

## **UPDATE TO THE PROFESSION**

9 April 2020

The purpose of this update is to inform the profession of the continued operations of the Family Court of Australia and Federal Circuit Court of Australia ('the Courts') during the COVID-19 pandemic. This update also provides some suggestions to members of the profession about how to actively and proactively engage with the Courts in these challenging times.

### **Court Operations**

Much has occurred since the Courts' previous update on [19 March 2020](#). The Courts' operations have had to be substantially adjusted since the beginning of March this year. Like many institutions and large organisations, the Courts have had to engage in a long term digital transformation. Microsoft Teams has been rolled out to each Judge, Registrar and Family Consultant. Each Judge and Registrar is now able to conduct hearings electronically from each Registry. Whilst urgent matters will be given priority, Judges now have the ability to continue to hear defended applications, trials and appeals.

This technology was rolled out at great speed to 101 judges, 35 Registrars and servicing up to 40 different locations. It is a great credit to all involved including the IT department, the Judges, Registrars, court staff and the profession for their cooperation.

A number of interim and final matters have been heard in the Courts over last two weeks using Microsoft Teams across the Nation. These were both family law and general federal law cases. The rapid implementation of new technologies has not been without issues, however, the problems have been dealt with as they unfolded and generally speaking, the hearings went well. There were also a number of appeals heard via Microsoft Teams last week in Sydney. To assist the profession, the Courts will be uploading some general guidance to the websites for participating in virtual hearings and other Court events, and using Microsoft Teams.

The Courts will also be moving to a Digital Court File (DCF) by 14 April 2020. The ability to conduct hearings remotely and the DCF will not only assist the Courts during the COVID-19 pandemic, but will also greatly enhance the Courts' flexibility to hear trials and appeals electronically in the long term. It allows Judges to hear cases from any registry or even in remote locations. It also provides an extremely safe and less stressful forum for vulnerable parties to attend hearings and give evidence.

Practitioners should also note that most interviews conducted by Family Consultants will now take place by telephone or video. However, in very limited circumstances, Family Consultants may also need to conduct face-to-face interviews.

### **Joint Practice Direction (JPD 2 of 2020)**

The Courts issued a [Joint Practice Direction](#) on 31 March which deals with the following issues:

- Filing of documents electronically;
- Subpoenas and inspection of documents;
- The filing of Annexures to Affidavits;

- Signatures on documents and affidavits; and
- Deferral of fee payments.

Further Joint Practice Directions may have to be issued to assist the practitioners and the Courts resolve difficulties caused by COVID-19.

## **Duty Lists**

All Duty Lists are being conducted by Microsoft Teams or by telephone. These hearing times may have to be staggered to alleviate congestion. Practitioners will be provided with updated hearing times prior to the date of the hearing. There may also be a call over before or on the morning of the Duty List by a Judge or Registrar to ascertain which cases are urgent, which matters have consent orders and which need other non-urgent hearings.

There may be a very small number of exceptional matters that need to be dealt with face-to-face, however these will be only with leave, and in accordance with the Courts' Face-to-Face In-Court Protocol.

Over the last month some non-urgent matters have had to be vacated due to technical issues. The Courts will be endeavouring to mention those matters in the next 12 weeks and ensure they are case managed appropriately.

For Duty Lists, please note that the Courts require practitioners engaged to act in these matters to consider the following:

1. Are there serious risk factors in this matter?
2. What are the major issues in dispute in the case?
3. If related to parenting, are the parties able to agree on an interim arrangement?
4. Would the parties benefit from a conference with a Registrar, and if parenting, including a Family Consultant?
5. Can disclosure be limited to particular topics?
6. Can it be heard on a preliminary point which might then lead to the whole proceeding being settled?
7. Is the case appropriate to be sent to mediation or another form of ADR?
8. If the matter is a property case, should it be sent to arbitration?
9. What other orders could the Court make by consent to progress the matter?

If any of the above is relevant, practitioners should raise these issues with the Duty Judge and seek orders, preferably by consent if possible.

## **Directions Hearings and Trials**

Now that the Courts have greater capacity for electronic hearings, the Courts will be attempting to conduct as many hearings as possible in the current circumstances. The Courts will be relying on the profession to assist by cooperating with the use of technology, adapt to new practice directions and be progressive.

Any matter that is currently listed will proceed electronically where possible. Where a case has to be vacated or requires a face-to-face hearing (especially if it is not urgent and requires a face-to-face hearing of more than 1.5 hours), it will be placed in a national pool and be listed as soon as the operations of the Courts allow.

For matters that either have a trial date or are seeking one, practitioners have the opportunity of approaching the Courts to seek orders that may assist in facilitating an electronic hearing. They could include:

- written opening and closing submissions,
- the provision of objections to evidence and a ruling before the hearing,
- narrowing of issues,
- a statement of agreed facts,
- limiting time for cross examination,
- the provision of an electronic court book and tender bundle, or
- a suggested trial timetable.

Practitioners should consider carefully whether there is any reason why trials of particular matters cannot properly be heard via Microsoft Teams. While it is new for us all, when a proper analysis is undertaken of the real issues in an upcoming trial that require factual determination, very often those can be dealt with entirely appropriately in a video hearing. If there is a dispute about whether a trial should proceed via video, the docketed Judge will determine that dispute. Practitioners should not assume that resistance to a video trial will automatically be successful.

## **The Summer Campaign**

Due to the roll-out of new technology, the Courts will, if possible, recommence the Summer Campaign electronically. More information will be provided in due course.

## **Child Dispute Services**

As with all areas of the Court, CDS is endeavouring to find ways of conducting its work that ensures that assessments retain their value for litigants and the Court, while also minimising the risks to families and staff in the context of COVID-19.

Interviews with adults are now being conducted by telephone or video. For assessments that have a child inclusive element, Family Consultants will consider whether this can also be done remotely. Where a remote interview is not possible or appropriate, and the assessment of children is considered to be critical and urgent, an in-person child interview and observation will still be conducted if the family is in a position

to attend the Registry in accordance with our updated In-Person Interview Protocol, which was sent to the profession on 3 April 2020.

### **Open Court**

In these times of restricted hearings it is not possible to physically have an open courtroom however, the daily court list published on the Courts websites will include a statement advising those who wish to apply to listen to, or view, a Court hearing, to email the presiding Judge's Chambers or Case Coordinator. A link or dial-in may be provided (subject to the Judge having ordered a closed Court). This will be accompanied by a reminder of the necessity of strict compliance with section 121 of the *Family Law Act 1975* (Cth) and not to record the proceedings by any means.

### **Mediation**

The Courts will be ordering any appropriate case that may have to be vacated or is being prepared for trial to electronic mediation. The Courts will also be making details of the Bar Associations', Law Societies', and other appropriate mediation services available on our websites.

Please ensure that you are aware of the software that can facilitate electronic mediation, including Microsoft Teams, Immediation, Zoom etc. and ensure that you make yourself available for the opportunity of participating in or conducting mediations where possible.

The Courts are finding that in these new and challenging times, a large number of parties are much more interested in settling their differences and are welcoming orders for mediation or are having fruitful discussions before mentions. It is also work that practitioners can engage in whilst working from home or chambers.

Please note that the Registrars are also being trained to conduct conferences by Microsoft Teams and Immediation. They are also conducting conferences by telephone.

### **Arbitration**

To assist parties and the profession to engage in arbitration, a specialist national list judge will be appointed in each Court to hear and manage applications and directions for cases that have been referred to arbitration. The further details will be placed on each Court's websites.

### **Appeals**

Last week, the Appeal Division successfully conducted a number of appeal hearings using Microsoft Teams. This is very promising for the future. The Appeal Division has also produced a Special Measures Information Note that will be been uploaded to the Family Court of Australia website.

### **Shared Parenting Arrangements and State and Territory Restrictions**

The Courts have sought urgent clarification from the Commonwealth Attorney-General about the State and Territory border and movement restrictions. There remains a great deal of concern amongst parents and practitioners that restrictions imposed may make compliance with Court orders and shared parenting

arrangements impossible or unsafe. An examination of the measures put in place by each State and Territory makes it readily apparent that there are a number of inconsistencies and more information is required.

The Courts will update the profession as soon as any clarification is received.

In the meanwhile, the Courts have published general information on the [websites](#).

<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/news/covid-info-borders>

<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/news/covid-info-borders>

### **Communication with each State and Territory Attorney-General**

The Courts have written to each of the State and Territory Attorneys-General advising each of them about the Courts' operations and specifically reminding them of the important role the profession plays in the administration of justice. This includes providing members of the profession with some flexibility in movement to and from chambers and offices in the preparation of electronic Court hearings and mediations.

### **Court communication to the public**

On 26 March 2020, the Courts released a statement indicating what is expected of parents during these troubling times. The statement sought to remind parents of their obligations to act in the child's best interest. It also sought to remind parents that the Courts remain open. The statement can be accessed [here](#). The Courts have also established an [Information for Parents](#) page that should answer a number of common questions.

### **Judge Judy Small AM Retirement**

Judge Judy Small AM is retiring from the Federal Circuit Court of Australia. Her Honour was appointed as a Judge of the Court on 15 April 2013. A farewell ceremony will be held electronically at 4.30pm on 20 April 2020. A link will be provided on the Court website.

The Courts are keen to continue to work with the profession. We thank you for the support you provide to the Courts and the families of Australia in these challenging times.

Please stay safe and take care of each other and your loved ones.

All my very best wishes

Will Alstergren  
Chief Justice  
Family Court of Australia  
Chief Judge  
Federal Circuit Court of Australia