The Law Handbook

YOUR PRACTICAL GUIDE TO THE LAW IN NEW SOUTH WALES

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Family Law

Sally Cole – Legal Aid NSW

Gabrielle Craig – Senior Solicitor, Women's Legal Service

Pip Davis – Assistant Principal Solicitor, Women's Legal Service

MARRIAGE, SEPARATION AND DIVORCE

[24.10] The law regulating marriage in Australia is the federal *Marriage Act 1961* (Cth). The Act sets out who can marry, who can perform a marriage ceremony, and how, where and when marriage ceremonies can be performed.

Separation and divorce, including property distribution and issues concerning children, are covered by the federal *Family Law Act 1975* (Cth).

Marriage

[24.20] Who can marry?

Age limits

Both men and women can marry at 18.

People under 18

In special circumstances, a person who is under 18 but over 16 may marry with the authorisation of the court. The consent of the person's parents or guardians is also generally required, but the court may dispense with this in some cases (*Marriage Act*, ss 12, 13).

Same-sex relationships

Same-sex couples now have the right to marry.

The law dealing with the relationships of lesbians and gay men is also discussed in Chapter 34, Same-sex Couples and Their Families.

[24.30] Procedure

Australian law recognises civil, religious and foreign marriages.

Marriage celebrants

A person who performs a marriage ceremony is called the *marriage celebrant*.

Civil marriages can be conducted by:

- a celebrant from the Registry of Births, Deaths and Marriages;
- a private celebrant (these are listed in the telephone directory).

Religious celebrants are authorised under the rules of the particular religion.

Fees

The Registry of Births, Deaths and Marriages charges between $433 and $546 dependent on the time and day of the week of the ceremony. This includes the fee to lodge the Notice of Intended Marriage ($166) and the issue of a standard marriage certificate ($58). Private civil celebrants also charge fees.

Celebrants of religious marriages usually receive a donation.

Time and place

A marriage can take place anywhere and at any time as long as basic legal requirements are met.

Notice of intention to marry

A Notice of Intended Marriage form must be completed and given to the celebrant at least one month before the marriage. The Notice of Intended Marriage form is available from any Registry of Births, Deaths and Marriages or Service NSW Centre.

Both parties must sign the notice in the presence of an authorised celebrant or other "approved person" (such as a justice of the peace or a solicitor).

Documents required

The marriage celebrant must also be given:

- the parties' birth certificates or passports;
- statutory declarations as to the parties' current marital status;
- if one of the parties has been married before, either:
  - a final divorce order (previously called a *decree absolute*); or
  - the former spouse's death certificate (s 42(10)).

Fee

There is a *notice of intended marriage* fee of $166.

[24.40] Marriage certificates

A marriage certificate is proof of the marriage. The certificate is required for various purposes, including:

- obtaining passports and visas;
- proving next of kin status for probate purposes;
- changing the name on bank accounts, if the person changes their name;
- in any application by a married person under the *Family Law Act*.

Marriage certificates are prepared on the day of the marriage by the marriage celebrant.

Signatures required

The certificate is signed by:

- the parties to the marriage;
- the celebrant;
- two witnesses, who must be 18 or over.

Lodging the certificate

The certificate must be forwarded to the Registry of Births, Deaths and Marriages within 14 days (*Marriage Act*, s 50(4)).

Copies of the marriage certificate

Three copies of the marriage certificate are usually made immediately after the ceremony so that the parties can have their own copy. Marriage certificates should be kept in a safe place with birth certificates, wills and other important documents.

Prohibited relationships

A prohibited relationship is a relationship between:

- a brother and sister (including half-brothers and half-sisters);
- a person and their ancestor or descendant, including adopted as well as natural children.

Cousins can marry.

Polygamous marriages

Polygamous marriages (marriages that permit a person to have more than one husband or wife) are not valid if made in Australia (ss 23, 23B).

However, a party to a polygamous marriage validly entered into outside Australia may make applications to the Family Court, such as for divorce, property settlement, parenting orders or injunctions (*Family Law Act*, s 6).

[24.50] Foreign marriages

Marriages performed overseas

Most marriages performed overseas are recognised in Australia as valid marriages if they were made according to the other country's laws (for exceptions, see *Marriage Act*, s 88D).

Marriages performed in Australia under foreign law

Marriages performed in Australia according to another country's laws are generally valid if:

- they are made in the presence of consular or diplomatic staff from the foreign country;
- they observe Australian laws about age and prohibited relationships (s 55).

Change of name

There is no legal requirement for either party to change their name on marriage.

[24.60] Sexual relations

Sexual offences within marriage

Marriage does not give a husband or wife a legal right to sexual intercourse with their spouse. A husband or wife can be charged with sexual assault of their spouse (*Crimes Act 1900* (NSW), s 61KA – see Chapter 35, Sexual Offences).

[24.70] Property and debts and marriage

Married people are treated as individuals if they buy property or incur debts in their sole name.

Property owned before marriage

Property belonging to a person before marriage remains their individual property after the marriage ceremony. This includes furniture, bank accounts, vehicles and household goods. On separation though, this property can be considered part of the property pool to be divided.

A person may transfer property from their sole name to joint ownership with their spouse without incurring stamp duty on the transfer. However,

there is no legal requirement to transfer property into joint names.

Property acquired after marriage

Property acquired while a person is married generally belongs to the person in whose name it was bought, or who paid for it (but see [24.290]).

Jointly owned property

Married people commonly buy property in their joint names.

For more about the law of owning property with another person (as joint tenants or tenants in common), see [24.290] and Chapter 27, Housing.

Debts

Debts acquired in one party's name are the responsibility of that person. The person's husband or wife has no legal responsibility for the debt.

For more information about property settlements after relationship breakdown, see [24.80].

[24.80] Wills and estates

Marriage has the effect of revoking any will made before marriage, unless the will was made in anticipation of the marriage.

To avoid legal problems, people should make new wills after marriage to make sure their intentions are expressed. When a person dies without leaving a will (*intestate*), the intestacy can cause problems for the surviving spouse, who must apply to the Probate Division of the Supreme Court for letters of administration, and appointment as executor of the estate.

Divorce does not automatically revoke a will made during marriage. However, when a divorce becomes final, any gift willed to the ex-spouse is revoked unless the ex-spouse can prove that the deceased person still wanted the gift to go to them.

To avoid problems, it is best to make a new will after divorce.

Wills and de facto relationships

To avoid problems, people living in de facto relationships are strongly advised to make wills in favour of each other, if this is the desired arrangement, especially if there are other possible beneficiaries such as an estranged former spouse or children from a former marriage.

For more information on wills and estates and on the rules about who inherits property when there is no will or when a will is invalid, see Chapter 40, Wills, Estates and Funerals.

[24.90] Breakdown of marriage

Marriage can be dissolved either by divorce or, in very limited circumstances, by nullity (see Nullity at [24.120]).

Most dissolutions today are by divorce.

The Family Law Act

The federal *Family Law Act* deals with:

- divorce and nullity;
- property division and spouse maintenance for married and de facto couples;
- issues concerning where children will live and who has responsibility for them.

The policy objective of the *Family Law Act* is to help people separate safely and with as little antagonism as possible and to encourage them to reach agreement about their children, finances and property.

Parents and the Family Law Act

The Act covers all parents, whether they are or were:

- married;
- in a de facto relationship;
- in a same-sex relationship;
- never in a relationship.

Parents are covered by the Act even if they have never lived together or had any dealings with each other apart from that which gave rise to their parenthood.

Parenting after separation is discussed in detail at [24.410].

Divorce

[24.100] The effect of divorce

Divorce is the legal end of the marriage between a couple. It does *not* deal with other matters such as:

- maintenance and child support;
- the division of property;
- where children will live;
- who will be responsible for children's care.

Generally, it is a good idea to resolve these matters before applying for a divorce.

[24.110] Grounds for divorce

The only ground for divorce is "irretrievable breakdown of the marriage". Australia has what is called "no fault divorce" which means the court will not consider accusations of fault, such as adultery, cruelty and desertion.

[24.120] Proving irretrievable breakdown

The irretrievable breakdown of a marriage is considered to have occurred when:

- the parties have lived separately and apart for at least 12 months;
- there is no reasonable likelihood of them getting back together (*Family Law Act*, s 48).

The 12-month separation period must be complete before an application can be signed and filed.

The 12-month separation period

The 12-month period of separation begins on the day after at least one of the parties considers the marriage to be over and communicates this to the other. Separation is a question of fact to be determined in each case.

Resuming cohabitation

The parties may resume their marital relationship after the separation has commenced, and continue to live as a married couple for one period of up to three months without having to start the whole separation period again (*Family Law Act*, s 50). The separation period resumes if and when the parties separate again.

Isolated acts of sexual intercourse do not break the separation period (*In the Marriage of Feltus* (1977) FLC 90-212).

For example...

Ken and Alice separated at the beginning of January 2019. At the beginning of March, they decided to try again to make their marriage work and lived together for three months until the end of May. The reconciliation was not a success, and they separated again. As they had already been separated for two months (in January and February), they only had to wait another 10 months to reach the 12-month period of separation required for the divorce.

If the parties are living apart for other reasons

A period of separation does not automatically begin when the parties are living apart because of imprisonment, illness or a work transfer. In these circumstances, evidence of separation can include:

- one party informing the other that they consider the marriage to be finished, in which case the separation will be considered to have commenced at that point; or
- there is evidence via actions, such as, one party living with a new partner, or taking steps to sever financial arrangements.

Separation under one roof

Sometimes former partners live separately and apart but still in the same house. In order to establish separation, it must be shown that at least one of them has left the marriage relationship and that they live independently of each other.

As each marriage relationship is different, the facts showing separation under one roof vary from case to case. The spouses should make sure that others know about their decision from the beginning. The court requires evidence from friends, neighbours or relatives (adult children are acceptable) that the parties do not share any of the usual activities of marriage, such as sleeping together, eating together, shopping, cooking or cleaning for each other, or going out together.

The case may be strengthened by showing that there were reasons why the parties remained together, such as lack of finances to obtain separate accommodation, or the interests of children.

It helps if the parties can show that they intend to live apart in the near future (an intention to continue living under one roof suggests the possibility of reconciliation).

If one party performs household services, such as washing and ironing for the other, they will need to show that this is necessary for the convenience of other people living there.

Marriages of short duration

Couples married for less than two years can get a divorce only if they have seen a counsellor about reconciliation. This is not a difficult requirement. Usually the parties just have to tell the counsellor that they do not think reconciliation is possible.

Where counselling can be dispensed with

The requirement can be dispensed with in some circumstances; for example, one party cannot be found, or refuses to attend counselling, or if there is a history of violence and abuse and it is not safe to attend counselling (*Family Law Act*, s 44(1B), (1C)). If a party does attend counselling where there has been violence in the marriage, the counsellor should be told so that separate sessions can be organised.

Rights after separation

People have various rights, and duties, after separation.

Children

Parents are equally responsible for the care and upbringing of their children until a court orders otherwise (s 61C).

In most cases if parents cannot agree about the care of children, they must attend family dispute resolution before they can apply to the court for a parenting order.

Children may spend time with the parent they do not live with, but are not required to do so unless there is a court order saying so (see [24.410]).

Financial support

A person who cannot support themselves or their children can ask the court to order the other party to provide financial support (see [24.230]).

Property

Binding financial agreements can be made before or during the marriage, or after breakdown, separation or divorce. Independent legal advice must be obtained.

The couple can make their own arrangements about the division of property (and have them approved by the court if they wish). If the parties cannot agree, either can apply to the court at any time after separation to divide the property.

Once parties are divorced, they have 12 months from the divorce becoming final to apply for property or spousal maintenance orders. After that time, the parties need special permission to file an application.

Nullity

An application for a decree of nullity is an application for an order from the court that a marriage be declared void. This can happen only if:

- a party was already married at the time of the ceremony (ie, the marriage was bigamous);
- the marriage was within a prohibited relationship (eg, between sister and brother, or parent and child);
- there was no consent by one or both parties (eg, there was fraud, duress, mistake or mental incapacity);
- the ceremony was invalid (eg, the celebrant was not properly appointed, and both parties knew this (*Marriage Act*, s 48(3)));
- one or both parties were not of marriageable age.

Nullity proceedings

While divorce proceedings are generally quite simple, nullity proceedings can be very technical, and it is usually best to have legal representation.

Proceedings are commenced by filing an application in the Family Court. It must include affidavits setting out the facts and circumstances making the marriage invalid. If this includes an assertion that a ceremony was invalid under the laws of the country where it was performed, the applicant should provide expert evidence of this.

Application of the Family Law Act

A party to a void marriage will be treated as a spouse for the purpose of property settlements and maintenance awards under the *Family Law Act* (s 71). Children of the marriage are also covered (s 60F(2)).

[24.130] Applying for divorce

Making the application

All applications for divorce are filed and heard by the Federal Circuit Court.

The Application for Divorce can be accessed via the Federal Circuit Court website (www.federalcircuitcourt.gov.au) and the Commonwealth Courts Portal (www.comcourts.gov.au).

Who can apply?

Either party to the marriage, or both, can apply for divorce. It does not matter who left whom, or whether the other party wants a divorce.

For the court to have jurisdiction, either spouse must, at the date the application was filed, have been:

- an Australian citizen; or
- domiciled in Australia (which means they have made a permanent home in Australia – it does not matter if they are living overseas temporarily); or
- ordinarily resident in Australia, having lived here for 12 months before the application (it does not matter if they are living in Australia temporarily).

[24.140] Filing the application

Divorce applications must be filed online via the Commonwealth Courts Portal (www.comcourts.gov.au), unless the parties are in a same sex relationship. Parties in a same sex relationship should contact the National Enquiry Centre (1300 352 000) for further information.

To complete the online application form, a party will need an email address to register to use the Commonwealth Courts Portal, a copy of their marriage certificate, a credit card to pay the application fee and access to a printer and a scanner. If either spouse was not born in Australia, they may need evidence to satisfy the question of jurisdiction, for example, their citizenship certificate or Medicare card. If they are seeking a fee reduction, they will need evidence of financial hardship, for example, their Health Care Card.

Once the party has paid for the application, they will be given the option of choosing a particular Federal Circuit Court registry and a date when the divorce hearing will take place, usually in two to three months time.

[24.150] Joint applications

Parties can apply together by both signing the application. Joint applications have some practical benefits. There is no need to go through the legal formalities of serving the documents, the parties do not need to attend the divorce hearing and the parties can, although are not required to, share the filing fee.

[24.160] Sole applications

In the case of just one party to the marriage applying for the divorce, that party (the applicant) completes the online application for divorce. The application must be printed, signed, and sworn or affirmed to be true, in front of a justice of the peace or a solicitor and uploaded onto the Commonwealth Courts Portal. Sealed (court stamped) copies of all the uploaded documents will be available to print and serve on the other party (see [24.170]).

Fees

A filing fee must be paid when the application is filed. The Federal Circuit Court's current fee (July 2019) is $910.

The fee can be reduced in some cases, for example, if the applicant has a government concession card or can demonstrate financial hardship. An application for reduction of payment form should be filed at the same time as the divorce application. The current reduced fee (July 2019) for divorce is $305.

The marriage certificate

The marriage certificate must be filed at the same time as the application as evidence that the couple was legally married.

If the original certificate is not available, a full copy must be obtained from the Registry of Births, Deaths and Marriages.

If there is no marriage certificate

If a marriage certificate was not provided at the wedding (because, eg, it took place in a refugee camp), the applicant must file an affidavit giving details of the ceremony, witnesses and vows, or evidence of some kind of promise to love and live with each other to the exclusion of all others.

Evidence of overseas marriages

All marriages made outside Australia must be evidenced by an official extract from the foreign registry of marriages.

If the foreign marriage certificate is not in English, it must be translated by a certified translator and filed at the court along with an affidavit by the translator stating they are competent to make official translations (*Family Law Rules 2004* (Cth), r 2.02(4)). The Federal Department of Immigration and Border Protection or the Community Relations Commission of NSW

will translate marriage certificates into English for a fee. The Multicultural NSW fee is from $77–$117 depending on urgency.

If foreign marriage certificates are not available, an affidavit must be filed giving an explanation.

If the marriage was invalid in the way it was performed in a foreign country, it may be possible to apply for a decree of nullity rather than a divorce, but the court will need expert evidence of what is a valid ceremony in that country (see Nullity at [24.120]).

[24.170] Serving the application

A sealed copy of the Application must be delivered to (served on) the other party (the respondent) together with a pamphlet setting out the effects of divorce which is available in a number of languages from family law court registries, the Federal Circuit Court website (www.federalcircuitcourt.gov.au), the Family Court website (www.familycourt.gov.au) or the Family Law National Enquiry Centre (1300 352 000).

The respondent must be served at least 28 days before the hearing date (42 days if they are overseas).

There are various rules and methods for the service of court documents.

Personal service

The respondent can be handed the documents in person by anyone over 18 except the applicant (*Federal Circuit Court Rules 2001* (Cth), r 6.07(3)). A friend, a relative or a process server can serve the documents without the applicant being present.

A process server including the NSW Office of the Sheriff will charge from $67 depending on the area and the number of attempts they have to make to serve the document.

The server should hand the documents directly to the respondent. It is not enough to leave them with someone else who lives or works with the person.

Identifying the respondent

If the server does not know the respondent, they should identify them by asking for:

- their full name;
- the full name of their spouse;
- the date and place of marriage.

It is a good idea to give the server a photo of the respondent.

If the respondent will not take the documents

If the respondent will not accept the documents, they can be put down in the respondent's presence. The person serving the documents should also say: "Your husband or wife (whichever it is) is seeking a divorce from you. These are the papers and the Federal Circuit Court will hear the application on such-and-such a date".

Proof that the documents were served

After the documents have been served, the server needs to fill out an *affidavit of service* recording the time, date and place of service, and anything relevant that was said. The affidavit must be signed, and sworn or affirmed to be the truth, in front of a justice of the peace or solicitor.

It is convenient if the respondent will sign the *acknowledgment of service* – this is the best proof that they were served.

The signed acknowledgment should be attached (*annexed*) to the affidavit of service. If the respondent refused to sign this form, the applicant can use the affidavit of service as proof that the documents were personally delivered to the respondent.

If the applicant recognises the respondent's signature, they should also complete an *affidavit proving signature* and sign the affidavit before a justice of the peace or solicitor.

Postal service

The applicant can send the documents by ordinary post with an acknowledgment of service for the respondent to sign, and a postage-paid envelope addressed to the applicant so that the form can be returned.

This method should not be used if it is unlikely that the respondent will cooperate and sign the acknowledgment.

Proof of service

When the form is returned, the applicant should complete and sign an *affidavit of service by post*, including the date on which the papers were sent.

Overseas service

If the documents are to be served overseas, the mode of service may depend on:

- whether Australia has an agreement with the country about civil proceedings, including the service of documents (ie, whether it is a

convention country) (*Family Law Regulations 1984* (Cth), reg 21AE); and
- whether the person is a national of that country.

If the country is a convention country

If the country is a convention country, the documents may (and in some cases must) be sent to the registrar of the Family Court, who forwards them to the country (regs 21AF, 21AG).

This process usually takes about nine months, and it can be expensive because translations must be provided for all documents if the country is not an English-speaking country.

The registrar will be able to advise whether the country is a convention country or not and, if it is, whether other forms of service are permitted. See also the Commonwealth Attorney General's guide to *Serving a Legal Document across International Borders* on their website.

If the country is not a convention country

If the country is not a convention country, service can be either by post or by a process server in that country.

Other types of service

The court does not generally grant divorces when one of the parties does not know about the application. However, if the applicant does not know where the respondent is, or has, for some other reason, been unable to serve them, the court can order substituted service, such as advertising in a newspaper or service on a relative.

Dispensing with service

Sometimes the court will waive the requirement for service altogether.

To have the requirement waived, the applicant must make a separate application asking for an order to dispense with service of the application for divorce. The application should include an affidavit with details of the last contact the applicant had with the respondent, and describing attempts at locating them or safety concerns about doing so. The application should emphasise that all avenues of enquiry have been exhausted – the electoral roll, parents, mutual friends, social media, the respondent's union, their last known address, their last known job, and anything else that has been tried.

What enquiries should be made?

The court does not usually require applicants to go to great expense in trying to track down respondents, especially if they are not well off. The following (inexpensive) enquiries are often sufficient:
- writing to the respondent's family and friends, telling them of the divorce application and asking them for information on the respondent's whereabouts;
- carrying out a search of the electoral roll;
- writing to the respondent's last known employer and asking whether they left a forwarding address.

The application for dispensation of service and the supporting affidavit should be filed with the divorce application.

[24.180] Arrangements for children in a divorce application

The court may not grant a divorce if the parties have not made suitable arrangements for the future care of:
- children (under 18) of one or both parties; or
- children who lived as part of the family before the parties separated (*Family Law Act*, s 55A).

The arrangements can be informal and do not need to be made into orders or a parenting plan before a divorce can be granted.

Information required by the court

The application for divorce asks for details about children, including:
- where and with whom they live (you may need to provide further information about things like whether the home is rented or owned, and what facilities it has, such as the number of bedrooms);
- the name of the school they attend, their year level and their progress at school;
- their general health and any ongoing medical needs;
- arrangements for their supervision;
- how often they see the parent they don't live with;
- how the family is supported financially;
- the amount of child support being paid.

In some circumstances (such as if the other spouse or the children cannot be found), these details are not needed for the divorce to become final.

If the court is not satisfied

If the court is not satisfied that proper arrangements have been made, it may adjourn the hearing until a report has been obtained from a *family consultant* (*Family Law Act*, s 55A(2)). However, usually the court will still grant the divorce.

[24.190] Opposing the divorce

A respondent can oppose the divorce, or correct mistakes or misrepresentations on the divorce application, by filing a response within 28 days of being served.

There are very limited grounds for opposing a divorce. It is not enough that the respondent does not want a divorce, or loves the other party or wants a reconciliation. The court will grant a divorce once it is satisfied that there is an irretrievable breakdown of marriage as proved by 12 months' separation.

The respondent can delay the divorce by showing that the separation did not occur when the applicant said it did.

Correcting the application without opposing the divorce

If there are mistakes or misrepresentations on a divorce application, it is a good idea to correct them by filing a response even if you don't oppose the divorce, as the application is a document that will stay on the court file.

[24.200] Going to court

Who must attend?

If the application is a sole application and there are children under 18, the applicant must attend the hearing.

Respondents do not usually have to attend unless they have filed a response, in which case they must go if they want the court to consider it. In this case, the applicant should go so they can comment on the response.

Neither party needs to go to court for the hearing if:

- there are no children of the marriage under 18; or
- the application is a joint application.

The hearing

Court lists

Divorce hearings are normally listed for a time between 9.30 am and 2 pm. There is usually a list of cases in the foyer of the court building. Court lists by court location with times and courtroom numbers are also available on the Federal Circuit Court website from late afternoon on the day before the court event (www.federalcircuitcourt.gov.au).

Legal representation

The applicant can either appear in person or be represented in court by a solicitor or barrister. The process is fairly straightforward, and many people go to court without a lawyer.

If they are represented, each party must pay their own legal costs.

Before going into court

At most courts, a court officer will collect "appearances" (take down the names of people appearing in the divorce hearing) shortly before the start of each list to try to make the lists run smoothly, and may briefly explain the procedure to applicants who do not have lawyers.

The applicant should arrive at the court early, look for their name on the list, and note the number of the courtroom and the case. After letting the court officer know they are at court, they should sit outside the courtroom until the court officer calls the name of the case. When the matter is called, the applicant sits at the long table – called the bar table – facing the judicial officer.

Court etiquette

Judges are addressed as "Your Honour". Registrars (who usually hear divorce applications) are referred to as "Registrar". It is customary for anyone entering or leaving the courtroom to make a short bow of the head to the presiding judicial officer as a courtesy.

What happens at the hearing

An applicant represented by a lawyer does not usually have to say anything.

Otherwise, the judicial officer normally asks applicants to state their name, the name of the respondent and whether there are any children under 18. The judicial officer then reads the papers and may ask a few questions about the separation (particularly if it was a separation under one roof) or arrangements for the children.

The applicant should stand whenever the judicial officer speaks directly to them.

The hearing only takes a few minutes and often there are 20 or 30 divorce hearings in rapid succession.

The court's business

The court is only concerned with the narrow factual question of whether the marriage is over as proved by at least 12 months' separation. Unresolved emotional issues are best dealt with during private counselling and not in public in a court.

Witnesses and evidence

In divorce proceedings, it is very unusual for either party to be required to go into the witness box to give evidence. Often the judicial officer just asks questions while the applicant is standing at the bar table, without requiring evidence on oath.

If there are children under 18, the judicial officer may ask about the children's welfare, perhaps to clarify whether child support is being paid for their benefit.

If the children live with the respondent and the respondent is not present or represented in court, the judicial officer may want to hear about them from the applicant, or someone who has seen them recently if the applicant is not fully aware of their situation. The respondent should be asked to swear an affidavit setting out the arrangements for the children before the hearing.

Where there has been a separation under one roof, affidavit evidence explaining the separate arrangements by one or two people who are not parties is usually sufficient. However, the judicial officer may wish to ask them questions, so it is a good idea if the people who made affidavits are in court, if possible. Otherwise, the divorce may be adjourned to a later date.

Friends and relatives

Parties are free to bring friends and relatives to court if they feel the need for support.

Interpreters

If the parties do not speak English, the court can arrange an interpreter free of charge if enough notice is given. There is a question on the Application for Divorce form that asks whether an interpreter is required or a letter can be filed before the hearing. The letter should quote the matter number of the case, and the time and date of the hearing. To be sure an interpreter will be available on the day, notice should be given at least two weeks before the hearing. It is a good idea to check with the court that an interpreter has been arranged a few days before the hearing.

[24.210] The divorce order

When the court finds that the separation requirements have been met and a divorce should be granted, it makes a divorce order (previously called a *decree nisi*) that will come into effect one month and one day after it is made.

The court can extend or reduce this time. For example, there may be special circumstances, such as an impending birth where a new partner is the parent, or a prospective spouse's imminent departure overseas (*Family Law Act*, s 55), that could justify the court in reducing the time in which the order takes effect.

The marriage officially comes to an end, and each party is free to remarry, at the end of the one-month and one day period (or other time ordered by the court) from the date of the divorce order. This is a final divorce order (previously called a *decree absolute*).

Setting a divorce order aside

A divorce order can be set aside in certain circumstances, but it is not possible to appeal once the divorce order has come into effect (*Family Law Act*, ss 55, 57–58).

If the parties reconcile

If the parties become reconciled during the period before the divorce order comes into effect, they can apply to the court to have it rescinded (s 57).

If a party dies

The decree will not become final if one party dies (s 55(4)).

[24.220] Appeals

Either party may appeal against the terms of a divorce order or a decree of nullity within 28 days after it is made. The divorce order may then not come into effect until one month after the appeal is decided (s 55).

To appeal a divorce order made by a Registrar, file an Application for Review within 28 days of the making of the order.

If questions about children or property are not resolved

The divorce order is not a parenting order or a property order. If disputes about children or property are not resolved between the parties, a separate application for orders may have to be made to the court (see [24.230] and [24.410]).

Getting legal advice

If the divorce is opposed or involves special circumstances such as separation under one roof, it is wise to seek legal advice. Free legal advice is available from Legal Aid NSW or a community legal centre (see Chapter 4, Assistance With Legal Problems).

PROPERTY AND MAINTENANCE AFTER RELATIONSHIP BREAKDOWN

[24.230]

Important!

Contact the Family Court or the Federal Circuit Court, or a solicitor, to find out about the relevant court rules before starting any family law action.

The law and legal process under the *Family Law Act* for dividing property after a relationship breakdown is substantially the same for people who were married and people who were in a de facto relationship regardless of whether they were in an opposite sex or same sex relationship.

The *Family Law Act* has covered property and maintenance disputes about both married and de facto relationships since 1 March 2009 but different sections of the *Family Law Act*, largely mirroring each other, apply to marriage relationships and de facto relationships. The only significant difference is that different time limits apply for commencing legal proceedings for property division for marriage relationships and de facto relationships (see [24.280] for information on time limits). For ease, the term spouse is used to refer to people who were or are married and those who were or are in de facto relationships.

Legislation

[24.240] Pt VIII of the *Family Law Act* gives the Family Court jurisdiction to settle property and maintenance matters between the parties to a marriage or former marriage and Pt VIIIAB gives the Family Court jurisdiction to settle property and maintenance matters between people in de facto relationships (including same-sex couples).

The Federal Circuit Court also has jurisdiction to deal with all property and maintenance matters, except that more complex or lengthy matters may be transferred to the Family Court.

[24.250] What is a de facto relationship?

The *Family Law Act* (s 4AA) states that a person is in a de facto relationship with another person if:

- they are not legally married to each other; and
- they are not related by family (child, including adopted child, descendant or parent in common); and
- taking into account all the circumstances of their relationship; they have a relationship as a couple living together on a genuine domestic basis.

A de facto relationship can exist between two people of different sexes or the same sex, and a person can be in a de facto relationship even if they are legally married to another person or in a de facto relationship with someone else.

[24.260] Which de facto relationships apply to family law property?

There are limitations on who may seek a remedy from the court (s 90SB).

The court can only make orders or declarations if it is satisfied of one of the following:

- the total period of the de facto relationship is at least two years; or
- there is a child of the de facto relationship; or
- there has been a substantial contribution by one party to the de facto relationship and there would be a serious injustice if an order or declaration was not made; or
- the relationship is or was registered under a prescribed law of a state or territory.

There is also a geographical requirement in s 90SK that must be satisfied:

- either or both parties to the de facto relationship lived in the relevant jurisdiction on the date the application was made; and
- either:
  - both parties lived in the relevant jurisdiction for a third of the duration of their relationship; or
  - the applicant for the declaration or order made substantial contributions in relation to the family or the property in the relevant jurisdiction.

The relevant jurisdictions are NSW, Queensland, Victoria, Tasmania, South Australia, the Northern Territory and the ACT (Western Australia is excluded).

Equitable remedies

Separated de facto couples who do not qualify to access remedies under the *Family Law Act* may be able to access equitable remedies available under general common law principles, depending on the circumstances of the case.

Property division after relationship breakdown

[24.270] A divorce order does not include the division of the couple's property.

[24.280] Time limits

Parties who were married

An application for a division of the matrimonial property can be made at any time after a married couple has separated.

However, once the divorce order becomes final, a property application must be made within 12 months. For example, if a divorce order is made in court on 4 July 2018, and it becomes final on 5 August 2019, the property application must be filed before 5 August 2020.

The court may allow a person to apply after this time limit if hardship for that party or the children can be established and a reason for the delay is given. This is called *granting leave to apply out of time* (*Family Law Act*, s 44).

Parties who were in a de facto relationship

An application for a division of property or spouse maintenance of a de facto relationship must be made within two years of the date the parties separated. The court may allow a person to apply after this time limit if hardship for that party or children can be established and a reason for the delay is given. This is called granting leave to apply out of time (*Family Law Act*, s 44).

Retrieving personal property

If a party who has left cannot get their personal possessions from the house, they can apply to the Local Court for an order to obtain their personal property. If an Apprehended Domestic Violence Order is made, an ancillary property order can be included (see Chapter 19, Domestic Violence).

[24.290] What property is considered?

All property owned by either party, with each other or with any other person, is considered for the property settlement.

The property the court considers must arise out of the relationship. This means that the court cannot make an order if a dispute arises out of a business relationship.

Property the court can deal with

Property the court can deal with includes:

- property purchased during the marriage or relationship;
- superannuation;
- gifts and inheritances received by either party;
- property owned by the parties before the marriage or relationship;
- assets and goodwill that a party has built up in a business;
- compensation awards;
- lottery winnings;
- redundancy packages.

Property in companies or trusts

Property in companies or trusts is treated as the property of one spouse for the purposes of the settlement if it appears that that spouse enjoys the benefits of ownership of the company or trust.

Property the court cannot deal with

Property that generally cannot be dealt with by the court includes:

- future expectations under wills or trusts (except in circumstances where the facts indicate a level of certainty of inheritance or benefit);
- long service leave entitlements;
- actions for personal injury damages (unless the other party nursed the injured spouse through their injuries).

All these may be considered financial resources of a party to be taken into account when the court assesses their future needs.

The family home

The main item of property owned by most people is a house, flat, or block of land. Houses and land are usually owned in either a single name, or as a joint tenancy or tenancy in common.

The manner in which the home is owned will not usually affect the order for property division made by the court, but may have some practical implications for the parties pending a property settlement order.

Who can live in the home?

If a house is jointly owned or leased, both parties are legally entitled to occupy it, and neither may deny the other access. Even if the house is in one party's sole name, they may not be able to throw the other out of the home (see [24.230]). If there has been domestic violence in the relationship, the victim may be able to get an order from the family law court or the local court excluding the other party from the home (see Chapter 19, Domestic Violence at [19.50] and exclusive occupancy section below).

Single ownership

Sometimes the house may only be in the name of one spouse. This is the least desirable form of ownership for a couple. During the course of the relationship, the house is treated as belonging to the spouse in whose name it stands – that spouse can mortgage or sell it without the other's agreement. On the breakdown of the relationship, however, the court can give the other spouse all or part of the house even though it was not in their name.

Joint tenancy

Joint tenancy is the most secure form of ownership for both parties in a marriage or de facto relationship. Each has an equal share in the property. One cannot sell the property without the other's agreement, and on the death of one of them, the other automatically becomes the owner of the whole property. Ownership passes because of the title; the property never becomes part of the deceased person's estate.

Tenancy in common

In this form of ownership, each owner has a distinct share in the property. It may be equal shares, or another proportion. Ownership does not automatically pass to the surviving spouse on the death of the other. Each tenant in common can deal with their share of the property and leave it to whomever they wish in their will.

This may be a more appropriate form of ownership when there are children of a previous relationship to consider.

Right of occupancy

A person is entitled to live in the family home unless there is a court order requiring them to leave, regardless of whose name is on the title.

Exclusive occupancy orders

The court can order one party to leave and give exclusive occupancy of the home to the other. In doing so, the court has to consider the needs of both parties, and the needs of the children. Exclusive occupancy of the home may be given to one party even if the home is in the other's name.

The court may be reluctant to order a party to leave the home. An exclusive use order can be obtained where there is domestic violence or threats and intimidation of the other spouse or the children. It may be faster and cheaper to apply to the Local Court through state law for a protection order called an apprehended domestic violence order which can include an exclusion order (see Chapter 19, Domestic Violence).

Threats to sell

If one party threatens to sell, give away or mortgage the home or any other property, the other party can seek a court order (an *injunction*) to stop them. The court may make an injunction to preserve the property until the final hearing and the making of property settlement orders.

A *caveat* (a warning to potential buyers) can be lodged on the title to stop the property being sold or further mortgaged. The form is lodged with Land & Property Information (formerly the Department of Lands). There is a lodgement fee.

However, an entitlement to a property settlement under the *Family Law Act* is not a caveatable interest in itself, and legal advice should be sought before taking this action because the person lodging the caveat may have to pay compensation for any loss suffered as a result.

An application to the Family Court or Federal Circuit Court for a property settlement should be filed at this stage, if it has not already been done.

[24.300] Division of property

When parties can agree

Under the *Family Law Act*, parties can make enforceable agreements about:

- division of their property;
- spouse maintenance payments;
- some child support payments.

[24.310] Types of agreements

The Act recognises several types of agreements, including:

- binding financial agreements;
- consent orders.

Binding financial agreements

Binding financial agreements to deal with property were introduced to the *Family Law Act* in 2000 when they initially applied only to marriages but now apply to de facto relationships as well.

The agreement must be in writing and can be entered into:

- before a marriage (s 90B) or before entering into a de facto relationship (s 90UB);
- during a marriage, either before or after separation, but before divorce (s 90C) or during a de facto relationship (s 90UC);
- after a divorce order is made (s 90D) or after the breakdown of a de facto relationship (s 90UD).

What can be included in the agreement?

The agreement can deal with:

- all or part of the property and financial resources owned by the parties at the time and property they acquire during the marriage or relationship;
- maintenance of the parties (during the marriage or relationship or after divorce or separation or both);
- other matters.

Any property, financial resources or other matters not dealt with by the agreement remain subject to the provisions of the *Family Law Act*. It is recommended that a solicitor draft the agreement.

Separation declaration

Where the agreement is made after separation, a *separation declaration* signed by at least one of the parties must be attached.

When is an agreement binding?

Sections 90G and 90UJ set out when a financial agreement is binding. The requirements are very strict and have been the subject of much litigation,

for example, see *Hoult v Hoult* [2013] FLC 93-546 and *Logan v Logan* [2013] FLC 93-555. The requirements include:

- the agreement is signed by all parties; and
- before signing, each party receives independent legal advice about the effect of the agreement on their rights and the advantages and disadvantages of making the agreement; and
- each party is given a signed statement by the legal practitioner that this advice was given to them; and
- a copy of the signed statement is given to the other party or their legal representative; and
- the agreement has not been terminated or set aside by a court.

Enforcement

The *Family Law Act* gives the court very wide powers to make any orders it thinks necessary to enforce financial agreements.

Recent trend

Binding financial agreements appear to be becoming less popular in response to court decisions relating to agreements drafted without proper legal advice and professional negligence. For example, see Staunton and *Thompson Lawyers v Schacht* [2014] NSWCA 247.

Termination

A binding financial agreement can be terminated at any time by the parties making a new binding financial agreement terminating the previous one or by making a termination agreement or by order of the court.

Setting aside an agreement

Applications to set aside a binding financial agreement must be made to the court. The circumstances under which the court may do so are set out in ss 90K and 90UM. It is expensive and difficult to have a properly executed agreement set aside, and people should think very carefully before entering into one. Changes in circumstances may be difficult to anticipate. For example, pre-marriage agreements may be attractive to parties of second or third marriages who want to protect property for the children of their previous marriage. In doing this, however, they may inadvertently leave a spouse not properly provided for when their circumstances change due to some event such as the birth of a child.

Consent orders

Consent orders are orders of the court that are just as binding and enforceable as orders made by the court after a final hearing. The main difference is that consent orders are based on the agreement of the parties.

Making consent orders

Consent orders can be made by lodging an application for consent orders with the Family Court or Local Court.

It is a good idea for parties to have independent legal advice before agreeing to the terms of a consent order application. They must be very careful that the actual terms of the orders are in proper legal form.

A Family Court registrar looks at the application and decides whether the consent orders appear to be a fair settlement of the property (or in the best interests of the children, if they include parenting orders).

Usually, if both parties have received independent legal advice, the registrar will make the orders. If one or both parties do not have a lawyer, the registrar may require more information about their financial situation or parenting arrangements.

Consent orders may also be made at any time during court proceedings when an agreement has been reached.

Where parties are married, they have 12 months from the divorce order becoming final to file an application for consent orders. Where parties were in a de facto relationship, they have two years from the date of separation to file an application for consent orders.

Changing property orders

When can consent orders be changed?

Property orders are considered to be final orders, and the court will only consider an application to set them aside in very limited circumstances, where:

- there has been a miscarriage of justice because of "fraud, duress, false evidence, suppression of evidence, or other circumstances";
- it is not practical or possible for them to be carried out;
- one party has defaulted in carrying out their obligations under the order;

- exceptional circumstances affecting children's welfare have arisen, and this is causing hardship to the children or the spouse looking after them;
- a proceeds of crime order has been made against one of the parties or the property of the marriage.

Where parties can't agree

Where parties are unable to reach an agreement about how to divide their property, they can elect to resolve their matter through arbitration or by asking the court to make orders.

Arbitration

Arbitration is defined by s 10L of the *Family Law Act* as "a process (other than by judicial process) in which parties to a dispute present arguments and evidence to an arbitrator, who makes a determination to resolve the dispute". Arbitration is generally used to determine the whole of a property dispute, but it can also be used to determine a discrete issue in dispute which, once determined, leaves the parties free to negotiate an outcome outside of arbitration through FDR or negotiation. Arbitration can only occur with the consent of all parties and can take place prior to proceedings, as an alternative to proceedings or during proceedings by referral of the court.

At the conclusion of the arbitration, the arbitrator must deliver an arbitral award within 28 days of the conclusion of the arbitration. Either party can apply to register the award (s 13H(1)). Once registered, it has the same effect as an order of the Court. Registration is necessary to enforce the award. A party can object to the registration of the award within 28 days of being served.

Applying to court for orders

The family law courts can make orders dividing or redistributing property and debt based on what is commonly described as a four step process involving:

- deciding what property the parties own, and its value (at the hearing date), then
- considering what contributions were made by each party in the past and their value as a percentage, then
- considering the parties' present and future needs, including income and earning capacity (actual and potential), the care of children, the effect of any order on earning capacity and other financial resources, then
- considering whether the proposed division is just and equitable in all the circumstances of the case.

See s 79(4) and reference to the factors in s 75(2) of the *Family Law Act* for the detailed legal framework for the courts power to alter property interests. The decision of the High Court in *Stanford v Stanford* (2012) 247 CLR 108; (2012) FLC 93-518 held that the court must be satisfied that it is just and equitable to alter property interests. See also *Bevan v Bevan* [2013] FLC 93-545.

Contributions in the past

The court looks at the history of the relationship and determines how much each party has contributed (directly or indirectly, financially or otherwise) to acquiring, looking after and improving the property. These contributions may be:

- property owned at the time of commencement of the relationship;
- money contributed before or during the relationship (such as wages, income from a business or investments, or payment of a deposit on a house);
- gifts and inheritances to one party;
- work done on the property (such as building, painting, gardening and renovating);
- efforts put into building up and running a business.

Help from one spouse's parents in fixing up the home, or through a gift of money, will generally be considered the contribution of that party.

Indirect contributions

Indirect contributions to the acquisition of property include such things as paying the day-to-day expenses of the home and family.

Homemaker's contributions

The court also looks at the contributions made by each party to the welfare of the family. Most importantly, this includes contributions as a homemaker (cooking, washing, shopping, cleaning, entertaining and so on) and, if there are children, as a parent (having and looking after children, and involvement in the children's schooling, recreation and development).

These factors may be considered both in their own right and in their effect on the earning capacity and acquisition of assets of the other spouse (eg, by staying at home, the homemaker

spouse has freed the other party to go out and obtain assets, income and expertise).

In many relationships, the contributions of the homemaker are regarded as equal to the contributions of the income earner. This may not be the case if:

- the marriage or relationship was short; or
- the contributions of one party were particularly large.

Unilateral disposal of assets

In some cases, one party may dispose of property unilaterally. This may be "waste" such as in *In the Marriage of Kowaliw* [1981] FLC 91-092, where the court considered that losses incurred because of the reckless negligence, alcoholism and gambling of one party did not have to be shared by both. It could also be "premature distribution" of an asset such as in *In the Marriage of Townsend* [1995] FLC 92-569.

Following the decision of the High Court in *Stanford* referred to above there may be increasing reluctance to include notional property in the asset pool, sometimes referred to as an "add-back", with suggestions that it is more appropriate to deal with a unilateral disposal of property under s 75(2)(o) or in an assessment of contributions. However, see *Vass v Vass* [2015] FamCAFC 51 in which the Full Court comments that notional add-backs can still be used.

Kennon adjustment

In *Kennon v Kennon* [1997] FLC 92-757, the Full Court of the Family Court looked at domestic violence and considered the wife's homemaker contributions were increased because her contribution (under *Family Law Act*, s 79(4)(c)) was made more onerous and difficult by the abuse she had suffered at the hands of the husband. A study of cases between 2006 and 2012 found that the average Kennon adjustment was 7.3%; the most common was 10% and the largest was 15% (P Easteal and L Young, "The Kennon 'Factor': Issues of Indeterminancy and Floodgates" (2014) *Australian Journal of Family Law* 1).

Special contributions

The court has identified a *special contribution*, where one of the parties' contribution in terms of their personal skills is so extraordinary that they should be credited with a higher percentage.

This special contribution has so far only been found in cases where there has been financial or professional acumen. There are no reported decisions where the court has found that the contributions of a homemaker were special.

The Full Court has commented on the appropriateness of reference to special contributions in the decision of *Kane v Kane* [2013] FLC 93-569, which held that profitable decisions made by a successful businessperson did not amount to special contributions and did not warrant concluding that the husband's contributions in a 30-year marriage outweighed the non-financial contributions of the wife. See also *Hoffman v Hoffman* [2014] FLC 93-591 and *Fields v Smith* [2015] FLC 93-638 which affirm that s 79 does not suggest that one kind of contribution will be more "special" than another kind of contribution.

Needs in the future

After deciding what the contributions were, the court considers whether one party has a need for more of the property by looking at the future needs of the parties.

The factors the court considers are listed in s 75(2) of the *Family Law Act* to the extent they are relevant and include:

- the age and health of the parties;
- the ability of the parties to support themselves;
- whether a party is supporting other people, such as children or other relatives;
- whether a party is being supported by anyone else, like a new partner or parents.

For example …

James and Carla separated after 10 years of marriage. They had little property when they married, but they saved enough out of James' wages to pay off a house. Carla worked at home to look after James and their children, now aged six, eight and nine. The children live with Carla, whose only income is a parenting payment.

The court considered that Carla's contributions as homemaker equalled James's financial contributions; that is, there was a 50–50 contribution to the parties' asset. However, because Carla has to look after young children, has a small income, and has little prospect of ever earning as much money as James, the court made an adjustment in Carla's favour of an additional 10%, so that 60% of the property went to Carla.

Many cases are not as simple as this. Parties should seek advice from a lawyer experienced in family property law.

What the court may decide

The court must be satisfied that the proposed division of property is just and equitable in all the circumstances of the case. The court has very wide discretion in what it can order, and what it orders will depend on the facts of the case. Possible orders include:

- that one party transfer property to the other;
- payment of a lump sum instead of transfer of property;
- that one party repay a debt to a third person;
- that the parties sell an asset and divide the proceeds on a set basis.

Debts

The *Family Law Act* allows the court to make orders binding third parties, including creditors of one or both of the parties. However, the court will usually exercise this power cautiously and as a last resort.

It is always best to ensure that debts are paid out, so no-one is left with a debt that resurfaces years later.

It is also important to ensure that guarantees provided by one party for the other are dealt with by the orders.

Pre-action procedures

Before filing in court, the parties are expected to make a genuine effort to settle the matter, including an exchange of documents relating to their financial circumstances and the value of their assets. In many cases, they must also attend dispute resolution before filing an application with the court.

Compulsory conciliation conferences

If the parties cannot reach an agreement and proceed to court, they will usually have to attend a conciliation conference with a registrar of the court to discuss settlement options. Both parties must attend and may bring a lawyer. Attendance at a conference is not required for consent orders and some interim orders.

If a party does not comply

If a party does not comply with this requirement, the conference may be adjourned and an order for costs made against them.

If agreement is reached

If agreement is reached, the registrar may make consent orders at that time to finish the case.

If there is no agreement

If there is no agreement, the registrar will make directions about the future conduct of the case.

Dealing with the house

If all relationship assets are tied up in the house, the court may have no choice but to order its sale.

If there are enough other assets or a big superannuation entitlement, the court may give one party the home, particularly if that person is looking after the children. The other party would then get the other assets, including all their superannuation entitlements.

One party may be able to renegotiate a mortgage to pay out the other party and keep the house.

In some cases, the court may postpone the sale and let the parent caring for children stay in the house until the children grow up, if this is not too far in the future and the other party has a cash flow or some money to go on with. Generally, the court will only make an order of this kind with the consent of both parties.

Exemption from stamp duty

Transfers of assets including the family home, in accordance with a court order, are exempt from stamp duty in NSW. Transfer of assets including the family home in accordance with an arbitral award are exempt from stamp duty if the parties were married (regardless of whether or not the award is registered) (*Duties Act 1997* (NSW), s 68(1)(b)) but at the time of writing in the case of separating de facto parties, the award must be registered in order to be eligible for stamp duty exemptions (*Duties Act*, s 68(1A)(b)).

Common misconceptions about property entitlements

There are many mistaken beliefs about property and financial entitlements on the breakdown of a relationship. Some of the more common are discussed below.

There's an automatic 50–50 split

No. There has never been any automatic 50–50 split of the property. The court considers contributions, needs and what is just in all the circumstances.

If I leave, I'll lose my rights

No. Each party in the course of a relationship earns a share in the property, and does not lose it simply because they decide it is no longer possible, or desirable, or safe, to remain in the house.

I owned it before we got together, so it's mine

The fact that someone owned a piece of property before the marriage or relationship does not mean they automatically have total rights to it or its money value when the relationship ends. The property will be regarded as a contribution by its owner, but it is assumed that over time both spouses contributed, directly or indirectly, to its maintenance or improvement. The longer the relationship, the less important is pre-relationship ownership. In a relationship that has lasted for less than five years, the original owner is more likely to keep all or most of the value of their initial contribution.

I can keep inheritances and gifts

A spouse is not always entitled to keep gifts and inheritances. Gifts are usually seen as a contribution made on behalf of the recipient. As with pre-relationship assets, their importance decreases as the relationship goes on. A lump sum inheritance put into the mortgage tends to become part of the relationship property (though it will be recognised that that spouse made a bigger financial contribution). A house that is rented out or owned with others and has not had relationship money paid for rates or repairs will probably stay with the person who inherited it. If the gift or inheritance was received shortly before separation, the spouse who received it has a good argument for receiving its full value.

The court can also consider future inheritances. The factual circumstance would have to be that it was more or less certain that the will and therefore inheritance would not be changed.

I worked hard for this business and it's mine

People who have worked hard during a relationship to build up a business often do not consider their spouse entitled to a share of it. But when the spouse has answered the phone, arranged work for the business, kept books or entertained business associates, the court will consider these efforts as a contribution to its success. Even if the spouse has never worked in the business, if they have taken on the responsibilities of caring for the house and children they will be regarded as having made an indirect contribution by freeing the other spouse to put time and effort into it. If the spouse worked in another job to provide family income when the business was less profitable, this too will be regarded as a contribution.

Women always get the best deal

What women receive in a division of property must often cover both themselves and their children. The woman may be awarded more than the man in the short term but studies in Australia and overseas, show that men do better in the long run. Men still often have greater income-earning and borrowing capacity, and if they do not have children to care for, they usually recover financially in three to five years. Women and children generally never return to the standard of living they enjoyed before the separation, even if the court gives the woman more of the property. A woman caring for children may not wish or be able to get full-time work. If she was involved in full-time child care during the relationship, she may not have the necessary skills to find a job that pays well. When women do have job skills, careers or equivalent earning capacities to their spouse, and there are no children – which is more likely with younger couples – they do not receive more than men.

Superannuation

Superannuation is often the second most valuable asset in a relationship and the *Family Law Act* provides that superannuation is to be treated as property. Women often have less superannuation due to factors such as child rearing responsibilities and the gender pay gap.

Obtaining information

The parties can access all the relevant information from the trustees of the superannuation fund. The court has a Superannuation Information Kit with a form that can be filled out and sent to the trustees.

The trustee must then provide the information on the member's assets in the fund to assist the

non-member spouse to ascertain their value. The trustee can charge a fee for this. There are protections in the regulations, and the address of the member must not be disclosed.

What the court can decide

The court has wide discretion when making orders in relation to superannuation. They can split the fund between the parties in any percentage that is just in all the circumstances. They can also leave the superannuation with one spouse and give the other more of the other property, for example, a greater share of the home, though note the decision in *Coghlan*.

A special species of property

In *D v D* [2006] FLC 93-256, the Full Court confirmed that the mix of superannuation and non-superannuation assets to be retained by each party is discretionary. In this case, the wife retained the majority of the immediately tangible assets, including the former matrimonial home, while the husband retained nearly all his superannuation.

Getting advice

The regulations and formulas are complex. It is always best to get a professional to value superannuation. A solicitor or accountant could help with this.

If a party dies before proceedings are begun

If one party dies before the other has instituted property proceedings, no property claim may be brought under the *Family Law Act*. The survivor may be able to claim a legal or equitable interest in the property or assets of the deceased, or make a claim for family provision from their estate (see Chapter 40, Wills, Estates and Funerals).

If a party dies before the matter is completed

When a property application has been lodged but one party dies before the matter is completed, the proceedings may be continued by or against the deceased's legal personal representative (the person looking after the estate). If the court decides that property orders are still appropriate, these orders are enforceable against the estate (ss 79(8), 90SM).

If a party dies before orders are carried out

If property proceedings are complete, but one party dies before the orders are carried out, they may be enforced against the deceased's estate.

Maintenance

[24.320] Maintenance is money paid by one party to a marriage or relationship for the financial support of the other party or their children.

Spouse maintenance and child support are treated very differently. As a general rule, parents are expected to financially support their children regardless of who the children live with. However, a person is only required to support a former spouse when a particular need can be shown.

[24.330] Spouse maintenance

Either spouse may get maintenance from their former spouse provided they can establish the need for support and the ability of the other party to pay.

For social and economic reasons, it is usually the woman who requires continuing financial support from her former spouse.

Qualifying for maintenance

To qualify for maintenance, a person will have to show that they are unable to support themselves properly because:

- they are caring for children under the age of 18; or
- they cannot obtain work because of ill health, age or some other adequate reason (such as having no job skills, having been too long out of the workforce or being too close to retirement age) (ss 72, 90SF).

What the court considers

In considering the income of a person applying for spousal maintenance, the court may not take into account an income-tested pension or allowance like the parenting payment.

The person applying must also show that the spouse is reasonably able to pay. The court will consider the standard of living that in all the circumstances is reasonable.

As with property disputes, maintenance cases are decided on their particular facts, and it is difficult to generalise about how much maintenance will be payable and for how long in normal circumstances. The court will consider the matters referred to in ss 72 and 75(2) and 90SF of the *Act*. See *Hall v Hall* [2016] HCA 23 for consideration of the meaning of financial resources under s 75(2)(b).

Applying for maintenance

Parties who were married

If there are divorce proceedings

An application for spouse maintenance must be made within 12 months of a divorce becoming final, but it can be applied for immediately on separation through the Local Court, the Federal Circuit Court or the Family Court.

Special leave of the court must be sought if the parties have been divorced for more than a year.

If there are no other proceedings

If there are no court proceedings except spousal maintenance, the application should be lodged in the Federal Circuit Court.

Parties who were in a de facto relationship

An application for a maintenance order must be made within two years of the date of separation for couples who were in a de facto relationship.

When spouse maintenance orders end

A maintenance order for a spouse ceases on their death or their marriage, unless the court makes a continuation order (ss 82, 90SJ).

Expenses associated with the birth of a child

Under s 67B of the *Family Law Act*, a child's father, who is not married to the child's mother, whether he has ever lived with the mother or not, is liable to contribute to her maintenance for:

- two months before the child's birth (or earlier, if she gives up work on medical advice); and
- three months after the birth.

What expenses are included?

Expenses can include:

- things for the child (such as clothing, cot and car seat); and
- the mother's medical expenses, including surgical, hospital, nursing, pharmaceutical and related costs.

Proof of these expenses should generally be retained. If the mother or child dies in circumstances related to the pregnancy or birth, funeral expenses can be claimed.

What the court considers

The court considers the financial situation of each parent, and any special circumstance that may cause injustice or undue hardship. It must disregard the mother's entitlement to any income-tested pension, allowance or benefit, such as the parenting payment (s 67C).

Making an application

Applications may be made to the Family Court, the Federal Circuit Court or the Local Court at any time during the pregnancy or within 12 months after the birth. Late applications require the special leave of the court.

[24.340] Maintenance for children over the age of 18

Since the Child Support scheme started in 1989, the court has had a limited role in the financial support of children (see [24.350] for more information about child support). The court does have jurisdiction under s 66L of the *Family Law Act* to order maintenance for a "child" over the age of 18 in limited circumstances. The application can be made by a carer or parent, or the child themselves. The court can only order maintenance if it is needed for the child to complete their education, or if it is needed because the child has a physical or mental disability. If satisfied that one or both of these pre-conditions exist, the court may make an order after considering the "child's" proper needs and the capacity of the child and each of the parents to contribute to these needs. A child who is studying at university for example, may be assumed to have *some* capacity to support him or herself via part time or casual work.

These applications are usually made in the Federal Circuit Court, and there is a requirement to attempt to resolve the matter via Family Dispute Resolution and obtain a certificate pursuant to s 60I of the *Family Law Act* prior to proceeding to court (subject to the usual exceptions).

If a maintenance order is made by the court, it *may* be able to be registered for collection with the Department of Human Services: ("Child Support"). Currently, this is only possible if it is an order to pay a carer or parent, and if it provides for the payment of a regular periodic amount. It is advisable to check with Child Support prior to drafting orders to ensure the orders will be registrable.

CHILD SUPPORT

[24.350] It is an important principle of Australian law that all parents have a legal duty to financially support their children, at least up to the age of 18 and in some circumstances beyond this age. This duty exists irrespective of whether the parents were married or lived together and continues if the parents stop living together. A parent for child support purposes can include a person in a same-sex relationship. (For further details about laws affecting same-sex couples, see Chapter 34, Same-sex Couples and Their Families.)

If the parents of a child are no longer living together, the money paid by one parent to the other or to the child's carer to support the child is called "child support". A parent or carer of a child will usually apply to the Department of Human Services ("Child Support") for an assessment of how much child support should be paid. Applications for child support can be made by calling Child Support on 131 272 or by applying online at www.humanservices.gov.au. Either parent or carer can apply to Child Support for a child support assessment – whether they will be paying or receiving the child support.

Child Support uses a mathematical formula to work out how much child support should be paid. A parent or carer can choose to collect the child support themselves, or to ask Child Support to collect this money on their behalf.

Is it compulsory to apply to Child Support for an assessment?

It is not compulsory to apply to Child Support for an assessment. Parents who do not receive Family Tax Benefit (FTB) A from Centrelink are free to work out between themselves how much child support should be paid by one parent to the other. Under these arrangements, payments are made directly from one parent to the other with no involvement from any government agencies. If a parent or carer of the child applies to receive more than the minimum FTB A for the child, they will be required to take "reasonable action" to obtain child support from the other parent and this will usually mean applying for an assessment. Centrelink will then assume that the carer is receiving the amount payable under a child support assessment for the purposes of working out how much FTB should be paid to the parent.

Exemptions from the requirement to seek child support

If the parent or carer receives more than the minimum amount of FTB A for a child, Centrelink gives them 13 weeks to take reasonable steps to obtain child support from the other parent or the minimum rate FTB A will be paid. In certain circumstances, Centrelink will grant an exemption from seeking child support. Exemptions can be granted in a number of circumstances but the most common reasons for obtaining an exemption are:

- where the parent or carer fears violence from the other parent if child support is pursued; or
- if the identity of the other parent cannot be established.

Centrelink social workers make decisions about exemptions. Anyone seeking an exemption should be referred to a Centrelink social worker, who will make a decision about the exemption. If seeking an exemption on the basis of domestic violence, it is helpful to provide a copy of any relevant Apprehended Domestic Violence Order or doctors reports (although these things are not essential).

Proof of parentage

Before Child Support will accept an application for a child support assessment, it requires proof that the person from whom support is sought is

a parent of the child. This requirement is usually satisfied in one of the following ways:

- the parents were married at the time the child was born; or
- the parent's name appears on the child's birth certificate; or
- the parent acknowledged parentage by completing a legal document such as a statutory declaration; or
- a court has found that the person is the child's parent; or
- the person has legally adopted the child; or
- the couple cohabited at any time during the period beginning 44 weeks and ending 20 weeks prior to the child's birth.

Child Support will usually ask a parent seeking child support to prove they are a parent of the child by providing a copy of the child's birth certificate. If a parent does not have a copy of the child's birth certificate, Child Support will also allow the parent to complete a statutory declaration declaring that they are named as parent of the child on the child's birth certificate. A similar form is available for non-parent carer's to declare that the child's parents are named on the child's birth certificate. (These forms are available on the Child Support website referred to earlier.)

If a parent or carer cannot prove parentage by one of the ways accepted by Child Support, she or he can to make an application to court (usually the Federal Circuit Court) seeking a declaration under s 106A of the *Child Support (Assessment) Act 1989* (Cth) that she or he is entitled to a child support assessment for the child. It is important to seek legal advice before going to court for a child support declaration, and legal aid is usually available to take this court action. Applications under s 106A must be lodged within the time limit prescribed in the court rules (currently 56 days from the day the person receives notice of Child Support's decision to refuse the application for an assessment). It is also permissible to seek an extension of time from the court. An application for an extension of time should be accompanied by evidence in an affidavit explaining the delay and addressing issues of hardship. An affidavit in support of a declaration under s 106A should annex the letter from Child Support stating that the application for child support assessment has been refused and should set out the reasons the applicant says the respondent is the parent. It may be necessary to ask the court to order that DNA parentage testing be conducted to help to resolve if the other person is a parent of the child. DNA testing must take place in accordance with the *Family Law Regulations 1984*.

It is also important to remember that that the DNA test results alone cannot be used to obtain a child support assessment. This means that after a positive DNA test report is obtained, the court must still make a declaration under s 106A that the applicant is entitled to a child support assessment for the child. The added benefit for the applicant is that once an s 106A order is provided to Child Support, the child support assessment starts from the date that the relevant application for child support assessment was made.

In some cases, a child support assessment is issued and the person assessed to pay the costs of the child disputes they are a parent of the child. A person in this situation can lodge an application in the Federal Circuit Court or Local Court seeking a declaration under s 107 of the *Child Support (Assessment) Act 1989* that the other person is not entitled to child support because the applicant is not a parent of the child. The court is also required to determine if any child support paid to date should be repaid to the person making the application (*Child Support (Assessment) Act 1989*, s 143). These court applications must be also be lodged within the time limit prescribed in the court rules (56 days from the day the person received notice of the child support assessment) or an extension of time can be sought.

A s 107 declaration cannot be sought where the court has previously made a declaration under s 106A. It may be possible to appeal the s 106A declaration or in some limited circumstances seek an order setting aside the previous declaration. Specialist legal advice should be sought.

[24.360] Child support assessments

How do child support assessments work?

The amount to be paid in child support depends on the taxable income of both parents, the age of the children, whether the parents have any other children as well as the amount of time each parent spends with the child.

Child support assessment formula

Child Support assesses the amount of child support payable by a parent using a mathematical

formula set out in the *Child Support (Assessment) Act 1989*.

The intention of the child support formula is that the amount payable is based on research into the cost of supporting Australian children of different ages and that parents with similar income amounts pay comparable amounts of child support.

The calculation of child support payments is based on:

- the costs of caring for children of different ages (based on Australian research);
- the relevant income of each parent;
- the amount of nights the child spends with each parent;
- whether either parent has any other dependent children in their care;
- whether either parent has any other children for whom they pay child support under a child support assessment.

Child Support can only issue a child support assessment in a case where the child support paying parent lives in Australia or in a country that has an agreement with Australia about the payment of child support.

What do the terms used to calculate child support payments mean?

Adjustable taxable income

A parent's income from a broad range of sources including:

- most recent taxable income;
- reportable fringe benefits;
- foreign income;
- net rental property losses;
- some pensions or social security benefits (FTB is excluded).

Self Support Amount

An amount representing a parent's basic living expenses, deducted from each parent's Adjustable Taxable Income. The Self Support Amount is the same for each parent and is indexed annually. In 2019, this amount was $25,038.

Relevant dependent child amount

An amount representing the costs of caring for children (usually only biological or adopted children) in a new family deducted from the relevant parent's Adjustable Taxable Income. The costs of a child/children in a new family are calculated in the same way as the costs for children receiving the benefit of child support payments.

The basic child support formula is calculated according to a 8-step process. More complex formulas apply to families where a parent has children from another relationship, or where a third party cares for the children.

Example of the Basic Formula

Dominique and Peter have a child, Sara, who is nine years old. Sara is in Dominique's care 300 nights per year and Peter's care for 65 nights per year. Dominique's Adjustable Taxable Income is $54,786. Peter's Adjustable Taxable Income is $84,138.

Step 1 – Work out each parent's child support income

The child support income is each parent's Adjustable Taxable Income less:

- the Self Support Amount (published each year and equal to half of Male Average Total Weekly earnings "MTAWE"); and
- the Relevant Dependent Amount (if there are children to support from new partnerships).

Dominique	
Adjustable Taxable Income	$54,786
minus Relevant Support Amount (2019 figure)	–$25,038
Child support income for Dominique	$29,748
Peter	
Adjustable Taxable Income	$84,138
minus Relevant Support Amount	–$2,50,382
Child support income for Peter	$59,100

Step 2 – Work out the parents' combined child support income

Add each parent's Adjustable Taxable Income together to get a combined child support income:

Child support income for Dominique	$29,748
Child support income for Peter	$59,100
Combined child support income	**$88,848**

Step 3 – Work out each parent's income percentage

A parent's income percentage represents the share that each parent has in the combined parental resources available to meet the costs of the child.

Divide each parent's child support income by the combined child support income and convert to a percentage:

Dominique	
Child support income	$29,748
Combined child support income	÷$88,848
	=0.3348
Dominique's income percentage	33.48%
Peter	
Child support income	$59,100
Combined child support income	÷$88,848
	=0.6652
Peter's income percentage	66.52%

Step 4 – Work out each parent's care percentage

A parent's care percentage represents the proportion of care that each parent has of each child support child.

Divide the number of nights of care a parent will have over a 12-month period by 365 and convert to a percentage:

Dominique	
Dominique's care percentage (300÷365)	= 0.8219
	= 82%
Peter	
Peter's care percentage (65÷365)	= 0.1781
	= 18%

Step 5 – Work out each parent's cost percentage

A parent's cost percentage is the share of a child's costs that a parent incurs through care of the child. It represents the extent to which the parent is taken to have met the costs of the child through caring for the child.

A parent's cost percentage is worked out using a table set out in s 55C of the *Child Support (Assessment) Act 1989*. Dominique's care percentage is between 66%–86%. Her cost percentage is 76%.

Peter's care percentage is between 14%–34%. His cost percentage is 24%.

Care percentages, cost percentages and levels of care

No. of nights/ year	*No. of nights/ fortnight*	*Level of care*	*Care percentage*	*Cost percentage*
0–51	1	Nil care	0%–13%	Nil
52–127	2–4	Regular care	14%–34%	24%
128–175	5–6	Shared care	35%–47%	25% plus 2% for each percentage point over 35%
176–189	7	Shared care	48%–52%	50%
190–237	8–9	Shared care	53%–65%	51% plus 2% for every percentage point over 53%
238–313	10–12	Primary care	66%–86%	76%
314–365	13–14	Sole care	87%–100%	100%

Step 6 – Work out each parent's child support percentage

A parent's child support percentage represents the share of the parent's resources (income percentage) less the share of costs he or she meets directly through caring for the child (cost percentage). A parent, who meets more of the costs through care than their share of resources, has a negative child support percentage and will generally receive child support.

Dominique	
Income percentage	33.48%
minus Cost percentage	–76%
Child support percentage	–42.52%
Peter	
Income percentage	66.52%
minus Cost percentage	–24%
Child support percentage	42.52%

Dominique has 33.48% of the combined child support income but meets 76% of costs directly through care. Dominique must receive some child support from Peter.

Peter has 66.52% of combined child support income but only meets 24% of costs directly through care. Peter must pay some child support to Dominique.

Step 7 – Work out the costs of the child

The costs of the child are calculated using the Costs of Children Table set out in Sch 1 of the *Child Support (Assessment) Act 1989*. This table sets out the formula to be used to work out the actual costs. The formula takes into account the parents' combined child support income and the number of children being supported. The amounts set out in the Costs of Children Table are indexed each year.

Information about costs of children can be found on the Child Support website. Using the Costs of Children Table, the costs of Sara are $13,606.

Step 8 – Work out amount of child support payable

The amount of child support payable is calculated by multiplying the positive child support percentage by the costs of the child.

Peter	
Child support percentage	42.52% ×
3 Cost of child	$13,606
Annual child support payment	$5,785

Peter must transfer $5,785 per year (approximately $111.00 per week) in child support payments to Dominique.

Keeping Child Support informed about a parent's circumstances

It is important that Child Support has accurate and up-to-date information for each parent's income and level of care of each child of the assessment. Parents who are paying or receiving child support are obliged to lodge their tax returns on time. If a parent does not lodge tax returns and there is no taxable income available, Child Support will use a **provisional income**. This can be difficult to change later. Parents on a low income (such as a full Centrelink benefit) should still lodge a tax return with the Australian Taxation Office so that Child Support can obtain the correct income details.

Child Support determinations about each parent's care levels

When an application for child support assessment is made, Child Support will make a determination about the level of care that each parent/carer has. The same level of care is used by Child Support in the child support and is used by Centrelink to assess a parent's entitlement to FTB. Child Support will usually work out the care level for each parent/carer based on the number of nights that the child is likely to be in the care of each parent/carer. Child Support will ask for information from each parent/carer about any recent patterns of care for the child to determine the care level for each parent/carer. They may also seek copies of any court documents or agreements that may form the basis of arrangements regarding care and the agreement reached between the parents.

Usually, the level of care will be based on the actual time the child/children spend with each parent. In some circumstances, the level of care can be based on the care arrangements set out in parenting orders if the orders are not being complied with. This depends on how long ago the orders were made, and whether the parent alleging the breach of orders is taking reasonable steps to ensure compliance with the orders. The rules about this are complicated and parents affected should talk to Child Support and if necessary seek specialist advice.

If care arrangements change, a parent should advise Child Support as soon as possible. Child Support will usually only make further changes to the care determination from the date of notification. Once a decision about care levels is made, a parent/carer who has concerns about the decision can formally "object" to the decision made by Child Support.

Minimum child support payments

It is acknowledged that a parent should pay some child support even when their capacity to pay is limited. A minimum child support payment applies for parents who receive income support payments from Centrelink or the Department of Veterans Affairs. The minimum liability is indexed annually and is currently around $8.00 per week. The minimum rate does not apply to a parent who has at least regular care of the child/children (ie, at least 52 nights of the year).

A parent who receives income of less than the equivalent of the minimum annual rate payable may apply to Child Support to have their child support payments reduced to nil. For example, a parent who is incarcerated can apply for the minimum payment to be reduced to nil by telephoning Child Support or using the appropriate form on the website.

Fixed annual rate of child support

A fixed child support assessment will apply to parents reporting a low taxable income who are not receiving any income support from Centrelink or Veterans Affairs. This amount is also indexed annually and is currently around $28.00 per child per week (capped at three children). Fixed assessments have been introduced to address the issue of parents who deliberately under-report their income to avoid or reduce their child support payments. However, a parent can apply to Child Support to pay the minimum amount of child support if he or she can demonstrate that his or her income is genuinely low.

[24.370] Varying a child support assessment

Estimates

In most cases, Child Support will use taxable income from the most recent financial year for a parent to determine the amount of child support to be paid. It is acknowledged that a parent's situation may change after an assessment is made. It is. In cases where Child Support has been using the most recent taxable income for a parent and that parent's income falls by at least 15%, the parent can contact Child Support and make an election to use an income "estimate".

Once a parent estimates their income, it is important that they report any income changes to Child Support. This can be done by lodging subsequent estimates (which can be either higher or lower than the original estimate).

After the estimate period ends, Child Support will compare the estimate of income of the parent against their actual taxable income. Child Support will charge the parent an "estimate penalty" when the actual income for the estimate period is 110%, or more, of the estimated income.

Application to exclude income from child support assessments

The child support legislation recognises that it can cost a lot for a parent to re-establish themselves following separation. A parent who earns extra money post-separation (eg, from working overtime or a second job) can apply for the extra income to be excluded from their child support assessment. Some things must be satisfied to claim this benefit:

- the relationship must have lasted for more than six months and the application must be made within three years of the last separation;
- the income must be of a different nature from other income earned and must not ordinarily have been expected;
- the income earned can only reduce the parent's Adjusted Taxable Income by 30%;
- a reduction to the assessment usually only comes into effect from the date of application;
- the application can only cover a period up to three years from the end of the relationship.

Application to change the assessment

The intention of the child support legislation is that the formula should apply so that parents with similar incomes pay similar amounts of child support. However, there is provision to change the assessment in individual cases if certain special circumstances exist. A parent or carer with a child support assessment may apply to Child Support for a change to their child support assessment if she or he believes that they can satisfy one of the 10 special circumstances for a change to the child support assessment.

Child Support can make a decision to change assessments from a period of up to 18 months before the application is made and can change future assessments as well. Child Support cannot change assessments once the child support assessment ends for a child (eg, when they turn 18).

If a parent/carer wants to seek a change to a child support assessment for an earlier period, an application for leave must be made to a court with jurisdiction under the Child Support legislation (usually the Federal Circuit Court). The court can only permit a change to a child support assessment for a period up to seven years prior to the application being made.

The process for change of assessment requires that the parent complete an "Application for Change of Assessment" form available from Child Support or from the website. The application asks the parent or carer to provide information about their own personal financial circumstances and to explain how they meet one of the 10 reasons for change of assessment. This form, and any documents provided with it to prove one of the 10 special reasons, will be provided to the other parent or carer who is given the opportunity to respond.

Decisions on "Change of Assessment" applications are made by a Senior Case Officer

(SCO) within Child Support. There is no formal "hearing" of the application but the SCO will normally attempt to make contact with each party by telephone, will consider information discussed along with any documentary material provided by the parties and information obtained by the SCO (eg, taxation records and Centrelink records).

The SCO will then determine if the special circumstances of the case justify a change to the child support assessment, and if it is fair to the parties, the children and the community to make the change. The SCO must provide reasons for their decision to the parties in writing (including a decision *not* to change the assessment). Once a change of assessment decision is made, it can usually only be changed via the change of assessment process and only if there is a change of circumstances for the payer, carer or child.

It can be beneficial to obtain legal advice before making or responding to a "Change of Assessment" application. A legal representative can help with the application or response but cannot represent a parent/carer in the "Change of Assessment" process.

The 10 reasons for change of assessment are:

- reason 1 – the parent has high costs of enabling them to spend time with, or communicate with the child the subject of the assessment;
- reason 2 – the costs of supporting a child are high due to the child's special needs. To establish this reason, a parent/carer must show that the child has a medical condition or disability and the parent/carer has out-of-pocket costs associated with this medical condition or disability (eg, out of pocket costs of therapies, medication, orthodontics);
- reason 3 – the costs of educating a child are high. This reason is often used if a child is attending a non-government school. To establish this reason, the applicant must be able to show that the child is being educated in a manner intended by *both* parents by, for example, providing a copy of the application for enrolment to the child's school signed by both parents;
- reason 4 – the child support assessment is unfair because of the child's income, earning capacity, property or financial resources. An application under this reason will usually not succeed if the child is earning a modest income from part-time or casual income, but may be successful if the child has left school and has taken on full time work or an apprenticeship;
- reason 5 – the child support assessment is unfair because the payer has paid or transferred money, goods or property to the child, the payee, or a third party for the benefit of the child. This reason only applies in very limited circumstances. Usually a non-agency payment claim will be a more appropriate way to address this situation (see below);
- reason 6 – the carer has high child care costs for a child aged less than 12 years. To establish this reason, the carer must be able to show that the out-of-pocket costs of child care are more than 5% of their Adjusted Taxable Income and that the child care costs are necessary, ie to enable the parent to work for example;
- reason 7 – the parent has high necessary expenses to support themselves. This reason can be used by a parent to claim a reduction in child support to enable them to re-establish themselves following separation or if they are paying joint debts of the relationship prior to a property settlement. This reason can also be used if the parent has an ongoing medical condition or disability and they have high out-of-pocket costs associated with this condition;
- reason 8(a) – the child support assessment is unfair because of the income, property or financial resources of one or both parents (eg, where one parent is involved in a family business and may declare a low taxable income that results in an unfair child support);
- reason 8(b) – the child support assessment is unfair because of the earning capacity of one or both parents. This reason targets parents who are found to have deliberately changed their income to either decrease their child support liability or increase their child support entitlement. For this reason to be established, the decision maker must make a finding that the parent has made a decision to change his or her pattern of work (eg, accepted a lower paid position or moved from salaried employment to self-employment) *or* not to work despite ample opportunity. A change based on a parents "earning capacity" can only be made if the change to work is not justified by health considerations or caring responsibilities and if the parent has not demonstrated that it was not a major purpose of the change was to affect the child support liability;

- reason 9 – the parent's capacity to support the child is significantly affected by:
  - their legal duty to maintain another child or person. This would usually only apply in relation to the parent's spouse in certain limited circumstances; or
  - their necessary expenses in supporting another child or person they have a legal duty to maintain. This could apply in cases where the parent has another dependent child living with them with special needs or a medical condition and high out-of-pocket expenses in relation to those special needs or medical condition; or
  - the parent has high costs of enabling them to spend time with, or communicate with, another child or person they have a legal duty to maintain;
- reason 10 – the parent's responsibility to maintain a child who lives with the parent but is not the parent's biological or adopted child. This reason can only be satisfied in certain limited circumstances including that the parent has re-partnered for a period of at least two years and the legal parents of the resident child are unable to look after the child due to ill health, death, or other caring responsibilities.

[24.380] Objections to Child Support decisions

If a parent or carer disagrees with a decision made by Child Support, including a decision made by a SCO in relation to a "Change of Assessment" application, they can apply to Child Support for an internal review of the first decision. This is called an "objection". An objection must be in writing and in most cases, must be lodged within a time limit of 28 days for Australian cases and 90 days for international cases. An extension of time can be sought. An exception to this time limit exists for objections to decisions about a care percentage. In these cases, the time limit does not apply, but if a change is made to the care percentage it will only take effect from the time the objection was lodged.

Objections do not have to be made on a prescribed form but they must be in writing and should make clear reference to the decision that is challenged. The objection must also explain the reason why the person lodging the objection considers the original decision to be wrong and should include any additional information relied on to seek a different decision. If an extension of time is sought, the objection should also set out the reasons for the delay and any other relevant factors. A decision on the objection will be made by a different officer. A copy of the objection will be provided to the other parent/carer in the child support assessment, and they will be given an opportunity to respond. Child Support has 60 days in which to finalise an objection.

Applications for review to the Administrative Appeals Tribunal (AAT)

If either the applicant or respondent to the objection is unhappy with the objection decision, she or he can seek an external review of the objection decision by lodging an application for review with the AAT. An application can be made with the AAT over the telephone or in writing but must be lodged within 28 days of receiving the objection decision. An application for an extension of time can be made. For further information about the application process, see the AAT website (www.aat.gov.au).

The AAT is required to provide a review process that is "fair, just, economical, informal and quick". Once an application is made, Child Support must provide the AAT and each party to the review with a copy of all relevant documents relating to a review of the objection decision. This bundle of documents can be quite substantial, but is important for parties to be aware of the contents so that they can identify relevant material and documents they wish to rely on. The AAT will also give each party the opportunity to provide any additional documents or written submissions. In some cases, the AAT may conduct a pre-hearing conference and may direct the parties to provide certain information, including financial statements. It is most important for parties to comply with any time frames set by the AAT for providing evidence and submissions. Failure to comply can result in the AAT refusing to admit evidence, or even the party being removed from the review process. The AAT may also request further information from Child Support or from third parties to assist it with the review of a decision.

The AAT will set the matter down for a hearing, which can be in person or over the telephone. In practice, many hearings are conducted over the telephone. Hearings are relatively informal, but parties are usually required to give their evidence under oath or affirmation. A party may apply to

have a legal (or other) representative make written submissions on their behalf and/or make oral submissions on their behalf at the AAT hearing. However, permission must be granted by the AAT first, and usually the application must be made at least two weeks in advance of the hearing.

The AAT must conduct a full merits review of the decision before it, and may either affirm the decision under review, set aside, or vary it. A party to the review may appeal the decision made by the AAT to the Federal Court or the Federal Circuit Court but only on a question of law. The appeal must be filed within 28 days of receiving the AAT decision. An exception to this is where the decision is one about the percentage of care, where a further application may be made for review to the second tier of the AAT. This application must also be made within 28 days.

As the AAT provides the last forum for a merits review in most child support matters, it is a good idea for clients to obtain legal advice and if necessary assistance and representation. Appeals to the court on a question of law can be difficult and often involve complex legal argument. The Child Support Registrar usually becomes a party to the appeal and may seek costs from another party if that party is unsuccessful. For this reason, parents/carers considering an appeal should seek specialist legal advice.

Child support agreements

As an alternative to using the child support assessment process, parents are able make their own arrangements for child support called child support agreements. There are two types of child support agreements:

- binding child support agreements; and
- limited child support agreements.

Binding child support agreements

In order to make a binding child support agreement, each party to the agreement must receive independent legal advice before entering into or terminating the agreement about:

1. the effect of the agreement on the rights of that party; and
2. the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement.

The binding child support agreement must include a statement that the party received this advice as well as well as certification from the lawyer providing the advice.

A binding agreement can only be set aside by a court if the court is satisfied that "exceptional circumstances" have arisen since the agreement was made that cause hardship to one of the parties to the agreement or the child/children. A binding child support agreement can also be set aside by the court if the court is satisfied there has been fraud or failure to disclose material information, undue influence or duress or unconscionable conduct to such an extent that it would be unfair not to set aside the agreement.

The amount of child support agreed to be paid under a binding agreement may be more or less than the amount of child support payable according to an administrative assessment. However, if a parent receives FTB A, this amount will continue to be calculated on the basis of the administrative assessment. Needless to say, practitioners providing legal advice and certification in relation to child support agreements should practice great caution and diligence in advising clients about the impacts on child support, Centrelink payments and about possible changes in circumstances (eg, changes in care arrangements and changes to income) that may affect the agreement in the future.

Limited child support agreements

The parties to a limited child support agreement do not need to receive legal advice before entering the agreement. It is easier to end a limited child support agreement than a binding child support agreement.

An administrative child support assessment must be in place before Child Support will accept a limited agreement. The amount payable under a limited agreement must be equal to or more than the amount payable according to the assessment. Once the agreement is accepted, Child Support continues to make notional assessments in the same way as it would have issued assessments had the agreement not been made. A limited agreement may be set aside by a subsequent agreement between the parties. Alternatively, an application can be made to the court to set aside the agreement in a case of fraud, duress or unconscionable conduct or where there has been a significant change of circumstances since the agreement was made causing hardship to either of the parties or the child/children.

However, in many cases, a court application can be avoided as there are circumstances in which the limited agreement can be set aside

administratively. If a notional assessment amount differs from the previous notional assessment by more than 15%, either party to the agreement can terminate the agreement, even if the other party does not agree. Additionally, after three years, limited child support agreements can also be ended by either party for any reason.

Centrelink and notional assessments

Centrelink will use the notional assessment from Child Support to calculate the rate of FTB A paid to the carer (rather than the amount agreed to under the limited or binding child support agreement). This means that a parent or carer who agrees to less child support than the notional assessment may end up financially disadvantaged as less money will be paid for the child by Centrelink.

Agreements made before 1 July 2008

Child support agreements made and accepted before 1 July 2008 are considered to be a special type of agreement called a transitional binding child support agreement. This is the case even if legal advice was not obtained prior to the making of the child support agreement. It is possible to terminate these agreements by a subsequent agreement between the parties. If this is not possible, an application to court to set aside the agreement is required. In 2018, the child support legislation was amended so that if a transitional binding agreement was made without one or both parties receiving legal advice the court could set it aside if just and equitable to do so.

Lump sum child support payments

Child support is normally paid by periodic amounts, but there are some limited circumstances where it may be appropriate for child support to be paid in a lump sum. This may arise in circumstances where the paying parent is due to receive a one-off amount of money, especially if there have been difficulties with periodic payments in the past. Lump sum child support is also sometimes contemplated by parties when they are making arrangements about property following separation. Provisions for child support to be paid as a lump sum or capitalised amount can be made under either a binding agreement or court order. When a lump sum child support agreement or court order is lodged with Child Support, Child Support makes a notional administrative child support assessment. Each year, child support payable under the notional assessment is deducted from the lump sum until it is exhausted, at which time another notional assessment will be made. As explained above, the notional assessment is also used to calculate any FTB A payments a parent is otherwise entitled to.

It is most important to note that Child Support cannot register a lump sum amount for collection and therefore cannot enforce payment of a lump sum. If Child Support receives an agreement or order making provision for a lump sum, they will assume this amount to have been paid. It is therefore most important to ensure there is adequate security for payment of the lump sum amount if these arrangements are contemplated.

[24.390] When will child support end?

Child support payments will usually end when the child turns 18. A child support assessment will end prior to this in a number of situations, including if the child becomes a member of a couple, is adopted by another person or is taken from a parent and placed into permanent care under a child welfare order, or in the unfortunate event that the child dies.

If a young person is still engaged in full-time secondary education in the year they turn 18, the parent or carer can apply to Child Support to have the child support assessment continue until the last day of the current school year. The carer parent needs to apply for this extension after the child's 17th birthday and prior to their 18th birthday. So, for example, if a child will be turning 18 in July in a year that they are completing year 12 at high school, the carer or parent may apply to Child Support for the assessment to continue until the end of that school year.

If a child continues in education beyond this, or has a physical or mental disability, it may be possible to seek an order for maintenance from the court (see [24.340] for further information).

[24.400] Role of Child Support in collection of child support payments

In addition to working out how much child support should be paid, Child Support collects and enforces *periodic* child support payments. A periodic payment refers to monetary sums

payable under a child support assessment or child support agreement on a regular (usually monthly or weekly) basis. Child Support is unable to collect lump sum amounts of child support or payments to third parties such as schools or health funds. If a parent fails to pay a lump sum or to make a payment to a third party, the parent for whom these lump sum or non-periodic sums are owed must enforce these payments privately.

Child Support often encourages parents to arrange child support payments between each other. If a parent thinks this will not work for them, collection by Child Support is likely to be a better option.

If a carer or parent opts for private collection and this arrangement breaks down or they do not receive payments on time and in full, they can ask Child Support to start collecting on their behalf. They can also ask Child Support to collect up to three months of unpaid child support or, in exceptional circumstances, nine months of outstanding child support.

Where a case is registered for collection, Child Support will try to make an arrangement with the paying parent for them to pay voluntarily. If this is unsuccessful, Child Support may take the following action:

- penalties for non-payment – Child Support will impose a financial penalty for non-payment of child support from the date that the child support is due. The purpose of the penalty is to encourage timely payments. The penalty is due to Child Support and is not paid to the carer or parent. An application can be made to Child Support to reduce the penalties payable by a paying parent;
- automatic withholding from salary or wages – the paying parent's employer takes some of the parent's income before paying wages and pays this to Child Support;
- issuing notices to third parties to pay Child Support – these notices may be against places such as a bank or financial institution or a contractor who owes money to a child support payer;
- intercepting tax refunds – Child Support will use the funds owed to a child support paying parent by the tax office to satisfy a child support debt;
- issuing Departure Prohibition Orders (DPO) against parents who have failed to pay child support and are seeking to leave Australia. The DPO can stop the parent from leaving Australia until they pay outstanding child support or makes a payment arrangement acceptable to Child Support. Parents who are subject to a DPO should seek immediate legal advice. Parents can apply to Child Support for a Departure Authorisation Certificate (DAC) to be issued to enable them to leave Australia for a prescribed period of time. These will usually only be issued if Child Support is provided with some money towards the debt and is satisfied that the person will return to Australia. An attempt to leave Australia in the knowledge that a DPO is in place is a criminal offence that carries a penalty either of payment of a fine or a prison term.

Child Support can also take enforcement action in court against a paying parent. The court may make orders about payment of arrears and may also make orders enforcing the debt, including orders about the seizure and sale of assets. Child Support will usually only commence court proceedings where the arrears are significant and where there are good prospects of success (eg, the payer has property in his or her name). Child Support usually also seeks that the paying parent pays their costs of making the application to court, which can amount to thousands of dollars. It is important that a person who owes child support addresses the issue quickly and does their best to avoid court action by negotiating a suitable payment arrangement with Child Support.

Under the *Child Support (Registration and Collection) Act 1988* (Cth), a payee who is owed child support can initiate enforcement proceedings in court. However, they must formally advise Child Support of their intention to take this action.

Credit of child support payments made directly to a parent or third party

Where child support payments are registered for collection by Child Support, it is possible for a parent to make payments directly to the other parent or a third party and to have these payments credited against amounts owing to Child Support. To be credited, the amounts paid must be for an amount owing at the time Child Support has been asked to collect. The parent or carer to whom the child support is owed must also usually agree that it was intended that the payments be paid in lieu of the child support owed. These payments are called Non Agency Payments (NAPs).

It is also possible for a person to claim certain payments to third parties, where there is no agreement from the other parent that the payments should be credited against the child support liability. These payments are called Prescribed Non Agency Payments (PNAPs). The types of payments that can be claimed as a PNAP are:

- child care costs for the child who is the subject of the enforceable maintenance liability;
- fees charged by a school or preschool for that child (but not for non-compulsory excursions or boarding fees or the like);
- amounts payable for uniforms and books prescribed by a school or preschool for that child;
- fees for essential medical and dental services for that child;
- the carer's share of amounts payable for the carer's home; and
- the costs to the carer of obtaining and running a motor vehicle, including repairs and standing costs.

Certain criteria must be met before a PNAP can be claimed:

- the parent claiming the payment must have less than 14% of care of the child/children;
- child support has not earlier been paid as a lump sum;
- the payment can be credited up to 30% of the amount owing in child support that month, provided the remaining 70% of the liability is paid to Child Support.

Bankruptcy and child support

Many people who owe child support believe that if they declare themselves bankrupt, their child support debt will disappear. Child support payments survive bankruptcy (although late payment penalties may be extinguished).

Imprisonment for default?

It is not permissible under Australian law for a person to be sent to jail for non-payment of child support alone. However, if a court has been asked to make an order for non-payment of child support and the court has ordered payment, it is possible for a person to be sentenced to a period of imprisonment if the court forms the view that the court order has been intentionally contravened.

CHILDREN

[24.410] The *Family Law Act* is federal law.

Part VII of the *Family Law Act* covers all children, whether their parents were married, in a de facto relationship (including same-sex couples) or never lived together.

Issues around care and protection of children are dealt with by state and territory child protection legislation so are different from state to state (see Chapter 7, Children and Young People). Family law courts cannot make orders about children who are the subject of state care and protection orders without the consent of the child welfare department. In NSW, this is Communities and Justice (NSW).

Rights and responsibilities under the Act

[24.420] Australian family law no longer uses terms like "guardianship", "custody", "access", "residence" or "contact". The *Family Law Act* refers to the person a child "lives with", who they will "spend time with" and "communicate with". The concept of "guardianship" has been replaced with the concept of "parental responsibility".

The *Family Law Act* encourages parents to have a more cooperative approach by emphasising the continued responsibility that parents have for their children, even though separated or divorced.

[24.430] Parental responsibility

Parental responsibility is defined in the *Family Law Act* as "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children" (s 61B). This definition does not mention "parental rights".

Children have a right to be cared for and a right to have a relationship with both their parents, but parents do not have a right to see children.

Each parent automatically has parental responsibility for the child and may make important decisions about the child's life unless and until there is a court order (s 61C).

If an order for *equal shared parental responsibility* is made, parents must make long-term decisions about their children in consultation with each other. For more information on equal shared parental responsibility, see [24.550].

[24.440] Children's rights

Section 60B of the *Family Law Act* recognises children have rights. It states that the best interests of children are met by:

1. ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
2. protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
3. ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
4. ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

Specifically, children have a right to know and be cared for by both parents, and to spend time and communicate with both parents and other significant people on a regular basis except when it is unsafe to do so. Children also have a right to enjoy their culture.

These rights apply except when it would be contrary to a child's best interests (*Family Law Act*, s 60B; the *United Nations Convention on the Rights of the Child*, Art 9.3).

[24.450] Actions by children

Children are able to make an application under the *Family Law Act*; however, this is unusual and the court would normally require an adult be appointed to act as a case guardian on behalf of the child.

This means that it would be possible for a child to seek an order allowing them to live with a person who is not one of their parents. A number of teenage girls have applied to court for an order to prevent someone from sending them overseas to be married.

The court's welfare jurisdiction

The Family Law Courts can supervise the way in which parents exercise authority over their children. This is called the court's "welfare jurisdiction" and is related to the common law concept of parens patriae, which is still held by the state Supreme Court. Parens patriae means "the parent of the country" and involves the Crown (in this case, the Department of Communities and Justice) assuming responsibility for people who are not able to care for themselves, such as children and the mentally ill.

Using the welfare jurisdiction, a child might be able to challenge the exercise of parental powers by their parents. The welfare powers under s 67ZC of the *Family Law Act* have mainly been used in connection with medical treatment, such as hormonal medical treatment of a child in relation to Gender Identity Dysphoria and Disorders of Sexual Development, or sterilisation of a girl with a disability.

If parents can reach agreement

[24.460] Many parents who separate are able to decide between themselves where their children should live without taking the matter to court. Parents can often work out what arrangement will suit their children better than a court can, and a solution reached by agreement is likely to work better for everyone than one imposed by a court.

Parents who agree about the arrangements for their children can:

- keep it as an informal agreement;
- make a parenting plan;
- apply to the court to approve consent orders.

[24.470] Informal agreements

Where parents can make their own arrangements about the care of their children, the agreement can be informal, and there is no requirement to put it in writing.

[24.480] Parenting plans

The family law system encourages parents to reach an agreement without going to court by entering into a *parenting plan* (s 63B). A parenting plan is an agreement between parents of a child that:

- is in writing;
- is signed and dated by the parents;
- deals with things such as parental responsibility, who the child lives with, spends time and communicates with, child support and other issues (s 63C(2)).

A parenting plan is not valid unless it was made voluntarily, without any threats, duress or coercion.

Parents should only sign a parenting plan after thinking about it carefully, and after seeking advice from a lawyer. They are expected to follow the "best interests of the child" considerations when developing a parenting plan (see [24.530]).

Family Relationship Centres can help parents develop parenting plans (see [24.490]).

Effect of parenting plans

Parenting plans are not enforceable. Parenting plans can, however, override an existing court order about children made after 1 July 2006. The parenting plan can also be taken into account if the matter goes to court later. Parenting plans are recognised by agencies such as Centrelink and Child Support as evidence of care arrangements.

Consent orders

Where parents can agree about arrangements for children and want the agreement to be enforceable, they can ask the Court to approve the orders. Before approving the orders, the Court must be satisfied that the orders are in the best interest of the child.

Once approved, these orders are called consent orders, and they have the same effect as if they were orders made by a judge after a hearing. Because these orders are enforceable, it is important that parents are sure they are happy with the agreement reached and can comply with the orders, because there are serious consequences for not following the orders without a reasonable excuse (see [24.590] for further information on contravention of court orders). It is also difficult to change the orders once made without the agreement of the other parent. Before a Court will consider changing consent orders, the Court must be satisfied there is a significant change in circumstances (see [24.610] for further information on change of circumstances).

Family dispute resolution

[24.490] Parents who are having problems reaching an agreement about the care of the children can approach family dispute resolution services to help them sort out their parenting arrangements.

Anyone who wishes to make an application to court for parenting orders will be required to attempt family dispute resolution first. There are important exceptions (see [24.500]).

Where to go for family dispute resolution

Family dispute resolution can be done through any accredited family dispute resolution practitioner, including Family Relationship Centres.

Family Relationship Centres

Family Relationship Centres provide information and referral to help families with their relationships. When families separate, the centres provide information, parenting advice and dispute resolution (mediation) to help them reach agreement on parenting arrangements without going to court. They also refer families to a range of other services that can help. Many of the services are free or are offered on a sliding scale according to level of income. There are 65 Family Relationship Centres nationwide. To find a Family Relationship Centre nearby, you can call the Family Relationships Advice Line or see the Family Relationships Online website (see [24.650]).

[24.500] Dispute resolution requirements

In most cases, it is compulsory to attempt family dispute resolution before filing an application to court. An application for a parenting order can only be lodged at court if it is accompanied by a certificate from an accredited family dispute resolution practitioner or an exception applies.

Section 60I certificates

Unless an exception applies, a court cannot hear an application for a parenting order unless a certificate from a family dispute resolution practitioner has been filed. The certificate must state that:

- the other party did not attend; or
- all parties attended and a genuine effort was made to resolve the dispute; or
- one party did not make a genuine effort to resolve the dispute; or
- the family dispute resolution practitioner decided that family dispute resolution was not appropriate to conduct or continue.

If the case goes to court after one of the parties failed to make a genuine effort, it may be taken into account when the judge is deciding whether or not to make a costs order.

Where a certificate is not required

Applicants will not need to get a certificate where:

- the application is made by consent;
- the application is in response to the other party's application;
- the court is satisfied that there are reasonable grounds to believe there has been or is a risk of child abuse or family violence;
- the application is about a serious contravention (breach) of parenting orders that were made in the last 12 months;
- the application is urgent; or
- a party is unable to participate; for example, because of a disability, or because there are no services in their area (s 60I(9)).

The reasons for not having a certificate must be outlined in an affidavit filed with the application for parenting orders.

If there is family violence or child abuse

Where an exception is claimed because of family violence or child abuse, the applicant must be referred to a family counsellor or family dispute resolution practitioner to get information about services and options, including alternatives to court action. The applicant's affidavit needs to state that the information was obtained or explain why getting the information would have involved delay that created a risk of child abuse or family violence (s 60J).

Get legal advice!

It is a good idea to get legal advice before going to family dispute resolution and before signing a parenting plan and before signing consent orders. If an agreement is not reached at family dispute resolution or if you think you are exempted from family dispute resolution, it is important to get legal advice before filing an application to court.

Parenting orders

[24.510] Parents who need enforceable arrangements about their children need court orders. These can be by consent (see [24.310] for more information on consent orders, or made by the court after a contested hearing).

[24.520] Orders the court can make

The court has very wide powers to make orders relating to parenting of a child (s 65D). Parenting orders can deal with:

- where the child lives;
- who they spend time with;
- the allocation of parental responsibility;
- how parents should communicate with each other over major long-term issues;
- communication the child is to have with another person, including by telephone or email;
- any other aspect of the child's care, welfare and development.

What the court must consider

[24.530] Best interests of the child

The paramount (most important) consideration when making orders about children is the best interests of the child.

What is in the child's best interests?

Section 60CC of the *Family Law Act* sets out a list of factors that judges are to consider when making an order about children. There are *primary* and *additional* considerations.

The factors listed in s 60CC must also be considered when making parenting plans.

Primary considerations

The primary considerations are:

- the benefit to the child of having a meaningful relationship with both parents;
- the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Greater weight is to be given to the need to protect the child from harm when deciding what is in the child's best interest.

Additional considerations

The additional considerations are:

- any views expressed by the child;
- the nature of the child's relationship with parents and others, including grandparents;
- the extent to which each parent has taken, or failed to take, the opportunity:
  - to participate in making decisions about major long-term issues in relation to the child; and
  - to spend time with the child; and
  - to communicate with the child;
- the extent to which each parent has fulfilled his or her obligations to maintain the child;
- the effect on the child of any changes in the child's circumstances;
- the practical difficulties and expense involved in spending time with and communicating with a parent, and the impact on the child of maintaining personal relationships and direct contact regularly with both parents;
- the capacity of each parent and others to provide for the child's needs;
- the maturity, sex, lifestyle and background of the child and parents;
- the child's right to enjoy Aboriginal or Torres Strait Islander culture, where relevant;
- each parent's attitude to the child and to parenting;
- any family violence involving the child or a member of the child's family;
- any family violence order;
- the desirability of making the order that is least likely to lead to further proceedings;
- any other fact or circumstance the court thinks relevant.

The child's views

If a child expresses a view about where or with whom they wish to live, then the court must consider these views.

The importance given to the child's views will depend on the child's age and maturity, their understanding about the implications of the views they are expressing and the facts of the case. There is no age at which a child's views are suddenly followed.

The court acknowledges that teenagers often do what they please regardless of court orders, and an older child may run away from a parent they do not want to stay with.

Finding out the child's views

Discovering the real views of children can be difficult. Sometimes both parents correctly claim that a child has said they wish to live with them.

Children cannot be required to express a view (s 60CE). It is not appropriate to pressure children into a choice between their parents. They may be caught up in a conflict of loyalties, and say to each parent what they think will please or comfort them. Often they only want an end to conflict.

Giving evidence of a child's views

It is only in extraordinary circumstances that a child may be a witness and only if the judge gives special leave.

Generally, evidence of a child's views may be presented to the court through:

- reports by a family consultant or another court-appointed expert;

- affidavits containing statements about the child's views that the child has made to someone else (usually one or both parents and not by way of an affidavit of the child);
- the independent children's lawyer, if one has been appointed by the court (see below).

[24.540] Reports by family consultants

Reports by family consultants can be ordered by the court to assist it in making any decision about children (*Family Law Act*, s 62G). The report can cover any matter that relates to the care, welfare or development of the child, and must include the child's views unless this is inappropriate because of age or other reason.

Family consultants are counselling professionals appointed by and employed by the Family Court to assist judges in children's cases. Information provided to a family consultant is not confidential or privileged.

When do family consultants get involved?

A family consultant is likely to be appointed by the court early in the proceedings to assist the parties and the court to resolve issues about children.

Effect of a family consultant's report

A family report is not binding on the court. After listening to all the evidence and each parent in the witness box, the judge may reach a view opposite to that of the family consultant. The report is only one piece of evidence. It is, however, a very important piece of evidence. Courts rely on the expertise of family consultants. If the report favours one parent, it can be very difficult for the other parent to persuade the court to come to a different conclusion. The family consultant can be called to court by either parent's lawyer and asked to explain the report and be cross-examined, like any other witness.

Reports from other experts

A court may also order a report from an outside expert. Reports on children prepared by psychologists, psychiatrists or social workers are only accepted by the court if:

- it has ordered the report; or
- it has given special leave for a parent to submit a report that requires the child to see another specialist (s 102A).

An independent children's lawyer may ask the court to appoint an expert and present a report to the court (s 68M).

The independent children's lawyer

The court may decide to appoint an *independent children's lawyer* to represent the child's interests (s 68L).

The Full Family Court set out a list of situations in which it would be appropriate to appoint a separate representative for the child (see *Re K* [1994] FLC 92-461). An independent children's lawyer will often be appointed when:

- there are high levels of hostility and dispute between the parents;
- there are allegations of abuse or neglect of the child;
- there are allegations of family violence;
- one of the parties is not a parent of the child;
- there is a serious dispute because of a difference in religion or culture between the parents;
- allegations have been made about the views of the child and the child is mature enough to express their views;
- the parents or the child have serious mental health issues;
- there are difficult and complex issues involved in the matter.

The role of the independent children's lawyer

The independent children's lawyer's role is not to act as the child's legal representative, which means that the child cannot instruct the lawyer how to run the case. The independent children's lawyer should:

- form an independent view of what is in the child's best interests;
- act in what they believe is in the child's best interests (s 68LA(2)).

The lawyer's duties include:

- arranging for necessary evidence, including expert evidence, to be obtained and put before the court;
- acting impartially;
- putting the child's views before the court;
- minimising as far as possible the trauma of the proceedings for the child;
- if it is in the best interests of the child, facilitating a resolution of the matter (s 68LA(5)).

Appointing the independent children's lawyer

The court makes an order for the appointment of an independent children's lawyer on its own initiative, or on the application of the child or a parent. Legal Aid NSW is then requested to provide the lawyer (*Family Law Rules 2004*, r 8.02(2)), and will do so if it is reasonable.

In some cases, the parties are required to pay the cost of the independent children's lawyer.

[24.550] Equal shared parental responsibility

There is a presumption that it is in the best interests of the child for the court to make an order for *equal shared parental responsibility*.

What is equal shared parental responsibility

Equal shared parental responsibility means that parents have to consult each other and agree on decisions about "major long-term issues" such as (s 65DAC):

- the child's education (both current and future);
- the child's religious and cultural upbringing;
- the child's health;
- the child's name;
- changes to the child's living arrangements that would make it significantly more difficult for the child to spend time with a parent.

What equal shared parental responsibility is not

The Act makes it clear that equal shared parental responsibility does not refer to the amount of time the child spends with each parent.

Equal shared parental responsibility is only about major long-term issues, not day-to-day issues such as what the child eats or wears. The person with whom the child is staying at the time would normally make those decisions. Equal shared parental responsibility does *not* include a parent's decision to form a new relationship (s 4).

Where there is child abuse or family violence

The presumption for equal shared parental responsibility does not apply in cases of child abuse or family violence (s 61DA(2)). See also [24.580] for further discussion on family violence in family law matters.

Where the presumption can be rebutted

The presumption can be rebutted if it can be proved it is not in the best interests of the child for there to be equal shared responsibility (s 61DA(4)). The court can then make orders that one parent have sole parental responsibility, that is, sole responsibility for major long term decisions about the child.

Interim orders

When considering making interim orders, there are some cases where it may not be appropriate to apply the presumption because there is not enough evidence to make a decision.

The presumption does not have to be applied when an interim order is made if it is not appropriate in the circumstances.

Siblings

The court is reluctant to split up the children in a family – it is not a case of each parent getting some of the children (*Mathieson v Mathieson* [1977] FLC 90-230). The situation may be different if the children were separated while they were young and have been apart for a long time (*In the Marriage of Hayman* [1976] FLC 90-140).

Common misconceptions

There are many misconceptions about how the court decides cases involving the care of children. Some of them are discussed below.

My ex left the kids, so s/he can't have them

This is wrong. A person may have left the children behind for any number of reasons. They may have left in a crisis, or may not have had suitable accommodation for the children. The court will look at whether or not the parent is able to care for the children, regardless of who left the family home. If a parent has been out of the children's life for a long time, they will need to re-establish a relationship with the children before spending significant periods of time alone with them, especially if the children were young when they left.

Women always get the kids

Some men believe that they have little chance of obtaining an order for the children to live with them and that the court is biased in favour of women. The *Family Law Act* does not prioritise a child's relationship with either the mother or the father. Judges must consider the importance of a child

having a relationship with both parents (s 60CC). Since women generally take most of the responsibility for children's upbringing as primary carers, they often continue in this role after separation.

The separation was my ex's fault, so s/he doesn't deserve the kids

As with divorce, the question of who was at fault in the breakdown of the relationship is not relevant to a court decision about where children should live unless the parent's behaviour affects the children.

My ex got the kids so I don't have to give her/him anything else

Children are not property to be traded. It is the responsibility of parents to support a child unless there is a court order that says otherwise. Property entitlements are decided on the basis of past contributions and future needs. The court will not look favourably on a parent who wants to increase the amount of time a child spends with them simply to pay less child support.

[24.560] How much time should children spend with each parent?

Orders for a child to spend time and communicate with someone should be tailored to suit the particular circumstances of each family and the child's best interests.

The court will consider the developmental needs of the child. For example, orders to spend time with an infant might involve short, frequent visits. Then, as the child gets older, the frequency of the time may decrease but visits might be longer.

For school children, the court will normally specify arrangements for weekly or fortnightly visits and also specify what should happen during school holidays, Christmas, birthdays, Mother's Day, Father's Day or other special days.

Parenting orders will usually set out specific times and places for the child to be picked up and who will do this.

Equal time or substantial and significant time

If the court is making a parenting order for equal shared parental responsibility, the court must consider making an order for "equal time" or for "substantial and significant time", provided it is in the best interests of the child and reasonably practical to do so (s 65DAA).

What is "equal time"?

Equal time is not defined in the Act. It could be an arrangement where a child spends one week with one parent and then the next week with the other parent or where a week is split equally. It must be an arrangement that is in the best interests of the child and "reasonably practical".

What is "substantial and significant time"?

Section 65DAA(4) defines substantial and significant time as including weekends, weekdays and holidays, and allowing for parents to be involved in both the child's daily routines and special occasions.

What is "reasonable practicality"?

When deciding whether an arrangement is practical, the court will look at:

- how far the parents live from each other;
- the parents' ability to carry out an arrangement for equal time or substantial and significant time;
- the parents' ability to communicate with each other and resolve difficulties that might come up in the future;
- the impact that the arrangement would have on the child;
- any other matters as the court considers relevant (s 65DAA(5)).

Standard orders

There are no standard orders for children after separation. Equal time with each parent is not the default arrangement, nor is alternate weekends and half the school holidays with the father. The court must decide what arrangements are in the best interests of the child using the decision-making pathway outlined in s 65DAA (see [24.530]).

Does a child have to spend time with a parent?

Parents do not have a right to spend time or communicate with a child. The child, on the other hand, has a right to know and be cared for by both parents, referred to as a meaningful relationship. However, this right is balanced against the child's other right to be protected from harm, which

takes precedence over the right to a meaningful relationship where relevant.

A parent does not have to allow the child to spend time or communicate with the other parent unless there is a court order that requires it. However, spending time and communicating with a child is ordered in most cases, and unless the child is at risk, it is better to facilitate the child's relationship with the other parent even if there are no court orders. The court may look unfavourably on a parent who has not done this without a very good reason.

To prevent parents from feeling like they have to be a "friendly parent" when there is a risk of family violence, the law was changed in 2012 so that the court is no longer required to consider the willingness of a parent to facilitate a relationship with the other parent when determining the best interests of the child.

In determining whether a child is to spend time with a parent, the court will consider things such as the extent to which each of the child's parents has taken, or failed to take, the opportunity to participate in making decisions about major long-term issues in relation to the child, to spend time with the child and to communicate with the child and the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child.

Supervised time with a child

Supervised arrangements for spending time with a child are ordered if there is concern that the parent does not have appropriate parenting skills or there is some risk to the child's safety. Supervision can be provided by a children's contact centre, a family member or another trusted person.

Unacceptable risk of harm

The court can stop a parent from spending any time or communicating with a child if there is an unacceptable risk of harm, for example, because the parent has physically or sexually abused the child. Sometimes all contact with a parent is stopped because the level of conflict between the parties is so great that continued contact may cause the child harm.

Common misconceptions

I am entitled to 50:50 equal time

No one has a right to spend time with a child. The court will look at what is in the child's best interests and issues of practicality.

For shared care to work, there generally needs to be a high level of co-operation between the parents. The types of cases that get to court are often not suitable for a shared care arrangement. Cases that go to court usually involve issues of complexity such as violence, abuse, mental health problems, geographical distance or high levels of conflict.

Arrangements for 50:50 time are much more common where parents do not go to court at all. Sometimes this is because of misconceptions about having a "right" to equal time or because the parents' post-separation relationship is good enough for shared care to work.

Shared care works well for some families, allowing children to have a strong relationship with both parents. However, research shows that there are difficulties involved in shared care arrangements that require co-operative parenting. Shared care is also more likely to succeed where practical factors are favourable, including where both parents live very close to each other, fathers have flexible work arrangements, and mothers are in full-time employment.

Shared care is less successful and generally inadvisable where the children are very young, where there are high levels of conflict between the parents, or where there are issues of family violence and concerns for the children's safety. The Commonwealth Attorney-General's Department has published reports of research into shared care parenting and family violence in its website (www.ag.gov.au).

Applications for parenting orders

[24.570] Who can apply?

Under s 65C of the *Family Law Act*, an application for a parenting order can be made by:

- either or both the child's parents; or
- the child; or
- a grandparent of the child; or
- anyone else concerned with the child's care, welfare or development (s 65C).

In practice, most court cases are between children's parents.

If parentage of a child is in dispute, the court has the power to make orders for parentage testing (DNA testing).

The *Family Law Act* recognises same-sex couples with children as the legal parents of those children and as parents they can apply for parenting orders. (For more detailed information about same-sex couples and their children, see Chapter 37, Same-sex Couples and Their Families.)

Which court?

An application concerning children can be made to the Family Court, the Federal Circuit Court or the Local Court.

The Family Court deals with cases that have complex facts or raise complex legal issues, such as allegations of serious sexual abuse, severe family violence or mental health issues, international child abduction or special medical procedures. All other cases are normally filed in the Federal Circuit Court.

Transfer of proceedings

The Local Court can only deal with family law cases if both parties agree. If an application is made in the Local Court, unless both parties consent to the Local Court hearing the case on a final basis, it must be transferred to the Family Court or Federal Circuit Court (s 69N(3)).

The Federal Circuit Court and the Family Court can transfer proceedings to each other on the request of a party or the court's own initiative, however transfer is currently limited at some registries due to congestion.

Proceedings in more than one court?

The *Family Law Act* does not allow a party to start proceedings about the same issues in a second court if proceedings have already been started in another.

Before applying to the court

Check the pre-action procedures and mandatory dispute resolution requirements

Parties should make sure that they comply with, or are exempt from, the requirements before filing an application in court (see [24.500]).

Check the rules and directions

Before making an application to the court, it is important to check the *court rules* and *case management directions*. These are available on the courts websites or from the registries. For example, there may be a limit to the number of and length of affidavits to be relied upon in an interim hearing.

How to apply

Both courts use the same *Initiating Application* form.

In the Federal Circuit Court, the applicant must file:

- an *Initiating Application*; and
- *Notice of Risk*; and
- a s 60I certificate or seek an exemption from the requirement of attempting family dispute resolution;
- a supporting affidavit.

In the Family Court, the applicant must file:

- an *Initiating Application*; and
- *Notice of Child Abuse, Family Violence or Risk of Family Violence (Form 4)*; and
- a s 60I certificate or seek an exemption from the requirement of attempting family dispute resolution; and
- an affidavit must be filed if seeking interim orders.

To seek an exemption from the requirement of attempting family dispute resolution, the applicant must file either:

- an *Affidavit – Non-filing Dispute Resolution Certificate*; or
- set out the basis of the exception in an affidavit filed in support of an application.

Both courts have filing fees that must be paid when lodging an application.

If the matter is urgent

If urgent or emergency orders are needed, the case should be commenced in the usual way – by filing an *Initiating Application* form, unless an application has already been lodged, in which case an *Application in a Case* should be filed.

A supporting affidavit telling the court why the matter is urgent must be filed with interim applications in all family law courts.

Responding to an application

A response and an affidavit must be filed within the time set out in the *Federal Circuit Court Rules* or the *Family Court Rules 2004* (Cth). In the Federal Circuit Court, a response and affidavit must

be filed and served within 14 days of service of the application or cross-claim to which it relates (subr 4.03(2)) and in the Family Court, a response and all accompanying documents must be filed within seven days of the date for the case assessment conference, procedural hearing or hearing to which the response relates (r 9.08).

It is important to attend the first court date because the court can make orders even though one party is absent. If there is no time to get legal advice or file a response, it is best to go to the first court date and ask the court to adjourn the case for a few weeks.

The court process

Once an application is filed, the court process is governed by procedures and case management rules. The case management process is different in the Family Court and the Federal Circuit Court. Both the courts use a "docket system" where the case is allocated to a particular judge for the duration of the proceedings. Each judge actively manages the cases in their court, so there are different processes in each court registry and even between individual judges within the same registry.

Most parenting cases will be conducted according to the principles set out in Div 12A for *child-related proceedings*. This "less adversarial" approach is intended to make the court process more flexible and accessible, especially for self-represented litigants. One feature of this approach is to not require the use of the strict rules of evidence. Some cases, such as those involving international child abduction or allegations of serious physical and/or sexual abuse, are not dealt with using this less-adversarial approach.

The first court date

Both parties must attend court on the first date.

In the Federal Circuit Court, the first court date will usually be before a judge who will make directions about things that need to occur to get the case ready for trial and may order the parties to attend a conciliation conference or child dispute conference.

In the Family Court, the first court event will normally be before a registrar. After that, a family consultant will usually meet with the parties and the children as part of the *child-responsive program* where parties are encouraged to reach agreement before going to trial. If agreement is not reached, the case will go before a judge.

In urgent matters, the judge may make interim orders on the first court date.

If one party is afraid of the other

If one party is afraid of the other, the court should be told so that arrangements can be made for them to arrive and leave separately, to be apart at case assessment conferences or procedural hearings or to attend a court event by telephone or video. There are safe rooms at many courts and support workers can be arranged. To set up a safety plan, contact the National Enquiry Centre on 1300 352 000.

How long does it take for a court to make decisions about children?

The family law courts have guidelines about how long cases should take. Simple matters are usually expected to take six months from filing the application to the final hearing. Often, however, because of limited court resources, or for other reasons, they take longer – sometimes up to two or three years.

The court is required to deal with cases where there are allegations of child abuse or family violence quickly (ss 67Z, 67BA) (see [24.580]).

Interim applications

Interim applications are usually heard soon after filing. When filing an application for an interim order, it is best to be prepared for a hearing because the judge may make orders on that first day at court.

Family violence in family law matters

[24.580] Defining family violence

Section 4AB of the *Family Law Act* defines family violence as violent, threatening or other behaviour by a person that coerces or controls a member of the person's family, or causes the family member to be fearful. Examples of behaviour that may be family violence include (but are not limited to):

- an assault;
- a sexual assault or other sexually abusive behaviour;
- stalking;
- repeated derogatory taunts;
- intentionally damaging or destroying property;
- intentionally causing death or injury to an animal;
- unreasonably denying the family member the financial autonomy that he or she would otherwise have had;
- unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support;
- preventing the family member from making or keeping connections with his or her family, friends or culture; or
- unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

A child is considered to be "exposed" to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence. The legislation provides some examples of situations that may constitute a child being exposed to family violence:

- overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or
- seeing or hearing an assault of a member of the child's family by another member of the child's family; or
- comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or
- cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or
- being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.

Notice of Risk

In the Federal Circuit Court, a *Notice of Risk* must be filed by each party in all cases involving children, whether there is a risk of family violence or not. It covers risk factors in addition to family violence or child abuse, such as mental ill-health and drug or alcohol abuse.

In the Family Court, a *Notice of Child Abuse, Family Violence or Risk of Family Violence (Form 4)* must be filed in any children's case involving allegations of abuse or violence (ss 67Z, 67ZBA; r 2.04A). Note that this form is not just for allegations of child abuse; it also used to notify the court there is a history of family violence or a risk of family violence to a parent.

Parenting orders and family violence orders

Difficulty can arise in family law cases where there is family violence, because the state courts deal with family violence orders (called *apprehended violence orders* or AVOs in NSW), while family law is dealt with by the Commonwealth courts.

Family law orders will override the terms of an AVO that are inconsistent with the parenting order (s 68Q).

If the AVO was made first

The family law courts are required to ensure that any parenting orders they make do not expose people to family violence. If the court makes a parenting order that is inconsistent with an existing AVO, it must:

- state in the order that it is inconsistent with the AVO;
- give a detailed explanation about how contact is to take place;
- explain the order to everyone affected by it;
- serve a copy of the order on various named parties, such as the police and the Local Court (s 68P).

If the parenting order was made first

The Local Court has the power to vary a parenting order when it makes an apprehended violence order (AVO). If the Local Court makes a final AVO, it can vary, revive, discharge or suspend a parenting order (s 68R). If the court makes an interim AVO, it can vary, revive or suspend the order, but only for the period of time the interim AVO remains if effect (s 68T).

This can only happen when the Local Court "has before it material that was not before the court that made the order" (s 68R(3)).

The usual matters the court has to take into account in making parenting orders do not apply here. The court has to consider them but is not bound by them. This is to reflect that these orders will usually be made on short notice, and with the primary aim of protecting a person from violence.

Family violence allegations – personal cross-examination ban

Personal cross examination means asking a witness questions directly rather than having questions asked by a lawyer.

From 11 September 2019, personal cross-examination will be banned in family law proceedings in certain circumstances where there are allegations of family violence.

The ban will apply automatically if:

- either party has been convicted of, or charged with, an offence involving violence, or a threat of violence, to the other party;
- a family violence order (other than an interim order) applies to both parties; or
- an injunction under ss 68B or 114 for the personal protection of either party is directed against the other party.

The court may use their discretion and apply the ban where there are allegations of family violence.

If the court does not ban personal cross-examination, then the court must put in place other appropriate protections.

An application to apply the ban may be made by either party, the independent children's lawyer or the court can decide to apply the ban itself. Applications can be made for matters that will have hearing dates after 11 September 2019.

If the ban applies, then lawyers must conduct the cross examination of both parties. A party to the proceeding can hire a private lawyer or apply to their relevant legal aid commission for representation under the Commonwealth Family Violence and Cross Examination of Parties Scheme.

Under the Commonwealth Family Violence and Cross examination of Parties Scheme, legal representation is available for representation. There is not a means or merit test for approval of a grant however parties may be asked to contribute to the cost legal representation depending on their financial circumstances.

Allegations of sexual abuse

Where there is an allegation of sexual abuse, the family law courts do not need to decide whether or not it has actually occurred. What the court must decide is whether spending time with the parent (supervised or unsupervised) would pose an unacceptable risk to the child of sexual abuse, or of other physical, emotional or psychological harm or disturbance.

If the court decides abuse has occurred

If the court decides that abuse has occurred, it is on a civil standard of proof – on the balance of probabilities – and based on the rules of evidence (*G v M* [1995] FLC 92-641). Because of the seriousness of such allegations, the court will be very strict in applying the standard of proof (*Briginshaw v Briginshaw* (1938) 60 CLR 336).

If the court cannot reach a decision

If the court cannot decide on the evidence whether or not abuse occurred, it must decide whether the risk of a child spending time with the parent who is alleged to have abused the child is acceptable in view of the serious harm caused to a child by sexual abuse (*N and S and the Separate Representative* [1996] FLC 92-655; *In the Marriage of B* [1993] FLC 92-357; *C v C* [2002] FMCAfam 146).

The Magellan Program

Many of the cases that the Family Court has to decide at a hearing involve serious allegations of child sexual abuse and serious physical abuse of a child.

To deal with them, the Family Court has developed the Magellan Program, which requires both intensive management of cases by the court and cooperation from the NSW Department of Communities and Justice.

When an application for parenting orders is filed and there are allegations of serious physical and/or sexual abuse, the case is given to the Magellan Registrar who considers listing the matter in the Magellan Program. The aim is to deal with these cases quickly, ideally within six months.

Contravention of parenting orders

[24.590] When a parenting order is made, each person affected by the order must comply with it. This includes taking all reasonable steps to comply.

The family law courts do not oversee or follow up court orders, and the police do not enforce parenting orders. If there is a breach of a court order, (called a *contravention*) the usual first step is to attempt family dispute resolution and try to resolve the problem. A lawyer will be able to give legal advice and may also be able to help resolve the problem without going to court.

If agreement cannot be reached, an application for a court order can be made, both to deal with the contravention and to change the court orders if necessary.

When family dispute resolution is not necessary before filing a contravention application

Family dispute resolution is not necessary prior to filing in the following circumstances:

- the application is in response to the other party's application;
- the court is satisfied that there are reasonable grounds to believe there has been or is a risk of child abuse or family violence;
- the application is about a serious contravention (breach) of parenting orders that were made in the last 12 months;
- the application is urgent; or
- a party is unable to participate; for example, because of a disability, or because there are no services in their area (s 60I(9)).

What is a contravention?

A court order is contravened if a person who is bound by it:

- intentionally breaches the order;
- makes no reasonable attempt to comply with it;
- intentionally prevents someone else (who is bound by the order) from complying with it;
- helps someone who is bound by the order to breach it.

Examples of contraventions include where a parent does not return a child to the other parent, or fails to make the child available to spend time or communicate with the other parent.

What is a "reasonable excuse"?

In some circumstances, the court may consider that there was a *reasonable excuse* for contravening the court order. "Reasonable excuse" is defined in s 70NAE of the *Family Law Act*; it is not whatever the parent thinks is fair or proper. Reasonable excuses that may satisfy a court include:

- not understanding the obligations imposed by the order; or
- a reasonable belief that it was necessary to contravene the order to protect the health and safety of the child, the parent, or someone else; and
- the contravention was for no longer than was necessary to protect the health and safety of the person.

If a parent has been prevented from spending time with a child

Some examples of situations when it is unlikely that the court will accept that there was a reasonable excuse for stopping the child from spending time with the other parent include:

- if the child does not want to spend time;
- if a parent does not agree with the court orders;
- if a parent does not like the other parent's new partner;
- if the child has a cold;
- if the child had homework.

If the child is unwell

In some situations, illness of a child may be considered a legitimate excuse for not following a parenting order. The court must be convinced that not complying with the parenting order was reasonable in all the circumstances and was only for a reasonable amount of time. However, the Full Court has made it clear that a child should not be prevented from spending time with the other parent as ordered unless it is necessary to protect the child's health. For example, the court would need to be persuaded that the child could not be moved, or that the other parent did not have the skills to care for the child (*Childers v Leslie* [2008] FamCAFC 5).

If the child is in danger

If a child is in danger, the parent should stop the child spending time with the other parent and contact the Department of Communities and Justice. They should also obtain legal advice immediately and consider making an application to the court to have the parenting order varied.

If there are serious ongoing problems

If there are serious problems or issues as to why a parenting order for spending time or communicating with a child is not appropriate, it is likely that an application to vary the orders will be required. Legal advice should be sought if there are ongoing problems with the orders.

It is not appropriate for high conflict cases to be repeatedly dealt with through contravention applications. If this is happening, the court is likely to vary the orders to prevent further court cases.

If there was no reasonable excuse

If the court decides that an order has been contravened without a reasonable excuse, the court can make orders that are appropriate in the circumstances, for example:

- a person attend a post-separation parenting program;
- lost time with a child be made up;
- compensation be paid for reasonable expenses;
- a parenting order be changed;
- legal costs be paid.

In serious or persistent cases, a bond, fine, community service order or prison sentence can be ordered.

Where a parent does not want to spend time with a child in accordance with orders

Where a parent does not spend time with a child in accordance with orders, the court will not treat this as a contravention of orders and a court will not force a parent who does not want to spend time with a child to spend time if he or she does not want to.

Variation of parenting orders

[24.600] Duration of orders

Unless the order states otherwise, a parenting order continues to have effect until the child:

- turns 18;
- marries or enters a de facto relationship;
- is adopted by another person.

[24.610] If circumstances change

If circumstances change substantially, an application to vary (change) parenting orders may be made. The courts are reluctant to disturb the existing situation or for parties to be constantly going back to court, and will not consider an application where there are existing parenting orders unless the applicant establishes that there has been a significant change in circumstances (*In the Marriage of Rice and Asplund* [1979] FLC 90-725).

If the parent the child lives with dies

If there are orders for a child to live with one parent and that parent dies, the surviving parent does not automatically become the primary carer. That parent, or anyone else concerned about the matter, must apply for a new parenting order.

Relocation

[24.620] If the parent the child lives with wants to move

Parents with orders for the child to live with them often find themselves in difficulty if they want to relocate because of family support, violence, job opportunities, or some other reason. If the move will make it more difficult to comply with existing arrangements or orders about spending time, the other parent will need to agree, or the parent wanting to move will need to make an application to court seeking a change in orders and relocation.

If there are no existing orders, it is important to obtain the other parent's agreement to the move, preferably in writing, to avoid being ordered to return with the children until the case has been decided.

It is best if parties can come to an agreement as to how the other parent will spend time with the child. Any agreement can be put in the form of a parenting plan or consent orders.

If the parent the child spends time with will not agree

If the other parent will not agree, the parties will need to participate in family dispute resolution (unless an exemption applies – see page 126) before an application can be filed at court to get an order allowing them to move with the child. Moving without the other parent's consent or a court order means the moving parent risks a recovery order being made for the child to be returned to the other parent.

What must be shown in relocation cases

There is no separate set of principles for deciding relocation cases. The courts must consider the best interests factors and what is reasonably practical, just as they must in any other case about where a child should live. This includes considering whether equal time or substantial and significant time is appropriate.

Neither of the parties bears an onus (responsibility) of proving that the child should or should not be allowed to relocate. The court looks at the proposals made by both parents. However, satisfying a court that it is in the best interests of a child to relocate can be difficult because it is often harder to maintain a meaningful relationship with the other parent. The court must also consider the parent's right to live wherever they wish within Australia.

The parent who wishes to move should tell the court:

- why it is in the best interests of the child that they be allowed to relocate; and
- how the other parent will be able to maintain a meaningful relationship with the child.

If a parent the child does not live with wants to move

There has not yet been a case where the court has forced a parent to stay living close to their child if they want to move away.

Parental abduction of children

[24.630] If a child is taken or not returned

If a child has been taken from, or not returned to, their primary carer, the carer can apply for a *recovery order* in the Federal Circuit Court, Family Court or Local Court. They can make this application whether or not they have family court orders about the child.

What a recovery order does

A recovery order is a court order that can require a child to be returned to the person who is their usual carer. It can empower state, territory and federal police to find and return the child to their carer. It may also prohibit a person from taking the child again.

Urgent application

Recovery orders are urgent applications and should be made as soon as possible. The applicant will need to persuade the court that the situation is urgent and that the order must be made straight away. If it is not considered urgent, the parents are expected to try to resolve the matter themselves through family dispute resolution before applying to court.

In some cases, the court may make an ex parte order (an order made in the absence of one of the parties).

Applying for other orders

If the carer does not already have a parenting order, they should apply for a parenting order that the child lives with them at the same time as applying for the recovery order.

Location orders and Commonwealth information orders

The court can make a *location order* or a *Commonwealth information order* to obtain information on the whereabouts of the parent and the child from individuals or from state and federal government departments such as Centrelink.

[24.640] International abduction

Children may not be taken overseas without the consent of both parents or a court order. If a child has been taken overseas without the knowledge or consent of a parent, or kept there for longer than agreed, there are steps that can be taken to have the child returned to Australia.

Emergency number if child will be taken overseas

If a child has been abducted and there is a risk that a child may be taken out of the country before the next working day, call the National Enquiry Centre on 1300 352 000 to access the courts 24-hour emergency service.

Hague Convention countries

Australia is a party to the *Hague Convention on the Civil Aspects of International Child Abduction*. If a child is taken to another signatory country, they will usually be returned to Australia. Under the convention, a child must be returned to their home country unless:

- the parent seeking the return has had no contact with the child for some time;
- there is a grave risk that the child would be harmed if returned;
- the child is an older child, and has expressed a strong objection to being returned;
- the child has been away from their home country for more than a year and is settled (*Family Law (Child Abduction Convention) Regulations 1986* (Cth), reg 16).

Hague Convention countries are listed in Sch 2 of the *Regulations*.

Under the convention, it is not necessary for the person who had the child taken from them to have had a parenting order at the time; only that:

- the child usually lives in the country they were taken from; and
- the person whose child has been taken has a legal right under the law of that country to determine where they may live.

The *Family Law Act* automatically gives these rights to parents on the birth of a child without any orders.

Who takes action?

The Commonwealth Attorney-General is responsible for taking action to locate and secure a child's return, at no cost to the parent whose child has been taken. A solicitor with the NSW Department of Communities and Justice prepares the application.

Non-convention countries

Some countries that are not signatories to the Hague Convention are reciprocating jurisdictions for the purpose of enforcing court orders (see *Family Law Regulations 1984*, Sch 2).

This means Australian parenting orders may be registered in these countries. The orders may then be enforced, and the child ordered to be returned to Australia.

If a child has been taken to a country that is not a member of the Hague Convention, a parent may be able to get assistance from the Consular Branch of the Department of Foreign Affairs and Trade. The service operates 24 hours a day and can be contacted on 1300 555 135.

Preventing overseas abduction

Preventing a child from being taken overseas is much easier than retrieving them.

The Family Law Watchlist

If overseas abduction is a risk, the child can be put on the Family Law Watchlist kept by the Australian Federal Police. Any child on the list will be stopped as they pass through customs before boarding a plane or ship.

The Federal Police require either a parenting order or an application for a parenting order to have been filed in the family law court before they will put a child on the Family Law Watchlist.

Passports

The Australian Passport Office has a list of children to whom it will not issue a passport. If they do not have a passport already, any child at risk can be placed on this list as well as the watch list.

If the child does have a passport, it should be kept locked away if possible.

If the child is eligible for a passport from another country, the consulate or embassy of that country should be contacted to determine what procedures they have to prevent the overseas abduction of children.

Taking children overseas

Heading: applying for a passport

An application for a child's passport must be signed by each person who has parental responsibility for the child. This means that where a person has an order for sole parental responsibility, the signature of only that parent is required for the passport application.

If one parent refuses to sign a passport application or give consent for a child to travel overseas, a parent can complete a *Form B9 (Child without full parental consent)* and lodge it with the Australian Passports Office. The form asks an Approved Senior Officer of the Department of Foreign Affairs and Trade to consider issuing the passport due to "special circumstances".

Special circumstances can include situations where the child has not seen the other parent for more than three years, or when there is a family violence order against the non-consenting parent. Even if an application meets these criteria, there is no guarantee that the application will be approved.

If a parent will not consent and the Passports Office will not issue the passport without consent, the parent can apply to the Federal Circuit Court, Family Court or Local Court for an order that the passport be issued and for permission to travel overseas. If a holiday is planned, the court may require evidence of return tickets, or the lodgement of some surety to guarantee return.

Heading: Overseas travel where there are parenting orders or a filed application for parenting orders

Where there are parenting orders in place, or an application for parenting orders has been made, it is an offence to take or send or retain a child overseas without the written consent of the other parent to the travel or a court order which allows for travel (*Family Law Act*, ss 65Y, 65YA). The written consent must be "authorised consent" in accordance with reg 13 of the *Family Law Regulations 1984* which provides that a consent in writing must be authenticated by a person mentioned in s 8 of the *Statutory Declarations Act 1959* (Cth) endorsing on the consent a statement that (1) the person is satisfied about the identity of the person signing the consent; and (2) the consent was signed in the person's presence. The offence does not apply if the person believes the conduct is necessary to prevent family violence (*Family Law Act*, ss 65Y(2), 65YA(2)).

Changing a child's name

In NSW, a child's name cannot be changed without the consent of both parents or a court order. An order for sole parental responsibility is not sufficient to change a name without the consent of the other parent, because the rules about birth certificates are covered by NSW law. Even though a child's name is one of the "major long-term" decisions a parent with sole parental responsibility can make by themselves, a specific court order is still required by NSW law (*Births, Deaths and Marriages Registration Act 1995* (NSW), s 28).

If parents agree

If the parents agree, they should both sign an *Application to register a change of name for a child born in NSW* form and file it with the NSW Registry of Births, Deaths and Marriages.

If parents don't agree

If the parents disagree about the name change, either parent may apply to court for permission to change the child's name. In NSW, the application can be made to either the Federal Circuit Court or to the District Court of NSW.

What the court considers

The court will decide whether or not to change the child's name by looking at what is in the best interests of the child. The court should look at things such as:

- the short and long term effects of a change;
- any embarrassment likely to be experienced by the child if his or her name is different from the parent they live with;
- any confusion of identity which may arise for the child if his or her name is changed or is not changed;
- the effect a change of name would have on the relationship between the child and the other parent;
- the amount of time the other parent has spent with the child and is likely to spend in the future;
- the degree of identification that the child has with each parent;
- the effect of frequent or random name changes.

A child's name must not be changed unless the child consents to the change, or the child is unable to understand the meaning and implications of the change of name (*Births, Deaths and Marriages Registration Act 1995*, s 29).

Evidence required

Evidence of why the name change is in the child's best interest must be provided to the court. This may include, for example, evidence that the child:

- wishes to change their name;
- suffers embarrassment or even a sense of rejection because their surname is different from that of their primary carer;
- has had no contact with their other parent for a long time.

Evidence of usage such as school reports, a doctor's letter or a Medicare card may also be presented to the court.

Registering the change

If the court grants an order, it needs to be given to the NSW Registry of Births, Deaths and Marriages for the change to be made and to get a new birth certificate. In NSW, the order must explicitly direct the Registrar to change the register.

Contact points

[24.650] If you have a hearing or speech impairment and/or you use a TTY, you can ring any number through the National Relay Service by phoning **133 677** (TTY users, chargeable calls) or **1800 555 677** (TTY users, to call an 1800 number) or **1300 555 727** (Speak and Listen, chargeable calls) or **1800 555 727** (Speak and Listen, to call an 1800 number). For more information, see www.communications.gov.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS National) on **131 450** to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online, see www.tisnational.gov.au.

Changes are expected to the websites for many NSW government departments that were not available at the time of printing. See www.service.nsw.gov.au for further details.

Courts

Family Court of Australia

www.familycourt.gov.au

Federal Circuit Court

www.federalcircuitcourt.gov.au

Family Law National Enquiry Centre

ph: 1300 352 000 (including after hours emergency service)

Court Support

Women's Domestic Violence Court Advocacy Services (WDVCAS) provide information, assistance and referrals to women seeking Apprehended Violence Orders in Local Courts across NSW. For a list of contacts, see Contact points of Chapter 19, Domestic Violence.

Women's Family Law Support Service

(for women going through family law proceedings who have experienced domestic or family violence)

Sydney 9217 7389 or 0422 874 201 or wflss@bigpond.com sruti.wflcss@awccs.com.au (Sydney Registry only)

If you have any concerns about your safety while attending other family courts, call 1300 352 000.

Government resources

Department of Human Services

www.humanservices.gov.au:

Centrelink (Department of Human Services)

families and parents: 136 150

complaints and feedback: 1800 132 468

multilingual service: 131 202

www.humanservices.gov.au/customer/dhs/centrelink

Child Support

general enquiries: 131 272

information service: 131 107

feedback & complaints: 1800 132 468

multilingual interpreting: 131 450

Family Assistance (Department of Human Services)

ph: 136 150 (between 8 am and 8 pm Monday to Friday)

ph: 131 202 (for languages other than English)

Family and Community Services (previously "DoCS")

www.community.nsw.gov.au

Head Office: 9716 2222

Child Protection Helpline: 132 111 (to report child abuse and neglect, 24 hrs)

Domestic Violence Line: 1800 65 64 63 (24 hrs)

Enquiries, feedback & complaints: 1800 000 164

A list of Community Services offices is in Contact points of Chapter 7, Children and Young People.

Family Relationship Services

Interrelate Family Centres

www.interrelate.org.au

ph: 1300 473 528 or 8882 7800 (for list of Children's contact services)

Uniting

www.uniting.org

ph: 1800 864 846

Relationships Australia

www.relationships.org.au

ph: 1300 364 277

Family Dispute Resolution Services

Family Relationships Online

Includes register of accredited Family Dispute Resolution Practitioners

www.familyrelationships.gov.au

Family Relationship Advice Line

ph: 1800 050 321

Family Relationship Centres in NSW

Bankstown: 9707 8555

Bathurst: 6333 8888

Blacktown: 8811 0000

Campbelltown: 4629 7000

Central Coast (Erina): 4363 8000

Coffs Harbour: 6659 4100

Dubbo: 6815 9600

Fairfield: 9794 2000

Lismore: 6623 2700

Newcastle: 4016 0566

Nowra: 4424 7150
Parramatta: 9895 8144
Penrith: 4720 4999
Sutherland: 8522 4400
Sydney City: 8235 1500
Tamworth: 6762 9200
Taree: 6551 1200
Wagga Wagga: 6923 9100
Wollongong: 4220 1100

Community Justice Centres
www.cjc.nsw.gov.au
ph: 1800 990 777

Children's Contact Centres
www.accsa.org.au
Albury/Wodonga Upper Murray Family Care: 6057 5399
Bella Vista Interrelate Family Centre: 8882 7850
Blacktown Relationships Australia: 8811 0000
Broadmeadow (Newcastle) Relationships Australia: 4940 1500
Campbelltown CatholicCare: 4628 0044
Central Coast Relationships Australia: 4389 8760
Coffs Harbour Interrelate Family Centre: 6659 4150
Dubbo Interrelate Family Centre: 6815 9650
Harris Park Central West Contact Service: 9893 7949
Lismore Interrelate Family Centre: 6623 2750
Orange Interrelate Family Centre: 6363 3650
Penrith Relationships Australia: 4728 4800
Port Macquarie Interrelate Family Centre: 5525 3200
Nowra CatholicCare: 4421 8248
Sutherland Interrelate Family Centre: 8522 4450
Sydney CatholicCare Contact Service: 9307 8200 or 13 18 19
Tamworth Family Support CCS: 6763 2333
Wagga Wagga Relationships Australia: 6923 9180
Wollongong Catholic Care: 4227 1122

Australian Children's Contact Services Association
www.accsa.org.au
Counselling and crisis support
Some Family Relationship Services listed also provide counselling.

Child Abuse Prevention Service
www.childabuseprevention.com.au
ph: 1800 688 009 or 9716 8000

Domestic Violence NSW
www.dvnsw.org.au
ph: 9698 9777 or 9698 9771

Domestic Violence Line
ph: 1800 656 463 (telephone counselling, information and referrals access refuge referrals, 24 hours, seven days).

Dr Marie
www.mariestopes.org.au
ph: 1300 003 707

Family Planning NSW
www.fpnsw.org.au
ph: 8752 4300
Talkline: 1300 658 886

Link2Home
(statewide homelessness information and referral telephone service)
Lph: 1800 152 152

Immigrant Women's Speakout
www.speakout.org.au
ph: 9635 8022

Lifeline Telephone Counselling Service
www.lifeline.org.au
ph: 131 114 (24 hrs)

MensLine Australia
www.mensline.org.au
ph: 1300 78 99 78

Parentline
www.parentline.org.au
ph: 1300 1300 52

Rape & Domestic Violence Services Australia
www.rape-dvservices.org.au
ph: 8585 0333

NSW Rape Crisis
www.nswrapecrisis.com.au
1800 424 017 (24 hrs)
1800 211 028 (Sexual Assault Counselling Australia)

1800RESPECT (sexual assault or domestic and family violence counselling)
www.1800respect.org.au
1800 737 732 (24 hrs)

Women's health centres

Women's Health NSW
(peak non-government body for women's health)
www.whnsw.asn.au
ph: 9560 0866

Bankstown Women's Health Centre
www.bwhc.org.au
ph: 9790 1378

Blacktown Women's and Girls' Health Centre
www.womensandgirls.org.au
ph: 9831 2070

Blue Mountains Women's Health and Resource Centre
www.bmwhrc.org.au
ph: 4782 5133

Central Coast Community Women's Health Centre Ltd
www.cccwhc.com.au
ph: 4324 2533 (Wyoming), 4351 1152 (Wyong), 4342 5905 (Woy Woy)

Central West Women's Health Centre Inc
www.cwwhc.org.au
ph: 6331 4133

Coffs Harbour Women's Health Centre
www.genhealth.org.au
ph: 6652 8111

Cumberland Women's Health Centre Inc
www.cwhc.org.au
ph: 9689 3044

Hunter Women's Centre
www.hwc.org.au
ph: 4968 2511

Illawarra Women's Health Centre
www.womenshealthcentre.com.au
ph: 4255 6800

Immigrant Women's Health Service
www.immigrantwomenshealth.org.au
Fairfield: 9726 4044
Cabramatta: 9726 1016

Leichhardt Women's Community Health Centre
www.lwchc.org.au
ph: 9560 3011

Lismore & District Women's Health Centre Inc
www.lismorewomen.org.au
ph: 6621 9800

Liverpool Women's Health Centre
www.liverpoolwomenshealth.org.au
ph: 9601 3555

Penrith Women's Health Centre Inc
www.penrithwomenshealthcentre.com.au
ph: 4721 8749

Shoalhaven Women's Health Centre
www.shoalhavenwomenshealthcentre.org.au
ph: 4421 0730

South Coast Women's Health and Welfare Aboriginal Corporation – Waminda
www.waminda.org.au
ph: 4421 7400

Sydney Women's Counselling Centre
www.womenscounselling.com.au
ph: 9718 1955

Wagga Womens Health Centre
www.waggawomen.org.au
ph: 6921 3333

WILMA Women's Health Centre
www.wilma.org.au
ph: 4627 2955

Women's Centre Albury-Wodonga
www.womenscentre.org.au
ph: 6041 1977

Legal assistance

Child Support Service (Legal Aid NSW)
www.legalaid.nsw.gov.au
ph: 1800 451 784 or 9633 9916

Immigration Advice and Rights Centre (IARC)
www.iarc.asn.au
admin: 8234 0700
advice: 8234 0799 (Tues and Thurs 2–4 pm)

LawAccess NSW
www.lawaccess.nsw.gov.au
ph: 1300 888 529

Legal Aid NSW
www.legalaid.nsw.gov.au
For contacts, call LawAccess
ph: 1300 888 529

Wirringa Baiya Aboriginal Women's Legal Centre
www.wirringabaiya.org.au
ph: 1800 686 587 or 9569 3847

Women's Legal Service NSW
www.wlsnsw.org.au
ph: 8745 6900 (administration)
Women's Legal Advice Line
ph: 1800 801 501 or 8745 6988
Domestic Violence Legal Advice Line
ph: 1800 810 784 or 8745 6999
Indigenous Women's Legal Contact Line
ph: 1800 639 784 or 8745 6977
Care and Protection Legal Advice Line
ph: 8745 6908
Working Women's Legal Service
ph: 8745 6954

Community Legal Centres NSW
www.clcnsw.org.au
ph: 9212 7333

Child abduction and recovery

Australian Federal Police
www.afp.gov.au/what-we-do/services/family-law/family-law-kit

Commonwealth Attorney-General's Department
www.ag.gov.au/FamiliesAndMarriage/Families/InternationalFamilyLaw

Hague Convention
www.hcch.net

International Social Services Support
www.iss.org.au

Consular emergency helpline, Department of Foreign Affairs and Trade
www.dfat.gov.au/Pages/contact-us.aspx
ph: 1300 555 135 (24 hours)
Outside Australia: +61 2 6261 3305