

Panic Button: Preparing Urgent Applications

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'In any moment of decision, the best thing you can do is the right thing, the next best thing is the wrong thing, and the worst thing you can do is nothing.' Theodore Roosevelt

This paper is intended to help you prepare urgent Family Law Applications. These are the topics:

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(a) Introductory comments

Before doing anything, ask yourself:

- What can we realistically achieve on an urgent basis?
- What are the client's priorities; ie: what are the problems that most require urgent attention?
- Limit your claim to what realistically can be dealt with at an interim hearing in a duty list.

The Affidavit(s) in Support:

- a. Keep it short (10 pages maximum).
- b. Do not have affidavits from multiple supporting witnesses, particularly if they all say much the same thing.
- c. Depose witnesses who made relevant direct observations, not those who give unqualified or worthless commentary:

"I can say without reservation that Bill is the best father in Mt Druitt."

- d. Limit annexures to the best ones.
- e. Do not include title pages or other unnecessary content.
- f. Number all the pages including annexures (this is very important).
- g. Keep it relevant. Always stay on message.
- h. Keep the client's opinions and theories about the motivation of the other party to a minimum. Stick to the facts.
- i. Obey the rules of evidence as far as possible.
 - i. Any affidavit filed in family law proceedings should have regard to the rules of evidence because judges expect to receiving evidence offered with precision.
 - ii. Contrary to popular belief under sec 69ZT (1) only some, not all of, the rules of evidence do not apply in child-related proceedings and there remains discretion with the Court to restore the use of those rules in "exceptional circumstances" and if other requirements apply.
 - iii. Even in parenting proceedings an affidavit prepared in admissible form is always preferable. Whilst there are some situations where it is not possible for evidence to be offered in this way, always remember that hearsay and unqualified opinion evidence carries less weight in the bench's mind.

Here is a quick example:

Bad

On 17 March 2015 he was abusive, drunken and violent to me as usual.

Good

At 5.00 pm on 17 March 2015 I came home and saw that the Respondent was unsteady on his feet, his eyes were blood shot, his breath smelt of alcohol and his speech was slurred. He shouted out several times words like "You bitch, come here and I'll give you what you deserve!" He then lurched over and grabbed me by the hair and pulled me towards him. I managed to free myself and ran next door to call the police.

For the respondent, try to resist to the temptation of simply answering the applicant's affidavit paragraph by paragraph. It is irritating to read and hard to follow. Instead tell your client's story from his or her own perspective. You are answer allegations without necessarily setting it our seriatim.

Here is an example:

The Applicant wife says:

14. *At about 7 am on 18 September, 2014 he husband forced the front door open, grabbed Jimmy and tried to wrestle Jimmy's Ninja Turtle from my hand. When he could not get it, he left with our son.*

A bad response:

10. *As to paragraph 14, I deny the contents therein.*

A good response:

10. *As we had arranged the day before I went to the home to collect Jimmy at about 7 am on 18 September, 2014. I rang the doorbell but there was no answer. The door was open and Jimmy was on the carpet. I picked him up. The wife appeared holding Jimmy's Ninja Turtle. I said "Could I take it for him". She waved the toy with a menacing gesture and shouted "Get your own Turtle, you scumbag." I then left with Jimmy.*

(b) Listing Urgent Applications in the Family Law Courts

- The current procedure in Sydney and most other Registries is that documents are left with the Registry with a letter addressed to the Duty

Registrar whose task it is to decide whether to grant the matter an expedited listing and grant leave to the Applicant to serve at short notice.

- To this end the start of your affidavit ought to have a section headed something like "Reasons for urgent listing" which sets out briefly why the matter is so urgent. You can cross reference this section with the main parts of your affidavit; for example:

1. *Despite being the primary carer of our three children for the whole of their lives, the husband is currently preventing me from seeing them other than on the limited occasions I have described in paragraphs 33 to 38 herein.*
2. *The husband removed the children from my care when I was in hospital in mid March 2015 recovering from injuries sustained after he assaulted me (see paragraph 48).*
3. *Since we separated on 12 March 2015 I have received no financial support from husband. I am currently not working and have no other means of financial support. I am relying on the charity of my family even though the husband told me last month the he is now the CEO of XYZ Enterprises on a package of \$450,000 per annum. (see paragraph 54).*

- Your best chance of getting the Registrar's attention (and therefore getting short service) is to set out your reasons early in the affidavit in this way so he or she does not have to spend an hour trying to work out why the matter might be urgent. Your covering letter should repeat this or refer to that part of the affidavit.
- Once you have short service make sure the documents are served within time. Include a covering letter urging the recipient to seek legal advice if he or she is not represented and that you confirm that your client will be seeking an interim hearing and orders on the first return date.

(c) Urgent interim orders for children

- Seek orders that can realistically be obtained at an interim hearing based on the uncontested evidence available.

- Pare down the number and range of orders that you seek accordingly.
- There is no need to make provision for things in the distant future; eg: Christmas arrangements for 2017 and beyond.
- Do not seek orders that could be regarded as final orders.
- It is unwise to seek interim orders in exactly the same form as final orders as it will invite a submission that cross examination and a full hearing is required before the orders your client seeks can be considered.

(d) The form of interim Parenting Orders

- Make sure they are concise, straightforward and unambiguous.
- Draft the orders *in personam*, so that they require a party or parties to do something rather than ask for something to happen in abstract terms or in an indirect fashion.
- Do not draft orders requiring non-parties to do or not to do something.
- Try and solve problems with the orders; eg: conflict at changeover or disagreement about when holidays start.
- Have the client think really carefully about whether they can actually be implemented (travel times, changeover times, holidays, school events, communication etc)
- Limit the number of changeovers.
- Remove any room for ambiguity about when spending time starts or ends or when holidays start etc.
- Draft orders that can be enforced if required; eg: the start times and dates are set out with precision.

(e) Recovery Orders

- a. An Application in a Case needs to be filed together with supporting affidavits to obtain a recovery order.
- b. The affidavit must prove that the applicant is entitled to apply for the order.
- c. The application is supported by an affidavit, which must set out:
 - *details of the order breached.*
 - *details of last known whereabouts of the children.*
 - *details of efforts made to locate the children, including details of the people who might know the whereabouts of the other parent; and*
 - *any safety concerns for the children.*
- d. Refer to Appendix 1 for an example set of orders.

(f) Watchlist orders

- a. In most cases when seeking a recovery order, you should seek an order that the children be placed on the Airport Watchlist (called the PASS system by the AFP.)
- b. The AFP have an excellent website with a "Family Law Kit" with exhaustive information on this topic.

<http://www.afp.gov.au/policing/family-law/family-law-kit>

(g) A trap with Passport Orders

It is commonly thought that if a parent has an order for sole parental responsibility then it is not necessary to obtain a specific order for the issue of the passport.

However this is not the case due to a conflict in the definition of *parental responsibility* in the legislation.

Section 11 of the Australian Passports Act (2005) provides that:

(1) The Minister must not issue an Australian passport to a child unless:

- (a) each person who has parental responsibility for the child consents to the child travelling internationally; or*
- (b) an order of a court of the Commonwealth, a State or a Territory permits the child to travel internationally.*

For the purposes of the Act a parent has parental responsibility if in sections 5(b) & (d):

(b) under a parenting order:

- (i) the child is to live with the person; or*
- (ii) **the child is to spend time with the person; or***
- (iii) the person is responsible for the child's long-term or day-to-day care, welfare and development; or*
- (d) the person is entitled to guardianship or custody of, or access to, the child under a law of the Commonwealth, a State or a Territory.*

This means that even if a parent does not have parental responsibility within the meaning of the Family Law Act, if he or she spends time with the child, his or her consent is required for the issue of a passport unless there is a specific Court order. You therefore always need a specific passport order.

(h) Urgent injunctions concerning property

- Clarity and effectiveness are the keys to any property injunction order so that the parties understand what it is they are required to do, so no need for orders to be interpreted.
- If the orders require technical action, eg: something in the nature of accounting or corporate governance, make sure you seek advice from a qualified person about the form of the order so that it can actually be carried out lawfully and is effective in its terms.

- If possible include an alternative order so that there is some flexibility in the relief that you are seeking in case the judge is unwilling to make the primary order you seek for whatever reason.
- Refer to Appendix 2 for an example set of orders for preservation of property.

(i) A word about Costs

- Seek costs orders where appropriate but be mindful of the limitations when seeking indemnity costs.
- The ordinary rule is that, where the court orders the costs of one party be paid by another party, the order is for the payment of those costs on the party and party basis.
- The court *"should not depart lightly from the ordinary rules relating to costs between party and party and the circumstances justifying the departure should be of an exceptional kind"* (see: *Kohan and Kohan* (1993) FLC ¶ 92-340 at p 79,614 per the Full Court and *Yunghanns v Yunghanns* (2000) FLC ¶ 93-029 at pp 87,470-1).
- Indemnity costs orders are exceptional, especially in interlocutory proceedings and even more exceptional in cases involving children. Judges do make them lightly and it may give the impression that your client is trying to be unreasonable or punitive to seek them when the circumstances are not really exceptional at all.

(j) A final thought

- Urgent applications are always prepared in a rush. Error and/or omissions can creep in. Clients are flustered but don't you get flustered. Check and re-check. If possible have someone else look over your work before you file it.
- It is much better to delay things by a couple of hours than find out you have made a fatal error only when you are at the Bar table.

Good luck.

A handwritten signature in black ink that reads "R. Maurice". The letters are cursive and fluid, with a prominent "R" and "M".

Richard Maurice
18 March, 2015

Appendix 1

Sample recovery order

1. *That a recovery order be issued and directed to the Marshal of the Family Court of Australia and to all Officers of the Australian Federal Police Force and to all Officers of the Police Forces of all the States and Territories of Australia requiring them to return the children, Luke Nesmith, born 1 April 2010 and Cindy Nesmith both 10 March, 2012 ("the children"), to the applicant and for that purpose to stop and search any vehicle, vessel or aircraft and to enter and search any premises or place in which there is at any time reasonable cause to believe that the said children may be found.*
2. *That the respondent pay the applicant's costs of and incidental to this application.*
3. *That the respondent reimburse the applicant for any costs incurred in respect of the collection of the children pursuant to the execution of this recovery order*
4. *That the children be placed on the Airport Watch list pending further order.*

Appendix 2

Example of comprehensive orders to preserve property and receive information about assets already disposed of

1. *That pending the final determination of the property proceedings between the parties the husband be restrained by injunction from doing any act or thing, or causing someone to do any or thing, execute any deed, document, instrument or writing or give any direction which would have the effect of alienating assigning, selling, mortgaging or otherwise in any way encumbering or transferring:*
 - a. *Any real estate registered in his name or in which he has an interest (either directly or indirectly through any corporate entity or trust);*
 - b. *Shares in any company and/or interest in any trust in which has an interest (either directly or indirectly);*
2. *That pending the final determination of the property proceedings between the parties the husband be restrained by injunction from doing any act or thing, or causing someone to do any or thing, execute any deed, document, instrument or writing or give any direction which would have the effect of changing any of his share entitlements or offices he holds in any corporate entity or trust.*
3. *That in the event that the husband has in the last 12 months from the date of these orders done any acts or things or caused someone to do any acts or things that fall within the categories in the two preceding orders herein the husband shall provide to the wife's solicitors within 7 days hereof particulars of:*
 - a. *The asset(s) or interest(s) disposed of;*
 - b. *The date(s) upon which the transaction(s) took place;*
 - c. *The sum received by the husband as a result of the transaction;*
 - d. *The use to which the sum received has been applied, or if not applied where that sum has been invested.*
 - e. *Any changes to share structure or offices held in any entity;*
 - f. *Any relevant documentation.*

Appendix 3

Passport Orders

1. *That within 28 days hereof the parties do all acts and things, sign all documents and give all consents necessary to apply to the Commonwealth Department of Immigration and Citizenship for an Australian Passport for Luke Nesmith, born 1 April 2010 and Cindy Nesmith both 10 March, 2012 on the following terms:*
2. *The Father will provide a completed and signed Application form for the Mother's signature which she will sign and return to him.*
3. *The parties will share equally the passport application fee.*
4. *The Father will lodge the Application and upon receiving the issued passport shall retain subject it to these orders.*
5. *Either party may travel overseas with the child on the following conditions:*
 - a. *They give the other party at least 6 weeks' notice and provide to the other party a copy the child's return air-ticket and an itinerary which sets out the dates and places the child will be visiting overseas as well as contact telephone numbers.*
 - b. *The destination must be a country which is a signatory to the Hague Convention.*
 - c. *The trip must be scheduled to coincide with that party's school holiday time with the child, unless the parties otherwise agree in writing.*
6. *The Father will retain the child's passport for safe keeping at all times except when the Mother requires it to travel overseas with the child at which time the Father will give her the passport in order for her to apply for visas or other travel permits for the child.*

About the Author

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

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

In 1988, he was called to the private bar. Since then he has practiced mainly in the areas of Family Law, De facto relationships and Child Support, together with Wills and Probate. He also works as a Mediator in Family Law financial and parenting matters.

He has appeared in a number of significant Family Law cases including seminal cases on Family Law and De Facto property division like *Pierce and Pierce* (1999) FLC 92-844 and *Black v. Black* (1991) DFC ¶ 95-113 and *Jonah & White* [2011] FamCA 221 and more recently *Sand & Sand* [2012] FamCAFC 179 and *Adamson & Adamson* [2014] FamCAFC 232.

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