FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA

Before you file – pre-action procedure for parenting cases

This brochure provides information for people considering applying to the Federal Circuit and Family Court of Australia (the Court) for parenting orders.

It provides information about the pre-action procedures required before starting a case. For more information, see Rule 4.01 and Schedule 1 of the Federal Circuit and Family Court of Australia (Family Law) Rules 2021 (Family Law Rules).

Similar pre-action procedures apply to financial cases.

For more information, see the brochure Before you file – pre-action procedure for financial cases.

What is required?

The Family Law Act 1975 (the Act) requires a person to make an attempt to resolve disputes about parenting matters using family dispute resolution (FDR) services before applying to a court for a parenting order.

For more information, see the Court's brochure Compulsory Family Dispute Resolution – court procedures and requirements. This brochure outlines the additional steps you will need to take before filing an application in the Court under the Family Law Rules. These requirements are designed to assist you, the other parties to your dispute and the Court to resolve your dispute as quickly and as amicably as possible while taking into account the best interests of the child/ren. Further information about these requirements can also be found at www.familyrelationships.gov.au or by phoning the Family Relationships Advice line on 1800 050 321.

Before you file an application

Except for those situations listed under What applications are exempt? (see below), all prospective parties making an application for parenting orders under Part VII of the Act must first obtain a certificate pursuant to section 60I of the Act before filing an application.

What applications are exempt?

Under section 60I(9) of the Act, you can seek an exemption from providing a certificate in the following circumstances:

- if your matter is urgent
- if the Court is satisfied that there are reasonable grounds to believe that:
  - there has been child abuse and/or family violence by a party
  - there is a risk of family violence by a party, and/or
  - there is a risk of child abuse if there were to be a delay in applying to the Court
- where a party is unable to participate effectively in FDR (for example, due to an incapacity to do so or physical remoteness from a FDR provider)
- if your application relates to an alleged contravention of an existing order that was made within the last 12 months, and there are reasonable grounds to believe that the person who has allegedly contravened the order has behaved in a way that shows a serious disregard for his or her obligations under that order.

To apply for an exemption for any of the reasons above, you must either:

- prepare and file an Affidavit – Non-Filing of Family Dispute Resolution Certificate, or
- if you are filing an Initiating Application (Family Law) seeking interlocutory or interim orders, you can provide reasons in the affidavit filed in support of your Initiating Application.

The Affidavit – Non-Filing of Family Dispute Resolution Certificate is available on the Court's website at www.fcfcoa.gov.au.

Family violence or child abuse exemption

If you seek to apply for an exemption relating to family violence or child abuse, you need to obtain information from a family counsellor or FDR provider about the services and options (including alternatives to court action) available to you. You can get this information by calling the Family Relationship Advice Line on 1800 050 321 or by talking to a family counsellor or FDR provider.

This does not mean that you must attend or participate in FDR. All that you are required to do is obtain information about services and options that are available.

You must provide written acknowledgment that you have received the information from a family counsellor or FDR provider. You can do this by completing the form Acknowledgment – Information from a Family Counsellor or Family Dispute Resolution Practitioner. This form is available on the Court's website at www.fcfcoa.gov.au. If you are filing an Initiating Application (Family Law) seeking interlocutory or interim orders, you may confirm that you have obtained this information in the affidavit filed in support of your Initiating Application (Family Law) instead.

Obtaining the information from a family counsellor or FDR provider is not required where, in addition to the grounds listed above, the Court is satisfied there are reasonable grounds to believe that:

- there would be a risk of abuse of a child if there were a delay in applying for the order, or
- there is a risk of family violence by one of the parties to the proceedings.

When don't I need to provide a certificate?

You also do not have to provide a certificate if you are seeking:

- interlocutory orders only (these are interim or procedural orders) unless you are applying for these orders at the same time as filing an Initiating Application (Family Law)
- financial orders only, even if you have children
- consent orders
- Hague Abduction Convention orders
- child support, or
- an amended application (relating to a child that is the subject of the current application).

General information and responsibilities

Pre-action procedure objectives

The objectives of the pre-action procedures are to:

- encourage early and full disclosure through the exchange of information and documents about relevant issues
- help people resolve their differences quickly and fairly, and to avoid legal action where possible. This will limit costs and hopefully avoid the need to start court proceedings
- where an agreement cannot be reached out of court, help parties to identify the real issues in dispute. This should help reduce the time and costs involved in court proceedings, and
- encourage parties to seek only those orders that are realistic and reasonable on the evidence.

Your obligations as a prospective party to a case

If your attempts at FDR are unsuccessful, you:

1. will need to exchange with the other prospective parties written correspondence to clearly identify exactly what issues remain in dispute. This is explained in more detail in the Step-by-Step section of this brochure, and

2. must comply, as far as possible, with the duty of disclosure (see page 6 of this brochure).

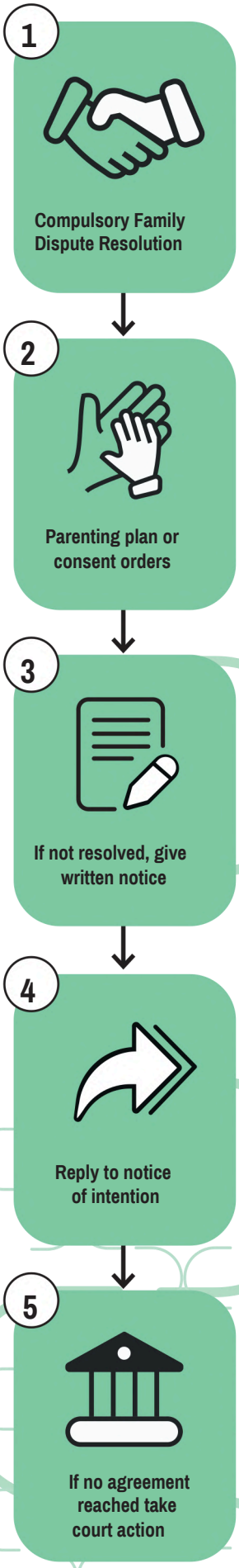
The best interests of the child is the Court's primary consideration when resolving or determining parenting disputes. At all stages during the pre-action negotiations and during any proceedings in the Court, you must keep in mind the following:

- the need to protect and safeguard the interests of the child
- the importance of a continuing safe relationship between the child and both parents and the benefits the child gains from the parents cooperating with one another
- the potential damage to a child involved in a dispute, particularly if the child is encouraged to take sides or take part in any dispute between the parents
- the importance of identifying issues early and exploring options for settlement
- the need to avoid protracted, unnecessary, hostile and inflammatory exchanges
- the impact of correspondence on the reader, particularly on the other party/ies
- the need to seek only those orders that are reasonably achievable on the evidence and that are consistent with current law, and
- the duty to make full and frank disclosure of all material facts, documents and other information relevant to the dispute – see page 6 for more on disclosure.

Parties must not:

- use the pre-action procedure for an improper purpose; for example, to harass the other party or to cause unnecessary cost or delay, or
- in correspondence, raise irrelevant issues or issues that might cause the other party to adopt an entrenched, polarised or hostile position.

The Court expects parties to take a sensible and responsible approach to pre-action procedures.



The pre-action procedure - step-by-step

STEP 1: Comply with the requirements of Compulsory FDR

This process is set out in the Court's Compulsory Family Dispute Resolution – court procedures and requirements brochure.

To obtain a copy of this brochure:

- go to www.fcfcoa.gov.au
- live chat on the website
- call 1300 352 000, or
- visit your nearest family law registry

Live Chat

For more information, including information about the exceptions to participate in compulsory FDR, go to www.familyrelationships.gov.au or call 1800 050 321.

STEP 2: Enter into a parenting plan or apply for consent orders

If an agreement is reached, you and the other party may enter into a parenting plan or apply to the Court for consent orders. For more information on parenting plans, go to www.familyrelationships.gov.au.

For more information or to get an Application for Consent Orders Kit:

- go to www.fcfcoa.gov.au
- live chat on the website
- call 1300 352 000, or
- visit your nearest family law registry

Live Chat

If the FDR process (see step 1) was unsuccessful in resolving the dispute, bear in mind that there are other dispute resolution processes such as family counselling, negotiation, conciliation and arbitration, in which you and the other parties could participate in, to resolve or narrow the issues in dispute. You can participate in all of these dispute resolution processes at any time before commencing court action.

STEP 3: If your case is not resolved, give written notice of issues and future intentions

A person considering applying to the Court must give the other person/s written notice of the intention to start a court proceeding (called a notice of intention), setting out:

- the issues in dispute
- the orders to be sought if a case is started
- a genuine offer to resolve the issues, and
- a nominated time (at least 14 days after the date of the letter) within which the other person must reply.

STEP 4: Reply to the notice of intention

If you receive a notice of intention, you must reply in writing stating whether the offer is accepted within the nominated time. If an agreement is reached, refer back to Step 2.

If you do not accept the offer, you must set out in a letter:

- the issues in dispute
- the orders you will seek if a case is started
- a genuine counter offer to resolve the issues, and
- a nominated time (at least 14 days after the date of the letter) within which the initiating party must reply.

If you do not respond, the initiating party's obligation to follow the pre-action procedures ends.

STEP 5: If no agreement is reached: taking court action

Where an agreement is not reached after reasonable attempts to resolve it by correspondence, other appropriate action may be taken to resolve the dispute, including filing an application in the Court.

Compliance

If a proceeding is then started, the Court will consider whether the pre-action procedures have been complied with and, if not, what the consequences should be (if any).

The Court may:

- where there is unreasonable non-compliance, order the non-complying party to pay all or part of the costs of the other party or parties in the case, and/or
- take compliance or non-compliance into account when making orders about how your case will progress through the Court. (See for example, rules 1.33, 1.34, 4.04, 12.15 and 12.16 of the Family Law Rules)

The Court may also ensure that the complying party is in no worse a position than they would have been if the other party had complied with the pre-action procedures. Examples of non-compliance with pre-action procedures include:

- not sending a written notice of a proposed application to the other party
- not providing sufficient information or documents to the other party
- not following a procedure as required by the pre-action procedures
- not responding appropriately within the nominated time to the written notice of proposed application, and
- not responding appropriately within a reasonable time to any reasonable request for information, documents or other requirements of this procedure.

Disclosure and exchange of correspondence

Parties have a duty to make timely, full and frank disclosure of all information relevant to the issues in dispute. There may be serious consequences for failing to disclose, including punishment for contempt of court. The Court's Duty of Disclosure brochure provides more information.

In summary, parties should promptly exchange copies of documents in their possession or control relevant to an issue in dispute at all stages, including before starting proceedings. Examples of documents include medical reports, school reports, letters, drawings and photographs.

In particular, parties are encouraged to refer to Rules 6.03 and 6.05 of the Family Law Rules as a guide to what information to provide and documents to exchange. Rule 6.15 of the Family Law Rules sets out documents that do not need to be produced. These include documents where there is a claim for privilege from disclosure or documents that have already been disclosed and where there has been no change likely to affect the result of the case.

Parties must not use a document disclosed by another party for any purpose other than to resolve or determine the dispute for which it was disclosed. That is, in seeking the documents through the pre-action procedures, the party receiving them is considered by the Court to have given an undertaking that they will be used for the specific purposes of the case only.

Where there are disagreements about disclosure, it may be appropriate for an application to be filed with the Court.

Expert witnesses

As part of the pre-action procedures, you or the other parties may require information from an expert witness. There are strict rules about instructing and obtaining reports from an expert.

In summary:

- An expert must be instructed in writing and must be fully informed of his or her obligations.
- Where possible, parties should seek to retain an expert on an issue only where an expert's evidence is necessary to resolve the dispute.
- Where practicable, parties should agree to obtain a report from a single expert instructed by both parties.
- If separate experts' reports are obtained, the Court requires the reports to be exchanged.

Lawyers' obligations

Lawyers have a duty, as officers of the Court, not to mislead the Court. In complying with this duty, lawyers must, as early as practicable:

- advise clients of ways of resolving the dispute without starting legal action
- advise clients of the obligations and requirements imposed by sections 60I and 60J of the Act.
- advise clients of their duty to make full and frank disclosure and of the possible consequences of breaching that duty
- endeavour to reach an agreement rather than start or continue legal action, provided this is in the best interests of the client and any child
- notify the client if, in the lawyer's opinion, it is in the client's best interests to accept a compromise or settlement where, in the lawyer's opinion, the compromise or settlement is a reasonable one
- in cases of unexpected delay, explain the delay to their client and whether or not the client may assist to resolve the delay
- advise clients of the estimated costs of legal action
- advise clients about the factors which may affect the Court's consideration in ordering costs
- encourage clients to engage meaningfully in dispute resolution during the proceedings
- actively discourage clients from making ambit claims or seeking orders which the evidence and established principles, including recent case law indicates, is not reasonably achievable, and
- provide clients with documents prepared by the Court (if applicable) about:
  - the legal aid services and dispute resolution services available to them, and
  - the legal and social effects and the possible consequences for children of proposed litigation.

The Court recognises that the pre-action procedures cannot override a lawyer's duty to their client. It is accepted that it is sometimes impossible to comply with a procedure because a client may refuse to take advice. However, if a client wishes not to disclose a fact or document which is relevant to the case, a lawyer has an obligation to take appropriate action, that is, cease to act.

Legal advice

You should seek legal advice before deciding what to do. A lawyer can help you understand your legal rights and responsibilities, and explain how the law applies to your situation. A lawyer can also help you reach an agreement with the other party without going to court.

You can seek legal advice from a:

- legal aid office
- community legal centre, or
- private law firm.

Court staff can help you with questions about court forms and the Court process, but cannot give you legal advice.

Personal safety

If you have any concerns about safety while attending court, please call 1300 352 000 before your court appointment or hearing. Options for your safety at court will be discussed and arrangements put in place.

By law, people must inform the Court if there is an existing or pending family violence order involving themselves or their children. More detail may be found in the fact sheet Do you have fears for your safety when attending court?.