"GOING TO COURT – Not what it used to be"
Foley's List – Family Law 2020 ZOOM Sessions
By Alex Metherell & Nonni Sdraulig

ALEX:

Since covid-19 was declared a global pandemic by the World Health Organisation on 11 March 2020, it seems safe to say that, mostly, we are starting to adjust to a new normal. An afternoon Zoom conference is a regular entry in the calendar and we have all watched the videos and read the blogs about how to best set up your workspace to optimise the background and keep your bright pink coffee mug, pile of laundry and slipper wearing feet safely out of view. Paperless practices are now a necessary way of life.

Just as we as individuals have been required to adapt, so too has the family law system. In this Zoom session, my colleague Nonni Sdraulig and myself, Alex Metherell, will discuss how the court has evolved during the covid-19 pandemic, what systems are now in place, how court lists are being managed by the family court and federal circuit court, and therefore, how to prepare your case and, most importantly, your client, for the new normal. Whilst our advice may be instinctive to some, we are hopeful that our thoughts can serve as a useful reminder for best practice generally and in particular, whilst we "go to court" in the virtual space. I also take this opportunity to note that this Zoom session is available in paper form upon request from Foley's List.

CHANGED NATURE OF COURT

There have been 2 joint practice directions issued by the Family Law Courts, since the advent of the coronavirus pandemic, together with several notices to the profession. The Court has conveyed that access to justice will be administered via Microsoft Teams videoconferencing or AAPT telephone conferencing. Further, the Court has attempted to improve access to justice through the Joint Practice Direction 2 of 2020, which permits electronic signing of court documents. This means that solicitors are

not required to attend upon their client or expert witnesses personally in order to submit their affidavit material. In practical terms, you can simply have your client type their name into the document with a note underneath the signing clause which reads "Signed in accordance with JPD 2 of 2020". In an era where face to face contact is worrisome for some or simply impractical for others, this adjustment has been observed by us to ensure that material can be prepared and filed safely and expeditiously. As a side note, I would caution practitioners to send the final draft of the affidavit to be signed by the client with a note that reads they must read the affidavit carefully and provide a return email to confirm that the affidavit contents are in accordance with their instructions, prior to providing the electronically signed version. Aside from the style of practice that has been implemented, it has been our experience that it is not simply a transition to a virtual court room or paperless practice that has occurred against a backdrop of business as usual.

Firstly, Registrar's are increasingly being tasked with triaging or case managing matters before they reach a judge. This had already commenced with the introduction of the Contravention List in May 2018, where the first return of a Contravention Application was heard before a Registrar.

This was followed by the implementation of the Discrete Property List and PPP500 List, which are both court lists managed by Registrars and designed to assist parties whose disputes pertain only to property matters so they do not languish in the court system for a disproportionate amount of time compared to the size of the asset pool that is in dispute. Nonni will discuss the running and requirements of these lists in more detail later in this podcast.

More recently, as part of the response to the covid-19 pandemic, the court established a dedicated covid-19 list commencing 29 April 2020. The operation of the covid-19 list is set out in Practice Direction 3 of 2020. To be eligible for the COVID-19 List, you must satisfy **all** of the following criteria:

- The application has been filed as a **direct result of the COVID-19 pandemic**;
- The matter is **urgent**;
- The application is accompanied by an Affidavit that addresses all of the criteria;

- If safe to do so, you have made reasonable attempts to resolve the issue but you were unsuccessful;
- The matter can be dealt with using electronic means (e.g.: using telephone or videoconferencing).

In order to bring an application to the covid 19 list, you must prepare your application, a supporting affidavit of no more than 6 pages using the COVID-19 template affidavit which is available on the FCC website, a cover letter to the Registrary advising that the matter is urgent ; and a Notice of Risk (if applicable). I suggest in your cover letter that you point to the paragraphs in your affidavit which deal with the urgency.

The Court requires that in your affidavit, you address the following criteria:

- why the matter is urgent;
- how the dispute has arisen as a direct result of the COVID-19 pandemic;
- details of any current allegations of risk to children or parties, such as a risk of child abuse or family violence;
- details of the parties' reasonable attempts to resolve the dispute through negotiation, or details of why it was not safe to attempt to resolve the dispute by negotiation; and
- details of how you propose to provide a copy of these court documents to the Respondent on the day of filing, including information about the Respondent's current email address;
- If applicable, annexing (or attaching a photo or copy of) any current family violence order, e.g. an intervention order or domestic violence order.

The FCC website provides that After submitting your application, the Court will assess whether you meet the criteria for the COVID-19 List. If the matter is suitable for the COVID-19 List, you will receive a first return date within three business days of your application being assessed by the Court or less if your application is assessed as critically urgent.

Depending on the issues in your case, the application may be dealt with via a virtual court hearing before a Judge or a Registrar;

So in practice, you may again find that you are met with the Registrar acting as a gatekeeper to the judge and that you need to justify why the matter should be dealt with urgently by a judge on that day. Further, we note that the court will only deal with the matters in the application that are directly referable to the covid-19 pandemic. So if you issue an application that has a covid-19 related issue as well as other issues, you will not be given carte blanche to ventilate all issues in the application to the court at your urgent return date.

FIRST RETURN BEFORE REGISTRAR – REGISTRAR'S POWERS

However, further to the aforementioned court lists that are managed by Registrars, family law practitioners are increasingly finding that matters that are freshly filed and allocated to a judge, are now having the first return listed before a Registrar rather than the docketed judge. Whilst not seeking to undermine the very important role that the Registrars of the Family Law Courts play, this new pathway can be problematic for clients and practitioners in circumstances where a Registrar does not have the same power as a Judge to make orders in any given case. This is a very important change in the management of cases, the litigation pathway and the setting of client expectations. It is a critical point to consider when drafting your application and discussing possible outcomes with your client.

Firstly, let's consider the powers of a Registrar. It may be surprising to some listeners that a Registrar does not have the same powers as a judge. On almost every occasion that I have dialled in to a Microsoft Teams hearing since this case management change has occurred, there are some practitioners that make submissions to the Registrars in pursuit of matters that the Registrar does not have the power to determine. I suggest that prior to each appearance you consider what powers the court officer has to make the orders that are being sought.

Part 20 of the Federal Circuit Court Rules 2001 sets out the Registrar's Powers in that court. Division 20.1 sets out what powers are delegated. Pursuant to that division, Registrar's exercising power pursuant to the Family Law Act 1975 can adjourn proceedings, make or rescind a divorce order, make orders as to service, make a location order or a commonwealth information order, make procedural orders about family violence or appoint an ICL, to make orders for a s69ZW Report from DHHS or

request that DHHS intervene in a case, to appoint a person to execute a deed or instrument pursuant to s106A, or to grant an injunction pursuant to s114 of the Act. A Registrar can also make enforcement orders pursuant to Division 25B.2 of the Federal Circuit Court Rules in relation to financial matters, subject to some exceptions and carve outs. As you can see, the Registrar has limited ability to make orders that are not procedural or otherwise by consent.

Rule 18.05 of the Family Law Rules 2004 sets out a similar regime of delegated powers to Registrars. Rule 18.05 contains a table 18.3 which sets out the powers delegated to Registrars under the rules, including the appointment of a case guardian, powers to make orders for the discontinuance of a case, and powers to make orders arising out of non-disclosure pursuant to rule 13.14 which can include dismissing the case. Rule 18.02 of the Family Law Rules 2004 relates to judicial registrars, or senior registrars, which effectively provide that the Senior Registrar can exercise all powers in which the court exercises original jurisdiction save and except for some exceptions including the making of final property orders and reviewing the decisions of other registrars.

A good rule of thumb to remember is that a registrar can make most procedural orders and orders by consent, but cannot hear a contest, unless you are listed before the Senior Registrar in the Family Court.

Once you have considered the Registrar's powers, the next question is whether the exercise of those powers will provide your client with the relief that they seek. It may be that your client seeks orders that require the exercise of judicial power, for example, an interim property distribution, the urgent sale of a house or parenting orders in relation to the living arrangements for a child. If this is the case, then you will need to set out all of the facts in your client's affidavit material as to why the matter ought to be heard by a judge urgently. This will enable Counsel briefed to appear in the matter to make submissions as to why the matter should be sent before a judge on the day it is listed. The alternative is that a Registrar will find a date in a future list for the matter to be heard. This date can be anywhere from a week to months depending upon the urgency the Registrar affords to the case.

In anticipation of court events, practitioners on the record will receive an email from the chambers of the docketed judge with instructions on how to dial in to the hearing via Microsoft Teams or AAPT teleconferencing. Some chambers are noting in the email that if court time is required, the matter will be transferred to the judge on the day. I cannot emphasise more greatly that whether or not the matter is transferred from the registrar to the judge is still a decision that will be made at the discretion of the Registrar hearing the matter. It is not a fait accompli that if you have a case that requires court time, then you will be automatically transferred. We have found that irrespective of the indication in the instruction email from chambers, Counsel on the day still needs to successfully mount a case for urgency.

This is a good juncture to remind listeners that an advocate is often only as good as their brief. If the affidavit material does not contain the facts that go to the urgency of the case and the need for it to be dealt with by a judge expeditiously, then submissions will be unable to be made on this basis.

PARENTING CASES

The listing of cases in this manner is not confined to property cases in those discrete lists, which Nonni will discuss later in this podcast. The first return dates of parenting cases are also being managed by a Registrar.

When approaching a parenting case that is likely to be heard by a Registrar in the first instance, the advice that I provide about preparing particularised material does not relate solely to the issue of urgency. It has become all the more important to take great care when drafting your affidavit material and consider the outcome that is sought or the long term case plan that is going to be adopted. It is imperative to be particular with respect to the orders that are sought and the evidence that you reply upon in support of those orders. For example, blanket allegations of sexual abuse against a child will be unhelpful. If the allegations are detailed and particularised to the greatest extent possible, then the Court has the material required of it to make an assessment as to whether the matter should be transferred to the Magellan List of the Family Court, being the list dealing with sexual abuse cases, rather than having the matter languish in one court list when it should otherwise have been promptly transferred. If you seek a s11F Child Inclusive Conference report, set out the matters that you say make the

case appropriate for a s11F such as evidence of alienation, of mental health issues pertaining to one parent or of an older child making express wishes. Again, it is not enough to simply say "the child has told me that he doesn't want to spend time with the other parent". When has the child said this? On how many occasions? Who has the child said it to? What were you doing when this comment was made, was it spontaneous or part of a greater discussion? If your client says that the other party has mental health issues that are relevant to the care of the child, such as alcohol or drug use, set out the basis for these allegations. It may also be worthwhile to consider whether your client requires a court funded s11F Conference or whether the case may be better served by a privately funded s11F Conference, which is a service increasingly offered by private family consultants. Aside from the cost, the primary difference which is a consideration in the current climate is that some private family consultants are continuing to conduct s11F conferences face to face, whereas the child dispute services at the court is conducting the conference be electronic means, usually telephone. As a result, the court appointed s11F Conferences may be of limited insight and assistance compared to the value that can be offered by a face to face conference with a private family consultant. This is a consideration that we recommend discussing with counsel briefed in the matter prior to the hearing.

Additionally, the only indicator upon which the Court can now appoint an Independent Children's Lawyer if there are allegations of abuse. Accordingly, you should only seek the appointment of an ICL in your case if these allegations are present. If the allegations are present, they should be particularised in your clients' material. I note that interim affidavits are only permitted to be 10 pages long, so there is an art to including all of the relevant information in a succinct matter. If in doubt, you can ask your counsel to settle the material or have a conference with the client before drafting the material to discuss what evidence ought to be included.

A further suggestion that I make in terms of the running of matters at this time is in relation to the issuing of subpoenas. At the present time, appointments must be made in order to inspect subpoenaed documents at the registry to ensure that social distancing protocols are complied with. You cannot simply turn up at the registry. Further, when considering expert evidence or source document evidence, I recommend considering putting medical, psychological or psychiatric reports on

affidavit in anticipation of a first return date, rather than waiting to trial, to ensure that the judge or registrar has access to this material on the court file in admissible form. We are not in a situation any more where a document can be easily tendered and you will be met with a more agreeable judicial officer if your case has been carefully prepared.

So, in circumstances where you are now likely to come across a Registrar at the first return date in the current climate, when you are considering bringing an application in a family law court, you should consider four things:

1. Consider what orders your client needs at the first return date
2. Look at the rules of each court to determine whether a registrar may be able to assist
3. If your matter is urgent, consider what evidence you require to mount the best case for urgency
4. Include all of the relevant evidence required to secure the procedural orders you say are required to advance your case to the next stage.

Now you've filed your application and you are listed before a registrar. How do you best prepare your client for the hearing? Nonni will elaborate shortly on what the solicitor with the conduct of the file and Counsel with the brief in the matter should do in preparation for the hearing. However, in terms of preparing the client, it is most helpful if the first time the client hears that they will be unable to achieve the orders they are seeking before the Registrar for the first time from Counsel. Clients ought to be prepared that prior to being able to have an argument before a judge, if this is ultimately what is required, that the matter is first going to be heard by the Registrar and unless agreement can be reached with the other side, the orders that are made are largely procedural. Family law clients should also be made aware that there are substantial delays in the listing of hearings by Registrars. In addition to the usual backlogs, electronic hearings are slow and more often than not, more than one hearing cannot be listed on any given day. It is our view that your client will be best served if you can provide them with the worst case scenario with respect to the delay in reaching a judge in order to avoid client dissatisfaction.

These are my perspectives on how the running of the court has altered since we transitioned to electronic hearings and how to best prepare your case, particularly from the perspective of a parenting case. It is my pleasure to now hand the mic over to Nonni.

NONNI:

I am going to talk about both the discrete property, Priority Property Pools under 500 lists (or PPP500) as well as the contravention application list, tips and tricks in relation to preparing for appearances in these lists together with a more general discussion about how to prepare your case and your clients for electronic hearings before Registrars in the FCC. As Alex said, some of this advice will be second nature to those familiar with these processes or otherwise common sense but it is always useful to be reminded of how best to prepare for different hearings, particularly during these changing and uncertain times.

DISCRETE PROPERTY LIST and PPP500

There have been two property lists introduced by the FCC, being the DPL and the Priority Property Pools under 500 List. First returns in both lists are dealt with by a Registrar of the court.

These lists were introduced for applications relating to financial orders only although the PP500 list deals exclusively with applications involving simple property pools with a value of $500,000 (incl superannuation) or under. Unlike the more recent practice of listing/re-listing first returns in parenting applications before a Registrar (which may or may not remain the practice once face to face hearings resume), these lists were introduced prior to the Covid-19 pandemic. Currently all hearings are being conducted electronically, both by Microsoft Teams and telephone.

The purpose of the DPL list is to essentially streamline property matters and allow the parties to obtain procedural and/or consent orders progressing their matter towards final resolution with minimum delay and expense. It was also created to more closely monitor compliance with orders such as those in relation to discovery and valuations while leaving the judges to hear urgent and contested applications.

The purpose of the PPP500 list is to achieve a just, efficient and timely resolution of cases under that threshold, at a cost to the parties that is reasonable and proportionate in the circumstances of the case. This list allows the parties to undertake alternative dispute resolution at the earliest opportunity and where this is unsuccessful, the opportunity for a less adversarial trial or hearing on the papers. Therefore if your client has a total pool of under the $500k threshold, you might consider filing in this list.

Be aware that the requirements and processes of the PPP500 list are slightly different to those of the DPL so make sure you check the FCC website prior to making an application. Today my focus is on the DPL however some of this advice will still apply to the PPP500 list as well.

So your application is listed in the DPL what does that all mean practically? Most importantly, where once a property application would be returnable before a judge in a duty list at first instance, first returns of such applications are now conducted by a Registrar. As Alex discussed with you earlier, the powers of a Registrar to make orders are much more limited than those of a judge and in particular, the Registrar is only able to make procedural orders (such as orders for valuations, discovery or the parties to attend a con conf or mediation) or orders by consent. They have **no** power to hear a substantive contested argument where the parties are in dispute.

This point is really important to discuss with your clients when issuing property only applications in order to manage their expectations. Many clients are under the impression that the court will have the power to make contested orders at the first return and one of the complaints I often hear from clients is *"what is the point of having this hearing if the Registrar cannot make orders that aren't by consent?"* Keep this in mind when preparing your clients for the hearing so it doesn't come as a rude shock to them on the day.

That being said, while the matter will be listed in front of a Registrar for the first return, in some circumstances it may still be referred to a judge on the same day. This is largely dependent on the Registrar's view of whether this is appropriate and there being a judge available on the day to hear the matter. Do not expect such a referral to take place as a matter of course – it will only occur in limited circumstances, most usually

when there is an urgent interim issue that cannot be resolved by consent such as an urgent sale of property, urgent injunctions or an application for urgent spousal maintenance (note my specific use of the word *"urgent"*). Make sure you discuss this with your client prior as what may appear or be "urgent" to them will not in reality be considered "urgent" by the court. Alex has already discussed the importance of including evidence about the urgency of any interim application in your affidavit material to enable the Registrar to make a decision. More likely however is that the Registrar will give the parties an abridged hearing date on that discrete issue or application rather than making a referral on the same day.

Preparation for the DPL

The Registrars in the DPL require the parties to particularise the orders sought in specific detail. This means that Registrars are no longer making orders for generalised discovery (the parties provide all documents requested pursuant to the rules within 7 days) or a panel of experts (the applicant to nominate three names with the respondent to choose one from the list of three).

As such, if seeking specific discovery orders, prior to the hearing the solicitor must check what general discovery (if any) has been provided; what discovery was specifically requested (if any) and whether it has been provided (in full or in part) and thinking ahead, what particular discovery is required to be able to assist the client and court to determine the specific issues in dispute in the case. For example, if the case raises issues in relation to an inheritance received, discovery of the will might be necessary or if an issue in dispute relates to Workcover or TPD payments, discovery of documents in relation to those claims will be relevant and should be sought. This requires the solicitor to think more critically about the case in the early stages of litigation, which will assist in negotiations and an early resolution of the matter if possible.

When drafting specific discovery orders in preparation for the hearing, the solicitor should always ask themselves firstly how the discovery sought is relevant to an issue in dispute and secondly whether it is a document within the power, possession or control of the party or whether it will need to be subpoenaed. If in doubt, brief early and contact the barrister to seek their advice about which orders are appropriate and

how they should be drafted as, at the hearing, the barrister must be able to (particularly if the other side oppose the order being made) identify to the court how the documents are relevant and that they can be provided by the other party.

In respect of appointing experts, this generally arises in relation to property or asset valuations and mediations. The solicitor must make enquiries of valuers and available mediators, including their costs, prior to the hearing so that these can be identified in the orders sought. Again, if in doubt about who would be best suited to undertake these tasks, the solicitor should contact the barrister briefed to seek their advice.

The Registrars also expect, where possible, that procedural fairness will be afforded to the superannuation fund *prior* to the hearing where a split is sought. Even if you are unsure as to the final base amount, a letter can still be sent to the fund affording procedural fairness pending confirmation of the amount.

In the event that non-urgent interim applications will need to be heard and determined by a judge prior to a final hearing, the solicitor should identify the necessary steps that need to be taken to prepare the matter for interim hearing, for example filing timelines for documents or expert reports. These types of procedural orders can then be made on the first return before the Registrar to ensure the efficient management and hearing of any interim applications in the future.

So in short summary, the Registrars now expect the legwork to be done by the solicitors prior to the first return in the DPL to enable the matter to proceed as efficiently and cost-effectively as possible on the day. In the event that a party seeks generalised orders, the matter will be stood down so that these enquiries can be undertaken which wastes not only the client's time, your time and the barrister's time but also the court's time.

Remember to brief early for these hearings and revert to the barrister if in doubt for advice.

CONTRAVENTION APPLICATION LIST

Another list that was introduced prior to the Covid-19 pandemic is the contravention application list. Since April 2018, all contravention applications have been listed directly to the CL before a Registrar for first return. The purpose of the list is to conduct a preliminary assessment as to whether the documents filed comply with the relevant division of the FL Act, discuss what outcome the applicant or parties are seeking and to check whether a resolution of the application is possible without the need for a final hearing. If the matter is unable to resolve, the Registrar may then make directions for either a dispute resolution process or for the application to be listed before a judge for determination. Once again, currently all appearances in the CL are being conducted electronically by either Microsoft Teams or telephone.

This discussion will centre around practical tips and tricks for the drafting and preparation of contravention applications in the CL list rather than the legislative regime, available remedies or penalties or definitions of "reasonable excuse". For a more fulsome discussion on these points, my colleague Dr Anna Parker has done a fantastic podcast which I would encourage you to listen to – it can be found on the Think Foley's podcast page titled *Episode 16 – Contravention Applications In Parenting Matters.*

Preparation for the CL

Prior to filing a contravention application, the solicitor should consider whether it is appropriate under the circumstances. Ask yourself what outcome the client wants to achieve and whether filing a contravention application is the correct mechanism by which to achieve this outcome. It may actually be that in some circumstances an application in a case or initiating application is more appropriate. It is well known that contravention applications are among the most complex and technical of all the available options open to the client so these alternatives should be discussed with the client and counsel who may be briefed in the matter prior to the making of any application.

Remember also that a contravention application must be heard before any final hearing of the substantive matter. This means that your trial date might be adjourned if you issue close to the trial and if the judge docketed to your case makes findings in relation to the contravention application, that judge will not be able to determine the

matter at the final hearing. This could lead to further delay while the matter is transferred into another docket.

A contravention application is quasi-criminal in nature. This means that it must be drafted carefully and properly as technical deficiencies can result in applications being withdrawn, summarily dismissed or unproven at a final hearing, possibly with costs consequences for your client. You can guarantee that the barrister on the opposing side will be checking that the documents filed are compliant because it is an easy objection to make without even addressing the substantive issues. Although this doesn't preclude you from re-drafting and refiling the application, prevention is better than the cure (and additional cost to the client!)

A few issues which seem to regularly crop up include the following:

1. Check that the orders alleged to have been breached are actually enforceable – if the drafting/wording of the orders is ambiguous or unclear or requires interpretation, your client will not succeed in making out a breach. If for example the orders state that your client is to have one weekend per month with the children on a weekend to be agreed between the parties, your client will not be successful in arguing a breach on a specific date because the orders are not particularised. It must be clear what the obligations of the parties are on the face of the orders before you can succeed in any contravention application in relation to same;
2. Too many alleged breaches have been included in the application: include only the most serious, easiest to prove and representative of the respondent's conduct. An application that contains, for example, 20 or 30+ breaches will mean that more time will have to be allocated to the final hearing (resulting in listing delays) and will make it less attractive to the judge to hear it on a day where there might be competing listings;
3. The alleged breaches have not been drafted properly – be careful about identifying the correct dates, times and places! For example, cross-check with the orders whether the dates of the alleged breaches contained in the application are actually correct. This is especially important in circumstances where your client alleges multiple breaches of the same order (for example telephone time on a specific night of the week). In one application I was briefed

in, I cross-checked all the dates only to find out that they were one day out on each alleged breach (a Wednesday night instead of a Tuesday night). I similarly had one case where the parties had agreed between themselves to change the night telephone calls took place however this was never formalised in the orders which still provided for the original agreed night. The application had alleged breaches of the agreement the parties made between themselves rather than breaches of the actual orders in place. In circumstances where there was no *"as otherwise agreed"* order, this is not permissible so make sure you double check all of the dates, times and places!

4. The affidavit does not contain the evidence to support the alleged breaches: even if your application is drafted without fault, the affidavit must contain evidence to support each individual breach alleged. This means that evidence must be given for each separate occasion your client alleges a breach took place. It is not sufficient to say *"The respondent contravened order 1 of the orders made on 16 May 2018 on the following occasions"* and then list a series of dates. Even if it feels repetitive (say in the example where multiple breaches of telephone time have occurred), you must set out in a separate paragraph for each date the evidence which goes to proving the alleged breach. In the event of insufficient evidence, the breach will not be made out; and
5. The orders alleged to have been breached are not attached to the affidavit in support of the application. Surprisingly, this happens more often than you would think. Make sure you read the information on the cover of the application! It clearly states that "You must attach to the affidavit filed in support of this application, a copy of the order, bond, agreement, or undertaking that you allege has been contravened". Given the mandatory nature of this requirement *"you must attach"* I have heard of applications being dismissed on this basis at first instance.

Some of these issues are minor and an oral application to amend can be made on the day. However, this will usually be met with an objection by the other side given the nature of these applications so never assume that an oral application to amend will be granted.

Another issue which regularly arises and which the Registrar will ask about at the first return in the CL is what remedy your client is seeking if the application is successful. Pursuant to the Act, there are a number of remedies available and you should discuss these with the client prior to the first hearing (taking into account the seriousness of the alleged breach and whether or not it is a "first offence"). It is surprising how often clients are unaware of the remedies are available to them so make sure you discuss this with them.

As an aside, I have appeared in the CL a number of times and one thing I have heard repeatedly on the grapevine is that the application will not be referred to a judge by the Registrar on the same day. However, on at least two occasions where the application was urgent, the Registrar referred the matter to a judge for hearing that day. This is something to keep in mind in terms of managing client's expectations and briefing for the first hearing.

If you have any questions about whether to file a contravention application, the drafting of the application or the most appropriate remedy to seek, brief early and discuss these issues with your barrister who will be able to guide and assist you and your client.

Preparing for electronic hearings before Registrars

Finally I would like to talk about preparing for electronic hearings in front of Registrars generally, no matter what list or application.

While we are all hoping to return to face to face hearings sooner rather than later, this looks less and less likely to occur anytime this year. As such, hearings via Microsoft Teams or telephone are here to stay for the time being.

I have found that clients, in particular new clients, are much more nervous about hearings occurring electronically than if they were face to face. In my opinion this is partly due to the fact that barristers are not able to meet with the clients in person prior to the hearing which seems to make clients feel more relaxed and confident about the hearing. Given this, instructors should consider requesting a zoom conference or similar (where able) between the client and barrister prior to the hearing which is more personal than a telephone call where the client can only hear the barrister's voice.

In relation to the hearings themselves, many registrars will not permit matters to be stood down. This means that negotiations between parties are expected to occur prior to the matter being called on in court so when it is, the matter is ready to proceed. Gone are the days (at least for now) where parties would turn up to court on the day of the hearing, negotiate briefly before the matter was called on, then stand the matter down for further negotiations before mentioning it later in the day. This means there is less work to be done on the day of the actual hearing but more to be done behind the scenes prior.

In the week leading up to the hearing, try to find out who is briefed for the other side so that your barrister can touch base with them. Solicitors should also send proposed minutes of consent orders to the other side having already made enquiries about experts, mediators and cost involved. If it is a matter where written submissions are required, brief your barrister early to enable these to be drafted and forwarded to the court prior to the hearing day. Each Chambers will send out an email with instructions in respect of what is required for each hearing – make sure this is adhered to strictly to ensure the matter runs as smoothly as possible on the day.

In terms of the actual hearing, make sure you advise the client that it will be conducted electronically. This may seem like common sense but I have spoken to a number of clients who thought they still had to turn up to court in person. Also, unless granted leave not to attend, the client should be "present" during the hearing if they have the electronic capabilities to do so. Make sure that you have advised the client to dial in at least 5 minutes prior to the hearing and to put themselves on mute (and turn off their camera if by Microsoft Teams).

It is also paramount that your client has a means of providing instructions to the barrister briefed *during* the running of the hearing – if conducted by telephone, I generally ask my clients to have their email open on their laptop (if they have one) and if conducted via Microsoft Teams, to have their mobile phone available to text further instructions if needed. It is a clunky means of obtaining instructions while court is in session but I have found it works in most circumstances.

"Going" to court is clearly not what it used to be however most of the information and tips and tricks provided in this podcast are applicable whether or not electronic

hearings remain the way of the court world in the future. Court processes in the FCC have changed over the past year with the introduction of discrete lists and especially as a result of the Covid-19 pandemic. This has required solicitors, barristers and clients to adapt to new practices in terms of listings and running matters via electronic means. This has also meant managing client expectations in different ways to ensure the smooth management of matters within the court system.

Alex and I hope this Zoom session has been helpful. If you need any assistance from a barrister with your family law matter, do not hesitate to contact Foley's List on 9225 7777.