



FAMILY COURT OF AUSTRALIA

SYDNEY DUTY LISTS

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A paper for the

CLE Series

Sydney

By the Hon. Justice William Johnston

SYDNEY DUTY LISTS

The core business of the Family Court of Australia is to hear and determine substantive causes. But the Court also provides a service for determining urgent or priority applications. This is called “The Duty List”.

When available

It is offered in Sydney on various days from 9:30 am before the Registrar, with appropriate matters being transferred to the Duty Judge that day.

Business of The Duty List

The main types of cases are:

- Interim parenting unable to await the first day of the Less Adversarial Trial (“LAT”)
- Interim financial:
 - o urgent / interim spouse maintenance
 - o preliminary costs
- Interim financial injunctions
- Ex parte matters:
 - o Child injunctions
 - o Location
 - o Commonwealth Information
 - o Child recovery
 - o Anton Piller applications
- Enforcement and contempt:
 - o Contravention and contempt applications
 - o Money enforcement
- undefended applications
- Nullity, declarations of validity of marriage and divorce
- Forum disputes
- Directions in Hague (Child Abduction Convention) proceedings

Duty List Management Principles

- (a) Diary rules keep the overall numbers in a particular list tight.

(b) Time limits

The upper limit of hearing time for any duty matter will be 2 hours (consistent with Rule 5.10 of the *Family Law Rules 2004* “the Rules”). In reality this will usually be less because the Judge will probably simply divide the available time in the list by the number of matters requiring attention.

(c) Cross-examination

This will not usually be permitted (again Rule 5.10 of the Rules) in interim or procedural matters. But cross-examination is appropriate in final applications eg contravention, contempt, nullity, money enforcement.

(d) Contravention and Contempt

For an applicant to be able to achieve imposition of a sanction against a respondent, they only need to establish one breach of an order. Accordingly, where an application alleges multiple breaches, the Duty Judge will usually ask the applicant to elect to proceed on 2 or 3 of the alleged breaches on the understanding that the remaining breaches will be withdrawn. If an applicant wishes (for some reason) to proceed on all alleged breaches, he/she will be offered a hearing (invariably much later).

In any event, contravention applications are about timely enforcement of court orders not waiting for a multiplicity of breaches to use as a weapon against the respondent. Excessive delay might be an abuse of process.

(e) “Not reached” matters

Occasionally Duty Lists contain more cases than can be determined on the day. Judges will endeavour to adjourn any matter in relation to which it becomes clear will be “not reached” by early afternoon. Such matters will be given priority on the adjourned day.

Common Problems

(a) Matters filed in the wrong Court. There is a protocol in operation between the Family Court of Australia and the Federal Magistrates Court to enable matters to be dealt with by the appropriate Court. This Protocol is attached.

(b) “Salami” applications requiring more hearing time than can be offered. These are interim or interlocutory applications involving multiple issues and / or voluminous evidentiary material.

(c) Parenting disputes

Parties to parenting cases in the Duty List will be expected to have undertaken mediation as required by s 60I and s 65F of the *Family Law Act 1975* (“the Act”).

There are some exceptions such as urgency. But where parties have not undertaken mediation Duty Judges will invariably order the family into the Child Responsive Program OR a Child Dispute Conference. This usually causes an adjournment.

In such cases Family Court Consultants will usually prepare a Child and Parent Issues Assessment as part of the Court's Child Responsive Program. This Assessment presents the Consultant's preliminary observations of the parties and children and identifies the relevant issues.

Occasionally, where priority demands it, the parties will be fast-tracked into a Child Dispute Conference. This is usually followed by the issuing of a Memorandum informing the Court about any areas of agreement, whether some child protection measures need to be undertaken, whether appointment of an Independent Child Lawyer is appropriate, whether the case requires expedition, whether a Chapter 15 expert should be appointed and whether certain subpoenas should be issued.

If there are allegations of violence, abuse, substance abuse or mental health issues, or even mature children's views, almost invariably an Independent Child Lawyer will be appointed. Usually that will end the Court's involvement on the day. Because if the child needs an Independent Child Lawyer, they will need such representative for all litigation purposes including in relation to any interim determination.

Independent Child Lawyers are arranged by Legal Aid New South Wales and are usually available approximately 3 weeks from the date of the order for appointment.

Often a respondent in cases involving serious allegations about behaviour is anxious to have the allegations tested in Court as soon as possible. But it is most unusual for sufficient time to be available in Duty Lists to enable such a hearing and to enable the Court to arrive at a finding of fact. So the Court usually takes a cautious, protective approach eg making orders for time between a child and respondent to be supervised.

Cases involving allegations of sexual abuse are usually adjourned to the Magellan list.

- (d) Non-justiciable or trivial disputes. For example, a variation in parenting changeover arrangements. Modest variation in the number of evenings per week spent by children with each parent. Such matters will rarely attract Duty time.
- (e) Disputes which are substantive, rather than interim in nature. For example relocation, change of name, long term education, religious instruction, medical treatment.
- (f) Reactionary applications where a party is forced to bring urgent proceedings in circumstances where the other party has taken things into their own hands. The most common example is where a parent has moved with a child interstate or overseas. The wrong party has to bring an application in the sense that often they have to guess at the

reasons why the other parent has moved and usually do not have much of the detail. The other party should have been the applicant because they know most of the details.

- (g) Disputes about management of a trading enterprise. The most common examples are where the parties had previously operated a farm, a retail or service business, a manufacturing business or a professional business. Often a set of orders will be developed which will place only one party in charge with appropriate reporting requirements to the other party as well as protective measures.

Injunctions and Preliminary Financial Distributions

In relation to applications for injunctions to protect property a reading of *Mullen and De Bry* (2006) FLC 93-293 will reap reward. This case reminds us of the breadth of s 114(3) of the Act ie. to grant an injunction (where) “it appears to the court to be just or convenient to do so”. It is also most helpful in showing the sort of considerations courts will take into account in determining balance of convenience and risk.

With respect to preliminary financial distributions ie preliminary costs or interim property settlement, the leading authority is *Strahan* (2010) 42 Fam LR 203. Amongst other matters, this case confirms that there are numerous relevant statutory heads of power for such orders including ss 79, 80(1)(h) and 117(2), and when making such an application one needs to address the requirements of the particular provision.

Duty List Advocacy

Some shortcomings in preparation can be rectified during the course of a multi-day trial. But case shortcomings in a busy duty list can be disastrous. Therefore it is essential that practitioners:

- are highly prepared;
- have necessary discussions with opponents so that matters which are able to be settled do so and that issue is joined in matters that require judicial time;
- are able to summarise the issues succinctly. At first mention, articulate a thumbnail sketch of what the matter is about to the Duty Judge;
- be able to prioritise the issues within the matter;
- provide a Case Outline (identifying the application or orders sought and affidavits relied on) to the Judge and to your opponent;
- ensure that subpoenaed documents have been inspected;

- confine written evidence to the essential reading (identified paragraphs of affidavits, flagging relevant passages of tendered documents and exclude “cheer squad” affidavits;
- in complex matters, prepare aids such as diagrams of corporate structures, balance sheets, schedules of assets, etc;
- unless ex parte, ensure all persons likely to be affected by the proposed orders have been given adequate prior notice of the proposed orders and the evidence in support;
- remain objective. A practitioner who identifies too closely with their client’s case is not assisting the client. You are an officer of the Court and owe a duty not only to your client but also to the Court;
- make submissions based on the evidence not on emotion;
- do not make florid or inflammatory addresses – there is no jury and you will test the Court’s patience;
- not indulge in over familiarity or excessive conflict with the opposing practitioner – over familiarity can appear to isolate, or demean, the parties. Excessive conflict can distract attention from crucial matters and affect the outcome;
- make efficient use of the available time.

Self-represented litigants

Remember that the Court has a duty to assist self-represented litigants at least by providing procedural information.

It can be helpful for practitioners to locate a self-represented opponent as early as possible on the day.

Early discussion about settlement can produce rewards.

Help them to find the duty solicitor as early as possible.

Conclusion

The Duty List poses special challenges for practitioners and also for the Court. Good preparation by practitioners and a high degree of co-operation between practitioners and the Bench will enable good and timely outcomes for those litigants requiring the Duty List service.

Acknowledgement: This paper is an updated version of a paper prepared by the Hon. Justice Ian Loughnan called “Lessons from the Duty List”.