fees; and
  - determine whether counsel proposes to claim a cancellation or reservation fee if the matter settles and/or is not reached.
- 1.9 The lawyer should ensure that counsel is provided with that material necessary to prepare for and appear at the trial, rather than the entirety of the lawyer's file.

#### Preparing the client

- 1.10 As most clients are extremely anxious leading up to and on the day of court events, especially hearings, lawyers should ensure that they have conferred with the client beforehand and that the client knows what to expect on their arrival at court. Clients should be provided with a basic introduction to court etiquette, including how to address the Bench, knowledge of where to sit and when they are required to stand and be seated. Clients should be reminded that they must tell the court the truth and be warned of the consequences of providing information which is false, misleading or deficient. In children's matters in the Family Court, lawyers should ensure that clients know that the trial may commence at a preliminary hearing and that once sworn, anything they say is evidence in the proceedings.
- 1.11 Before the trial, the lawyer should ensure that the client is made aware of:
  - the layout of the court;
  - the role each court official has to play in the trial proceedings;
  - the manner in which the proceedings are conducted;
  - the likely time frame for a judgment to be delivered; and
  - the likely time frame and costs involved in the event of an appeal, and the likely time frame in the event of enforcement proceedings becoming necessary.
- 1.12 The lawyer should provide the client with copies of all documents filed for the trial including the current orders sought against the client. The lawyer should ensure that the client reads all affidavits in the proceedings a few days before the trial, including ones that they have sworn themselves, so that the client has refreshed their memory and is ready for cross-examination.

### 2. TRIAL

- 2.1 In relation to the conduct of a trial in the Family Court lawyers should be familiar with Chapter 16 *Family Law Rules 2004* and any practice directions which apply to the particular Registry.
- 2.2 In relation to proceedings in the Federal Circuit Court, lawyers are directed to the *Federal Circuit Court Rules* (available on [www.federalcircuitcourt.gov.au](http://www.federalcircuitcourt.gov.au)).
- 2.3 Clients should also be informed of the difference between an oath and an affirmation, and what options they have if they become upset while in the witness box. A witness should be informed that if they have not heard a question put to them properly, or if they do not understand the question put to them, the witness should ask for the question to be repeated, or put in a way that is easier for them to understand.
- 2.4 Lawyers should be aware that if the opponent is a self-represented litigant, the court will generally follow the conventional conduct of proceedings, with some allowances made according to the level of experience and/or understanding of the self-represented litigant. Lawyers should adopt an accommodating and courteous approach when dealing with self-represented litigants, although they are not obliged to assist the self-represented litigant run their case. See the guidelines relating to self-represented litigants in Part 4.

### 3. SETTLEMENT AT TRIAL

- 3.1 Lawyers should provide information to clients regarding the best and worst possible positions concerning the acceptance of an offer of settlement, and advise on which course of action may be most advantageous to the client. If a client does not accept this advice lawyers should seek further instructions from the client in writing. Lawyers should be aware that clients commonly complain of undue pressure to settle.

- 3.2 Any settlement should address all issues, including costs and any taxation implications of the settlement (see Part 7 – Property/ Spousal Maintenance).

## 4. APPEALS

### Appeals from decisions by a single judge of the Family Court or Federal Circuit Court

- 4.1 Lawyers should inform their clients about the time limits in relation to filing a Notice of Appeal (and any cross-appeal) and that the costs of the other party may have to be paid by the client if they withdraw a Notice of Appeal or are unsuccessful. Clients should also be informed that if they succeed on an appeal then they are unlikely to receive an order for costs, rather it is most common to receive a limited allowance from the government towards their costs.
- 4.2 Clients and self-represented litigants often misunderstand the nature and function of this type of appeal. Lawyers should ensure that their clients understand that these appeals can only be based on limited grounds and do not involve a rehearing of the original issues.
- 4.3 Client expectations about the process involved in this type of appeal are often unrealistic. The most common misconception is that an appeal court will believe their evidence when the trial judge did not. Similarly, differences of opinion on how much weight is to be given to any particular factor will not usually be a basis for upsetting a first instance judgment. Lawyers should inform their clients that in relation to this type of appeal:
- filing an appeal will not stop the effect of the decision complained about. A separate application to stay the effect of the decision is required;
  - the exercise of discretion by a judge will not be interfered with unless the outcome is outside the generous limits allowed to that discretion or the decision is plainly (objectively) wrong;
  - an appeal court will not necessarily overturn the decision under appeal, even if the individual judges comprising the Appeal Court would have come to a different decision had they heard the case at first instance;
  - it is difficult to overturn findings of fact or credibility made by a trial judge;
  - fresh evidence cannot be admitted on an appeal unless the Full Court gives leave. Leave will not normally be given if the evidence was available at trial and there is no explanation for why it was not called;
  - appeals are expensive to mount because a transcript of the trial needs to be purchased by an appellant, who must also prepare an appeal book; and
  - the client will play little or no part in the process as the whole hearing is conducted on legal argument based upon transcripts of the earlier proceedings and evidence given at those proceedings.
- 4.4 The possible outcomes of this type of appeal are also often misunderstood. The most common misconception is that an appeal court will change or reverse the first instance decision. It is more common for the Appeal Court to send the whole case back to a different judge to hear it again, particularly where there has been a lengthy period of time between the first decision and the appeal decision. This can result in an order of the Appeal Court which is less advantageous to the client than the order made in the first instance. In this way, even a win on an appeal can become a loss for the client.
- 4.5 An appeal from a single judge of the Family Court will be heard by the Full Court of the Family Court, comprising three judges, two of whom must be members of the Appeal Division of the Court. An appeal from a Federal Circuit Court judge will also be heard by the Full Court

of the Family Court but in some cases the Chief Justice will direct that the Appeal be heard by a single judge of the Family Court.

- 4.6 If the decision is of a provisional nature, an appeal may only be commenced with the leave of the Full Court (other than a decision in relation to a child welfare matter where leave is not required). Some other decisions, such as child support decisions, also require leave.

### Appeals from decision made by a state Magistrates Court, a Judicial Registrar or Registrar of the Family Court

- 4.7 Decisions made by a state or territory magistrates court, a judicial registrar or registrar of the Family Court can be reviewed by a single judge of the Family Court. Because the review or appeal is by way of a rehearing, the matter is heard again as if the previous order had not been made. Evidence which was relied upon at the earlier hearing is before the court conducting the rehearing. Additional evidence may be filed for the review.

### Appeals from an arbitrator appointed under the Family Law Act

- 4.8 Awards by an arbitrator can be reviewed by a single judge of the Family Court only on a question of law.

### Appeals from decisions of the AAT

- 4.9 The *Administrative Appeals Tribunal Act 1975* (the AAT Act) provides that a person may appeal a child support decision of the AAT, to the Federal Court of Australia, or the Federal Circuit Court of Australia.
- 4.10 A parent can appeal to the Federal Court of Australia on a question of law in relation to an AAT first review of an objection decision (AAT Act s44(1A)) or an AAT second review of an AAT decision (AAT Act s44(1)). Where the AAT first review decision did not involve an AAT presidential member, a person may choose to appeal the first review decision to either the Federal Court of Australia or the Federal Circuit Court (AAT Act s44AAA). The AAT can also refer a question of law arising in a proceeding to the Federal Court of Australia (AAT Act s45). In certain circumstances a parent can also apply directly to a court for a change to their child support assessment because of special circumstances (CSA Act s116).<sup>16</sup>

### Appeals from decision of the Full Court of the Family Court

- 4.11 An appeal against a decision of a Full Court is only possible to the High Court of Australia where the High Court grants special leave to do so.

<sup>16</sup>See Child Support Guide - <http://guides.dss.gov.au/child-support-guide/4/3/6>.

## Notes on Children's Contact Services

Children's Contact Services, both federally funded and unfunded, are currently available at many locations throughout Australia. However, they are by no means available everywhere and some, particularly in metropolitan areas, may have waiting lists.

Most Children's Contact Services offer both facilitated changeovers and supervised visits. Facilitated changeovers enable the child to be transferred from the care of one parent to the other with reduced stress or potential for conflict. Children's Contact Services procedures are designed so that parents do not have to meet each other and may include separate entries and exits for parents as well as staggered arrival and departure times.

All government funded Children's Contact Services offer on-site supervised visits, to allow for safe and appropriate interaction between the child and the visiting parent under the supervision of trained staff. Visits may be for relatively limited duration (up to two hours) depending on the child's needs and may be offered weekly, although many services are only able to offer visits fortnightly. The level of supervision required for visits ranges from 'low vigilance' to 'high vigilance', depending on the family's needs, and is determined by consultation between the parents and the Children's Contact Service staff, and by reference to Court orders. When high vigilance visits are required, the visiting parent will be supervised at all times. Visits with lower levels of vigilance may be called 'supported visits'. Some Children's Contact Services may offer off-site supervision. Supervisors keep notes of all visits and facilitated changeovers.

Indicators for the use of a Children's Contact Service and the corresponding benefits include:

- where there is a history of family violence, the Children's Contact Service can provide greater safety for the vulnerable parent at the time of delivery and collection of children when the other parent is to spend time with the children;
- where the parent with whom the children live has a negative attitude to the children spending time with the other parent, the Children's Contact Service can assist both parents to develop greater confidence that the arrangements for the children to spend time with the other parent will be beneficial for the children;
- where the use of a third party, such as a relative to assist with arrangements for the children to spend time with a parent may be problematic, the Children's Contact Service can provide a neutral environment which may be more acceptable to parties;
- where there has been a period during which a child has spent no time with a parent, or other factors have made time with a parent difficult, the Children's Contact Service can enable the child to develop and/or maintain a quality relationship with that parent; and
- where there is a history of contravention of orders or inability by the parents to maintain regular arrangements for a child to spend time with a parent, the Children's Contact Service can help to stabilise those arrangements.

Indicators for supervised time with a parent (as opposed to facilitated changeovers) can include:

- a history of family violence, especially where there have been criminal proceedings or an injunction or a family/apprehended violence protection order;
- the child appears anxious about spending time with a parent. Here the Children's Contact Service may assist the child as described below;
- parental mental health problems or other issues which may lead to inappropriate interaction with the child; and
- a lack of parenting experience and/or parental communication skills. Here the Children's Contact Service can help the parent with whom the child does not live learn basic parenting skills and appropriate interaction with their child.

Before making a referral, lawyers need to contact their local Children's Contact Service so that they can inform their clients regarding:

- referral protocols: most Children's Contact Services will require agreement from the separating couple before taking on a referral. Most Children's Contact Services will require each party to complete an intake process before visits or changeovers can occur;
- opening hours: all funded Children's Contact Services operate at weekends and some may be open for limited hours during the week;
- availability of service: some services may have waiting lists and/or be limited in the times they can offer. Most government funded contact centres have significant delays in access and limited availability for supervision; and
- cost to the client: all services charge a fee for service. Fees are kept to a minimum and many services will take client income into account when assessing fees.

The use of a Children's Contact Service should be seen as a time-limited option, particularly for supervised visiting. Some services can offer only a limited number of visits.

In most cases Children's Contact Services will actively help parents to progress from supervised to unsupervised time with their child. Court Orders, Parenting Plans and other agreements which set out a planned progression to unsupervised time with a child are very helpful. Agreements may include an initial period of short supervised visits, which can then be extended, subject to the Children's Contact Service recommending that the child may benefit from longer visits. The next step might be a period combining supervised and unsupervised time with the parent on each occasion, i.e. commencing with a short supervised visit at the centre followed by an unsupervised visit when the parent takes the child out. Eventually, time with the parent may be completely unsupervised. At every stage the Children's Contact Service may report on the family's progress to lawyers or to the court (see below).

All Children's Contact Services have screening and assessment procedures and these include face-to-face interviews with all adult parties before accepting them for the service. Because of this, clients need to understand that any draft agreements or other proposals they have made may not be agreed to by the service provider. Lawyers should inform their clients that they will be required to provide information regarding their circumstances and copies of current family law agreements, parenting plans or court orders. If they refuse to supply the required information the service may not be offered.

It is vital that the Children's Contact Service is able to obtain full background details, including details of any violent or abusive behaviour, in order to decide whether it can accommodate the family and what resources will be needed, such as dedicated staff to supervise individual visits.

Children's Contact Services reserve the right to refuse a referral on the grounds that it poses an unacceptable risk to a child, their staff or other service users.

Adult clients will be expected to sign an agreement setting out the terms and conditions for using the Children's Contact Services. These will include:

- appropriate child-focused conduct during service use;
- safety and risk management procedures;
- grounds for withdrawal of the service;
- confidentiality, reporting practices and punctuality.

Grounds for suspension or withdrawal of service may include:

- inappropriate conduct by a parent during service use;
- angry or threatening behaviour;
- behaviour which appears to be affected by substance abuse; or
- a child's reluctance or refusal to spend time with a parent (see below).

All funded Children's Contact Services have comprehensive safety and risk management procedures in place. However, no guarantee can be given that a child will not be abducted or not returned. It is vital that services are given information if there are any such risks.

All funded Children's Contact Services operate with child-focused practices. Lawyers for the parent with whom the child lives should discuss with their clients the need to prepare the child for the visit. Most Children's Contact Services will assist the parent with this preparation. Many services will expect the child to have orientation visits at the contact centre prior to service use in order to:

- familiarise the child with the centre, staff and procedures;
- learn how the child feels about the proposed time with the other parent, so that the required level of support and/or vigilance can be determined; and
- help the child to develop a sense of security and trust in the staff.

At the same time, children will be encouraged to develop confidence and positive expectations about the proposed time with the other parent.

Most services consider the child as their primary client and will not force the child to spend time with a parent where the child refuses or seems very reluctant or anxious. The offer of service use may be withdrawn until the child shows that they are more positive about spending time with the other parent.

Children's Contact Services will only allow other family members to visit, collect, or deliver children by prior agreement. Lawyers should make any such agreement clear to the service.

If it is not possible to access an appropriate Children's Contact Service, face-to-face time with a parent should be carefully reviewed, particularly where children are likely to have been traumatised by family violence or abuse. Other forms of communication might be suggested, such as letters, telephone calls and the use of audio or video tapes. In serious cases consideration should be given as to whether it is appropriate to seek an order that a child spend no time with the other parent.

Lawyers should also advise their clients that they should inform contact services if they no longer need to use the service and of any other change in their circumstances.

Most funded Children's Contact Services will provide information and reports to Independent Children's Lawyers. Many funded Children's Contact Services may also provide reports on non-privileged information at the request of other parties. These reports are likely to be made available to all parties. The non-confidential parts of a Children's Contact Service file may be subpoenaed and workers may be subpoenaed to give evidence in court. Other parts of what some Children's Contact Services do may be protected by s10D of the *Family Law Act*. It should not be assumed that a Children's Contact Service will provide information on affidavit. Most contact services will treat information provided by clients and children with a high level of confidentiality and will only release this information where the child is believed to be at risk of harm or when the information is requested by an Independent Children's Lawyer.

The Australian Children's Contact Service Association provides a list of waiting times to access children's contact services around Australia. They also provide an online directory which holds information about government funded, NGO, and private contact services - [www.accsa.org.au](http://www.accsa.org.au).

**The Family Courts have issued guidelines to assist with the referral process to Children's Contact Services. These guidelines are available on the websites of the Family Court and Federal Circuit Court.<sup>17</sup>**

<sup>17</sup> Family Court of Australia - [www.familycourt.gov.au](http://www.familycourt.gov.au).

Federal Circuit Court of Australia - [www.federalcircuitcourt.gov.au](http://www.federalcircuitcourt.gov.au).

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