

How do I apply to the Federal Circuit Court for a Parenting Order?

This information is based on the law as at October 2013. It is written for the use and benefit of women in the Australian Capital Territory and Region. The information is a general guide to the law and should not be relied upon as a substitute for legal advice.

You can file an application for a parenting order at either the Federal Circuit Court or the Family Court. Usually applications are filed in the Federal Circuit Court. If your matter is a complex one it will go to the Family Court. See the Centre's fact sheet *Parenting Orders in the Family Court and Federal Circuit Court*.

What do I do before filing my application?

There is a requirement under the *Family Law Act* that before filing any application for parenting orders you have to attend Family Dispute Resolution (FDR) unless the matter is urgent or the organisation providing FDR decides that the matter is not suitable for FDR, for example, where there is a history of violence or controlling behaviour.

If your matter then settles through FDR you can file a consent order. See the Centre's fact sheet *How do I get a Parenting Order by Consent?* If your matter remains unresolved, and you have received a certificate from the FDR service (called a section 60I certificate), you can then file your application for a parenting order.

Do I need to have a solicitor?

You do not have to see a solicitor before attending FDR, or making an application to the Court for orders, but it is a good idea to have one to help you through the process. It is a good idea to obtain legal advice before attending FDR so you know what your legal position is. In most cases your solicitor will not attend FDR with you.

If you do not have much money you may be able to get Legal Aid. Your case for Legal Aid is sometimes stronger if you are responding to the other side's application and there is an upcoming court date. Legal Aid will consider the financial circumstances of an applicant for aid, along with the merit of the matter. Generally Legal Aid will want you to have attended FDR before making an application for Aid and to have a section 60I certificate. If the matter is urgent, you can write this on your application for Legal Aid and explain that this is the reason that you have not attended FDR.

What types of parenting orders can you apply for?

You can apply for final and interim orders. An interim order is the order that you have in place until a final order is made. If you only apply for a final order then your matter may not be heard by the Judge for at least a year. If your matter is urgent then you must apply for interim orders and final orders so that it can be dealt with

by the Court sooner. It is important to have legal advice before making any application to the court.

The orders sought are generally orders about who the children will live with and how they will spend time and communicate with the other parent or significant other. They may also include other orders, such as not removing the children from the area or in regards to education, religion or sport.

In parenting cases it can be very difficult to change a certain situation if it has been in place for some time. Therefore, for example, if your children have been living in a 'week about' arrangement since your separation six months ago, you may have problems convincing the Court, especially on an interim basis, that your children should now come and live with you (unless you can prove that your children are at risk staying in the current situation).

You will need strong evidence that an interim order is not in your child's best interests to get a different final order. This will usually include evidence from a Family Consultant who has prepared a report prior to the final hearing (see below). If your matter goes to trial the Court will nevertheless consider all the evidence before it. The Court will have more time to look at the issues prior to and at the trial than at the interim hearing.

In a lot of parenting cases involving interim hearings, however, the matter never gets to the trial stage. This is because the matter settles by negotiation between the parties at some time after the interim hearing and before the trial. In these cases the parties file consent orders dealing with the matter on a final basis.

What documents do I need to file?

You need to file the following documents at the Registry:

- An Initiating Application. This application is for both final orders **and** for interim and final orders together.
- An affidavit from you setting out the facts you're relying upon.
- An affidavit from a person who can give important evidence to the court about the orders you are seeking on an interim basis.
- A Section 60I Certificate from a registered FDR practitioner, unless exempt. This applies even if you have pre-existing orders in relation to the child that is the subject of the current order.
- If you are alleging child abuse or family violence, or a risk of either, a Notice of Child Abuse, Family Violence, or Risk of Family Violence (Form 4) together with evidence in your affidavit on which the allegations are based.
- The filing fee for an Initiating Application varies between \$320 and \$640. (The fee will depend upon whether you apply for final orders only or whether you apply for interim orders as well. It will also depend upon whether you apply for financial orders as well as parenting orders). The fee for filing a Response is \$320. Fees are subject to change, check the Family Law Courts website at www.familylawcourts.gov.au. You may be eligible for an exemption from the filing fee if you hold certain government concession cards or are receiving

certain government benefits, have been granted legal aid or can demonstrate financial hardship. See the Guidelines for Fee Exemption and Reduction at the Family Law Courts website above for more information.

You need to file the original of each document plus one photocopy for each party to be served and one photocopy for your own records.

Initiating applications can be electronically filed through the Commonwealth Courts Portal at www.comcourts.gov.au.

From the Family Court or the website at www.familylawcourts.gov.au you can get:

- An 'Initiating Application kit'.
- Fact sheet on 'Preparing an affidavit'.
- Fact sheet on 'Compulsory Family Dispute Resolution – court procedures and requirements'. This fact sheet lists exemptions from the requirement to file an FDR certificate and outlines how to seek an exemption.

What about Local Courts?

You may also be able to bring an application for parenting orders in your Local Court, depending on the Court and the matter's complexity. This will be of particular relevance if you live outside the Canberra region. It may, however, be preferable to file in the Federal Circuit Court because of the more specialised services that are available through that Court. If the matter is going to be a complicated one, then the Magistrate in the Local Court may end up transferring it to the Federal Circuit Court, or even the Family Court, in any event.

Service of documents

Once the documents have been filed at the Registry, sealed copies will be returned to you. A sealed copy has the Court seal stamped on it. The sealed copies will have the date of your first Court appearance written on the top right hand corner.

You keep one copy and arrange to serve the other copies to the other party or parties. Service of documents is a legal term that means giving or delivering court documents personally to another person in a way that assures the Court that the other person has received them. Documents need to be served on other parties as soon as practicable after filing. The Court will not do this for you. If the other person does not turn up to Court on the date given, the Court will want evidence that the documents have been served on that person.

You must serve all documents filed, as well as any relevant Family Court brochures, by 'special service'. Methods of 'special service' include:

- By hand. You can arrange for any person over 18 (not yourself) or pay a Process Server to hand deliver the documents for you. You can find a Process Server in the Yellow Pages. A Process Server completes an Affidavit of Service to verify that the documents have been served on the other party.
- By post, fax or email. Only use this method if you are confident the other party will sign the Acknowledgment of Service and return it to you.

- By service on the other party's lawyer. This can only be done if the lawyer agrees that the documents may be served on him or her. The lawyer will also need to acknowledge service.

For more information on special service, see the 'Service Kit' at the Family Law Courts website at www.familylawcourts.gov.au which outlines special service in more detail and includes an Acknowledgment of Service form.

Once the other party has received your documents, they will then have to file and serve their response to the 'address for service' you provide in your application, normally together with their own affidavit in support of the orders they want.

What happens at Court?

If you have a lawyer, s/he will attend with you. On the first Court date the Court may do any of the following:

- Give directions about things you must do (ask you or the other party to do certain things to help settle the matter).
- Order a Family Report (see below) be prepared.
- Order you and the other party or parties attend FDR if you haven't already attended.
- Fix a date for a final hearing.
- Conduct an interim hearing if the matter is urgent and the Court has the time to hear it (if there is no time available then a later date will be fixed).

Different rules apply to interim and final applications. Interim hearings are done 'on the papers'. This means that the Judge decides what is in your child's best interests based on the parties' affidavits and the submissions or 'arguments' that are put forward. You need to swear or affirm that an affidavit is true when you sign it. As a general rule evidence is not given from the witness box and there is no cross-examination of the other parent or person at an interim hearing.

The Federal Circuit Court is a busy Court and Court times depend upon urgency and how busy the Court is. Normally when you file your application you will be given your first Court date (see above) in 4 to 6 weeks. You may be waiting a long time for your final hearing, sometimes up to 18 months.

What is a Family Report?

A Family Report is a report specifically prepared for Court by a Family Consultant (also known as a 'Counsellor'). Family Consultants are psychologists and/or social workers who specialise in child and family matters after separation and divorce. See the fact sheet 'Family Consultants' at www.familylawcourts.gov.au for more information.

The Family Consultant will talk to you, the other party or parties and the children (if they are old enough). They will include in the report everything they believe is appropriate when dealing with the care, welfare and development of your children. They will sometimes make recommendations as to what they see as the likely

consequences should your children live with one person as opposed to the other. Sometimes they may even suggest who they think the children should live with and what time they should spend with the other party.

It is not, however, the role of the Family Consultant to do the Judge's job for him/her, and to say what they think should happen in a particular case. The Family Report is nevertheless an important piece of evidence which is usually heavily relied upon by the Judge when determining your matter.

What is an Independent Children's Lawyer?

In some complex matters, for example where there are allegations of child abuse or cultural or religious differences are affecting your child, an Independent Children's Lawyer (previously known as a Child Representative or a Separate Representative), may be appointed, either by the Judge or on the application of one of the parties. It is the role of the Independent Children's Lawyer to act on behalf of your child, rather than on behalf of one of the parties.

It is the job of the Independent Children's Lawyer to present evidence (if relevant) and make submissions at the trial as to whom they think your child should live with and what time, if any, they should spend with the other party. The Independent Children's Lawyer may arrange for expert evidence or subpoena relevant information.

What if I don't agree with the orders the Judge makes?

For an appeal to be successful, you must convince a Family Court Judge that the Federal Circuit Judge made an error. You cannot lodge an appeal just because you are unhappy with the decision. Appeals are very expensive and there are strict time limitations. A Notice of Appeal must usually be filed within 28 days after the date of the order. Appeals are not things to be entered into lightly. If you believe that you have grounds for an appeal, then you must seek urgent legal advice. See the fact sheet 'Appeal Procedures – Single Judge' at the Family Law Courts website at www.familylawcourts.gov.au for more information.

If later on you and the other parent or person can agree about any changes to the orders you want made, then you can file a consent order to change them. If there is no agreement, and you want to vary the orders which have been made (and you are not lodging an appeal) you must wait until there has been a 'significant change in circumstances' before you can file another initiating application.

What if the other person does not comply?

If the other parent or person does not comply with the order once it has been made, and they do not have a lawful or reasonable excuse, then you can make a Contravention Application. The Court can:

- Enforce an order to compel a person to comply with it.
- Make a further order that discharges, varies or suspends the order without the need for a separate variation application to be filed.
- Penalise the person breaching the order.

Where do I go for information and advice?

Family Law Courts National Enquiry Centre	1300 352 000 www.familylawcourts.gov.au
Family Relationships Centre Family Relationship Advice Line (Weekdays 8am to 8pm, Saturdays 10am to 4pm) Canberra Family Relationship Centre (Monday to Friday, 9am to 5pm)	www.familyrelationships.gov.au 1800 050 321 6122 7190
Relationships Australia	1300 364 277 www.relationships.org.au

About the Women's Legal Centre

The Women's Legal Centre (ACT & Region) Inc. is a community legal centre for women in Canberra and the surrounding area. The Centre is run by women and aims to improve women's access to justice. The Centre offers free, confidential telephone advice Monday to Friday from 9.30am to 12.00 noon, and face to face appointments, when appropriate.

The numbers for legal advice (weekdays 9.30am to 12 noon) are:

Local	6257 4499
Outside Canberra	1800 634 669

The Women's Legal Centre is funded by the Social Inclusion Division of Civil Justice and Legal Services Group, Commonwealth Attorney-General's Department.