Family Law

Plain English Guide on steps before you file in the Federal Circuit and Family Court of Australia

Being in Court can be a stressful, costly and time-consuming process for both the parties and their family and friends. To avoid court proceedings except when it is absolutely necessary, the Federal Circuit and Family Court of Australia has implemented safeguards to encourage parties to try resolve their matters outside of Court, by requiring that they make a proper, genuine and reasonable attempt to settle the matter before filing any application in Court.

This Plain English Guide sets out these safeguards and the steps / requirements parties need to comply with before bringing an application in the Court.

In essence the key requirements are:

1. Provide a copy of the pre-action procedures to the other side;

2. Invite the other party to participate in dispute resolution;

3. Cooperate with the other side and make a genuine effort to resolve the matter by participating in dispute resolution;

4. Should dispute resolution services not be available, not be successful or are otherwise not safe for the parties to engage in, give notice to the other side of their intention to commence proceedings.

1 – Pre-Action Procedures

The pre-action procedures are contained in Schedule 1 of the *Federal Circuit and Family Court of Australia (Family Law)* Rules 2021.

Additionally, the Federal Circuit and Family Court of Australia also have created a pre-action procedures brochure which must be given to the other party with the notice of intention to commence proceedings discussed below.

Any party considering commencing proceedings must, before doing so, provide a copy of the pre-action procedures to the other side and ensure compliance with these procedures.

2 – Invitation to participate in dispute resolution

Before anyone files in Court, enquiries must be made into dispute resolution services available to assist in resolving the matter outside Court, such as family dispute resolution (FDR) regarding children or mediation.

Once a party has identified the services available to them, they must invite the other side to participate in dispute resolution and in doing so, provide the other side with a specific person's or company's details who are available to assist.

For example, if the available and most suitable dispute resolution service is mediation, the inviting party needs to identify a suitable mediator or mediators and their respective dates of availability. The other side can then agree to the mediator or select a mediator from a panel proposed and confirm their preferred date for mediation from of the options provided.

The purpose of this is to ensure that parties exhaust all options in negotiating an agreement between them before proceeding to Court.

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3 – Cooperation and Genuine Effort to Resolve the Dispute

Where it is safe to do so, parties must make a genuine and reasonable attempt to engage in the available dispute resolution service they have identified.

When invited to participate in a dispute resolution service, the invitee must cooperate with the inviting party for the purpose of agreeing on an appropriate dispute resolution process. Both parties then must make a genuine and concerted effort to engage and participate in the dispute resolution process with a view to trying to reach an agreement and keep the matter out of Court.

In the absence of successful dispute resolution, the Court requires proof of the parties genuine effort, requiring that they file evidence of this at the time of filing any application to commence proceedings.

Such evidence is generally in the form of a document called a S60I certificate, whereby the person or company who was engaged for the purpose of assisting the parties in dispute resolution, signs a form to confirm that the parties were present at dispute resolution and made a genuine effort to participate, but were unable to reach agreement.

4 – Notice of Intention to Commence Proceedings

The Court requires that the notice of intention to commence proceedings, must include and address each of the following matters which are summarised in this Plain English Guide:

1. attach a copy of the Federal Circuit and Family Court of Australia's Pre-Action Procedures Brochure

2. identify the issues in dispute – this requires an identification, in precise terms, of the dispute. A general overview is not sufficient or appropriate;

3. the orders to be sought if proceedings are started – specifically set out what the party giving notice intends on asking the Court to do, if an application is made. In doing so, the party can make an offer of settlement.

4. a genuine offer to resolve the issues – if dispute resolution services have not been engaged in yet, the letter should include an invitation for the parties to attend a dispute resolution service including by proposing specific people or companies who are available for same (as discussed in point 2 above).

5. A time frame for a response – parties must be given at least 14 days to respond to the letter.

If no response is received to the pre-action letter or otherwise the parties are unable to reach an agreement after all reasonable attempts to resolve the matter have been exhausted, parties may file an application to commence proceedings and seek the Court's assistance.

Exceptions

The Court understands that it is not possible or appropriate in all cases for parties to complete the above steps or participate in dispute resolution services. Examples of situations where this is not appropriate include those involving actual or a risk of child abuse, domestic violence, family violence etc. where it would not be safe for parties to participate in dispute resolution services.

Other exceptions include circumstances where an application needs to be heard on an urgent basis, for example if an injunction is needed to prevent a party from disposing of significant assets.

Such exemptions should be identified clearly to the Court upon filing any application.

General Ongoing Obligation of Disclosure

From the outset, parties have an ongoing obligation to provide full and frank disclosure of all matters and information which are relevant to the issue in dispute.

For financial matters, this may include providing documents such as copies of bank statements and tax returns, copies of company financial statements etc.

For parenting matters, this may include things such as school report cards, school attendance reports, school counsellor records etc.

If a party fails to comply with this ongoing obligation, the other party should identify this failure in any notice of intention to commence proceedings. If the party continues to not comply with their obligation, or otherwise refuses to engage in proposed dispute resolution services, a party can rely on this as grounds to commence proceedings.

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