FLPA Twilight Series

Preparing and conducting a family law case – for new practitioners

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Introduction

This paper deals with litigation. However, I am of the firm view that settled outcomes are the best outcomes for clients, both monetarily and emotionally. Particularly in the case of settled parenting outcomes, such outcomes are more likely to succeed and benefit the children in the long term. Irrespective of the dispute, all realistic prospects of settlement should firstly be exhausted before thoughts turn to litigation. Litigation, except in limited circumstances, should be an act of last resort.

Hopefully, litigation can be avoided by implementing the thoughts and ideas in this paper in your settlement negotiations.

In this paper I focus on preparing and conducting a family law case in the Federal Circuit Court of Australia. Similar principles apply in the Family Court of Australia.

Correct and Realistic Advice

Preparing an Application in either the Federal Circuit Court or the Family Court begins at the first interview. Successful outcomes begin in managing, often, the client's unrealistic expectations of outcomes in court.

It is not surprising that many clients come with unrealistic expectations. Our clients are emotional and often traumatized by separation. They view their own interests in tunnel vision and are often blinded to sensible reason. Their idea of the court process is confined to US court drama shows. For many clients, their first exposure or interest in the law coincides with separation. Before coming to see you, they have often trawled through countless websites of general family law information and taken "advice" from family, friends and other

separated people. They come to you overloaded with often conflicting information, having little or no relevance to their specific fact scenario or disputed issues.

Be careful of opinions that you provide a client at the first interview. It will be these opinions that a client will remember. They will hold them against you when the outcome does not accord with your initial opinions. It will be almost impossible to have a client accept any significant change to your initial opinions as the matter evolves.

If you are not confident in giving an opinion at first interview, do not give one. Clients do not object if told that further information is required, or particularly, in complex matters, you would like to give further thought and consideration to the matter before giving an opinion.

When you provide an opinion, remember the discretionary nature of the law that we practise. If it is a property case, your advice should contain a range of percentages. If a parenting case, proffer a range of possible outcomes. Irrespective of the area, always include the worst possible outcomes.

Professionally, we owe it to our clients to provide accurate and correct opinions and advice. We are providing advice to clients on the most important things in their lives; their children and property. Litigating about these matters is emotional and stressful enough, without the eventual realisation that the parameters of outcomes that you provided were unrealistic or plainly wrong.

If a client leaves because they do not like your advice take comfort that you have given the client correct advice. This is better than a client hearing it for the first time from a Judge at final hearing.

Very few clients know or appreciate the process of determining a matter in either the Federal Circuit Court or the Family Court. Explain the Court process to your client. Clients understandably want to progress the court process in leaps and bounds. Stamina and patience are the virtues in litigation. Explaining the court process step by step assist clients understand and perhaps avoid the disappointment and frustration that clients often experience about the court process. Dispel the expectation that a Judge at the first court event will finally determine their matter. Make certain that clients are clear that they will not get everything they want and for some clients it is not the forum for “compensation claims” or vindication that separation was not their fault.

The Docket System

The Federal Magistrates Court (as it then was) pioneered the docket system. It continues in the Federal Circuit Court. Upon the filing of an Initiating Application, the Application is assigned to a Judge. The Judge assigned to the Application will be the Judge who will determine interim issues, make procedural orders and if necessary, finally determine the matter.

The docket system can be used effectively by knowing, understanding and complying with the way that the individual Judges operate and their differing expectations, views, and demands. I recommend that you know and understand each Judge's expectations and attend Court so prepared.

I advocate coming to Court with draft Orders. In the Federal Court of Australia it is mandatory. It is good practice to develop in the Federal Circuit Court. It provides a better opportunity for agreement to be reached before the court hearing and provides the Judge with assistance and a framework in making orders, particularly during busy duty days.

For the younger practitioners, knowledge of how each Judge operates is obtained from appearing (and often learning the hard way; lessons you never forget). I have learnt a great deal over the years sitting and observing in the back of courtrooms, waiting for my matter to be called. Time permitting it is a practice that I would recommend to any young practitioner. Further, judgments are published on the Court's web page. It is beneficial to research judgments on matters you will be asking the Court to determine, particularly if a similar fact scenario was previously determined by the Judge who will determine your matter.

Preparation for Interim Hearing – Affidavits

Affidavits are a pivotal document. It is your client's evidence in chief in written form and supports the Orders that you seek and forms the basis of your submissions to the Court. Above all it should be persuasive.

Before Affidavits are sworn or affirmed, it is vital to test the evidence that your client or a witness intends to swear or affirm in the Affidavit. History often takes on its own perspective and clients are often entrenched in their historical recollections and prone to grandiosity.

In property cases, whatever the client asserts, make certain, as far as possible, the client has a document to corroborate each assertion. Prepare a chronology of events. It is at this time that you often find that, for example, instructions that an inheritance used to purchase a

property was actually received well after the property was purchased. J.P. Bryson QC (as he then was) in an article, "*How to Draft an Affidavit*" said that most litigation is solved when the relevant facts are ascertained and stated in chronological order. Do not leave testing your instructions to the honed skills of the Judge. It will often lead to embarrassment and an unhappy client.

Also test and question grandiosity and exaggeration. If it is your client's case that your client worked 70 hours a week, you are unlikely to maintain for long an assertion that your client was also the primary carer of the 5 children during the marriage. Beware the client who asserts that their spouse "*did nothing"* during (25 years) of marriage. A Judge will never accept such a speculative and general assertion.

The material in the Affidavit should be presented in a manner which is easy to read, logical, and most importantly relevant. This is achieved by ensuring that each Affidavit:

1. Complies with the Federal Circuit Court Rules in relation to form;

2. Contains only relevant information;

3. Assembles the evidence in short sentences and short paragraphs and is delineated by headings;

4. Is a collation of the facts in an orderly, or preferably, chronological sequence;

5. Is based on the law of the subject and the law of evidence;

6. Is in a language which is simple and consistent with the style and language level of the witness; and

7. Is admissible.

The Affidavit not only tells your client's story, but also can affect your client's credibility. In this regard it is important that the Affidavit:

1. Does not exaggerate or contain bold assertions;

2. Gives credit were credit is due;

3. Contains any damaging facts. It is better to disclose them and try and explain them. It will sound a great deal worse if heard for the first time in your opponent's affidavit(s);

4. Avoids referring to the other party as the Applicant or Respondent. Your client may call their former partner lots of names, but it is certain that it is not the "Applicant" or "Respondent". Consider using their first name. It will go some way to show that your client is objective enough to refer to their former partner by their name.

5. Avoids starting a sentence, "I say that …". What else would the deponent be doing?

6. If it contains allegations, make certain that such allegations are essential and relevant to an issue in dispute between the parties. If it is made to simply abuse or prejudice the other party, it will do nothing for your client's credibility;

7. Not speculate. For example, in the absence of evidence to support serious allegation of abuse of a child, clients are supposed to actively encourage the other parent's participation in the children's lives. They are supposed to support the objects in Part VII of the Act. If a client insists on speculation, they should be warned that if their attitude towards their spouse is not seen to be balanced, this could jeopardize the orders they are seeking; and

8. Should not contain argument. The proper place for argument is in submissions.

In drafting your Affidavit, have regard to the orders being sought. The Affidavit should only include those matters, which are relevant and necessary to support the orders your client seeks from the Court. Additionally, evidence is often properly adduced about the "big ticket" items but often evidence is omitted to support the more minor orders being sought, for example, changeovers. If you are seeking an order, for example, that changeovers be at a Contact Centre, make certain that your evidence supports such an order. For Applications seeking changeovers "half way", it is recommended that you adduce evidence of distances involved and evidence of your client's financial circumstances including the payment (or lack thereof) of child support.

In preparing Affidavits in response, avoid drafting Affidavits that say:

1. In deny paragraphs 1, 5, 7, 19 and 21 of the Affidavit of ….

because:

(a) It requires the Judge to find and refer to the first Affidavit to cross reference and understand the issues being placed in dispute, which is time consuming and annoying; and

(b) While putting an issue in dispute, it does little in advancing your client's case.

Instead, in preparing an Affidavit in response, it is more advantageous and clearer to structure the Affidavit:

1. I have read Sandra's Affidavit filed 15 July 2013.

2. In that Affidavit, I do not agree with Sandra's assertions:

(a) That I turned up drunk to collect the children on 25 September. I did not drink any alcohol that day before collecting the children. I had been at work all day. Straight after finishing work, I drove directly to Sandra's house to collect the children.

(b) …

(c) …

A Judge at interim hearing cannot determine facts that are in dispute. The time afforded for the hearing at an interim application is limited too. Accordingly, there is little benefit in only preparing an Affidavit which places every fact asserted by your client's spouse in dispute.

The risk being is that the only order that the Judge will make at Interim Hearing is the preparation of a Family Report or seek other expert or independent evidence, due to being starved of any evidence to confidently make any of the interim orders sought by your client.

For example, you may be faced with evidence from your client's spouse that your client is incapable of caring for the children for more than a night a fortnight or simply incapable of caring for them at all. Simply denying it provides little assistance. Evidence of the time your client spent with the children, while your client's spouse held that supposed view is crucial. Any evidence that your client's spouse did not have any hesitation in allowing your client to

care for the children for a week when the spouse went on holiday is an essential inclusion. Such evidence is both difficult to deny and places doubt in the veracity of the spouse's belief.

Further, it is sometimes forgotten amidst the allegations and counter allegations of the parties that Applications for parenting orders are about children. If your client is seeking to increase time to equal time or substantial and significant time, evidence of how your client will implement such a regime is vital. But go further, it will only benefit your case if the Judge views a picture of a parent who really knows their child. For example, for younger children, evidence how your client settles the child if they become upset, the child's favourite book or subject that they enjoy reading (or being read), their favourite television shows or DVDs would be helpful. For older children, evidence of how they are progressing at school, their favourite position at soccer or netball, their best friend's name and their favourite musical artist perhaps would be beneficial. If your client is close to and knows their child, it is unlikely to be denied or meaningfully opposed. If may also provide the Judge with the confidence to make an order on an interim basis without the absolute need to wait for expert evidence.

The Interim Hearing

Effective advocacy is 98% perspiration and 2% inspiration. Preparation, understanding of the competing proposals and knowledge of your material and that of your opponent is vital.

Prior to the first mention in Applications for only final property settlement orders:

1. Extract after comparing your material with your opponents:

    (a) The agreed facts. Concede the obvious;

    (b) Items of property, the value of which is in dispute; and

    (c) Assertions of the other party that your client does not agree with or does not know about. If a document or class of document is required to prove or resolve the issue, be ready to argue for such direction.

2. Prepare your own draft directions.

This will ensure that all necessary directions are made to provide the best possible opportunity for the matter to be resolved at a Conciliation Conference or mediation. By the time of a Conciliation Conference or mediation, the only issues that should be left in dispute is the percentage division and what each party is to receive or retain to make up their percentage division.

For Interim Hearings, on a duty day, the Judge, apart from your matter, may have more than 20 other matters to determine.

To assist, prepare a written outline of submissions. The outline should contain:

1. A list of documents that you will be relying on. Judges cannot read material until you tell them what you want them to ready or rely on;

2. Agreed facts and orders. Do not mis-state them and again, concede the obvious;

3. A short chronology of events in the matter;

4. A summary of your submissions. Start with your best points. Deal with weaknesses in your case, rather than ignoring or "glossing" over them. After proper consideration of a weakness, you may be able to convince the Judge that such weakness is not fatal to your case. It will be amplified if you leave it to your opponent to exploit; and

5. Relate each submission to the evidence. You can only make submissions about matters that are in evidence.

Prepare full written submissions if the hearing is to involve an argument about the law. In doing so, ensure that the submissions contain the correct statement of the relevant law. If that entails drawing the Judge's attention to authorities that may be against the proposition for which you contend, you must do it. It is important not to over simplify propositions of law to the extent that it becomes misleading.

From a practitioner's point of view, the act of preparing an outline of submissions assists in preparing and ordering your case and providing the appropriate framework for oral submissions.

At Interim Hearing, be prepared to be able to summarize your client's case orally in no more than say 10 sentences. Your summary should be strictly taken from the evidence and not contain any oral evidence. In many lists, the Judge has a Callover to ensure the efficient dealing of matters on the duty day. It is at this point that a precise, concise summary of your client's case is requested and has to be provided.

There are not too many passive Judges who will have the time or the inclination to listen to you expelling your prepared and florid submissions. Expect the inquisitorial Judge. Never presume that the Judge has read your material. Anticipate and be prepared to respond accurately and concisely to the questions asked of you and never mislead. If you have not done so, the Judge will quickly identify the disputed issues and expect that you can confirm that they are issues in dispute and you can take them to your client's evidence to assist them in understanding your client's position with respect to the issues.

All great advocates map a path to the Orders sought by their client and invite the Judge to walk along it, with the evidence and the law being the sign posts. It is to be remembered that a Judge at interim hearing cannot determine issues in dispute. Therefore avoid relying on disputed issues. They do not provide any useful sign posts and the Judge's walk with you will be a short one. Try and rely on the other side's material to your advantage. Being able to rely on your opponent's facts (with which you agree) or omissions in the other side's material, will avoid the difficulty of disputed issues to advance your case.

Family lawyers are good at waiting outside the court room. Use this time constructively to negotiate with your opponent. With some opponents, this is unfortunately impossible. Nevertheless, the best outcomes are settled outcomes. During settlement negotiations the parties still retain control over the outcome. If settlement is not possible, use the time to confine the issues in dispute and be able to clearly list them. Once the issues in dispute are agreed, use the time to ensure that you can relate your client's evidence to support your position on each issue.

The Final Hearing

Family Law solicitors do more advocacy than their colleagues in other practice areas. Some conduct their own trials, or final hearings. Most, I think, wisely, brief Counsel.

The advantages of briefing Counsel are that they provide a new and objective view of the matter, enrich and often add to the presentation of your client's case and assist in (hopefully) reaffirming to the client the realistic outcomes of final hearing. Appearing at

final hearings, and particularly the art of cross-examination, is like playing golf; effectiveness comes with regular practise. Final hearings, in my view, should be left to those who practise regularly.

In a paper, "*Advocacy in the Federal Magistrates Court of Australia*", the late Federal Magistrate Slack noted, "*There is an adage known to Barristers that says 90 out of every 100 trials will be determined by their facts, three will be determined by fine advocacy and 7 will be determined by poor advocacy".*

You can choose your Counsel and by doing so hopefully avoid the 7 out of 100 result. But it is entirely up to us to brief Counsel with material that is relevant and admissible. After all, in 90 out of 100 cases, Counsel is only as good as the material that they are given. In more complex matters, or for younger practitioners, Counsel will be relieved to receive an initial brief to advise on evidence or settle trial affidavits rather than be given a trial brief that provides little assistance in them obtaining the desired outcomes.

Trial Affidavits

The matters that I have referred to above in interim hearings apply equally to trial Affidavits. In the Federal Circuit Court (subject to a specific direction or order to the contrary), parties can rely on earlier affidavits filed in the matter at the final hearing. Often then, it is a matter of updating your client's evidence from earlier affidavits for the final hearing. Accordingly, all affidavits should be prepared with a view that they may be ultimately relied upon (or cross examined on) at final hearings.

Unlike interim hearings, a final hearing is the time for the Judge to decide the facts that are in dispute. Accordingly, the affidavits relied upon at final hearing must contain the evidence to support each fact needed for your client's case to succeed. The evidence must also comply with the provisions of the Evidence Act (Cth).

It is not the intention of this paper to provide a comprehensive review on the law of evidence. Some aspects are essential to the presentation of an admissible affidavit. Not to do so, may result in your client hearing the words heard by the Wife in *Sheehan v Sheehan (1983) FLC 91-352* when Hogan J referring to the two Affidavits filed by the Wife:

> "*In my view the portion of that material which should be excised from the Affidavits is so great that if the matters to be disposed of with any regard to convenience, it is*

clearly right that the whole of those Affidavits should be removed from the file rather than seeking, by expunging the offending material, to put the Affidavits in order".

Above all, the evidence must be relevant to the issues to be determined. To determine relevance, firstly the issues required for your client's case to succeed must be determined. Then, secondly, to be relevant evidence, the evidence adduced should only be that evidence that could rationally affect (directly or indirectly) those issues.

Relevant evidence can still be determined to be inadmissible if relevant evidence contravenes the rules on opinion evidence and hearsay evidence.

Opinion evidence given by a person not qualified to give the opinion is not evidence. A lay witness can give admissible evidence of what they have observed by the exercise of their sensory powers. As soon as that lay witness expresses an opinion or draws a conclusion based upon such observations, it, if successfully objected to, ceases to be evidence.

Hearsay evidence is evidence of a previous representation made by another person. That evidence, if successfully objected to, and an exception does not apply, ceases to be evidence if it is adduced to prove the existence of a fact intended to be asserted by the representation.

Hearsay evidence is admissible if:

(a) The maker of the previous representation who has personal knowledge of the fact based on what they saw, heard or perceived gives evidence;

(b) The hearsay evidence is being relied upon for purposes other than the fact to be asserted;

(c) The person who made the previous representation is not available;

(d) That to call the person who made the representation would cause undue expense, delay or be impracticable; or

(e) The previous representation is contained in a business record.

Under s.67 *Evidence Act (Cth)* reasonable notice in writing is to be given to each party of your intention to adduce evidence in (c) or (d).

With the introduction of s.69ZT *Family Law Act*, compliance with the rules of evidence in parenting cases is perhaps less crucial. S.69ZT *Family Law Act* provides that in parenting cases the rules of evidence do not apply unless the Judge is satisfied that the circumstances are exceptional. What constitutes exceptional circumstances, I do not know. One would consider that, if the possible prejudice that may be caused by admitting evidence outweighs its probative value, it will be excluded. In the meantime, the Judge may give weight to otherwise inadmissible evidence as they Judge thinks fit.

Orders sought

The Orders sought at the final hearing must then be drawn as accurately and as comprehensively as possible.

In parenting cases:

(a) Identify the historical difficulties that may have arisen in the implementation of previous interim orders. For example, if there has been an interim order providing for a parent to authorize a school to provide information to the other parent and they have not done so, consider redrafting the order so that the order itself is the required authority;

(b) Be conscious of practicalities. There is little benefit in seeking an order that your client collect the children from after school, when your client has no practical means of doing so; or proposing that Christmas Day be shared when your client historically has Christmas with his parents in Tasmania; and

(c) Plead in the alternative, particularly in parenting cases involving relocation. If the Judge is not persuaded that the child should live with your client, proposed orders of the time your client proposes to spend with the children should be thoroughly articulated.

In property cases:

(a) A precise order should be proposed on how practically your client seeks the property to be divided;

(b) If your client proposes to retain a property, ensure that there is sufficient time in the order to allow your client to refinance mortgages and otherwise comply with such order;

(c) If a property is to be sold, consider a period for sale by private treaty and if not sold, sale by auction;

(d) If your client is proposing to exit a business, or other entity, ensure that orders are proposed to release your client from debts of that entity or guarantees previously provided; and

(e) Include provision for the dealing of unsecured debts.

The drafting of Final Orders to be sought should be a joint exercise with your client. Ensure that particularly for the purposes of cross-examination, your client knows the orders they are seeking and that they are able to comply with each order sought.

Outline

Most Judges direct that a Summary of Argument or Case Outline be filed prior to the final hearing. The contents of such document are also the subject of procedural orders.

Spend time in its preparation. After all, it is an opportunity to both persuade and have the Judge understand your case before any oral argument or oral evidence is heard.

Court Etiquette

Clients come and go. Your colleagues and the Judges do not. Rudeness in the prosecution of your client's case benefits no-one, particularly you. You will be quickly pigeon-holed by the Judges and it will do your reputation no good at all.

I cannot say it any better than the late Federal Magistrate Slack: [1]

> "*Your reputation for honesty, courtesy, diligence and courage must be protected and enhanced at all costs. You will be appearing in the Federal Magistrates Court* (as it was) *on a regular basis. A reputation for honesty, courtesy and diligence will not always be rewarded by results but you will have the respect and appreciation of the Court".*

[1] in Slack F.M. paper "*Advocacy in the Federal Magistrates Court of Australia*"

While in Court:

(a) Bow at the door as you enter and exit the Courtroom;

(b) Position yourself at the bar table in descending seniority from the left of the bar table as viewed by the Judge;

(c) Stand when you address the Judge and sit when your opponent is addressing the Judge;

(d) Never leave the bar table until you are either excused or the practitioners of the next matter are present at the bar table;

(e) If you must communicate with your client or Counsel while your opponent is addressing the Court, do it with courtesy to your opponent; and

(f) Do not mis-state the evidence in submissions.

Conclusion

A family member had a medical problem requiring the advice of a specialist. He was referred to a specialist described as "the best specialist in Brisbane". I was of course emotionally involved in the matter. As I sat listening, I hoped that he was at the top of his game, that he was indeed the best in the business and was providing accurate and correct advice. I have no medical knowledge. The advice given was not particularly the advice I wanted to hear. In the end, the advice given was correct and within the expectations given. I respect that specialist for the advice he gave and the work he did. He is, in my view, "the best specialist in Brisbane". Keep in mind that a client may come to you after being told by another that you are the "best in Brisbane". They sit with you hoping you are the best in Brisbane and are at the top of your game. The challenge is to have them think that at the end of the matter. It starts with accurate and correct advice and providing realistic expectations.

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