Keeping Your Ex in the Dark

Applications without notice in Family Law

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As attractive as it may be to litigate in the absence of an opponent, applications without notice are sparingly used in family law, as in other jurisdictions. An ex parte application, by nature, represents the denial of natural justice to the absent party and is a rare and extraordinary remedy to be used only when the circumstances require.

The jurisprudence underpinning ex parte applications in family law is largely borrowed from the common body of case law, giving rise to settled and predictable principles. These can be broadly summarised as follows:

By nature, ex parte orders are made in very limited circumstances, where they are required to protect people or property, and would be limited in scope and time to the return of the matter before the Court with both parties present[1].

The onus is on the party seeking to move the Court to justify the making of the order. The applicant would have to show the making of the order is necessary, and other remedies would not be preferable or appropriate[2].

Of particular importance in any application seeking a hearing in the absence of the other party, is the duty of the applicant to provide full and frank disclosure to the Court of all the facts, including those that may be unfavourable to the applicant's case[3].

Ex parte applications are best made as soon as possible after the circumstances giving rise to the need to apply for the order (or as soon as possible after the applicant learns of the circumstances). The Court should provide the respondent an opportunity to be heard at the earliest possible time following the making of the ex parte order[4].

Should the ex parte application call for an injunction, the applicant may be required to give the usual undertaking as to damages, if the granting of the injunction may cause damage to the respondent.

Perhaps the most common ex parte application concerning parenting matters is an application for a recovery order (for return of a child).

The procedure in relation to applications without notice can be found within the Family Law Rules 2004, in particular at rule 5.12. Notably, such applications are limited to applications for interim or procedural

orders, in line with the general principles. The requirement for full and frank disclosure of all the facts relevant to the application is specifically articulated at rule 5.12(b). This provision requires the Court to consider family violence, previous cases and orders currently in force, any likely hardship to the respondent, a third party or a child if the application is made, whether the intention to make the application has been made known to the respondent, as well as capacity to give an undertaking as to damages, urgency of the application and harm that may result if the order is not made.

Rule 5.13 identifies the need for an ex parte order to operate until a specific time or until the date when the matter can be heard.

A recovery order is a remedy available pursuant to Section 67Q of the *Family Law Act 1975*. In short, the head of power permits the Court to make an order for a child to be returned to a parent or person identified in the section, authorising federal and state law enforcement to act to effect the order, including by use of force. In circumstances where a party to proceedings identifies imminent danger to a child whom they seek to have recovered to their care, it may logically follow that giving notice to the other party may heighten the danger. If this is so, the Court may make an order in the absence of the party who has retained the child, with regard to the procedure identified in rule 5.12, as well as the procedure applicable to recovery orders generally, articulated in Rule 21.12.

In practice, the evidence required to move the Court to make an ex parte recovery order would largely focus on urgency, family violence and the risks to the child or a parent, should the respondent have notice of the application. In particular, rule 5.12 (b) will be closely applied by the Court making the determination[5]. The Court is also mindful of the denial of natural justice that such an application brings, and should not be moved lightly when exercising this jurisdiction[6].

Another common ex parte application in parenting matters is an application for a family law watchlist order (restraining a person from removing a child from Australia).

A family law watchlist order is a type of restraint able to be made by the Court pursuant to the general restraints identified in section 114 of the *Family Law Act 1975*. In practice, for a successful ex parte application of this nature, the applicant would have to show a risk of one party leaving the jurisdiction with a child or children if they became aware of the application. The Court would need to be moved by evidence of risk in the particular circumstances, including ties to other jurisdictions and capacity of the other party to remove the child or children. The obvious risk is that one party is able to circumvent the jurisdiction of the Court by removing the children from Australia, and for this reason the Court can often be moved to make interim orders without notice on this discrete issue.

In summary, ex parte remedies are sparingly and carefully used by the Courts exercising family law jurisdiction. They require careful preparation on the part of the practitioner and candid presentation by counsel, with close regard to the relevant practice rules.

ENDNOTES

1 In the Marriage of Sieling (1979) 4 Fam LR 713.
2 In the Marriage of Lee (1977) 3 Fam LR 11, 609.
3 *Thomas A Edison Ltd v Bullock(1912)* 15 CLR 679.
4 In the Marriage of Sieling (1979) 4 Fam LR 713.
5 See generally Dickens & Dickens [2014] FamCA 1226 and Hurley & Lomu [2016] FamCA 774.
6 Moore & Evers (Summary Appeal) [2014] FamCA 947.