

PROCEDURE FOR PROPERTY MATTERS (MARITAL AND DE FACTO)

Which court?

Property applications (marital and de facto) should be brought in the Federal Magistrates Court (FMC) unless it is likely that the case is complex and will take more than 2 days. In such a case, the Application should be filed in the Family Court, or may under FMCR 8.01 be transferred from the FMC to the Family Court.

Your local registry

This is to be found at the link “list of family law registries” at our website under this chapter. Note that NSW, Qld, Vic and Tas have more than one registry.

Both parties

1. Go through your client’s returned Client Information Sheet (see “lawyer-client documentation” under chapter “client preliminaries” above), completing details of:
 - assets, liabilities and financial resources of each party
 - financial, non-financial and family welfare contributions by each party

Investment properties

If there are a number of investment properties, ask your client to prepare a separate page for each property, setting out (as they must for the home and all previously owned properties too) what each paid for its purchase, borrowing and upkeep; exactly what work each did towards maintenance or improvement; and what any parent or other person did to contribute on behalf of each spouse.

- any windfalls, inheritances, lottery wins, gifts or loans or other financial, non-financial or other contributions made by parents, other family or friends
 - the future needs of each party – specifically, each party’s age, income, capacity for employment, capital and financial resources, dependants, whether either party has re-partnered; a living standard that is reasonable in the circumstances, duration of the marriage and the extent that it has had an impact on each party’s earning capacity
 - the wish of each party to continue their role as a parent, and in particular, their financial needs if time with the children is to be significantly shared
2. Time limit. Where the parties are divorced, check the deadline for applying for property settlement and/or spousal maintenance (“time limit” above)
 3. Interim issues. Obtain details of any alleged violence or continuing conflict as to the need for an injunction for protection (see “interim orders” and “affidavits” under “precedents” in chapter “children”)

4. Preservation of assets or documents. Obtain details of any risk of disposal of assets or documents and the need for an interim injunction to preserve assets or other orders (including any proceedings that should be issued without notice in order to prevent disposal) (“interim orders” and “affidavits” in “precedents” below).
5. Interim costs. See “partial property settlements” above. Obtain instructions about this.

Applicants

1. Attend to steps 1–5 above. If any of 2–5 applies that requires an urgent court application, you may file your application without further notice to the other party (FMC); or if you are in the Family Court due to complexity of case, waiving pre-action procedures (see below).
2. If your client has an interest in superannuation, complete and send a Superannuation Information Kit to the fund trustee. See “superannuation interests” below.
3. Assemble your client’s documents and supply a copy to the other party or their lawyer. See “first letter to other party or their lawyer” under “precedents” below.
4. Write to the other side with your nomination, for their selection, of valuers of assets the value of which has not been agreed. See letter referred to in 3 above.
5. Write to the other party or their lawyer setting out the net asset pool according to your instructions (see “start by drawing up an outline of the asset pool(s)” under “identify and value the net property” above); and an outline of s 79(4) contributions and s 75(2) factors. See “first letter to other party” in “precedents” below.

(Family Court only – you are required to send a pre-action letter to the other party or their lawyer and allow for the requirements and timetable set out in that letter to be complied with. See “pre-action letter” under “letters” in “precedents” below.)

6. Obtain from your client the details needed to complete an Initiating Application (that seeks both your final orders to be made at the final hearing and any interim orders required immediately until the final hearing); and an affidavit; and Financial Statement (see “forms” for the forms and “precedents” as to their contents).

Note – In the FMC, your client’s affidavit must contain, firstly the evidence in support of any application for interim orders and, secondly, an outline of their case for final orders (a more detailed affidavit usually being filed before the final hearing).

See “affidavits” in “precedents” below. These are in support of interim and final orders.

- They may be used whether the parties are Applicants or Respondents.
- For urgent interim orders, limit your affidavit to that aspect.
- If your case is in the Family Court due to complexity, an affidavit is only required for interim applications (an affidavit relating to final orders being left until prior to the final hearing).