



Registered TM 1227576

Dean R. Love & Associates

Barristers & Solicitors
DRL Legal Pty Ltd (ACN 123 034 846)

FAMILY LAW – CIVIL LAW – CRIMINAL LAW

ABN 34 123 034 846

Perth Office:
1st Floor, 231 Adelaide Terrace
PERTH WA 6000

Postal:
PO Box 3263
PERTH WA 6832

Tel: (08) 9218 9993
Fx: (08) 9218 9557
enquiries@drlegal.com.au
www.drlegal.com.au

PRE-ACTION PROCEDURE FOR FINANCIAL CASES

Pre-action Procedure for Financial Cases (property settlement, maintenance) Rule 1.05 and Schedule 1, Family Law Rules

The Family Court has introduced new processes that prospective parties must follow before filing an application in the Court. The requirements for what is known as Pre-action Procedure generally apply to disputes about financial and parenting orders. This brochure sets out the pre-action requirements for financial cases. Where there are issues concerning parenting orders, you should obtain the separate brochure, entitled *Before you file- pre-action procedure for Parenting Orders*.

The object of the Pre-action Procedure is to control costs and if possible resolve disputes quickly, ideally without the need to file an application. The Pre-action Procedures apply to:

- anyone who is considering starting a case;
- anyone who would be named as a respondent if a case was started; *and*
- their lawyers (if they have one).

The Family Law Rules require prospective parties to a case to genuinely try to resolve their dispute *before* starting a case by case use of the Pre-action Procedure. Except in limited circumstances (see below under the heading “Exemptions”) all prospective parties must:

1. participate in dispute resolution services, such as mediation, counseling, negotiation, conciliation or arbitration;
2. if dispute resolution is unsuccessful, write to the other parties, setting out your claim and exploring options for settlement;
3. comply, as far as practicable, with the duty of disclosure (see Part 4 of this brochure).

Anyone who does not comply with these requirements (unless exempt) risks serious consequences, including costs penalties. See Part 2 of this brochure for more detail.

This brochure is structured as follows:

- PART 1 General Information and parties' responsibilities
- PART 2 Compliance
- PART 3 Step-by-step guide, the pre-action procedure
- PART 4 Disclosure and exchange of correspondence
- PART 5 Expert witnesses
- PART 6 Lawyers' responsibilities
- PART 7 Further information

Exemptions

Pre-action Procedure is not required for applications for divorce only or application for child support only. In addition, the Court may accept that it is not possible or appropriate for the Pre-action Procedures to be followed in cases:

- involving urgency;
- involving allegations of family violence;
- involving allegations of fraud;
- where there is genuinely intractable dispute (for example, where one person refuses to negotiate);
- where a person would be unduly prejudiced or adversely affected if another person became aware of the intention to start a case (for example, where there is a genuine concern that the other person will attempt to defeat the claim if they have this prior knowledge);
- where a time limitation is close to expiring; *and*
- where there has been a previous application about the same issue or subject in the last 12 years.

Part 1 General Information and parties' responsibilities

Pre-action procedure objectives

- to encourage early and full disclosure through the exchange of information and documents about the prospective case;
- to help people resolve their differences quickly and fairly, and to avoid legal action where possible. This will limit costs and hopefully avoid the need to start a Court case;
- where a case became necessary because full agreement was not reached, the pre-action procedure should help to clearly identify the real issue in dispute. Again, this should help reduce the time involved and the cost of the case because it will make it easier for the Court to determine the issues and resolve the case quickly and justly;
and
- to encourage parties to seek only those orders that are reasonably achievable on the evidence.

Your obligations as a prospective party to a case

Families, and particularly the children are the Family Court's first consideration when resolving or determining family disputes. At all stages during the pre-action negotiations and, should a case be started, during the case itself, you must keep in mind"

- the need to protect and safeguard the interest of any child;
- the importance of a continuing relationship between a child and a parent; and the benefits the child gains from the parents cooperating with one another, as far as is possible;
- the potential damage to a child involved in a dispute, particularly if the child is encouraged to take sides or take part in any dispute between the parents;
- the importance of identifying issues early and exploring options for settlement;
- the need to avoid protracted, unnecessary, hostile and inflammatory exchanges;
- the impact of correspondence on the reader, particularly on the other party in the case;

- that you should only seek negotiated agreements or orders that are realistic and reasonable given the evidence that is available about the dispute; and that are consistent with current law;
- the principle of proportionality and the need to control costs because it is unacceptable for the costs of any case to be disproportionately high compared with the financial value of the subject matter of the dispute; *and*
- the duty to make full and frank disclosure of all material facts, documents and other information relevant to the dispute (see Part 4 on page 5 for more on disclosure).

Parties must not:

- use the pre-action procedure for an improper purpose such as to harass the other party or to cause unnecessary cost or delay;
- in correspondence, raise irrelevant issues or issues that might cause the other party to adopt an entrenched, polarised or hostile position.

The Court expects the parties to take a sensible and responsible approach to pre-action procedures. You are not expected to follow the pre-action procedures to your detriment if reasonable attempts to follow them have not achieved a satisfactory result.

Part 2 Compliance

This brochure sets out what the Court considers is a standard and appropriate approach to be taken before filing an application in a court. If a case is subsequently started, the Court may consider whether the requirements have been met, and if not, what the consequences should be (if any).

The Court may:

- where there is unreasonable non-compliance order the non-complying party to pay all or part of the costs of the other party or parties in the case; *and/or*
- take compliance or non-compliance into account when making orders about case management.

(See for example, Family Law Rules 1.10, 11.03 and 19.10)

In addition, the Court may ensure that the complying party is in no worse a position than he or she would have been if the other party had complied with the pre-action procedure. Examples of non-compliance with a pre-action procedure include:

- not sending a written notice of proposed application;
- not providing sufficient information or documents to the other party;
- not following a procedure required by the pre-action procedure;
- not responding appropriately within the nominated time to the written notice of proposed application; *and*
- not responding appropriately within a reasonable time to any reasonable request for information, documents or other requirements of this procedure.

Part 3 The pre-action procedure ~ step by step

STEP 1 Invite the other parties to participate in dispute resolution

A person who is considering filing an application to start a case must:

- 1 Give a copy of this brochure to the other prospective parties to the case; *and*
- 2 Invite the other parties to participate in dispute resolution.

STEP 2 Agree on a service provider and attend the service

Each prospective party must:

- agree on an appropriate dispute resolution service, *and*
- make a genuine effort to resolve the dispute by participating in dispute resolution.

When agreement is reached the parties should consider formalising their agreement by filing an application for a Consent Order (Form 11).

STEP 3 Written notice of issues and future intentions

If no primary dispute resolution service is available or a person refuses or fails to participate, or agreement is NOT reached through dispute resolution, a person considering making an application to the Court must give the other person/s written notice of the intention to start a case in the Court (called a notice of claim), setting out:

- the issues in dispute;
- the orders to be sought if a case is started;
- a genuine offer to resolve the issues; *and*
- a nominated time (at least 14 days after the date of the letter) within which the other person must reply. This brochure must be attached to the notice of claim.

STEP 4 Replying to the notice of claim

The other person must within the ‘nominated time’, reply to the notice of claim in writing specifying whether the offer is accepted.

<p>Where agreement is reached the parties should consider formalising the agreement by filing an application for Consent Order (Form 11)</p>	<p>Where the person DOES NOT accept the offer, they must, in a letter, set out:</p> <ul style="list-style-type: none"> ▪ the issues in dispute; ▪ the orders you will seek if a case is started; ▪ a genuine counter offer to resolve the issues; <i>and</i> ▪ a nominated time (at least 14 days after the date of the letter) within which the claimant must reply. 	<p>Where the other person does not respond, the obligation to follow pre-action procedure ends. Other dispute resolution actions can be taken, including the filing of an application in the Court.</p>
---	--	---

STEP 5 Taking other action

Where an agreement is not reached after reasonable attempts to resolve it by correspondence, other appropriate action may be taken to resolve the dispute, including filing an application in a court.

Part 4 Disclosure and exchange of correspondence

Parties to a case have a duty to make timely, full and frank disclosure of all information relevant to the issues in dispute (as set out in Chapter 13 of the Family Law Rules, which can be accessed through the Family Court website or at court registries). There may be serious

consequences for failing to do this, including punishment for contempt of court. See the brochure *Duty of Disclosure* for more information concerning this duty.

Part 4(2) of Schedule 1 of Family Law, states, in summary, that in attempting to resolve their dispute, parties should, as soon as practicable on learning of the dispute and, if appropriate, as a part of their exchange of correspondence during the pre-action procedure, exchange:

- a schedule of assets, income and liabilities;
- a list of documents in the party's possession or control that are relevant to the dispute;
and
- a copy of any document required by the other party, identified by reference to the list of documents.

In particular, parties are encouraged to refer to the Financial Statement (Form 13) and Rules 4.15, 12.02, 12.05 and 13.04 as a guide to what information to provide and documents to exchange. Documents that are not subject to the duty of disclosure under Rule 13.12 and that would not be ordered to be disclosed by a court, do not need to be produced. These include documents where there is a claim for privilege from disclosure or documents that have already been disclosed and where there has been no change likely to affect the result of the case.

The documents that the Court would consider as appropriate to be exchanged include:

IN A MAINTENANCE CASE

- the party's taxation return and taxation assessment for the most recent financial year;
- the party's bank records for the previous 12 months;
- if the party receives wage or salary payments, the party's three most recent pay slips;
- if the party owns or controls a business, the business's Business Activity Statements for the previous 12 months; *and*
- any other document relevant to determining the income, expenses, assets, liabilities and financial resources of the party.

IN A PROPERTY SETTLEMENT CASE

- the party's three most recent taxation returns and assessments;
- documents about any relevant superannuation interest, including:
 - ~ the completed Superannuation Information Form;
 - ~ for a self-managed superannuation fund, the trust deed and the last three financial statements;

~ the value of the superannuation interest, including how the value has been calculated and any documents working out the value;

- for a **corporation** (business), **trust** or **partnership** where the party has a duty of disclosure under Rule 13.04:

~ financial statements for each (including balance sheets, profit and loss accounts, depreciation schedules and taxation returns) for the three last financial years;

- for the party or a **corporation** (business), trust or partnership where the party has a duty of disclosure under Rule 13.04:

~ any Business Activity Statements for the 12 months ending immediately before the first court date;

- for any **corporation**, its most recent annual return, listing directors and shareholders; and the corporation's memorandum and articles of association;
- for **any trust**, the trust deed;
- for **any partnership**, the partnership agreement, including amendments, *and*
- unless the value is agreed, a market appraisal of any item of property in which a party has an interest

Where a party is unable to produce a document for inspection, it is reasonable for the party to be required to provide written authority, authorising a third party (for example, an accountant) to provide a copy of the document to the other party, where this is practicable.

Parties should agree to a reasonable place and time for the documents to be inspected and copied at the cost of the person requesting the copies. (Chapter 13 of the Family Law Rules is a guide to what is regarded as reasonable conduct of any parties in making these arrangements).

Parties must not use a document disclosed by another party for any purpose other than to resolve or determine the dispute for which it was disclosed. That is, in seeking the documents through the pre-action procedure, the party receiving them is considered by the Court to have given an undertaking that they will be used for the specific purposes of the case only.

Where there are disagreements about disclosure, it may be appropriate for an application to be filed with the Court.

Part 5 Expert Witnesses

As part of the pre-action procedure, you or the other parties may require that information be sought from an expert witness. There are strict rules about instructing and obtaining reports from an expert.

In summary:

- An expert must be instructed in writing and must be fully informed of his or her obligations.
- Where possible parties should seek to retain an expert on an issue only where an expert's evidence is necessary to resolve the dispute.
- Where practicable parties should agree to obtain a report from a single expert instructed by both parties.
- If separate experts' reports are obtained, the Court requires the reports to be exchanged.

Part 6 Lawyers' obligations

ALSO SEE RULES 1.08 AND 19.03 OF THE FAMILY LAW RULES

This article provides basic information only and is not a substitute for legal advice. If you are likely to be involved in court proceedings or legal action, you should get advice from a lawyer.

Lawyers must, as early as practicable:

- advise clients of ways of resolving the dispute without starting legal action;
- advise clients of their duty to make full and frank disclosure, and of the possible consequences of breaching that duty;
- Subject to it being in the best interests of the client and any child, endeavour to reach a solution by settlement rather than start or continue legal action;
- notify the client if, in the lawyer's opinion, it is in the client's best interests to accept a compromise or settlement if, in the lawyer's opinion, the compromise or settlement is a reasonable one;
- in cases of unexpected delay, explain the delay and whether or not the client may assist to resolve the delay;
- advise clients of the estimated costs of legal action (see rule 19.03);

- advise clients about the factors that may affect the Court in considering costs orders;
- actively discourage clients from making ambit claims or seeking orders that the evidence and established principle, including recent case law, indicates is not reasonably achievable;
- provide clients documents prepared by the Court (if applicable) about:
 - ~ the legal aid services and dispute resolution services available to them; and
 - ~ the legal and social effects and the possible consequences for children of proposed litigation.

The court recognises that the pre-action procedures cannot override a lawyer's duty to his or her client. It is accepted that it is sometimes impossible to comply with a procedure because a client may refuse to take advice. However, a lawyer has a duty as an officer of the Court and must not mislead the Court. If a client wishes not to disclose a fact or document that is relevant to the case, a lawyer has an obligation to take the appropriate action, i.e. cease to act.

Part 7 Further Information

The Court's website www.family.wa.gov.au is a useful source of information. It includes all the forms and brochures of the Court, with Links to the Family Law Act, the Family Law Rules and other relevant legislation.

Further information may also be available at your nearest Family Court registry, including information about where you may be able to access community-based providers of pre-action procedure negotiation, conciliation, counseling and mediation.

CONTACT DETAILS

Registries:

ALBURY	(02) 6021 8944
ALICE SPRINGS	(08) 8952 8222
ADELAIDE	(08) 8205 2666
BRISBANE	(07) 3248 2200
CAIRNS	Contact the Townsville Registry, (07) 4722 9333

CANBERRA	(02) 6267 0511
COFFS HARBOUR	Contact the Brisbane Registry,(07) 3248 2200
DANDENONG	(03) 9767 6200
DARWIN	(08) 8981 1488
DUBBO	(02) 6841 5000
HOBART	(03) 6232 1725
LAUNCESTON	(03) 6334 2111
LISMORE	(02) 6621 8977
MELBOURNE	(03) 8600 3777
NEWCASTLE	(02) 4926 1255
PARRAMATTA	(02) 9893 5555
ROCKHAMPTON	(07) 4921 2939
SYDNEY	(02) 9217 7111
TOWNSVILLE	(07) 4722 9333
WOLLONGONG	(02) 4226 8200
WESTERN AUSTRALIA	Family Court of Western Australia, (08) 9224 8222