

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

*This information is based on the law as at July 2010. It is written for the use and benefit of women who contact the Women's Legal Centre (ACT) and is to be read in conjunction with the specific advice given to those women when they contact the Centre.*

You can file an application for a parenting order in either the Federal Magistrates Court or the Family Court. Usually applications are filed in the Federal Magistrates Court. If your matter is a complex one you go to the Family Court - see the Centre's tip sheet *How do I apply to the Family Court for a Parenting Order?*

## **What do I do before filing my application ?**

There is a requirement under the Family Law Act that before filing any application for parenting orders you have to attend Family Dispute Resolution (FDR) unless you are excused from doing so. See the Centre's tip sheet *Family Dispute Resolution*.

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

## **Do I need to have a solicitor?**

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

If you do not have much money you may be able to get Legal Aid. Your case for Legal Aid is sometimes stronger if you are responding to the other side's application.

## **What types of parenting orders can you apply for?**

You can apply for an *interim* order or a *final* order.

An interim order is the order that you have in place until a final order is made.

If you only apply for a final order in the Court then your matter may not be heard by the Federal Magistrate for at least a year.

If your matter is urgent then you must apply for an interim order as well as a final order so that it can be dealt with by the Court sooner. Most applications before the Court in relation to children contain applications for interim as well as final orders.

The orders sought are generally orders about with whom the children will live and how they will spend time with and communicate with the other parent. They may also include orders such as not removing the children from the area or about the children's schooling.

In parenting cases it can be very difficult to change a certain situation if it has been in place for some time. Therefore, if your children have been living in a "week about" situation since your separation six months ago, you may have problems convincing the Court, especially on an interim basis, that your children should now come and live with you (unless you can prove that your children are in some sort of 'danger' staying in the current situation). You will need strong evidence that an interim order is not in your child's best interests to get a different final order.

If your matter does go to trial the Court will nevertheless consider all the evidence before it. The Court will have more time to look at the issues at the trial than at the interim-hearing.

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

#### **What documents do I need to file?**

- An Initiating Application
- An affidavit from you and any third parties supporting your case
- If you are alleging child abuse or family violence, or a risk of either, a form 4 – notice of child abuse or family violence

You also need to file two photocopies of your application and any affidavit or form 4 filed, plus an extra photocopy for each additional other party.

The following documents must also be filed:

- A filing fee - which is currently \$243, unless exempt
- a certificate from a FDR practitioner, unless exempt

#### **What about Local Courts?**

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

### **Service of documents**

Once the documents have been filed at the Registry, two or more stamped copies will be returned to you. The stamped (*sealed*) Court documents will have the date of your first Court appearance written on the top right hand corner.

You keep one copy and you have to arrange for the other copy or copies to be served upon (that is, given to) the other party or parties. The Court will not do this for you. If the other party already has a solicitor acting for them, you can serve their solicitor. If they do not have a solicitor acting for them, then you have to arrange for them to be served with the documents.

You cannot physically serve them yourself. If there is no-one appropriate you know who is prepared to serve the documents for you, then you will have to pay a process-server to do it. You can find a process-server through the Yellow Pages. The person who serves the documents must then sign an affidavit of service. This is so you can later prove to the Court that the other person received the documents, if they do not turn up to Court.

It is also possible to serve by post or electronically, provided the other party acknowledges receipt of the documents served.

Once the other person has received your documents, they will then have to file and serve their response on you, normally together with their own affidavit in support of the orders that they want.

### **What happens at Court?**

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

- give directions about things you must do (ask you or the other party to do certain things to help settle the matter)
- order that a Family Report (see below) be prepared
- order you and the other party or parties attend family dispute resolution if you haven't already attended
- fix a date for a final hearing
- conduct an interim hearing if the matter is urgent and the Court has the time to hear it (if there is no time available then a later date will be fixed)
- finally determine the application

Different rules apply to interim and final applications. Interim hearings are done *on the papers*. This means that the Federal Magistrate decides what is in your child's best interests based on the affidavit material of the parties and the *submissions* or 'arguments' that are put forward. You need to swear or affirm that an affidavit is true when you sign it.

As a general rule there is no giving of evidence from the witness box and there is no cross-examination of the other parent or person at an interim hearing. The Court aims to hear all cases within six months of filing, but it is quite often a longer process than this.

### **What is a family report?**

A family report is a report specifically prepared for Court by a family consultant. The family consultant will talk to you, the other party or parties and the children (if they are old enough). The family consultant will include in that report everything they believe is appropriate when dealing with the care, welfare and development of your children. He or she will sometimes make recommendations at the end of the report as to what they see as the likely consequences should your children live with one person as opposed to the other. Sometimes they even suggest who they think the children should live with and what time they should spend with the other party. You may need to pay for part of the cost of the report.

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

### **What is an independent children's lawyer?**

In some 'difficult' matters before the Court it is appropriate to have an independent children's lawyer (what used to be called a child or a separate representative) for example, where there are allegations of child abuse or where there are real issues of cultural or religious differences affecting your child. It is the role of the independent children's lawyer to act on behalf of your child, rather than on behalf of one of the parties.

It is the job of the independent children's lawyer to present evidence (if relevant) and make submissions at the trial as to whom they think your child should live with and what time if any, they should spend with the other party.

### **What if I don't agree with the orders the Federal Magistrate makes?**

If you believe that the Federal Magistrate made a mistake in a matter of fact or law then you can lodge an appeal. You cannot, however, lodge an appeal just because you are unhappy with the decision. Appeals are very expensive and there are strict time limitations (usually 28 days) to follow. Appeals are not things to be entered into lightly. If you believe that you have grounds for an appeal, then you must seek urgent legal advice.

If you wish to appeal against an interim decision then you first need to obtain the Court's leave.

If later on you and the other parent or person can agree about any changes to the orders you want made, then you can file a consent order to change them. If there is no agreement, and you want to vary the orders which have been made (and you are

not lodging an appeal) you must wait until there has been a 'significant change in circumstances' before you can file another initiating application.

**What if the other person does not comply?**

If the other parent or person does not comply with the order once it has been made, then you can bring a contravention application. The Court has the power to vary a parenting order (where one party has contravened the order) without the need for a separate variation application to be filed.

**About the Women's Legal Centre**

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

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

Local	6257 4499
Outside Canberra	1800 634 669

The Women's Legal Centre is funded by the Indigenous Justice and Legal Assistance Division, Commonwealth Attorney-General's Department.