

INTERIM FAMILY LAW PROCEEDINGS

Federal Circuit Court — Practice Direction No. 2 of 2017

IF A PICTURE PAINTS 1000 WORDS, CAN 2500 WORDS PAINT A PICTURE?

Fabian B Dixon SC

What it really means to you

1. Like me, upon reading the Practice Direction, the question that I asked was why was it done? What is the Court trying to do? What is the Court trying to eliminate and what was the cause for such a Direction?
2. You should all have the Practice Direction in front of you and you should be aware of the Practice Direction.
3. I would also suggest that it is necessary for you as solicitors to be aware of and have a copy of the Rules of the Federal Circuit Court as this Direction only applies to that Court.
4. The answer to the first few questions is, I believe, obvious. What the Court is attempting to do is to allow the Court to be efficient and to cause all persons involved in such applications to focus on the real issues that are being sought in any interim hearing.
5. Up until the present time much of the material which has been submitted to Court in relation to interim hearings has been, I venture to suggest, unnecessary, verbose and irrelevant ,or contrary to the Evidence Act 1995 (Cth), particularly Sections 55 and 56.
6. As a result of this Practice Direction, affidavit material in support of an interim application must not:
 - (a) Exceed 10 pages in length;
 - (b) Contain more than 5 annexures.

7. Hence the starting point in respect of an interim application is to ensure that the order that you seek is clear, concise and precise, and that you only seek the interim orders that you really need for your client. Having established or worked out what the interim order is that you need, you will then turn your mind to what must be included in the affidavit to establish the basis for the Court to make such an interim order.
8. First of all you should check that the Court has the jurisdiction to make the interim order. That is, that the Court has the power to make the interim order that you are asking for.
9. As a result of the Practice Direction it is even more important to ensure that your affidavit is in plain, direct and active English and that the paragraphs will assist the Court in coming to the conclusion in support of your application.
10. I venture to suggest that the Direction will avoid the following, which I give as an example:

"I lived on a farm 5 miles away from my husband who worked for his father on their cattle property.

We first met at the Spinster's Ball when I was made Belle of the Ball and from then on I used to go and watch my future husband play footy with the Huon football team.

We often went away on picnics and I spent a lot of time at his house during the weekends talking to his mother.

My husband then went overseas in 1995 on an agricultural scholarship which he won and worked overseas in England in a dairy farm learning new techniques.

It wasn't until 5 months after he returned in 1996 that I ran into him at the local store and we started going out again.

I first moved into a worker's cottage on his father's farm with him in 1997. I was not working, he was working on the farm.

In 1998 on the 2nd March we were married at the local Catholic Church, our reception was held at the local CWA Hall

Although it was our desire to have children early, we did not have any children until 2005 when our first child Michael was born at the local cottage hospital.

Our second child Sarah was born in 2010 at a hospital in Huonville.

I lived and worked on the farm with my husband during which time we had a dairy herd, we grew crops etc. etc. etc.”

11. All of that could be replaced with one paragraph which says this:

“I started living with my husband in 1997, we were married on the 2nd of March 1998. I did not work on the farm. We have two children Michael born on the 1st of September 2005 and Sarah born in 23 August 2010. My husband and I separated in 2nd of July 2016 when I moved to live at 10 Smith Street, a property which I currently rent.”

12. As you can see by that very general example, that one paragraph tells the Judge when they met, when they married, what number of children they have and when they separated. It sets the scene. Virtually all the events recounted in the previous paragraphs would not assist the Judge.

13. One of the problems that confront the Court is that very often the client is asked to write a life story and that is then cut/paste into the form of an affidavit. I submit that it is not of assistance to allow the client to dictate what should be in the affidavit. It may be difficult but make sure, particularly in view of the new Direction, that only relevant material is put in the affidavit as irrelevant material will dilute the facts and will weaken your case.

Language and points to avoid in preparing the affidavit

14. It will not assist you obtaining an order if you use emotional language, nor if you over exaggerate statements, and by that I mean the following:

- Try and avoid saying what the deponent thinks,

- What upsets or concerns the deponent,
- What the deponent considers to be the medical problems the other party suffers from,
- What the deponent presumes or thinks took place,
- What the deponent's opinion is of the value of the house. That may be fine if they are a valuer, if not, there is no evidentiary basis for that to be included in an affidavit and it should be objected to.

15. How often do we see in cases where one party will say:

“the other party never helped around the house” or

“he never cooked a meal”,

only to find when the matter is examined, that that deponent had been on holidays for 3 weeks away interstate and the children had been left with the other party who had cooked, cleaned and looked after the house on not one, but a number of occasions during the period of the relationship. As a result of cross-examination the deponent's credibility has, I submit, been severely affected and a Judge may take with a grain of salt, the remaining evidence of the deponent including any other generalisations in the affidavit they are irrelevant to their case.

16. I would suggest as a result of this Direction that the best way, apart from the opening paragraph, is to allow one paragraph, one statement.

17. One of the problems that the Court faces is that there are long paragraphs with about 10 or 12 different statements of facts or propositions included which make it difficult for anyone reading the affidavit to see what the real point was of that paragraph. It also causes problems in cross examination.

18. From my discussions with Judges of the Circuit Court, they have, for a number of years, been concerned by the amount of waffle and irrelevant material contained in interim affidavits.

19. Another reason why it is important to follow the Direction is a number of the Judges in the Circuit Court have mixed dockets, and that is that they may only have 4 duty lists per year in relation to Family Law matters. Thus, if an adjournment is sought and granted as a result of non-compliance with the Directions, it may well be that your interim matter may not be back before the Judge for a period of 3-4 months at the earliest. So much for the urgency!!!

20. The benefit of a clear and concise 'one paragraph, one submission' approach, is that it forces the Respondent to either admit what is in the paragraph or deny it. If there are a multitude of allegations in a lengthy affidavit then very often the deponent is able to avoid being "boxed in" to that position and you may be faced with objections on the basis that the contents are:

- Comment,
- Irrelevant,
- Speculation and inadmissible,
- Not based on established facts,
- Are opinions which the deponent is not qualified to give.

21. A simple example of that is where it is contained in an affidavit "my husband is an alcoholic". Well I ask, what does that mean? When did he drink and for how long? What alcohol does he drink? What was the effect of the alcohol on his behaviour; happy, sad, aggressive, violent? How relevant is it to the issue about which you are seeking the interim order from the Judge?

22. It would be far better to say:

"On the 1st March 2016 my husband drank a bottle of Johnnie Walker whisky, I found him at 5pm asleep on the floor with the empty bottle beside him, he had vomited and had a petrol bomb in his hand, I called the ambulance and Police, he was taken to the local hospital and was kept in hospital for 3 days after which he attended a health retreat".

23. If one is seeking interim orders in relation to spouse maintenance then it is important that the Statement of Financial Circumstances is completed and is completed in its entirety and with accuracy. Too often this important document is merely thrown together. For example, if you are seeking an interim spouse maintenance order and you have completed that document in its entirety and on the basis that it is accurate, all you would need to put in an affidavit was "I rely on the matters contained in my Statement of Financial Circumstances filed with this application". There is no need to put anything else as it will be the Barrister who will then be able to make clear and concise submissions to the Judge in relation to that document and point out to the Judge that that sworn document gives the basis for which the interim spouse maintenance order could be made in conjunction with the relevant evidence in the affidavit

24. I submit that no other extraneous paragraphs in an affidavit need to be used.

What might be the result of not complying with the Direction?

25. The answer to the first question is a loss of hearing priority. If you do lose that hearing priority because you have not complied with a Direction, you may be faced with a Judge saying:

"Well Mr X, you have no material before me, do I proceed on that basis or do I give you an adjournment on the basis that you pay the costs relating to the adjournment", that is YOU the solicitor pay the costs because of non-compliance with the Direction. That I believe will become more and more prevalent as a result of non-compliance with this Direction. Point 12 says that "Specific costs orders may be made".

26. I also point out a word of warning that if you want to "play games" about service of documents and you file the document 3 weeks before the hearing date but only serve it 48 hours before the actual hearing, trying to obtain a tactical advantage, then again, from my general discussions you should be ready to answer the question:

“Why shouldn't I make an order for costs against you Mr X? You have had this application now for 3 weeks and only served it 48 hours before”.

Thus, you may have to pay some costs and if your client is in Court they will see that you may have lost the hearing priority and nothing may be dealt with by the Court until the matter returns to Court, which may not be for 3 or 4 months.

27. Finally, in looking at the topic, it is important to stand back and say in that 10 page document, have I painted the picture? You be the Judge. Does this give the facts upon which the Judge can make and justify the making of the interim orders sought? Do I have the relevant information as opposed to the irrelevant information within those 10 pages?

28. If you have doubts, then could I suggest that perhaps, and it should not be an expensive exercise, that you have that document settled by a Barrister. Why? One reason may be that it may avoid an order for costs being made against you. Secondly Barristers, particularly if it is the Barrister who may end up dealing with the application, will be able to assist in removing extraneous material and may even have suggestions for you to include relevant material to the issue that you want the Court to make the interim order on.

29. We should all be aware that this new Practice Direction has not been made for fun, has not been made to just give us another Direction that we have ignore, it has been made in order for Judges to work efficiently and to allow litigants to have speedy and cost effective access to the Courts.

Fabian B Dixon SC

OWEN DIXON CHAMBERS EAST

Barrister at Law