



NAVIGATING FAMILY LAW

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We acknowledge that this resource is generic and that diverse groups may require appropriate supports alongside this information.

We encourage all workers utilising these resources to identify the relevant services to best support Aboriginal, Torres Strait Islander, Culturally and Linguistically Diverse groups and people with special needs.

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CONTENTS

PARENTING ORDERS

SECTION 1- Before attending Court

Part 1: Compulsory Dispute Resolution Conference/Mediation

Part 2: Who can conduct Dispute Resolution Conferences?

SECTION 2- Commencing proceedings in the Federal Circuit Court and Family Court

Part 1: Federal Circuit Court and Family Court

Part 2: Documents Required

Part 3: Service of Documents

SECTION 3- Processes Involving Children

Part 1: Child Dispute Conferences

Part 2: Family Reports

Part 3: Independent Children's Lawyers

SECTION 4- Orders the Court Can Make and Subpoenas

Part 1: Types of Orders

Part 2: Subpoenas and inspection of subpoenaed Documents

SECTION 5- Attending Court

Part 1: The Trial Process

Part 2: Court response to breaches of Parenting Orders

Part 3: Security and Protocols at Court

Part 4: Seeking Legal Assistance

SECTION I- Before attending Court

Part I: Compulsory Dispute Resolution Conference/Mediation

When a S60I Certificate is necessary

The *Family Law Act 1975* requires a person to provide a S60I certificate in order to file an application for parenting orders in court.

A S60I certificate will be provided to parties when they attend mediation with a registered dispute resolution practitioner.

Why mediation?

Mediation is a practical way for separated parents to resolve their dispute, and reach an agreement about ongoing arrangements for the care of their child/children.

There are five types of Section 60I certificates that may be issued by a Family Dispute Resolution Practitioner -

- the parties attended Family Dispute Resolution and all participants made a genuine effort to resolve the issues in dispute, or
- the parties attended Family Dispute Resolution but one or more parties didn't make a genuine effort to resolve the issues in dispute, or
- a party didn't attend Family Dispute Resolution due to a refusal or failure of the other party to attend, or
- the party didn't attend Family Dispute Resolution because the practitioner didn't believe it would be appropriate to conduct Family Dispute Resolution, or
- the parties began Family Dispute Resolution, but after starting mediation the practitioner decided it was not appropriate to continue.

All the aforementioned certificates will be accepted by the Court, but if one party (or the parties) did not make a genuine effort to resolve the dispute or one of the

parties failed to attend mediation a Judge might order them to attempt mediation again.

If a person does not provide a certificate the Court cannot accept the application. The requirement to provide a Certificate applies even if there are pre-existing orders in relation to the child who is the subject of the application. However, in certain circumstances the Court may grant an exemption for the provision of a certificate.

A certificate is not required in the following cases where:

- only interim orders are sought (these orders generally operate until the case has a final hearing). However, if final orders are also being sought in the initiating application then a Certificate is required.
- only financial orders are being sought
- the orders are being made by 'consent', i.e. with the agreement of both parties
- an application is being made pursuant to The Hague Convention
- applications relating to Child Support, or
- an amended application for parenting orders.

What are the exceptions to attending mediation?

Section 60I(9) of *The Family Law Act 1975* sets out the circumstances where a person may be exempted from providing a Section 60i Certificate -

- if the matter is urgent
- if the court considers that there are reasonable grounds to believe that:
 - there has been child abuse and/or family violence by a party
 - there is a risk of family violence by a party, and/or
 - there is a risk of child abuse if there was a delay in the application being considered by the court
- if a party is unable to participate effectively in mediation, e.g. due to physical remoteness or an incapacity
- if the application relates to an alleged contravention of an order that was made within the last 12 months and there are reasonable grounds to believe that the person who has allegedly contravened the order has

behaved in a way that shows a serious contempt for his or her obligations under the order.

If a person is seeking an exemption from filing a Certificate, they must either

- file an Affidavit – *Non-Filing of Family Dispute Resolution Certificate*, or
- if an Initiating Application has been filed seeking both interim and final orders, the information in support of the exemption from filing a Certificate can be included in the Affidavit.

This applies to applications filed both in the Family Court and in the Federal Circuit Court.

PART 2: Who can conduct Dispute Resolution Conferences?

The Family Relationship Centre and Relationships Australia

Offices of the Family Relationship Centre can be found in most major areas. The Centre arranges free mediations for separated parents with a view to assisting them to reach an agreement about their parenting issues. The process involves the parties attending separate intake interviews and then a joint session is conducted with both parties (although the mediation can be conducted on the basis that the parties are in different rooms).

The offices of Relationships Australia operate in a similar way to the Family Relationship Centre in that it arranges for the parties to attend individual intake interviews before arranging for them to participate in a joint session.

Due to the 'separate intake interview' process, which both services adopt, it may take some time before a joint mediation session can take place. Relationships Australia also charges a fee in some cases, with this being based on the circumstances of the parties.

Private Mediations

Many lawyers and social workers are approved by the Attorney General's Department to conduct mediations and issue Section 60i certificates.

While mediations with a private mediator are much quicker to arrange, the mediator will charge a fee. (The mediations can be arranged faster than

mediations with the Family Dispute Resolution Centres or Relationships Australia because the private mediators do not arrange intake session but request the parties to complete an 'intake form' which provides a background to the dispute).

Mediations conducted by Legal Aid Queensland

Family Dispute Resolution Conferences will be conducted by Legal Aid Queensland provided the person applying for the grant of aid for the mediation is financially eligible and meets the 'merit test' imposed by Legal Aid. (Just because a person is in receipt of Centrelink benefits or is a low-income earner does not mean an automatic entitlement to Legal Aid and each application is assessed on its merits).

In some cases, Legal Aid may grant a person legal aid funding for a mediation, but he/she may have to make a contribution to their legal costs. The contribution will be assessed on the basis on the person's income.

A person can apply for a grant of aid from Legal Aid Queensland either through a private solicitor or by attending at a Legal Aid office.

Legal Aid mediations are conducted in a similar way to private mediations in that there is no 'intake interview' and information about the dispute is provided to the mediator by a 'Client Assessment Sheet' and a 'Solicitor/Client Assessment Sheet'.



SECTION 2- Commencing proceedings in the Federal Circuit Court and the Family Court

Part 1: Federal Circuit Court and Family Court

The **Family Court** assists in determining complex family law matters while matters in the **Federal Circuit Court** are less complicated. Most cases are commenced in the Federal Circuit Court (including other federal law matters), and it therefore deals with a higher volume of cases. Where a matter can be filed in either Court, the application should firstly be made to the Federal Circuit Court and thereafter the Judge hearing the matter can decide if it should be transferred to the Family Court.

Both Courts apply the *Family Law Act* 1975 to determine family law issues; however both operate under different rules and procedures. The Family Court has jurisdiction (power) to hear all family law matters except divorce. It deals with more complex matters, including international child abduction, international relocation, serious allegations of sexual abuse of a child and special medical procedures such as gender reassignment.

Part 2: Documents required

When commencing proceedings in the **Federal Circuit Court** seeking parenting orders the following documents must be filed –

- an **Initiating Application** (generally seeking both interim and final orders)
- an **Affidavit**
- a **Notice of Risk**

The documents can be found on Federal Circuit Court website.

After the documents have been filed sealed copies must be served on all parties.

Initiating Application

The Initiating Application is a document which details the orders that the person is asking the court to make. That document also includes basic information about the parties such as names, addresses, dates of birth, names and dates of birth of the children, whether the applicant has obtained a Section 60i Certificate, etc.

The Initiating Application carries a filing fee. However, if the applicant is in receipt of Centrelink benefits or has a Health Care Card they can claim an exemption from the payment of the fee.

The Initiating Application can be filed 'online' but if an urgent hearing date is being sought the application must be sent to the Court. A Registrar will then consider the application and decide whether it should be listed before the court on an 'urgent' basis.

When the Initiating Application has filed the date of the first court appearance will appear in the top right-hand corner of that document.

Affidavit

An Affidavit is a sworn statement of the evidence that will be presented by a party or witness in the case. It provides evidence to the Court about the issues in dispute between the parties and is effectively a person's 'story to the Court'. Any Affidavit that is filed in Court must be served on all parties, including the Independent Children's Lawyer, if one has been appointed. It must be filed in Federal Circuit Court when an application or Response is filed for both interim and final orders.

Tips for filing an Affidavit:

- Blank Affidavit forms can be found on the Family Court and the Federal Circuit Court websites.
- Affidavits can be complex documents to draft and it is recommended that advice be sought from a Community Legal Centre, Legal Aid or a private lawyer before an Affidavit is filed at Court.
- The contents should be divided into paragraphs that are numbered and divided into sections with headings, e.g. 'Domestic and Family Violence' or 'Work performed by the parties during the marriage/de facto relationship'.

- If a person is relying on evidence from a family member, friend or professional that person will need to swear an Affidavit which will detail the information that he/she wishes to provide to the court.
- Generally, a child under the age of 18 years cannot swear an Affidavit, but in limited cases the Court may allow such an Affidavit to be filed.
- The information must be relevant and support the orders that are being sought in the application.
- Opinion evidence should be avoided - the Affidavit must be based on facts and not on a person's beliefs or views. The exception is the evidence of an expert, such as a medical practitioner.
- While the court will accept hearsay evidence (facts that are based on information provided by others) it is best to avoid such evidence
- Negotiations that took place at a mediation or during negotiations should not be included in the Affidavit.

Annexures are documents referred to in the affidavit and must be attached.

- If there's more than one document, they must be numbered. These documents can be school reports, bank statements etc.
- Each Annexure must have a statement signed by the authorised person (Justice of the Peace/Solicitor) at the same time as the Affidavit, identifying the annexure as the document mentioned.

The wording of the statement is:

This is the document marked with the letter [insert letter] referred to in the Affidavit of [insert deponent's name] sworn before me this [insert date] day of [insert month] 2017.

- The person signing the Affidavit (the deponent) is required to sign at the foot of each page in the presence of the authorised person, who must also sign at the foot of each page.

On the last page of the Affidavit the following details are set out:

- the full name of the person signing the Affidavit, and their signature
- whether the Affidavit is sworn or affirmed

- the date and place at which the person signs the Affidavit
- the full name and occupation of the authorised person, and their signature.

If any amendments are made to the Affidavit they must be initialled by both the deponent and the authorised person.

Notice of Risk

The Notice of Risk is a form which must be filed by any person who files an initiating Application or Response seeking parenting orders.

The purpose of the Notice of Risk is to identify a wide range of risks to children in parenting matters including drug and alcohol abuse, mental health issues, etc. The Notice also enables child protection authorities to become involved in the matter at the earliest opportunity to assist the court in early intervention.

The Notice of Risk is filed in the Federal Circuit Court. A similar document is filed in the Family Court, and is known as a 'Notice of Child Abuse', 'Family Violence' or 'Risk of Family Violence'.

Commencing proceedings in the Family Court

The documents to be filed in the Family Court, when final parenting orders are being sought are the Initiating Application, Section 60i Certificate and a copy of the child's/children's birth certificates. If interim orders are being sought, then an Affidavit must also be filed. (A Respondent to an Initiating Application filed in the Family Court must also file an Affidavit if interim orders are being sought).

When filing documents in both the Federal Circuit Court and the Family Court it is necessary to file the original and at least two photocopies so that there is a copy for each party. If there are more than two parties to the proceedings additional copies will have to be filed with the Court.

Part 3: Service of documents

When the documents have been filed at the Registry sealed (stamped) copies will be returned and service must then be effected as soon as possible. ('Service' is a legal term which means handing or delivering court documents personally to

another person, so the Court can be satisfied that the other person has received them.)

The Court will not arrange service of documents. If the documents have been eFiled (details of electronic filing of documents can be obtained on either the Family Court or the Federal Circuit Court websites) the sealed (stamped) documents must be printed for service. If the documents have been filed with a Registry sealed copies will be returned, and service can then be effected. If the other party does not appear at Court on the date given, it will be necessary to show that the documents have been served on that person.

All documents that have been filed at Court must be served on the other party. If an Initiating Application is being served it must be served by hand and by a person who is not a party to the proceedings and who is over the age of 18 years.

A person may arrange for a Process Server to serve the documents (for a fee).

When the documents have been served, a Process Server will complete an Affidavit of Service to verify that the documents have been served on the other party. If the person being served refuses to accept the documents, the person serving them may put the documents down in the presence of the person to be served and tell the person what the documents are.

Once the other party has been served with the documents, they are required to file and serve a Response and other documents on the Applicant.

If the Applicant is represented by a lawyer, the documents can be sent to that lawyer if he/she agrees that the documents may be served on him or her. The lawyer will also need to acknowledge having been served with the documents and will sign a document known as an 'Acknowledgment of Service'.

If service is affected late, i.e. within seven days prior to the court event, documents showing that service has been affected must still be filed with the court, and any

issues in relation to late service of the documents, if raised, will be dealt with by the Judge.

Apart from applications commencing proceedings and subpoenas requiring the attendance of a person, all other court documents, including a response, can be served by **ordinary service**. This means the documents can be:

- served by hand but a signed Acknowledgment of Service from the other party is not required, or
- posted to the person's residential address, or
- sent to the person by electronic communication, or
- if a person does not have a contact address, by delivering, posting or sending by electronic communication to their last known address.

Section 3- Processes Involving Children

Part I: Child Dispute Conferences

A Child Dispute Conference is a meeting attended by the parties and the children, conducted by a Family Consultant. Lawyers are not included in these conferences.

Ordering a Child Dispute Conference

The conference is ordered by the Court and provides a preliminary understanding of the issues in dispute between the parties. The conference focuses on the needs of the children and can help the Judge hearing the case implement short term arrangements for the child/children. While the conference can also assist the parties to reach an agreement, its main purpose is to conduct a brief and preliminary assessment of the issues.

Child Dispute Conferences are only conducted at the Court and as they are ordered pursuant to a section of the *Family Law Act 1975* the reports which are prepared by the Family Consultants are called 'Section IIF Reports.'

A Family Consultant who conducts the Child Dispute Conference is either a social worker or a psychologist, who has been appointed by the court because of his/her skills in working with families and children. Family Consultants are recognised as expert witnesses in children's matters. The Family Consultants will have access to all court documents and will therefore be apprised of all the issues relevant to the matter. The information obtained by a Family Consultant in a CDC Child Dispute Conference is not confidential and can be reported to a Judge.

If a Judge orders that the parties attend a Child Dispute Conference a date for that conference is generally given when the parties are in court. Details will also be included in the Order issued by the Court which is sent to all parties.

Participation in a Child Dispute Conference is mandatory and if a person fails to attend there may be delays in the matter and additional costs. Family Consultants are required to advise the Court if a party does not attend a Conference and appointments can only be changed in exceptional circumstances (i.e. domestic and family violence).

The Family Consultant will interview each party separately and may suggest speaking to the parties together. However, a joint interview will only occur if all parties agree. The children will generally be interviewed separately to their parents. However, this will obviously depend on the ages of the children.

A party may bring a support person to the interview, but that person is generally not involved in the interview process. Other significant people, such as a partner, are also generally not interviewed.

The Family Consultant will focus on:

- issues of risk, such as domestic and family violence
- how the dispute is impacting on the children
- the ability of the parents to work together, and any possibilities of resolving the matter
- the child's/children's needs

After the Conference

The Family Consultant will prepare a 'Memorandum to Court' detailing his/her assessment of the matter and will focus on the children's needs. The Memorandum will also include advice about what arrangements or processes should be implemented to assist the Court in the further management of the matter, with the emphasis being on the child/children's care, welfare and development needs.

The Memorandum will be released either to the parties or lawyer(s) prior to the next Court hearing. It is possible for the parties to reach an agreement after reading the Memorandum, and if they do so, they can submit Consent Orders to the Court (see below). If the Court makes the Order the matter will be finalised and there will no need for the parties to return to Court.

The Memorandum is admissible in court as evidence in a matter. However, it cannot be shown to anyone other than the parties and their lawyers. It is an offence under Section 121 of the *Family Law Act 1975*, to publish or circulate to the

public, or a section of the public, any part of any proceedings which may identify a party, witnesses or certain other persons.

The advice provided by the Family Consultant is not binding on the Court and if a party wishes to challenge the report he/she can only do so in Court. Similarly, if a party has a complaint about a Family Consultant he/she should refer to the Complaints Policy that applies to the Court in which the proceedings are being heard – Federal Circuit Court - www.federalcircuitcourt.gov.au, or Family Court - www.familycourt.gov.au.

Part 2: Family Reports

A Family Report is a report written by a Family Consultant appointed by the Court. However, in some cases, the parties may commission a report and that will then be prepared by a Psychologist or Social Worker in private practice.

A Family Report is designed to provide an independent assessment of the issues relevant to the case and can provide a Judge with assistance when making decisions about the best interests of the child/children. It may also assist the parties to resolve their dispute.

The issues that the Family Report Writer will consider when preparing the report are the family's circumstances and issues of concern that are relevant to the care arrangements for the children, such as drug use or alcohol abuse. The report may also include opinions expressed by the children, an insight into the relationships and attachments of the children and may also include suggestions as to the parent with whom the child should live.

The paramount consideration when preparing the report is the best interests of the child/children.

As with the 'Memorandum to Court' referred to above, the Family Report cannot be shown to anyone other than to the parties that are involved in the case. It cannot be shown to other people, such as family members or friends, without the permission of the court.

If the Court orders that a Family Report is to be prepared the parties (or their lawyers) will receive a letter from the court setting out details of the time and

location for the interviews. The parties and the children are required to attend the interviews. If a party does not attend the report interviews, the report may not be completed by the date of the next court hearing, and this could cause delay.

Further, the failure by a party to participate in the interview process will mean that the Judge is not provided with a true picture of the issues in dispute between the parties.

A Family Consultant (or Social Worker or Psychologist) will interview the parties and the children. Generally, the interviews will be concluded in one day but in some cases the interviews may occur over a few days. The parties will be interviewed separately and other significant people, such as step or half siblings, partners or grandparents may also be interviewed.

The child, subject to his/her age, will also be interviewed separately from the adults. This will assist the Family Consultant to ascertain the child's views away from potential influence by their parents. However, the Family Consultant may also arrange separate interview sessions to observe the interaction between the child and their parents, or other people who are significant in the child's life.

The information which is provided to the Family Consultant by the parties is not confidential. All relevant information will be included in the Family Report and is admissible as evidence in court.



The Family Consultant may also have access to affidavits filed by the parties together with information which has been provided to the court in response to a subpoena, such as medical records, police or school reports.

The Family Report is only one piece of evidence that the Court will consider when making a decision. The Court is not bound by the recommendations made in the report, and if a party objects to the conclusions they can be challenged at trial by calling the Family Consultant as a witness. (If a Family Consultant is required at the trial they will require at least 14 days written notice prior to the trial.)

The Family Consultant can be cross-examined at the trial in relation to the contents of the report, their assessment of the family and recommendations.

In some cases, the Court will require an expert, such as a psychiatrist, to provide an assessment and information about a party that the Family Consultant cannot provide. An expert may be required for cross-examination if the matter proceeds to trial, and as in the case of a Family Consultant, notice of an impending trial must be provided.

Part 3: Independent Children's Lawyers

Independent Children's Lawyer (ICL) is an impartial solicitor, who represents the child's best interests and makes sure that is the focus when any decisions are made about parenting arrangements. He/she will provide an independent opinion about the arrangements that will be in the child's best interests.

The Family Court/Federal Circuit Court can order that an ICL be appointed in those cases where it is considered it is important for the child's welfare and wellbeing. However, one of the parties may also seek the appointment of an ICL where -

- there are allegations of physical, sexual or psychological child abuse
- there are allegations of domestic and family violence
- there is intractable conflict between the parents
- there are significant health issues (physical or psychological) affecting the child, a parent or someone who has a significant involvement with the child
- there is a proposal to separate siblings
- there is a proposal by one parent to move with the child
- there are cultural or religious differences which are affecting the child
- the child is alienated from a parent

This is not an exhaustive list, but it provides an indication of the serious nature of the issues that would appear in a matter where an ICL is appointed.



If an ICL is appointed one or both parties may, subject to their financial circumstances, be required to contribute towards that lawyer's costs. While an ICL is obliged to consider the views of the child, he/she will ultimately provide their own independent view about the arrangements that are in the child's best interests.

One of the main roles of an ICL is to arrange for evidence, including expert evidence, to be obtained and put before the court. This can be done by arranging a Family Report and/or an Expert's Report, and obtaining documents (via subpoena) such as medical or police records or school reports.

SECTION 4- The Orders the Court can make

Part I: Types of Orders

The Court can make Orders in relation to parenting or financial issues, or both.

There are three types of Orders that can be made –

- **Final Orders** - bring a matter to a close
- **Interim Orders** - made until further or final orders are made. Generally, an application for interim orders cannot be filed without also filing an application for final orders.
- **Consent Orders** – made with the agreement of both parties and have the same legal effect as if they had been made by a judicial officer after a court hearing. (See further details in relation to Consent Orders below).

When determining if an Order should be made the Court must have regard to–

- the child's best interests, if a parenting order is being sought
- the justice and equity of the settlement, if a financial order is being sought

Who can apply for Orders?

PARENTING ORDER

Any person involved in the care, welfare and development of a child may apply for a parenting order. This includes not only the child's parents (even after divorce) but also grandparents and other relatives.

The documents that are required to be filed if Parenting Orders are being sought in the Federal Circuit Court are:

- an Initiating Application with a Section 60i Certificate
- an Affidavit
- a Notice of Risk

If an application is being made in the Family Court for final parenting orders an Initiating Application (with Section 60i Certificate) and a copy of the child's/children's birth certificates are required. If interim orders are being sought an Affidavit must also be filed.

Detailed information about the preparation of the documents required to be filed when commencing an application for parenting orders is set out in Paragraph 3 above.

The Court may make a recovery order if a child has been removed from the:

- a parent
- a person who has a parenting order that provides that the child lives with, spends time with or communicates with that person, or
- a person who has parental responsibility for the child

A recovery order can require the return of a child, or authorise a person who is named in the order, such as the police, to find, recover and deliver a child to one of the people listed above. A recovery order can also prohibit the person from again removing or taking possession of the child. In these cases a recovery order can authorise the arrest (without warrant) of the person who again removes or takes possession of the child.

A recovery order can be sought by a person if they are -

- the person with whom the child lives, spends time with or communicates with in accordance with the provisions of a parenting order
- the person who has parental responsibility for the child in accordance with the provisions of a parenting order
- the grandparent of the child, or
- the person concerned with the care, welfare and development of the child, i.e. the child lives with or spends time with that person but there is no parenting order stating such arrangements.

An application for a recovery order should be filed in the Federal Circuit Court, unless the person has a current Family Court Order, in which case the application should be filed in that court.

If the person seeking the recovery order does not have a current parenting order, then application for such an order should be made at the same time as applying for the recovery order.

An Affidavit must be filed in support of the application and should include details about the following -

- a brief history about the relationship between the person seeking the order and the person whom it is thought is caring for the child
- details about where the child usually lives – the chances of recovering the child will improve if the person has information about where the child is likely to be
- details of any previous court orders
- how the child was removed from the person’s care or not returned to the person
- the child’s whereabouts and the basis for that belief
- attempts taken (if any) to find the child
- why it is in the best interests of the child to be returned
- the likely impact on the child if a recovery order is not made
- any other information or details relevant to the case

In deciding whether to make a recovery order, the Court must consider the best interests of the child as the paramount consideration. The Court may make an order which allows or requires a person to return the child at a designated time and place. In some cases the court will make a recovery order that directs a person(s) such as police officers, to find, recover and return the child. If such an order is made a copy of that document must be given to that person(s) and in most cases, this will be the Australian Federal Police.

If a child has been removed from a parent, or from a person who has a parenting order, which provides for the child to live with or spend time with that person, and the whereabouts of the ‘abductor’ are unknown, an application can be made to the Court for a ‘**Commonwealth Information Order**’. Such an Order will be directed to a Commonwealth entity, such as Centrelink, and will require that details of the person’s whereabouts be provided to the Court. This information will then be utilised by the Federal Police to ‘recover’ the child, or if there is no current order, to enable service of court documents on the person who has removed the child.

FINANCIAL

Financial orders can be obtained by both married and de facto couples.

In the case of a married person, the order must be sought within 12 months of a certificate of divorce being granted. After that time the Court's permission must be obtained to proceed with an application.

If a person has been a party to a de facto relationship, the application must be made within two years of the breakdown of the relationship. After that time the Court's permission must be obtained to proceed with an application.

If an application is being made for property/financial Orders in the Federal Circuit Court it is necessary to file -

- an Initiating Application
- an Affidavit
- a Financial Statement

The same documents must also be filed when applying for financial orders in the Family Court but a copy of the marriage certificate must also be filed.

A fee applies on the filing of an Initiating Application but if person is the holder of a Pensioner Concession Card, Health Care Card or in receipt of Legal Aid an exemption from the payment of the filing fee can be sought.

If a person is served with an application in which they are named as the respondent they can also apply for Orders. Those Orders are detailed in a document called a '**Response**'. The Response is filed at Court and a copy is then served on the Applicant or his/her solicitor. A Response is filed in relation to both parenting and financial issues.

CONSENT ORDERS

If the parties to proceedings in the Federal Circuit Court resolve the issues in dispute between them they can file Consent Orders, and if the Court makes the Orders the matter will be finalised and there will no need for the parties to go back to court.

However, if there are no current proceedings in the Federal Circuit Court and the parties reach an agreement an **Application for Consent Orders** must be filed in the Family Court. Applications for Consent Orders attract a filing fee.

Part 2: Subpoenas and Inspection of subpoenaed documents

A **subpoena** is a document issued by the Court to require the production of evidence or documents from an individual or an organisation. It will be issued for a range of reasons, which aim to provide information to assist the Court in making a determination related to disputed issues.

When should a Subpoena be issued?

- A subpoena can be issued to many organisations such as a hospital or doctor, to obtain details of a person's past medical issues (particularly mental health), to the police to obtain a history of domestic and family violence or charges relating to the use of drugs, to the Department of Family and Community Services, schools, counsellors, etc.
- In matters that relate to property settlement, subpoenas are more likely to be issued to banks and accountants.
- Independent evidence produced by a subpoena will often be used to corroborate a person's case, or to provide evidence that damages or discredits the other party's position. The evidence may be used in cross-examination to test the truth or otherwise of a witness' evidence.

In theory, anyone can be subpoenaed to produce documents to the Court, or to attend Court to provide evidence in person. In parenting matters, there is often a limited range of people and organisations that are served with subpoenas, such as the Police, the Department of Family and Community Services (previously DOCS), schools, doctors, counsellors/therapists and hospitals.

When a subpoena is issued, the person or organisation named is served with a copy of the subpoena, and is required to comply with the request within a set amount of time. Conduct money must also be provided to cover the expense of complying with the subpoena. However, the money may not cover all the costs associated with the expense of complying with the subpoena. In most cases, the person named in the subpoena will be required to produce a copy of their files including notes, records, correspondence, assessments, and/or reports to the Court.

Once the documents are produced to the court an appointment needs to be made to inspect them. If a person is acting on his/her own behalf, they will be able to inspect the documents. However, if a person is represented by a lawyer, the lawyer is the person who can inspect the documents.

Documents cannot be removed from the Court and photocopying is limited, in parenting matters, to the Independent Children's Lawyer. The restriction on copying documents in financial matters is not nearly as restricted.

SECTION 5- Attending Court

Part I: The Trial Process

When a matter is allocated a trial date the Judge will issue directions in relation to the filing and serving of Affidavits. Strict time frames apply in both the Federal Circuit Court and the Family Court and filing Affidavits outside the designated time frame can result in the Judge not considering the contents.

If either party wishes to rely on evidence from third parties, to support his/her application, those persons will also be required to file Affidavits.

On the day when the matter is listed for trial the parties will have to attend court in person and answer any questions posed by the Judge and by the other party.

The Court may order that, prior to the trial, the parties exchange and lodge with the Court a 'Case Outline Document' or 'Case Summary Document. This document must be filed and served prior to the first day of a hearing before a Judge.

It includes:

- Details of the orders being sought
- A list of the witnesses that are proposed to be called in the case
- A brief chronology of relevant events.

The completed and signed Case Outline Document must be filed with the court together with sufficient copies so that there is a copy for each party.

At the trial the Applicant will outline their case and the Respondent or their lawyer may ask questions arising from the evidence being relied upon by the Applicant. That evidence will be set out in the filed Affidavits. Similarly, when the Respondent gives evidence, the Applicant may 'cross examine' or question, the Respondent. If there is an ICL appointed, he/she may also present evidence to the Court and cross-examine the parties and their witnesses.

If an 'expert' has been commissioned to prepare a report, such as a family consultant, psychologist or psychiatrist, that person may also be cross-examined.

When both parties have given their evidence and been cross examined, the Court will then give each of them the opportunity to make any final comments (closing submissions) in support of his/her case.

After the closing submissions have been made, the Judge may make orders and give reasons for the decision. Alternatively, the Judge may reserve the decision to another day.

If the decision is 'reserved', the Court will inform the parties of the date when the decision will be delivered, and they then attend at the court to hear that decision. A copy of the decision will also be provided to the parties, and that decision will include the orders that have been made and the reasons for the decision.

Part 2: The Court's response to breaches of Parenting Orders

What is considered a breach?

When a parenting order is made, each person affected by the order must take all reasonable steps to comply. For example, a parent has an obligation to ensure a child spends time with the other parent (if this is specified in the order).

If the Court finds that a person has breached (contravened) the order, without reasonable excuse, because he/she has:

- deliberately failed to comply with the terms of an order, or
- have made no reasonable attempt to comply with the terms of an order, or
- intentionally prevented a person who is bound by the terms of an order from complying with it, or
- assisted a person who is bound by an order to contravene it

then a penalty will be imposed

Penalties for a breach

The penalty for breaching an Order will depend on:

- whether the breach is a minor or major breach (a major breach may be not allowing the other parent to see the child at all),

- the reason for the breach,
- the circumstances of the case,
- how many times the breach has occurred.

The penalties imposed by the Court for breaching an order can include:

- the payment of a fine
- a community service order
- the requirement to attend a post separation parenting program
- an order that the party who has contravened the order pay some or all of the other party's legal costs
- a term of imprisonment

When hearing a contravention application, the Court may decide to:

- vary the order
- suspend the order
- discharge the order
- make an order compensating the other person for lost time with the child

What are the exceptions?

In some cases, the Court will find that there has been a 'reasonable excuse' for breaching (contravening) an Order. For example:

- the person did not understand the obligations imposed by the order, or
- the person reasonably believed that the actions constituting the contravention were necessary to protect the health and safety of a person (including the person who contravened the order) or the child, and
- the contravention only lasted so long as was necessary to protect the health and safety of the person who contravened the order or the child

Generally, if an Order is breached, the party affected must provide a certificate from a Family Dispute Resolution Practitioner (unless one of the exceptions detailed in paragraph 1 above applies). That Certificate and an Application detailing the alleged contravention, an Affidavit and a copy of the allegedly breached Orders, will also have to be filed. Copies of the sealed documents will have to be served personally on the person who allegedly breached the Order.

When an allegation of non-compliance of a court order is made, the alleging party (the applicant in a contravention case) must show that the allegation is established 'beyond reasonable doubt', i.e. it is more likely than not that the alleged breach occurred.

NOTE: A **parenting plan** is not **legally binding** as it is not a legally enforceable agreement. For example, if parent A breaches a parenting plan by failing to adhere to the agreement, parent B cannot ask a court to impose a penalty on parent A for that breach.

Part 3: Security and Protocols at Court

Security at Court

If a person has concerns about his/her safety when attending Court, they should contact the Court at least seven days prior to the court date and options for safety will be discussed. The Court can implement a safety plan.

A person is required, by law, to inform the Court if there is an existing domestic and family violence order to which they are a party and a copy of any Domestic and Family Violence Order must be annexed to the Initiating Application.

Protocol at Court

As attending Court can be a daunting experience it is recommended that a party arrive at least 30 minutes early to allow plenty of time to find the courtroom. Court staff can provide assistance in finding the right courtroom.

A family member or friend (who is over the age of 18) can sit in court with a party and provide support. Unless approved by the Judge, a support person cannot sit at the bar table with a party and cannot speak on his/her behalf.

Recording devices are not permitted in courtrooms without permission of the Judge.

Before entering the courtroom a person must:

- turn off electronic equipment, including mobile phones, and
- remove hats or sunglasses, unless for medical or religious reasons.

Courtesy must be given to the Judge by standing when he /she enters the court room. When being addressed by Judge, a person must stand and address the Judge as 'Your Honour'.

If a person is appearing at Court to apply for a Divorce that application will be heard by a Registrar and he/she must be addressed as 'Registrar'.

Part 4: Seeking Legal Assistance

Legal Aid Queensland (call 1300 651188) provides some funding in family law matters.

In order to be granted legal aid a person must:

- be financially eligible
- establish that there is 'significant' dispute between the parties, such as one party not being permitted to spend any time with his or her children.

An application for legal aid can be made by a private solicitor who is on the Legal Aid Preferred Supplier Panel. Alternatively, a person may attend at a Legal Aid office and make an application for funding. If the application is successful, he/she will be referred to a solicitor. Advice can also be obtained from a community legal service but cannot provide representation for a person in court.

PROPERTY ORDERS

SECTION 1- Defining Property under the Family Law Act

- Part 1: Eligibility
- Part 2: Financial Orders
- Part 3: What is Property?
- Part 4: Superannuation

SECTION 2- Commencing Proceedings for Property Settlement

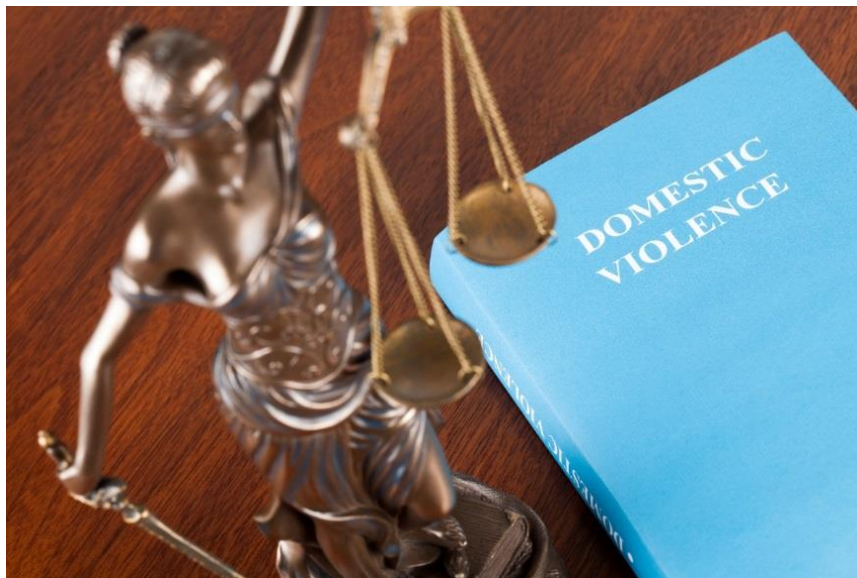
- Part 1: Documents Required and Disclosure
- Part 2: The Court's Considerations

SECTION 3- Conciliation Conferences and Private Mediation

SECTION 4- Property Orders and Breaches

- Part 1: Property Orders
- Part 2: Breaches of Property Orders

SECTION 5- Legal Terms



SECTION 1- Determining Assets under the Family Law Act

Part 1: Defining Relationships

Married couples and persons who were in a de facto relationship may apply to the Court for a financial order to determine financial matters between them.

Time limits apply in relation to applying for property orders in the case of both marriage and de facto relationships –

- In the case of a marriage – the application for property orders must be filed with the Court within one year of the divorce becoming final.
- In the case of a de facto relationship - the application for property orders must be filed with the Court within two years of a separation.

Part 2: Financial Orders

When the Court determines a financial dispute between two persons a 'financial order' will be made relating to the division of property, and can include orders for payment of maintenance (either to a former spouse or to a de facto partner).

A court can make a financial order based on an agreement between the parties (a consent order) or after a court hearing or trial. When a financial order is made, each person affected by the order must follow it.

Part 3: What is property?

'Property' for the purpose of the *Family Law Act* may be an 'asset' or a 'financial resource'. An item which can be classified as an asset generally has a realisable value, such as real estate, shares, motor vehicles, etc. A financial resource provides a source of funds or financial support in the future.

The Federal Circuit Court (the Court which will deal with most property matters) will not be concerned if an asset is registered solely (such as shares) in the name of one person and those assets will not be excluded from the pool of assets.

If there is a dispute about the value of an item of considerable value (e.g. over \$5000), that item will need to be valued.

Part 4: Superannuation

The superannuation splitting law deals with superannuation as a different type of property, and allows separating couples to value their superannuation and split payments. It is important to note that 'splitting' a superannuation interest does not convert the superannuation into a cash asset – it is still subject to superannuation laws and in most cases it is usually retained until retirement ages are reached. If an agreement has been reached between two parties to split a superannuation entitlement that agreement can be formalised by:

- a written agreement which requires both parties to seek advice from a lawyer, who must sign a certificate for his/her client, stating that independent legal advice about the agreement has been given and;
- Consent Orders (the orders can then be made in chambers without either of the parties having to attend court).

If agreement cannot be reached, proceedings will have to be commenced seeking a court order. In order to split superannuation, the interest(s) will have to be valued. A trustee(s) of a super fund(s) will value the interest(s) and may charge a fee at the time of application, to provide this information. The requisite form for obtaining such information can be found in the *Superannuation Information Kit*.

There are different types of superannuation, and the superannuation splitting legislation sets out methods for valuing most types of superannuation.



SECTION 2- Commencing Proceedings for Property Settlement

Part 1: Documents Required and Disclosure

Documents Required

As stated above in Paragraph 3(a), in order to commence proceedings in the Federal Circuit Court it is necessary to file -

- an Initiating Application
- an Affidavit
- a Financial Statement

The same documents must also be filed when applying for financial orders in the Family Court but in that case a copy of the marriage certificate must also be filed. (The Family Court only deals with financial cases involving multiple parties, valuation of complex interests in trusts or corporate structures or complex issues concerning superannuation).

The Affidavit that is filed in a financial matter should detail the assets that the parties owned at the commencement of their relationship, the contributions that they made during the relationship (both financial and non-financial), their current circumstances (such as whether they are working or in receipt of Centrelink benefits) and future needs.

Disclosure

A duty is imposed on all persons who are parties to proceedings under the *Family Law Act* to provide 'disclosure'. This means that each party must exchange all information relevant to an issue in the case, including information recorded in a document and stored by some other means such as on a computer until the case is finalised. If a person's circumstances change during the course of the proceedings that person must provide details about that change together with all relevant documents. For example, if a person was working and their circumstances changed such that they were receiving Centrelink benefits.

NOTE: The duty of disclosure also applies in parenting matters and could involve the provision of school reports, medical reports, etc.

Part 2: The Court's Considerations

When applying for a property settlement, the Court determines the application by way of a '4-step' process.

Step One – The asset pool

- Involves identifying and valuing the assets and liabilities of the parties. This includes all property regardless of what name it is held in, or how they were acquired. Superannuation is also included in the asset pool.
- The Court will value the assets at the current date, not the date that the parties separated.

Step Two – Contributions - how the assets were acquired

- The Court will consider the contributions made by both parties during the relationship, including financial and non-financial contributions (such as caring for children or being a home maker).
- The Court can take into account contributions that may have been made by others (such as extended family) on behalf of one party.

When may the Court find that the contributions of the parties were other than equal?

In many cases, particularly where there has been a long relationship, the Court will form the view that the parties have contributed equally.

The Court, however, may find that the contributions of the parties were other than equal, particularly in the following circumstances -

- if the relationship was short and there are no children, the Court will be primarily concerned with the direct financial contributions made by each party;
- where, at the commencement of the relationship, one of the parties had considerably more assets than the other party; and,

- where one of the parties has made a substantial contribution by way of an inheritance, a gift from family or a payment from a personal injury settlement; or
- where the deliberate or irresponsible behaviour of one of the parties has resulted in a loss to the parties (e.g. a party used funds for gambling).

Step Three – The parties' future needs

This step involves considering the future needs of each of the parties, and the Court will take into account factors such as:

- the ages and state of health of each of the parties;
- whether there are children of the relationship under 18 years of age;
- a standard of living which is reasonable in the circumstances;
- the income, property and financial resources of each of the parties and their capacity for employment;
- the extent to which the earning capacity of a party has been affected by the relationship;
- if either party is living with someone else, the financial circumstances of their household;
- the need to protect one of the parties who may wish to continue their role as a parent

and may make a further adjustment, based on a percentage of the asset pool, to compensate for the difference in future circumstances.

Step Four - The division must be 'just and equitable'?

After taking into account steps 1 to 3, the Court must decide whether the division is 'just and equitable' that is, fair to both parties.



SECTION 3- Conciliation Conference and Private Mediation

A Conciliation Conference, which is conducted by a Registrar of the Court, provides parties with an opportunity to reach an agreement about financial issues arising out of the breakdown of their relationship.

As there is an expectation that the parties will make a genuine effort to reach an agreement, they should attend the conference in a spirit of compromise. If an agreement is reached at the Conciliation Conference it can be formalised by way of Consent Orders, and those orders will be just as binding on the parties as if a Judge made them.

The Court will order that the parties attend a Conciliation Conference only if they meet certain financial criteria. If they do not satisfy the Court's financial requirements they will be ordered to attend a mediation conducted by a private mediator, and generally meet the costs of that mediation jointly. As in the case of a Conciliation Conference, if an agreement is reached at a private mediation, that agreement can be formalised by way of Consent Orders and the making of such Orders will finalise the matter.



SECTION 4- Property Orders and Breaches

Part 1: Property Orders

The Court can order that:

- a party pay money to another party within a specified period of time
- a property be transferred or sold
- a party sign certain documents so as to effect a transfer of an asset

Part 2: Breaches of Property Orders

When a property order is made, each person affected by the order must comply. In the event that one party fails to comply, the other party has several options, namely dispute resolution through mediation or file an enforcement application.

In some cases, the existing orders may provide that if one party refuses or neglects to sign documents required for compliance with the orders, then a Registrar of the Court can sign the documents instead.

When determining an enforcement application the Court can:

- seize and sell property (including real estate)
- order a bank to transfer money to one party
- order an amount owing to be paid by way of instalments

Legal Terms

Abuse - in relation to a child – see definition set out in relation to ‘Family Violence’

Address for Service - the address provided by a party where documents can be served on them, either personally, by post or by some form of electronic communication

Adjourn - postpone a court event to another date

Affidavit - a signed written statement that is used by a person in court. The person making the Affidavit must swear an oath, before a solicitor or Justice of the Peace, that the contents of the document are true. An Affidavit is used in court to provide written evidence and is often used in place of verbal evidence. An Affidavit must be served on all parties.

Appeal - a procedure which allows a party to challenge a decision made by a court

Applicant - the person who first applies to the court for orders to be made

Barrister - a lawyer who specialises in court work

Breach - when the conditions of a court order are broken (also see Contravention)

Case - when a person makes an application to the court for orders, that becomes a case before the court

Consent Order - an agreement reached between the parties that is approved by the Court and then becomes a court order. A consent order has the same legal force as an order made by a Court after a hearing.

Contravention - if the Court finds that a party has not complied with the terms of a court order, then he/she has contravened (breached) the order.

Court hearing - the date and time when a case is scheduled to come before the court

Court order - the actions a party/parties must do to carry out a decision made by a court. An order may be interim or final.

De facto relationship - a relationship between two persons who live together as a couple and are not married

Deponent - a person who swears or affirms an Affidavit

Directions Hearing - a hearing before the court at which time orders will be made to a party/parties to progress the matter, such as the filing of a certain document

Disclosure - a process which requires each party to provide to each other party all documents that are relevant to an issue in the case

Divorce Order - an order made by the court that ends a marriage

Duty List - the list of cases that are heard by the Court. When a matter is heard in a duty list the Judge may approve consent orders, give directions about steps that the parties must take to progress the matter or allocate a trial date.

Enforcement order - an order made by a court to make a person or party comply with or follow an order

Equal Shared Parental Responsibility - a presumption under the *Family Law Act* that both parents will have a role in making decisions about major long-term issues concerning a child, such as significant health issues or where he/she will go to school

Ex parte hearing - a hearing where one party is not present and has not been given notice of the application. Such a hearing is usually reserved for urgent cases.

Family Consultant - a psychologist and/or social worker who specialises in child and family issues that may occur after separation, and who is employed by the court to assist it in making decisions about a child's living arrangements

Family Dispute Resolution Practitioner - a specialised mediator who can issue a certificate stating that the parties have attended mediation. The certificate (known as a 'Section 60I Certificate') is required in order to commence proceedings in court for parenting orders

Family Dispute Resolution - a process in which a family dispute resolution practitioner assists people to resolve some or all of their disputes with each other following separation

Family Law Act 1975 - the law in Australia which covers family law matters

Family law registry - a public area at the Family Court and Federal Circuit Court where documents are filed in relation to a family law case and where people can obtain information about the court and its processes

Family Report - an independent assessment of the issues relevant to the case which can provide a Judge with assistance when making decisions about the best interests of a child/children. It involves interviews with family members and other people who are important to the child's/children's welfare.

Family Violence - violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member) or causes the family member to be fearful. A child is exposed to family violence if he/she sees or hears family violence or is otherwise exposed to family violence.

Family Violence Order - an Order made under a law of a State or Territory to protect a person, including a child, from family violence.

Federal Circuit Court - a Federal Court that hears less complex family law matters, including parenting issues, property disputes and divorce

Filing - the procedure of lodging document at a family law registry for placing on the court file

Final hearing - the hearing before the court at which all parties give their evidence (generally in Affidavits) and are cross-examined.

Final Order - an Order made by the Court to bring a matter to a close. The proceedings are heard by a Judge who hears the evidence and makes a decision. The Judge will give reasons for the decision, which is referred to as a 'judgment'.

Hague Convention on the Civil Aspects of International Child Abduction- is the main international agreement that covers international parental abduction. It provides a process through which a parent can seek to have their child returned to their home country.

In chambers - if a matter is decided 'in chambers' it means that the matter is being determined in the office of a court Registrar or Judge and not in open court.

Independent Children's Lawyer - a lawyer appointed by the court to represent a child's interests in a case

Interim hearing - a hearing of an application for an order other than a final order.

Interim order - an order made by a court until another order or a final order is made.

Interim hearing - a hearing of an application for an order, other than a final order, where the Judge will read the parties' documents and makes a decision. Cross examination does not take place at an interim hearing.

Judgment - a decision made by a court after hearing all the evidence

Jurisdiction - the power or authority given to a court and its judicial officers to apply the law

Mention - an appearance by the parties before the Court to assist in the progression of the matter after the initiating application has been served on the other party. There can be several mentions of a matter during the proceedings

Order - a direction made by the Court for a person to do a certain thing. Orders may be made by Judges and Registrars of the Court.

Parental responsibility - the responsibility of each parent to make decisions about the care, welfare and development of their children.

Parenting Plan - a written agreement between the parties detailing parenting arrangements for children. It is not approved by or filed with the court and is not enforceable by the court.

Parenting Order - an order that deals with how parents exercise parental responsibility, a child's living arrangements and the time that is spent with each parent.

Parties --the Applicant and the Respondent are parties to the proceedings and in some cases a legal entity, such as a corporation, may also be a party.

Procedural Order - an order made by the Court of a practical nature such as an order that the parties attend a Conciliation Conference

Registrar - a Court officer, a lawyer, who has been delegated power to perform certain tasks, e.g. grant a Divorce

Respondent - a person who responds to an application by agreeing to or opposing the orders sought by the Applicant

Response - the document in which the Respondent requests the Court to make different orders to those sought by the Applicant

Rules - a set of directions that outlines court procedures. The rules of the Family Court are the *Family Law Rules 2004* and the rules of the Federal Circuit Court are the *Federal Circuit Court Rules 2001*.

Service - the process of giving or sending court documents by one party to the other, after they have been filed, in accordance with the rules of the court. Service of documents ensures that each party has copies of all documents that have been filed in court.

Subpoena - a document issued by the court, at the request of one party, requiring a person to produce documents and/or give evidence.

Trial - the final hearing of a matter before a Judge. The Judge will hear the evidence and at the end of the trial make a decision and orders which will finalise the matter.

Transcript - a record of the spoken evidence in a court case. All court hearings are recorded except uncontested divorce hearings. This includes mentions and directions hearings. If a party requires the transcript in relation to a matter he/she is responsible for the cost of obtaining that transcript.

