

## A PRESENTATION PREPARED FOR ARITA

**Part 1:      *Family and Federal Circuit Court Reform; How might this impact a Trustee in Bankruptcy and/or a Liquidator?***

**26 July 2018**

**Written and presented by  
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## **ABOUT THE AUTHORS**

### ***Daniela Naidenov***

Daniela founded Daniela Fazio Lawyers Pty Ltd in July 2015, a boutique law firm specialising in insolvency and debt recovery following 10 years working with Sally Nash & Co Lawyers (now known as O'Neill Partners Commercial Lawyers incorporating Sally Nash & Co Lawyers).

Daniela is a Solicitor admitted to practice in New South Wales as well as a Nationally Accredited Mediator.

Holding significant experience acting for Trustees in Bankruptcy, Trustees for Sale, Liquidators, Court appointed Receivers, secured creditors, bankrupts and debtors, Daniela offers proven success supporting corporate clients as well as lay clients to bring finality to all matters efficiently, cost effective and expeditiously as possible.

### ***Irina Hoskinson***

Irina worked in NSW Courts system since 2003. She has been admitted as a solicitor in 2010 and after admission held a position of a Deputy Registrar of the Supreme Court of NSW. In that role, she mainly dealt with possession of property matters, presided over examinations and oversaw grants of probate and administration matters.

She then commenced private practice where she worked primarily with bankruptcy and debt recovery matters for 4 years. She was also the main solicitor working in the Family Provision practice at Craddock Murray Neumann before being called to the Bar.

She was called to the Bar in May 2016 and currently practices from 3 St James Hall Chambers. Her practice areas include corporate insolvency, bankruptcy, family provision, family law and criminal matters.

## 1. STATISTICS

1.1 In 2016-17, around 106,000 family law applications were made to the Federal Circuit Court (“FCC”) and the Family Court of Australia (“the Family Court”).

Of these family law applications:

- almost 44,000 applications were for divorce in the FCC
- around 14,200 consent order applications were filed in the Family Court
- 25,600 interim order applications were filed across both the FCC and the Family Court
- almost 20,500 final order applications were filed across both the FCC and the Family Court.<sup>1</sup> These applications are a key driver of the family law caseload because final orders require determination and therefore require significant court time and judicial effort.
- In practice, the FCC finalizes over 85% of final order family law matters
- 90% of the FCC’s caseload consists of family law matters.

1.2 The number of cases that are now dealt with in the Family Court, at first instance, represents a small percentage of all family law cases as the majority of cases are now dealt with in the FCC. Accordingly, it is true to say that there has been a progressive shift in the balance of filings between the two Courts since 2000 when the FCC was created.

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<sup>1</sup> Courtesy of the Australian Government, Attorney General’s Department publication “Structural Reform of the Federal Courts Fact Sheet 2 –Facts and Figures, 30 May 2018”

- 1.3 Over the last 5 years family law matters pending in the Family Court and the FCC has grown from 17,200 to 21,000. As a result, the age of pending cases has also increased since 2012 - 2013, with approximately 29% of FCC and 42% of Family Court matters pending final order cases are now older than 12 months.
- 1.4 The national median time to trial has also increased from 10.8 months to 15.2 months in the FCC, and from 11.5 months to 17 months in the Family Court.
- 1.5 An average of approximately 350 appeals have been filed in the Appeal Division of the Family Court each year in the past 5 years.
- 1.6 There were 16,811 new bankruptcies in 2017-2018, a slight increase from 2016- 2017 where there were 16,320 new bankruptcies in 2016–17.
- 1.7 Since the FCC establishment, the range and volume of cases heard by the FCC has substantially increased, confirming the Court's role in Australia's federal judicial system.
- 1.8 The FCC deals with approximately 95% of migration and bankruptcy applications filed in the Federal Courts. Approximately 85% of the FCC's workload is in the area of family law. Five years ago, the FCC dealt with 40% of all family law matters filed in the Federal Courts (excluding Western Australian family law matters).

## **2. THE EXISTING FAMILY LAW COURTS**

### *The establishment*

- 2.1 The Family Court was established by Parliament in 1975.
- 2.2 The FCC was established by the *Federal Circuit Court of Australia Act 1999* (formerly the Federal Magistrates Act) and its jurisdiction at inception was

conferred by the *Federal Magistrates (Consequential Amendments) Act 1999*. These Acts received royal assent on 23 December 1999.

- 2.3 The FCC Court was established to provide a simple and accessible alternative to litigation in the Federal Court of Australia (Federal Court) and the Family Court of Australia (Family Court) and to relieve the workload of those Courts.
- 2.4 The FCC Act directs the Court to operate informally and to use streamlined procedures. This complements the Parliament's initiatives to encourage people to engage in a range of dispute resolution processes.
- 2.5 The Family Court and the FCC predominantly exercise the jurisdiction under the *Family Law Act 1975 (Cth)* ("*the Family Law Act*").
- 2.6 NB/ family law cases filed in Western Australia are dealt with by the Family Court of Western Australia and the Family Law Reforms will not include the Family Court of Western Australia.

#### *Jurisdiction*

- 2.7 The Family Court is a superior Court which has original jurisdiction to hear family law matters. ***It also acts as an appeal Court from decisions of single Judges of the Family Court and the Federal Circuit Court.***
- 2.8 If any one of the following criteria applies, then an application for final orders is usually filed and/or heard in the Family Court, if judicial resources permit, otherwise the matter should be filed and/or heard in the FCC:-
  - International child abduction
  - International relocation

- Disputes as to whether a case should be heard in Australia
- Special medical procedures (of the type such as gender reassignment and sterilisation)
- Contravention and related applications in parenting cases relating to orders which have been made in FCC proceedings; which have reached a final stage of hearing or a judicial determination and which have been made within 12 months prior to filing.
- Serious allegations of sexual abuse of a child warranting transfer to the Magellan list or similar list where applicable, and serious allegations of physical abuse of a child or serious controlling family violence warranting the attention of a superior court.
- Complex questions of jurisdiction or law.
- If the matter proceeds to a final hearing and it is likely it would take in excess of 4 days of hearing time.

2.9 The jurisdiction of the FCC has grown since its inception and broadly includes: -

- family law and child support
- administrative law
- admiralty law
- **bankruptcy**
- copyright

- human rights
- industrial law
- migration
- privacy
- trade practices.

2.10 The FCC shares those jurisdictions with the Family Court and the Federal Court of Australia. Some work in those jurisdictions continues to be done in State and Territory Courts also.

2.11 The jurisdiction conferred on the FCC is **concurrent** with that of the Family Court and the Federal Court of Australia. That is, the FCC has no exclusive jurisdiction and in some areas its jurisdiction is less extensive than that of the Federal Court and the Family Court.

2.12 In the family law area, the FCC has jurisdiction in the following matters:

- applications for divorce
- applications concerning spousal and de facto maintenance
- **property disputes pursuant to s79 of the Family Law Act**
- all parenting orders including those providing for where a child lives, who a child spends time and communicates with, maintenance or specific issues

- enforcement of orders made by either the Federal Circuit Court or the Family Court.
- location and recovery orders as well as warrants for the apprehension or detention of a child.
- determination of parentage and recovery of child bearing expenses.

### **3. THE PROBLEMS WITH THE EXISTING STRUCTURE**

3.1 The current Court structure and overlapping family law jurisdiction between the Family Court and FCC leads to significant inefficiencies, confusion, delays, additional costs and unequal experiences for many families. This results in poor outcomes for some children and families. The reforms aim to address these inefficiencies.

3.2 What about the Trustee?!

3.3 The family law application process varies significantly between the Family Court and the FCC. This is the result of variations in the Courts' legislative frameworks (including their respective Acts, Regulations and Rules) and operational and cultural practices that have evolved over time. As a result:

- Costs for families are estimated to be up to four times more in the Family Court than the FCC
- Matters in the Family Court require 45 per cent more attendances by litigants than in the FCC
- Days per trial in the Family Court are double that in the FCC.



*The Rules (inconsistency)*

3.4 Rules

	<b>Family Court Rules</b>	<b>Federal Circuit Court Rules</b>
<b>Commencement of Proceedings</b>	Initiating Application/ Bankruptcy - Application	Application
<b>Affidavit</b>	Does not need to be filed at commencement	Needs to be filed at commencement
<b>Interim Application</b>	Application in a case	Application in a case
<b>Response</b>	Response to Initiating Application plus Affidavit  Bankruptcy—Notice stating Grounds of Opposition to an Application or Application in a case plus Affidavit;  Bankruptcy – Application in a Case	Response
<b>Reply</b>	Must be filed if different orders sought	May be filed in certain circumstances
<b>Address for Service</b>	Notice of Address for Service/ Bankruptcy – Notice of Appearance	Notice of Address for Service

<b>Adding a party</b>	By filling an amended Application or Response	By filing an Application
<b>Removing a party</b>	By filing an Application in a Case plus Affidavit	By filing an application in a case
<b>Response to the Interim Application</b>	Must file if seeking different orders	Not provided for in the Rules
<b>Appeal</b>	To the Full court of the Family Court	To the Full court of the Family Court

### *The forms*

- 3.5 The forms that are used depend on the jurisdiction of the Court. It is especially confusing when one looks at the forms used in the Federal Circuit Court. If the party wishes to file a Reply or Response, they may be confused by the names of the forms.

### *The Procedures*

#### 3.6 **Family Court**

##### *Disputes about both parenting and financial issues*

First hearing will be run by the Registrar.

***(Called “Registrar managed court events”)***

- 3.7 Registrar managed events are aimed at preparing the case for trial if a judicial decision is necessary and giving the parties the opportunity to reach agreement without the need for a judicial decision (private mediation or conciliation conference).

Parenting - Family consultant managed court events

3.8 In most parenting cases, clients will go through the child responsive program with a family consultant (a court psychologist or social worker).

3.9 The following events will most likely take place:

- *Case assessment conference*
- *Child responsive program (run by a family consultant)*
- *Conciliation conference (if appropriate)*

The matter then gets allocated to a Judge for a procedural hearing.

3.10 **Judge managed court events**

The Judge will decide which Court events will be held to decide both the parenting and financial aspects of the case. Financial issues may be considered by a Judge as part of a less adversarial trial if both parties agree and the Judge permits this.

3.11 **Federal Circuit Court**

First Court date is usually already before the Judge. The Court will allocate a first Court date when the parties file their initiating documents. This is usually referred to as a 'duty list'. On this day, the Court may:

- give directions
- approve proposed consent orders
- conduct an interim hearing
- finalise the application
- fix a date for an interim or final hearing.

- 3.12 The FCC operates a docket system. This means that the application will usually be determined by the same Judge from the first Court date to the final hearing.

### *The Attitude*

- 3.13 There are no set rules as to where to commence the case. The first decision will be made by the initiating party's lawyers. The Registry does not have to accept the Application in the jurisdiction the parties are filing it in. After further assessment, if the matter is too complex, the Judge may transfer the matter to the Family Court from the FCC. Conversely, the matter may be transferred from the Family Court to the FCC if the matter should not have been commenced in the Family Court.
- 3.14 In its Annual Performance Statement, the Family Court states that it has two aims. One is to deal with more complex family law matters, and another is to deliver appellate services. The level of complexity being a threshold to file in the Family Court as opposed to the more streamlined FCC is not defined.
- 3.15 As a rough rule of thumb, large property matters (\$20 - \$30mil) would start in the Family Court even if there are no other complex issues.

### *The Judicial Officers including Registrars and administrative staff*

#### **3.16 Family Court**

Comprises of two Divisions – the Appeal Division and the General Division.

- 3.17 There is one Chief Justice and one Deputy Chief Justice. There is also a Chief Executive Officer appointed to manage the administrative affairs of the Court. There are currently 11 Judges in the Appeal Division and 26 Judges of the General Division.

### 3.18 **Federal Circuit Court**

There is one Chief Judge and one Chief Executive Officer and Principal Registrar. There are currently 17 Federal Circuit Court Judges listed in Sydney.

### 3.19 **Registries**

The Family Court and FCC Registries are combined. There are 19 family law Registries (excluding Western Australia).

## 4. **THE PROPOSED CHANGES**

- 4.1 The family law system is undergoing its first, independent comprehensive review of Australia's modern family law system since the inception of the *Family Law Act*, 1975 more than forty years ago.
- 4.2 On 30 May 2018, the Attorney-General announced the Government's intention to bring forward legislation for structural changes to the Federal Courts (excluding the High Court of Australia).
- 4.3 Under the new legislation, a new ***Federal Circuit and Family Court of Australia*** (FCFCA) will be established from 1 January 2019 through the amalgamation of the FCC and the Family Court of Australia.
- 4.4 A new Family Law Appeal Division in the Federal Court of Australia will also be established to hear all appeals in family law matters from the FCFCA (and some appeals from the Family Court of Western Australia). This is, in our view, a positive because at present appeals in the Family Court are heard by Judges who hear matters at first instance – there is no distinction between trial Judges and Appellate Judges in the Family Court, the Judges come from the same group of Judges.

- 4.5 The Government expects to introduce legislation in the Spring Parliamentary sittings. Subject to passage of legislation, the FCFCA and the Family Law Appeal Division (“FLAD”) will commence operation on **1 January 2019**.
- 4.6 However, notwithstanding the fact that the FCFCA and FLAD are due to commence operation on 1 January 2019, there appears to be a disconnect with the Australian Law Reform Commissions timetable in the Family Law System Inquiry.
- 4.7 The reform will not have any immediate effect on matters currently before the Courts. Transitional arrangements will be put in place for those matters that are before the Courts at the time of the commencement of the FCFCA and FLAD to minimise any delay or inconvenience to parties.
- 4.8 It is estimated that this reform will improve the efficiency of the Federal family law system by up to 1/3, with the potential in time to allow up to an extra 8,000 cases to be resolved each year.

#### *The Proposed Structure of the FCFCA*

- 4.9 The FCFCA will be divided into two divisions: -

##### ***Division 1***

- will comprise of the existing Judges of the Family Court
- will deal only with family law matters

##### ***Division 2***

- will comprise of the existing Judges of the FCC
- will deal with both family law and general federal law matters

- The current Fair Work Division of the FCC will be retained in Division 2 of the FCFCA.
- 4.10 The FCC's existing general federal law jurisdiction and fair work jurisdiction will not be impacted by the establishment of the FCFCA, with no changes to the existing appeal pathway.
- 4.11 There will be no changes to jurisdiction or operation of the High Court of Australia, the Family Court of Western Australia, or other State and Territory Courts that deal with family law cases.
- 4.12 It is estimated that a common structured initial case management process and managed case listing could result in up to 3,000 additional family law matters being finalised every year.

#### *Operation of the FCFCA in family law matters*

- 4.13 The FCFCA will have a single Federal point of entry for all Australian family law matters.
- 4.14 It is estimated that consolidating first instance family law jurisdiction into a single Court entity with a single point of entry could result in finalising up to an additional 3,500 family law matters each year.
- 4.15 Urgent and high risk cases will continue to be prioritised, and each case will be allocated at the earliest possible point to the relevant Judge and division with the right expertise and capacity.
- 4.16 The FCFCA will operate under the leadership of:-

1 Chief Justice supported by

1 Deputy Chief Justice,

who will each hold a dual commission to both Divisions of the FCFCA.

- 4.17 It is hoped that the appointment of a single Chief Justice and Deputy Chief Justice will allow for more effective allocation of cases between the 2 Divisions and enables the FCFCA to operate under a common case management process which again, aims to result in a more efficient and consistent handling of family law matters.

### *Appeals*

- 4.18 A fundamental change in establishing the FCFCA will be the removal of a substantial part of the appellate jurisdiction of the Family Court, allowing considerable judicial resources currently used to hear appeals to focus on hearing first instance family law matters. This is hoped to contribute to the new Court being able to hear more matters each year, reduce the backlog in first instance family law matters and contribute to reducing median case waiting times.
- 4.19 The FCFCA will retain jurisdiction to hear appeals on family law matters from State and Territory Courts of summary jurisdiction. This appellate jurisdiction will be extended to both divisions of the FCFCA.
- 4.20 All family law appeals from the FCFCA (and some appeals from the Family Court of Western Australia) will be heard by the new FLAD of the Federal Court.
- 4.21 There will be no changes to the rights to appeal as currently provided for under the *Family Law Act 1975*.
- 4.22 It is estimated that better management of appeals could result in up to 1,500 additional family law matters being finalised every year.



### *The “New” Rules*

4.23 Initially, the Federal Court and both divisions of the FCFCA will maintain their existing Court Rules. Following consultation with the judiciary, legal profession and other stakeholders, the new Court will update its Rules with a view to achieving consistency in forms, procedures, administrative matters and practice directions, which we expect to be sometime after 31 March 2019 (after the Report from the ALRC is delivered to the Attorney-General).

### *The purpose*

4.24 The reforms are aimed to help Australian families resolve their disputes faster by improving the efficiency of the family law system, reducing the backlog of matters before the family law Courts, and driving faster, cheaper and more consistent dispute resolution.

4.25 The establishment of a single new Court aims to create a consistent pathway for Australian families in having their family law disputes dealt with in the first instance.

4.26 The reform is designed to:-

- maximise the use of highly skilled and trained judicial officers
- maximise Court resources
- to significantly improve access to justice for Australian families
- improve the efficiency of the family law system
- reduce the backlog of matters in the family law Courts

- Drive faster, cheaper and more consistent resolution of disputes for Australian families.

4.27 By adopting a common case management approach across both divisions of the FCFCFA, it is hoped that the experience of litigants will become standardised so that those families (and hopefully Trustees and Liquidators who may be involved in the process) will know that the dispute will be dealt with by the FCFCFA as a whole, enabling information to be readily available about what to expect and when and by providing an early sense of the likely cost implications of lodging a family law application upfront.

*The new Rules and the new forms*

4.28 Have not yet been drafted. We expect the new Rules and the new forms will be drafted sometime after 31 March 2019.

## **5. PRACTICAL SUGGESTIONS NOW AND IN FUTURE**

5.1 How will the proposed divisions of the FCFCFA better place a Trustee in Bankruptcy/ Liquidator in family law proceedings to reach a sensible commercial outcome as soon as practicably possible with the non-bankrupt spouse or at the hearing, if at all?

5.2 Regrettably, if a Trustee in Bankruptcy or a Liquidator are faced with family law proceedings, the Trustee and/or Liquidator is already on the back foot because most often than not, the family law proceedings were commenced 1, 2, 3, years prior to the Trustee/ Liquidators involvement. Therefore, the parties are usually already frustrated with each other, the Court process, the expenses they may have already incurred. Other challenges a Trustee/ Liquidator may face include:-

- Disputes concerning the children (as between the husband and wife) where the children may be used as pawn

- Allegations of family violence
- Emotional spouses
- Mental health issues of either spouse
- Sick children
- Drugs
- Gambling

5.3 A Trustee in Bankruptcy/ Liquidator wants certainty in an outcome but also certainty as to what the costs of litigating are going to be.

5.4 A Trustee in Bankruptcy has a duty to act commercially; s19 of the Bankruptcy Act, 1966.

5.5 Bearing in mind those considerations set out in paragraphs 5.3 and 5.4 above, it is my preference, and indeed has been the preference of our clients to negotiate a settlement as soon as practicable with the aim of filing consent orders with the Court.

5.6 Also important to keep expectations realistic and don't forget s75 Family Law Act factors which may weaken a Trustee's position at negotiating stage or at a final hearing.

## **6. SUBMISSIONS**

6.1 Daniela and Irina will be preparing submissions as to those matters we would like to see addressed in the reform. If you would like to contribute by providing queries/ questions you would like addressed in the reform and you are content for those submissions to be made by the authors on your behalf, then please

contact Daniela by **1 August 2018** with details of your queries/ questions.  
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