

Family Law Practice Manual

Fifth Edition

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The law in this fifth edition is stated as at July 2004 (unless indicated otherwise).

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Foreword

Peter Szabo's *Family Law Practice Manual* is now in its fifth edition, having first been published in 1985. I know – because Peter was previously a partner with me at Phillips Fox – that putting together a practical manual was always his objective. It is a credit to him, and obvious testament to its value, that it is now in its fifth edition. I'm afraid I cannot say that the practice of family law is any simpler now than it was when the first edition came out. There are now two Courts, with different forms and rules, and this latest edition takes account of the Family Law Rules 2004: a complete rewrite of the previous Rules, some of them significantly different. The Forms, too, have changed. For those who are struggling to come to grips with new Rules and Forms, Peter Szabo's *Family Law Practice Manual* could not come at a better time.

The authors' very practical experience over many years, their capacity to observe and understand the practical and methodical way of working through things and their attention to detail mean that the *Family Law Practice Manual* will continue to be an invaluable resource for all practitioners practising family law in the Federal Magistrates Court and the Family Court of Australia. There are many publications which contain information about the Rules and the Act and comment on the law, but none provide practical assistance in practising in the family law environment in the way the *Family Law Practice Manual* does.

Diana Bryant
Chief Justice
Family Court of Australia

September 2004

Preface

There are three, not two, certainties in life: death, taxes and changes to Family Law. There have been a myriad of changes since the fourth edition, the most dramatic of which is the creation of the Federal Magistrates Court and its sharing of work with the Family Court.

To recognise the new world, this Manual is now the Family Law Practice Manual (not the Family Court Practice Manual). This Manual covers the practice and procedure in both the Family Court and the Federal Magistrates Court, with brief notes about State Magistrates Courts as well. Chapter numbering is connected with the particular court in question. For example, initiating property proceedings is dealt with in Chapter 7. The Family Court process is in Chapter 7A and the Federal Magistrates Court process is in Chapter 7B. Initiating children's proceedings are similarly numbered Chapter 8A and 8B for the two courts, and so on.

The Family Law Rules introduced on 29 March 2004 commence a highly legalistic and traditional style of court regime, with heavily enforced deadlines to comply with and significant threats of cost penalties for breaches. This could not be further from the dream that Lionel Murphy had when, as Attorney-General, he introduced a helping and friendly court. Meanwhile, the Federal Magistrates Court continues to dispose of a vast number of cases with very moderate resources and very little complexity about its processes. When you consider that the time delay in the Family Court from issue to trial is about 2 years, whereas the Federal

Magistrates Court takes about one year for the same process, you have a duty to your client to issue a substantial majority of cases in the Federal Magistrates Court. Even where cases are technically outside the jurisdiction of the Federal Magistrates Court (for example, they exceed \$700,000.00 in asset value), it may be appropriate to issue in the Federal Magistrates Court when the matter is not really complex and both parties are entitled to consent to that Court dealing with the matter even if it is in excess of nominal jurisdiction.

We also have a new Chief Justice in the Family Court, the Honourable Diana Bryant, whose appointment we applaud and whose appointment we respectfully consider to be very well merited.

Superannuation splitting is now with us, which is a good thing. However, its implementation in legislation – the rules and processing by the court – almost makes it a bad thing; it is very complex. It is extremely important to be aware of the meticulous processes required by the court when dealing with superannuation matters and this Manual should answer your questions in that area.

The judiciary and registrars (of various descriptions) of the two courts continue to work hard to finalise cases, and the two courts work fairly seamlessly together. It is understood that a probable change will be to institute a common filing point and a uniform case assessment conference process in both courts, by which the parties and registrar together would decide in which court the case should continue.

For both that purpose and to better officiate in conciliation conferences (and for other reasons), the legal complexities need to be dealt with so that Family Court deputy registrars have substantial powers of delegation to act in Federal Magistrates Court areas as well.

Technology is with us in a big way and no lawyer can be without it. At the end of Chapter 1 are the invaluable website addresses of the two courts, the Child Support Agency and other organisations. The forms, court brochures, legislation, rules and practice directions are all available there. Sadly, the new Family Court forms are designed principally for self-represented litigants. With their many boxes and voluminous instructions, they have made the task for the majority of users – the legal profession – far more cumbersome than ever before. The increase in paper is staggering.

To borrow another saying, the more things change, the more they stay the same. The press continues to rabidly misunderstand and misrepresent the role of lawyers in family law, and practitioners – a most thick-skinned species – continue to work hard to settle family law disputes. This is with a view to achieving reasonable outcomes with as little stress and expense for clients as is possible in each case. Practitioners are well aware that clients whose cases are over quickly are much more likely to be happy (perhaps ‘accepting’ is more accurate), to pay their accounts and to refer their friends, in comparison with clients who participate in the small number of bitterly fought court cases.

I hope this Manual assists you in working towards the holistic betterment of your clients, and towards your own satisfaction in a job well done.

I wish to thank the interstate practitioners for their input to this update. They are David Burrell and Jill Miller from Adelaide, Geoff Wilson and Warwick Jones from Queensland, John Barkus and Paul Doolan from Sydney, and Michael Foster from Hobart.

Finally, with the creation of two courts and two sets of rules, and the great expansion of rules in the Family Court itself, I felt this edition could only be done with three authors, not one. Hence I have worked on this Manual with two very experienced practitioners, Stephen Winspear and Rob McBain. I am very grateful for their help and input.

Peter Szabo
November 2004

About the Family Law Practice Manual

The manual

The authors

Peter Szabo is an accredited Family Law Specialist and a partner of Marshalls and Dent in Melbourne. He has particular expertise in financial issues and taxation and estate planning within property settlements. His extensive family law experience includes being the key legal representative in *Ascot Investments Pty. Ltd. v. Harper*, the definitive High Court decision on third party rights in the Family Court. Peter was founding Chairman of the Advisory Committee to the Accreditation Board for Family Law Specialists in Victoria and was at the forefront in establishing legal specialisation in family law.

Peter lectures extensively in family law, and has written several family law books, including *Tax and Family Law: the Difference between Hacking and Carving*, and *The Guide to Family Law Financial Planning*, and is a regular contributor of articles and papers to the media. He is also recognised for his expertise in alternate dispute resolution and was responsible for setting mediation guidelines for the Law Institute of Victoria.

Rob McBain became one of the first Accredited Family Law Specialists in the inaugural year of 1989. After 12 years of practising Family Law as a partner with specialist law firms (Schilling Missen and Impey, Wisewoulds and Henty Jepson & Kelly), Rob started his own practice, McBain & Associates, in 1995, specialising in all aspects of Family Law from children's issues to complex property disputes.

Rob's involvement in the area includes membership of the Family Law Executive of the Law Institute of Victoria since 1985, and current Chairman, past Chairman and member since 1989 of the Maintenance and Property Committee of the Family Law Executive. He also serves as a member of the Family Law Advisory Committee of the Law Institute. Rob has been a guest instructor at the Leo Cussen Institute since 1985, and is one of the authors of its Family Law workshop and PTC materials. He is the co-author, together with Catherine Gayle, of *Divorce, An Australian Man's Guide*.

Stephen Winspear was in the first group of lawyers accredited as Family Law specialists in Australia in 1989. He has been a member of the Executive of the Family Law Section of the Law Institute of Victoria for many years, as well as taking part in the Courts Practice Committee and the Education Committee of the Institute.

He regularly teaches Family Law in the Practical Training Course at Leo Cussen Institute and has published papers in diverse areas including Customs Law and Family Law.

Stephen heads a 10-person Family Law Department at Moores Legal in Melbourne and practises in all areas of Family Law. His firm is one of a dwindling number which does legal aid work, principally for several women's refuges. In today's public funding climate this work is decidedly pro bono in intent – with full recognition that by accepting Legal Aid work the firm is making a contribution to the community.

Updates

One of the problems with writing books on Family Law is constantly having to update them. Luckily with the advent of the internet, such a task is made relatively easy. You should put a link on your computer Internet searcher to refer to the Leo Cussen site at www.leocussen.vic.ed.au and also to the Family Law Section of the Marshalls & Dent website at www.mdlaw.com.au. The law in this 5th Edition is current as at November 2004 unless otherwise indicated.

Inevitably, there will be changes to the forms. At the time of writing, the forms were under review. Details of changes will be set out on the abovementioned sites. The first draft of amendments however, are expected to be more cosmetic, fixing up obvious things like missing client details on some of the court forms. It is hoped that with the passing of time and with the appointment of Chief Justice Bryant, there will be a tendency towards simplification of forms and also more acceptance of substantial compliance with the forms, enabling comments to be removed from them.

More substantial changes to practice and procedure will inevitably arise. The Chief Justice has indicated there is likely to be the implementation of a “one point of filing” for both Family Court and Federal Magistrates’ Court applications. What this means is that all applications will be allocated a first return date, being a Case Assessment Conference. At that Conference, the matter will then be referred to the appropriate Court with further directions on filing documents and the like.

This probably means that the initial application is likely to become a simplified one in line with the Federal Magistrates' Court forms.

In relation to the children's matters, you will be aware of the move to implement mediation and counselling facilities, with a view to limiting the use of actual court time for determining such cases. This will probably mean some changes to current practice and procedure and again, when they become clear, comments will be provided.

To assist in keeping the Manual current and accurate, comments are invited from you via e-mail. The addresses are:

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Supplements and further editions will be published when appropriate.

Peter Szabo

November 2004

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