



Précis Paper

Discussions on Family Law: Initiating Applications and Interim Applications

This presentation discusses the fundamentals of how to commence proceedings in family law matters and when it is appropriate to make an interim application.

Discussion Includes

- Initiating applications versus interim applications
- Jurisdiction of the Family Court and the Federal Circuit Court
- Requirements for starting proceedings
- Service of initiating application
- Responding to an initiating application
- Considerations in interim applications
- Case management

Précis Paper

Discussions on Family Law: Initiating Applications and Interim Applications

1. In this edition of BenchTV, Giles Stapleton (Barrister, 9 Selborne Chambers, Sydney) and Tijana Petkovic (Director, Blanchfield Nicholls Partners, Sydney) give a thorough overview of how to initiate proceedings in family law matters and important considerations in interim applications.

Initiating Applications and Interim Applications

2. An initiating application is an application under the *Family Law Act 1975* (Cth) for relief pursuant to various sections of that Act that grant relief where a relationship has broken down, including parenting orders, maintenance and property orders. The initiating application is similar to a statement of claim or originating process in other civil proceedings, and is the actual form that a party will use to commence a claim.
3. In contrast, an interim application is similar to a motion, and is an application to move the court to make decisions on various issues before the proceeding is finally determined. Interim applications are a way of administering the way that the litigation is run and ensuring that the parties have access to the court's powers. They may be, for example, for disclosure orders, an order restraining a party from doing a certain thing, striking out a claim, joining a party to the proceedings or for interim parenting orders.
4. Interim parenting applications are among the more common type of interim application, particularly in circumstances where parties may have to wait several years until their claim is finally determined. Interim applications may also be used in relation to land where one party needs to use the land prior to the final determination of the proceedings.

Jurisdiction of the Family Court and the Federal Circuit Court

5. Both married couples and de facto couples can access the family law scheme set out in the *Family Law Act 1975*. The Act gives jurisdiction to both the Family Court and the Federal Circuit Court to determine family law claims. It is very rare that a family law matter can be resolved in the District or Supreme Court.

6. Mr Stapleton describes the Federal Circuit Court as the court that is more for “mass consumption”, which deals with general property and maintenance orders and general children’s matters. If the matter is complex and involves significant issues between the parties, particularly in relation to children or misconduct by one of the parents, it is more likely to be a matter that should be dealt with in the Family Court. Some matters are more suitable for the Family Court, including applications for special medical procedures, issues relating to the Hague Convention, annulment of marriage, and declarations of validity of marriage or divorce. The Magellan Program in the Family Court was developed for cases where there are serious allegations of child abuse and sexual abuse, and involves specialist judges and fast tracked proceedings. Another consideration for practitioners in choosing which court to file in is the length of the list.
7. There are some sections of the *Family Law Act* in which relief is only available in the Family Court. One way to ascertain this from reading the statute is to consider whether the provision refers to the “Court” (meaning the Family Court) as opposed to the “court”. Mr Stapleton also advises practitioners to check the Family Court website which makes clear which matters it deals with, as the provisions of the *Family Law Act* are often quite technical.
8. Which court will be appropriate will also depend upon the complexity of the case. The scale of the portfolio of properties or the nature of the dispute between the parties are relevant considerations. Moreover, the length of the final hearing is also important, as the Federal Circuit Court will deal with simple, day-to-day matters that can be dealt with in a hearing lasting 2-3 days, whereas where hearings will require more time, applications should be filed in the Family Court.
9. Matters may be transferred between the courts if issues arise during the course of the proceedings that make the other court a more appropriate forum. The Family Court has introduced a first return date before a Registrar, who will determine whether the matter should stay in the Family Court or be transferred to the Federal Circuit Court.
10. If there is a dispute about whether the Family Court or the Federal Circuit Court has jurisdiction to hear the dispute, for example where there is property overseas, a preliminary hearing will be held to determine jurisdiction.

11. Finally, it is important to note that both the Family Court and the Federal Circuit Court have jurisdiction to deal with other matters, such as matters relating to the *Corporations Act 2001* (Cth), if that part of the dispute relates to the family law dispute.

Commencing Proceedings in Family Law Matters

12. The first step in commencing proceedings is to file an initiating application. In the application, the party commencing the proceedings must plead out in a written form the sections of the Act pursuant to which relief is sought. This is also an opportunity to specify the orders sought. The initiating application must also be accompanied by an affidavit in support which allows the Registry to understand the nature of the case and the issues in play. In the Family Court, however, an affidavit is not always necessary at the start of proceedings, unless the party is seeking interim relief.
13. The parties must also file a s 60I certificate under s 60I of the *Family Law Act*, which is a certificate from a family dispute resolution practitioner stating that the parties have attempted to resolve the dispute prior to initiating court proceedings. There are certain exceptions to this requirement, including where there are urgent circumstances or serious allegations of violence. This provision forces parties to at least consider whether a resolution can be reached prior to commencing proceedings. It is also important to continue discussions between the parties and attend mediation, even after proceedings have been started, as the legal fees involved in litigation can be considerable.
14. Fees for filing in the Family Court range from about \$160-\$1200, and in the Federal Circuit Court range from around \$330-660. There are some grounds upon which a party can be exempt from paying filing fees, however the threshold is quite high. Once filed, the court will provide the parties with the first return date to attend court.
15. The initiating application must be served on the other party. If a solicitor is acting and has instructions to accept service, the initiating application can be served on the solicitor. If there is no solicitor acting, the application must be personally served on the other party. Service is not required where urgent relief or certain injunctive relief is sought, or if there are concerns that the other party may dissipate the matrimonial assets.
16. If urgent interim relief is sought and an order is not made without notice to the other side, it is likely that the order will only be made for a very short period of time, and the court will then

bring the parties back before it within 1-2 days. It is important to note that if you have moved the Court to make an order, and it can prejudice the other party, you can be required to make undertakings to pay damages to the other party if the claim is ultimately not as compelling as initially thought. Moreover, moving the court in the absence of the other party is extremely serious.

17. Mr Stapleton and Ms Petkovic advised that if a person is served with an initiating application, they should seek urgent legal advice. They then need to file a response to the initiating application, either consenting to the orders sought or disputing them, and indicating the orders that they wish the court to make.

Considerations in Interim Applications

18. There is a section in the initiating application in which the party can seek interim orders. The other party can also seek interim orders. The purpose of interim orders is to regularise the relationship between the parties on certain issues before the final hearing, for example by putting in place interim parenting orders or allowing one party access to a bank account.
19. The interim application is usually filed with an affidavit in support. Mr Stapleton advised practitioners to put on as much evidence as possible at this stage, and to make a note when there is more evidence to come, or if there are deficiencies where, for example, disclosure or discovery has not been forthcoming from the other side.
20. There is no cross-examination of witnesses in interim applications, and the court will not usually hear evidence and make findings about credibility. Ms Petkovic therefore noted the importance of filing as much evidence as possible in support of the application, in circumstances where the court will make a determination on the papers. She cautioned that interim applications often fail because sufficient evidence was not before the court to warrant the interim relief.
21. Although urgent circumstances, such as mistreatment of children, may give rise to a legitimate need to file multiple interim applications, parties are encouraged not to file multiple interim applications as this practice will delay the final hearing of their matter, as well as delaying the hearing of other matters before the court. Practitioners are advised to try to list all of the interim relief they will need in the initial interim application.

22. Mr Stapleton also noted that the Registrars of the Federal Circuit Court will consider what is being sought in an interim application, and a party will be prevented from promoting a property case at the expense of the children. That is, a case in the Federal Circuit Court may be delayed until the parenting orders are resolved.

BIOGRAPHY

Giles Stapleton

Barrister, 9 Selborne Chambers, Sydney

Giles Stapleton was admitted as a solicitor in 2005 before being called to the NSW Bar in 2012. Prior to coming to the Bar, Giles held executive positions in public companies in the Australian property funds management industry. His primary practice is in property ownership, development, investment management, financing arrangements, corporate/family asset structures, and directors' duties.

Tijana Petkovic

Director, Blanchfield Nicholls Partners, Sydney

Tijana has worked in family law for 10 years and was appointed Director of Blanchfield Nicholls Partners in July 2016. Her experience includes property matters involving significant asset pools, complex business structures and spousal maintenance claims, as well as child-related matters including abuse and overseas relocation. Tijana is a member of the Family Law Section of the Law Council of Australia and the Women Lawyers Association of NSW, and is on the committee of Women's Nexus.

BIBLIOGRAPHY

Legislation

Family Law Act 1975 (Cth)