Please note: The *Family Law Act* is changing after 6 May 2024. The information provided in this 12th edition of Women and Family Law is specific to the current *Family Law Act 1975*. Please read the 'important information box' on page 48 for details. You can contact Women's Legal Service NSW for legal advice about how these changes might affect your parenting matter.

4. Children

4.1 When parents can agree on future arrangements for the children

Do we have to go to court about the children?

The *Family Law Act 1975* (***Family Law Act***) encourages separating parents to agree on parenting arrangements without going to court. If you and the other parent can agree about arrangements for your children, then you do not have to go to court at all.

We agree about arrangements for the children – what now?

There are three options:

- You can have an ***informal agreement*** about the care and living arrangements of your children. Your agreement can be verbal or in writing. There are some benefits to having informal arrangements, for example, they can be much more flexible than court orders. However, they are not enforceable and if they are not detailed enough, this can lead to misunderstandings about what the agreement means.
- You can write a ***parenting plan*** about the arrangements for your children. A parenting plan is a written agreement, signed and dated by you and the other parent. It sets out the future care arrangements for your children. It can cover who has **parental responsibility** for the child, who the child lives with, spends time with and communicates with, child support payments and other issues. Parenting plans are not legally binding and cannot be enforced if one parent does not

follow the agreement. However, the court will take into account the agreement made in a parenting plan if your case later goes to court and the court believes it is in your children's best interests to do so. You can write a parenting plan yourselves or get the assistance of a **Family Dispute Resolution Practitioner (FDRP)** (see ➤ **section 4.2** below) or a lawyer.

- You can have your agreement or parenting plan made into ***consent orders*** by way of an *Application for Consent Orders* filed with the court. Generally, this does not require you to attend court; the Application and orders are considered by the judge in Chambers. The court will only agree to the orders if they are in the best interest of the child. The advantage of consent orders is that they are legally enforceable. This means that you can be sure that the other party will comply with the agreement.
- That said, it is important to know that having consent orders won't mean that a court will force a parent to spend time with children if they don't want to – see ➤ **What can I do if the other parent doesn't want to see the children?** Consent orders are usually in place until the children turn 18 years old. It is difficult to change consent orders and usually, unless both parties agree to a change, you will need to show the court that there has been a significant change in circumstances if you want the court to change them. Because consent orders will be in place for a long period of time and because they are very hard to change once you have agreed to them, it is particularly important to get advice from a lawyer before you agree to them or sign anything.

You can also combine the certainty of court orders with the flexibility of parenting plans to cover different aspects of the arrangements.

When we can't agree on future arrangements for the children

When you cannot agree there are two options:

1. Attend **Family Dispute Resolution** (FDR) to see if you can reach an agreement (see ➤ *section 4.2* below); or if that is unsuccessful or not appropriate
2. File an Application in the Family Law Court for **parenting orders** (see ➤ *section 4.3* below).

4.2 Family Dispute Resolution

What is Family Dispute Resolution?

Family Dispute Resolution (**FDR**) is a way of trying to sort out family law disagreements without going to court. This method is sometimes also called mediation and the mediator is called an **FDR practitioner** (**FDRP**).

An FDRP is a trained, neutral person who helps people discuss their family law issues to see if they can reach an agreement that is acceptable to both parties. FDRPs do not tell you what to do or give legal advice. They try to help you to explore options you may not have thought of and to reach an agreement that reflects what is important to both people involved.

You can do FDR at a Family Relationship Centre, at Legal Aid (if you are eligible) or with a private FDRP. If you are doing FDR through a service that is not an FRC or Legal Aid, it is important to make sure that the FDRP is accredited to provide FDR in family law matters.

What is a Family Relationship Centre?

Family Relationship Centres (**FRCs**) are government-funded services that provide information to people about relationship issues including parenting, financial help and pre-marriage counselling.

FRCs also provide family dispute resolution services to help separating parents work out arrangements for their children. FRCs provide assessment, preparation and three hours of family dispute resolution for free or a low fee.

There are FRCs across NSW. See ➤ *Chapter 9: Referrals and Resources*.

Do I have to participate in FDR?

In most circumstances, you must participate in FDR with the other parent before you can make an **application** to the court for **parenting orders**. However, there are important exceptions to this requirement (see below).

If you cannot reach an agreement at FDR or an exception applies, you may be able to apply to the court for parenting orders. However, you will also need to make sure that you have followed the pre-action procedures outlined below. See ➤ *section 4.3*.

If you are not eligible for an exception and you do not attend FDR or comply with the other pre-action procedures, then a costs order may be made against you if you file in court.

How does the court know I have attended FDR?

You can make an application to court for parenting orders if:

- you have a **section 60I certificate** from the FDRP who assisted you; and
- you have complied with the pre-action procedures; or
- an exception applies to you, and you include this information in your application.

A section 60I certificate from a FDRP will state one of the following:

- the other **party** did not attend for FDR;
- all parties attended and a genuine effort was made to resolve the dispute;
- one party did not make a genuine effort to resolve the dispute; or
- the FDRP decided that FDR was not appropriate.

If a genuine effort to resolve the dispute is not made, it may affect future court decisions about legal costs.

A section 60I certificate is only valid for 12 months. This means that if you want to use your certificate, you must file an application for parenting orders within 12 months from the date of the last attempt at family dispute resolution. If you miss the 12 months and still want to file parenting orders, you will need to try FDR again unless you are eligible for an exception.

What are the exceptions to FDR?

You will not need to get a certificate from a FDRP if:

- you and the other parent are applying for consent orders;
- your application is in response to the other party's application;
- the court is satisfied there are reasonable grounds to believe there has been or is a risk of abuse or family violence;
- your application is about a **contravention** of parenting orders that were made in the last 12 months, and the person who breached the court order showed serious disregard for their obligations under the order;

- your application is urgent; or
- one of the parties is unable to participate in FDR for a reason such as having a disability or living in a remote location.

If you think that you may be eligible for an exemption you should get legal advice as soon possible.

It is important to remember that even if you do not attend FDR prior to filing in Court because you are eligible for one of the exceptions, the court can still order the parties to attend FDR. Safety measures can be put in place to make sure you can safely participate.

Should I try FDR if I have experienced family or domestic violence?

It can be difficult to decide whether or not to try FDR if you have experienced domestic violence. FDR works best when there is equal bargaining power between the two parties. Where one party has significant power over the other, it is often difficult to achieve a fair resolution. A woman who feels less powerful or is intimidated may make concessions or agree to decisions that are not necessarily in her best interests, that are not what she really wants, are not safe or may not be in the best interests of the children.

However, a woman may still be able to achieve a fair **settlement** if she has good legal advice and a lawyer (see below) and feels safe to assert her rights with FDRPs present. FDR can be part of a healing and empowering process but should be entered into with caution and good support.

If you are thinking about inviting the other parent to go to FDR and you have experienced domestic violence, it is important to get legal advice first. Sometimes it's better not to start the FDR process at all and a lawyer can help you work through this before you approach the FDR provider or the other parent about it.

If I have experienced domestic violence, how can I try and make FDR work for me?

The following suggestions might help you to make FDR work for you if you have experienced family violence:

- Tell the FDRP about your experience of domestic violence and discuss what they can do to provide a safe process;

- If you will feel intimidated or afraid to be in the same room as your ex-partner ask about a telephone FDR or a shuttle FDR (see ➤ *what is shuttle FDR below*);
- Make arrangements for separate times to arrive and leave and the use of separate waiting rooms;
- Get legal advice before attending FDR. A lawyer can give you advice about your circumstances and what proposals you could offer to ensure the proposal is in the best interests of your children and safe and which will also keep you safe;
- Get legal advice about any potential agreement to make sure your agreement is fair and safe. Don't sign an agreement if you are unsure about what you are agreeing to or if you are unsure about whether it is in your best interests or the best interests of your children;
- Have a lawyer represent you in your FDR session. This provides an important safeguard if there is a history of domestic violence;
  - If you are eligible for legal aid, you could participate in a Family Law Conference which is a type of FDR where you can have a **lawyer** present;
  - Ask your local FRC about having a lawyer represent you in FDR. Some community legal centres provide free representation in FRCs, or you can pay a lawyer to represent you in the FDR session;
  - You can have a lawyer represent you in FDR provided by a private FDR service.

What is shuttle FDR?

Shuttle FDR is where the parties are in different rooms. The FDRP moves between rooms to listen and pass information about the issues and possible solutions between the parties, meaning you don't have to see or speak directly with the other parent. Shuttle FDR is one way of attempting to provide a safe environment where there is a history of domestic violence. FDR can also be done by telephone in appropriate circumstances.

What happens in FDR?

FDR is usually scheduled for three hours, but it may finish earlier or go for longer. FDR could also run over a number of sessions. It is important to have breaks and for the session not to go too long, otherwise it's too exhausting.

Different FDRPs may use different processes but usually an FDR session will include the stages described below.

1 Opening statement by the FDR Practitioner

The FDRP explains their role (a neutral person there to assist communication and negotiation) and outlines the expected process.

2 An opening statement by each party

Each party is asked to give a short statement outlining how they see the situation and how they and/or the children have been affected. No interruptions are allowed. It does not matter who goes first.

3 The FDRP summarises both opening statements

Listen carefully and let the FDRP know if they have got anything wrong.

4 Setting the agenda (list of issues or topics to discuss)

The FDRP identifies issues and works with the parties to set an agenda for the session. It might include issues like where the children live, when and how they spend time with the other parent, schooling, how the parties will communicate with each other about the children and so on.

5 Exploration

The FDRP works with both parties to explore the issues on the agenda one at a time. There is usually lots of talking and sometimes allegations are made about past behaviour. The purpose of FDR is not to decide the truth of an allegation; it is about making decisions about future arrangements for the children.

6 Private sessions

The FDRP may stop the session one or more times to talk privately with each party. Private sessions are confidential. The FDRP explores options with each party, discusses underlying issues or hidden agendas and asks the parties to think about whether options are practical. They may also explore alternatives to those each party may have proposed.

7 Negotiation

Some FDRPs enter into a negotiation stage towards the end. At this stage, the FDRP might become more involved in problem solving, assessing options, identifying common interests and focusing on the best interests of the children.

8 Agreement

Agreement in FDR is by consensus, that is, both parties agree on the outcome. You might reach agreement about some but not all issues. The FDRP may want to put your agreement in writing. It is really important to get legal advice before signing any written agreement.

9 Termination

Termination of FDR occurs where there is no agreement. This may be because a party walks out or does not show up, where the parties cannot reach an agreement or where safety issues cause the FDRP to decide to end the FDR. If this happens the parties will be given a section 60I certificate that states that FDR was unsuccessful. This certificate allows either party to file an application in court within 12 months of the date that they last attempted family dispute resolution.

Important Information on preparing for FDR

The following suggestions may help you prepare for FDR.

- Get legal advice before going to FDR. Consider your best and worst alternatives to a negotiated agreement. You might hear this called a 'BATNA' and 'WATNA'. They may be the range of orders a court may make. Knowing the best and worst alternatives will help you in the negotiations.
- Prepare a short opening statement to make at the beginning of the FDR meeting. Give your view of the situation and how you and/or the children have been affected.
- Prepare for the rest of the FDR meeting by writing notes to take with you and help you remember what to talk about. Write notes about:
  - your main concerns - the issues that you need to have resolved. Focus on what is in the best interests of your children and explain why;
  - what you want and why it is best for your children; and
  - what you might agree to in the short term and what would need to happen or change for you to move beyond this short-term arrangement.

- If your ex-partner gives their opening statement first, do not respond to what is said – stick to the opening statement you prepared. The FDRP's job is to identify the issues and give you a chance to respond to them later.
- Be prepared to let the FDRP know if you need a break, if you want to continue in separate rooms because you're feeling unsafe or too stressed to continue in the same room (shuttle FDR) or if you feel the session needs to end. It's important the FDRP knows any difficulties you are having with the session. Otherwise, there is a risk that she or he may decide that a genuine effort wasn't made to resolve the dispute and this may affect future court decisions about legal costs.
- Stick to the agreed ground rules during the session.
- Try not to interrupt when others are speaking. Write down your concerns and raise them when it's your turn.
- Don't feel pressured to sign a parenting agreement at the FDR session – get legal advice first.

4.3 What do I need to do before going to court?

When parents cannot agree on the arrangements for their children, either parent may apply to the court for a decision about what is best for the children.

It is important to get legal advice quickly so you can decide whether you need or should apply for court orders. Sometimes it's better not to apply for court orders even when you can't reach an agreement. A lawyer can give you advice about this based on your personal circumstances.

Generally, the *Family Law Act* requires parties to try and reach an agreement and to complete a number of steps before they file an application in court for parenting orders. See ➤ *section* below. If you have completed these steps, then you can file an application to the court for parenting orders.

However, there are some important exceptions to these requirements. See ➤ *section* below.

Pre-action procedures

The things that a person must do before they file an application in court are called "pre-action procedures."

Generally, before filing an application for parenting orders, you must:

- invite the other party to dispute resolution;
- agree on a dispute resolution service and attend dispute resolution;
- provide written notice to the other party of your intention to file an application to the court for parenting orders (if the other person refused to attend FDR, or if the FDRP assessed it as unsuitable for FDR or if there was no agreement at FDR).

What does my Notice of Intention need to include?

Your Notice of Intention should:

- be in writing;
- set out any issues that are in dispute;
- outline the orders that you want;
- include a genuine offer to resolve your dispute;
- include a nominated time (at least 14 days after the date of the letter) within which the other person must reply.

Are there any circumstances where I do not need to comply with all the pre-action procedures?

You may not have to complete all of these steps if it is not safe to do so or if your matter is urgent.

If you think that it would be unsafe to comply with any of these requirements or if your matter is urgent then you should get some legal advice as soon as possible as you may be eligible for an exemption from complying with these procedures.

It is important to check with a lawyer because in some circumstances the court can make a costs order against you if you have not completed all of the steps and you were not eligible for an exemption.

What if I receive a Notice of Intention?

If you receive written notice from the other parent advising that they intend filing in court for parenting orders, you must reply to this letter in writing. You should get legal advice before responding to the letter.

How do I respond to a Notice of Intention?

Your response to a Notice of Intention to commence legal proceedings should:

- be in writing;
- say whether you accept an offer (including if it is only a part of the offer) that has been made by the other person;
- set out any issues that are still in dispute;
- outline the orders that you want;
- include a genuine counter offer to resolve the issues; and
- include a nominated time (at least 14 days after the date of the letter) within which the other person must reply.

4.4 Parenting Orders

Who makes parenting orders?

Parenting orders are any orders about children which are approved or made by the court. Parenting orders can be made by the parties by consent (by agreement) (see ➤ *4.1* above) or by a judge after hearing all of the evidence and deciding what arrangements are in the best interests of the child.

What can parenting orders cover?

Parenting orders deal with who has **parental responsibility**; where the children live; who the children spend time with; how parents should communicate with each other about the children; the communication children are to have with another person (including by phone, video call or email) and any other aspect of each child's care, welfare and development.

Who can apply for parenting orders?

An application for a parenting order can be made by anyone who has a genuine interest in the child. This means it does not have to be made by a parent. It enables people such as a grandparent to apply to the court for orders about children.

What is parental responsibility?

Both parents automatically have parental responsibility for a child until that child turns 18. Parental responsibility means 'all the duties, powers, responsibilities and authority that, by law, parents have in relation to children'. If you separate from the other parent, your parental responsibility does not automatically change. Both parents can still make important decisions about the child's life.

What is equal shared parental responsibility?

The *Family Law Act* presumes that it is in the best interests of the child to make an order that provides for equal shared parental responsibility.

When an order is made for equal shared parental responsibility, parents are obliged to consult each other and make a genuine effort to reach an agreement about major long-term issues about the child. These issues include:

- the child's education (both current and future);
- the child's religious and cultural upbringing;
- the child's health;
- the child's name; and
- changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent. (This does not include a parent's decision to form a relationship with a new partner, but does include moving to another area.)

The presumption for equal shared parental responsibility does not apply in cases of child abuse or family violence. In these circumstances, the court must look at whether there should be equal shared parental responsibility or sole parental responsibility.

Equal shared parental responsibility does **not** mean the amount of time the child spends with each parent is the same. The decision about equal shared parental responsibility is made separately to any decisions about how much time a child spend with each parent.

What is sole parental responsibility?

Sole parental responsibility means that one parent can make the long-term decisions for a child without needing to consult with the other parent or anyone else.

The court can make an order for sole parental responsibility where there has been family violence or where it is otherwise in the best interests of the child for only one parent to make long term decisions for a child.

How are the best interests of the child decided?

The 'best interests of the child' is the most important consideration when the court makes orders about children. The best interests of the child are made up of primary and additional considerations.

The primary considerations are:

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

The need to protect children from harm is given greater weight in cases where there is family violence, child abuse or risk of exposure to violence or abuse.

The additional considerations are:

- the views of the child;
- the nature of the relationship of the child with parents and others, including grandparents;
- the extent each parent has participated in:
  - making long term decisions about the child;
  - spending time with the child; and
  - communicating with the child;
- the extent to which each parent has met their obligations to maintain the child (non-payment of child support can be considered);
- the effect of change to the current arrangements for the child;
- the practical difficulties and expense of '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 the parent and others to provide for the needs of the child;
- the maturity, sex, lifestyle and background of the child and parents;

- if the child is an Aboriginal or Torres Strait Islander child, the right to enjoy Aboriginal or Torres Strait Islander culture;
- the parent's attitude to the child and to parenting;
- any family violence involving the child or a member of the child's family;
- an order that is least likely to lead to further proceedings; and
- any other fact or circumstance the court thinks relevant.

The court must consider any current family violence orders.

Is it likely that the court will order equal time living arrangements?

If the court orders each parent to have equal shared parental responsibility for the child, the court must then consider making an order for the child to live with each parent on an ***equal basis*** or to provide for the child to spend **substantial and significant time** with the other parent. Substantial and significant time should include weekend, weekdays and holidays and allow for parents to be involved in daily routines and special occasions. The court can only order these care arrangements if it is in the best interests of the child and reasonably practical. The court considers:

- how far apart the parents live from each other;
- the parents' current and future capacity to have an arrangement where the child can spend **equal time**, or **substantial and significant time**, with each of the parents;
- the parents' current and future capacity to communicate with each other and resolve any difficulties that might arise in making an arrangement work;
- the impact that an arrangement would have on the child; and
- other matters the court considers relevant.

Important information – changes to the *Family Law Act*

The *Family Law Act* is changing after 6 May 2024. There will no longer be a presumption that it is in a child's best interests for the court to make an order for equal shared responsibility.

The court will no longer need to consider whether it is in a child's best interest to spend equal or significant and substantial time with both parents.

The court will consider whether is in a child's best interest to make an order for joint decision making or sole decision making.

The court will still consider the 'best interests of the child' as the most important consideration when making orders about children.

The court will no longer need to consider primary and additional considerations. The court will instead consider the following 'general considerations':

- what arrangements would promote the safety of the child and the people who have responsibility for the child;
- the child's views;
- the developmental, psychological, emotional and cultural needs of the child;
- the capacity of each person who has, or is proposed to have, parental responsibility, to provide for the child's needs;
- the benefit to the child of having a relationship with their parents and other significant people, where it is safe to do so;
- any other relevant circumstances.

Why have orders for children to spend time and communicate with someone?

The main aim of making parenting orders about children spending time or communicating with the other parent is to foster an ongoing relationship between a child and both parents. As long as there are no significant risks of harm to a child, it helps children if you encourage them to spend time with their other parent.

Does the court always make orders for children to spend time and communicate with the other parent?

Parents do not have an automatic right to spend time with or to communicate with a child. The child on the other hand, has a right to know and be cared for by both parents as long as it is safe. Unless you can show that there is an unacceptable risk of abuse or neglect or family violence directed towards the child or the child's family members, the court usually

makes orders for a child to spend time and communicate with the parent the child does not live with.

I have a child with my same sex partner. What are my options? Am I a parent?

If you were in a **de facto relationship** with the birth mother and you consented to the assisted/artificial conception or you were married to the birth mother when the child was conceived through donor insemination, then you are the child's legal parent. As a parent, you have parental responsibility for the child. If you cannot agree with the other parent about arrangements for the child then you can apply to the court for the child to live with you, spend time or communicate with you.

If the child was born as a result of sexual intercourse with a man, and you did not give birth to the child, then you are not the child's legal parent (even if you were in a de facto relationship or married at the time) but you can apply to the court as someone concerned with the child's care, welfare or development.

Can I apply for a parenting order?

You can apply to the court for a parenting order if you are the child's legal parent or as a person who has a genuine interest in the child and is concerned with the child's care, welfare or development.

I'm a grandmother. Do I have any rights to see my grandchildren?

If you are a grandparent, you can apply to the court to see your grandchild. The *Family Law Act* says that children have a right to spend time with their relatives and other significant people if it is in their best interests. The relationship between a child and other people, including grandparents, is specifically included in the list of considerations about the best interests of the child. If you want an order to spend time or communicate with your grandchild, then you must make sure you comply with the pre-action procedures (see above), including attempting FDR before applying to the court for orders. You will need to tell the court why it is in the best interests of your grandchild to make the orders you want. It is possible to apply for court orders even if the child's parents are still together. Legal Aid NSW has a brochure about legal options for grandparents. See ➤ *Chapter 9: Referrals and Resources*.

4.5 Going to court

Do I need a lawyer?

It is possible for you to go through the entire court proceedings without having a lawyer at all and many people have no other choice. You will need to be prepared to 'represent' yourself in court by finding out about the law, the court rules and the **practice directions (document that set out court procedure)**, writing **affidavits** yourself and making arguments to the court about why it should make the orders you are asking for. This can be particularly hard if the other parent has a lawyer.

If you are on a low income, you should see if you are eligible for legal aid. You can also get free legal advice from some community legal centres and many family lawyers will give you a free first appointment.

The **Family Law Court** has tried to simplify procedures so it is easier for you to apply for orders without the assistance of a lawyer. Check the court rules and case management and practice directions. These are available from the court registries or on the Federal Circuit and Family Court of Court of Australia website: fcfcoa.gov.au.

While it is possible to represent yourself, it is in your interest to get advice from a lawyer and have your paperwork reviewed by a lawyer before you file paperwork in court. It is important to see a lawyer who is experienced in family law.

What is a ban on personal cross examination?

In certain circumstances, unrepresented parties may be prevented from cross examining another parent. This is often called a **section 102NA order**. The court must make this order in certain circumstances including:

- where either party has been charged with or convicted of an offence involving violence or threat of violence involving the other party;
- a final Family Violence Order Applies to both parties; or
- an injunction has been made under section 68B or section 114 of the *Family Law Act*.

The court can also make this order if there have been allegations of family violence and if it considers the order appropriate.

If the court makes a 102NA order that prevents a party from cross examining another party, the unrepresented party can apply for assistance

under the Legal Aid Family Law Cross Examination Scheme. This means that person will have a lawyer for the final hearing and a small amount of preparation work in preparing for the final hearing. This is not means tested and you do not have to pay for the lawyer appointed to you.

For more information, see ➤ *Chapter 2: Getting Help*.

What documents do I need to start my court case?

To start your court case, you must file the following documents:

- Initiating Application;
- Affidavit;
- Notice of child abuse; family violence or risk; and
- Genuine Steps Certificate.

While you don't have to get a lawyer to prepare these documents, the documents can be complicated and it is very important that you include all the relevant information, so it is a good idea to get legal advice about them before you file.

There is usually a filing fee payable when you file your documents. In some circumstances you may be eligible for an exemption from paying these fees, for example if you have a health care card or pensioner concession card you may not have to pay the fee. You may also be eligible for an exemption if you have a grant of legal aid or if you are represented by a community legal centre. It is a good idea to check on the court website or with the court registry to see if you may be eligible for a fee exemption.

What do I do if I have been served with an Initiating Application and other court documents?

It is very important that you don't ignore any court documents that you receive, and it is a good idea to get legal advice as soon as possible.

You will need to file the following court documents:

- Response to Initiating Application;
- Affidavit;
- Notice of child abuse, family violence or risk; and
- Genuine Steps Certificate.

The court documents will tell you the date by which you need to file your response as well as what day you need to attend court. It is very important

that you file your response by the date ordered and attend court if you don't have a lawyer.

Can a lawyer be appointed for the children?

The Court may decide to appoint an **independent children's lawyer** to represent your child's interests. An independent children's lawyer should be appointed in any case where there are serious allegations of abuse or neglect of the child, where there is so much hostility that the best interests of the child may not be presented to the court by either parent, or where there is some other complicating feature like differences of religion or culture between the parents or serious mental health issues.

If you believe that an independent children's lawyer should be appointed, you can ask the court to make this order.

In most cases the independent children's lawyer is paid by Legal Aid but in some circumstances, parents may have to contribute to or cover the costs of the independent children's lawyer. This depends on the financial situation of the parents.

Special Court Lists

The Family Law Court has special lists for some types of matters. This is to make sure that these matters are dealt with appropriately and as quickly as possible.

What is the Evatt List?

The Evatt List was developed to deal with high-risk domestic and family violence cases. After filing, the court sends a questionnaire (called the Family DOORS Triage Risk screening questionnaire) to the Applicant parent and the Respondent parent. It is very important to complete this questionnaire and return it to the court. If the court assesses a case as 'high risk' because of responses to the questionnaire, the case will be included in the Evatt List. Families are provided with appropriate resources and support to ensure everyone's safety including specialist case management and the court aims to deal with these cases as quickly as possible.

Matters which go to the Evatt List are those seeking parenting orders only, or parenting and financial orders.

What is the Magellan List?

The Magellan Program was developed to deal with Family Court cases involving serious allegations of physical and sexual child abuse. An individual judge closely manages each Magellan matter and the court aims to deal with these matters as quickly and efficiently as possible.

What is the Indigenous List?

The Indigenous List is a specialist list and case management process to support First Nations families. There are specialised support services available for families on the day that they attend court.

The Indigenous List currently operates in the following locations:

- Adelaide;
- Alice Springs
- Brisbane;
- Cairns;
- Coffs Harbour;
- Darwin;
- Lismore;
- Melbourne;
- Sydney; and
- Townsville.

If you would like your case to be dealt with in the Indigenous List, it is important that you let the court know that you are a First Nations person and that you include this information and your desire to have your matter put in the Indigenous List in either your Initiating Application or your Response to Initiating Application.

What is the National Contravention List?

The Contravention List deals with all contravention applications. See ➤ *4.7* for more information on this list and contraventions.

What is the Critical Incident List?

The Critical Incident List is a special list for applications made where these is no parent available to care for the child in circumstances such as the death or incarceration of a parent or parents.

What if the children are in danger or if I am not safe?

If you or your children are at risk of family or domestic violence or sexual assault, you should call the police on 000.

If you fear for the safety of your children, you can contact the police or apply at a Local Court for an **apprehended domestic violence order (ADVO)**. See ➤ *Chapter 5*.

Urgent Applications to the Family Law Court

You should get legal advice as quickly as possible if you or your children are in danger. You can apply to the court for an urgent order for your children to live with you. If your child is at risk of harm you may be exempted from having to participate in FDR and other pre-action procedures and be able to go straight to court.

In a genuine emergency, a court can make orders without the usual requirement that notice be given to the other parent. An order made without the other parent being present is called an **ex parte order**.

The court can also make a temporary order about the children, called an **interim order**. If there are risks to the child's safety then an interim order should be made to protect the child from this risk.

The Family Law Court can also give you a protection order (called an injunction in family law) for you and the children, where there is a clear threat to you or your children's safety or welfare.

If you are asked to complete the Family DOORS Triage Risk screening survey you should do this as soon as possible as this will determine whether your case will be placed in the Evatt List. (See ➤ above).

If your child has been sexually or physically abused, the court will also assess whether your case should be put in the Magellan list.

Notice of Child Abuse, Family Violence or Risk of Family Violence

All Initiating Applications and Responses seeking parenting orders in the Family Law Court must be accompanied by a Notice of Child Abuse, Family Violence or Risk. This form can be found on the Family Law Court website at fcfcoa.gov.au and can be filed electronically through the Commonwealth Courts Portal (comcourts.gov.au). The

Notice seeks information about child abuse and family violence; mental ill-health; drug and alcohol abuse; parental incapacity; or any other risk to the child.

What if I don't feel safe at court?

If you have any fears for your safety when you attend court you should tell the court as soon as possible and they can help arrange a safety plan for you. There are safety measures that can be put in place to keep you safe and help you to feel more comfortable. The safety measures can include the use of a safe room, assistance from security and separate entrance and exits. In some circumstances it may be possible for you to participate in the court process by telephone or online.

4.6 Appeals

What can I do if I am not happy with the court decision in my case?

If you think a registrar has made an incorrect decision you may be able to ask for a 'review' by a judge. You need to lodge an Application for Review. Usually, an Application for Review must be filed within 21 days of the date of the original decision but it is important to get legal advice at the time to make sure that this is the correct time limit.

If you think the judge made an incorrect decision based on the law, you can appeal the decision. An appeal is not a rehearing of the whole case. The appeal is only to look at whether the judge made an error of law. A Notice of Appeal must be filed within 28 days of the order being made and you will have to pay the filing fee or apply to have the filing fee waived.

When you file an appeal, you should also apply for a stay of execution from the court that made the orders you think are incorrect. The stay will stop those orders from having effect while you wait for the appeal.

Appeals can be complex and if you are unsuccessful, a cost order may be made against you. You should get legal advice before you file an appeal.

If you have applied for your parenting orders in the Local Court and you do not agree with the decision of the Magistrate, you can appeal to the Family Law Court. The matter will be heard by a judge of the Family Law Court and the case is reheard from the start. You need to lodge a Notice of Appeal within 28 days of the orders being made by the Local Court and pay the filing fee.

4.7 Contravention of parenting orders

Do I need to comply with court orders?

Family court orders must be taken seriously. If there is an order for the child to spend time with the other parent or any other person, and you do not allow this to happen, you risk being taken to court for contravention (breach) of the court order. You must comply with a family court order unless you have a "reasonable excuse."

What is a reasonable excuse?

It is important to get legal advice quickly if you cannot comply with court orders or if you think it would not be safe to do so. A lawyer will be able to tell you if you have a reasonable excuse.

A reasonable excuse includes the following:

- you did not understand the court orders and you can show good reason why you did not understand them; or
- you had a reasonable belief that the contravention was necessary in order to protect the health and safety of a child or if it was necessary to protect your own health and safety; and
- the contravention did not last longer than was necessary in order to ensure the safety of the child or to ensure your own health and safety.

If there are parenting orders in place and you are concerned that the children are in danger when spending time with the other parent, you may need to immediately apply to the court to change the parenting orders. It is important to get legal advice first before filing for a change of orders.

What happens if I don't have a reasonable excuse?

Contraventions of parenting orders are taken seriously by the court.

If the court finds that the parenting orders have been contravened because there was no reasonable excuse, the court can order the contravening parent to attend a parenting program, order make-up time with the other parent, or in serious or persistent cases, issue a fine or make an order for the parent to spend some time in jail. If the parenting orders are no longer workable, the court might consider changing the orders. Sometimes this can include changing where a child lives.

If the court believes a parent only filed a contravention application to harass or threaten the other parent, the court can order that parent to pay the other parent's legal costs.

National Contravention List

All contravention applications are dealt with in the National Contravention List. This is a special list which allows contravention matters to be dealt with quickly.

Applications in the contravention list are taken very seriously so it is very important that you comply with all the directions made by the court and attend court when ordered.

Costs orders can be made against parties who do not comply with the directions of the court or against parties who have filed applications that do not have merit.

What can I do if the other parent does not want to see the children?

Even if there are parenting orders for the children to spend time with the other parent, the courts are not willing to force a parent to see their child. The courts have yet to consider this to be in the child's best interest. A practical option may be to ask for help from a family counsellor or parenting program to assist the other parent to see the importance of spending time with the child and the damage it might be doing to a child to not turn up when promised.

If the children live with me, can I move?

If moving house will make it more difficult for the other parent to spend time with a child or will make the existing arrangements unworkable, then you should try and get the other parent's consent to move. If they won't agree, you may need to apply for parenting orders allowing you to move.

These cases are called relocation cases. You will have to show the court why it is in the best interests of the child to allow you to move with the children and how the other parent will be able to maintain a meaningful relationship with the child (if safe to do so).

You should get legal advice before you move. If you move with the children without the consent of the other parent or a court order, the court can make orders for the children to live with the other parent or force you to return if the children are to live with you.

If there are current parenting orders in place and the move would mean that you cannot comply with the orders, you will need to apply to the court to vary the orders before you can move unless the other parent agrees to you moving. It is important to get this agreement in writing.

What if the other parent takes the children without my permission?

If it is safe to so, you should first try to contact the other parent and see if you can get an agreement about returning the children.

If you do not have a parenting order and the children are taken and not returned, you can apply to the court for a **recovery order** for the children to be returned and a parenting order for the children to live with you. If you already have a parenting order, you still need to go back to court and apply for a recovery order. A recovery order is like a warrant for the return of the children and empowers the state, territory and federal police to find and return your children to you.

You will need to prove that the court should deal with your case urgently. For this reason, it is important to get legal advice quickly and to file an application in court quickly.

If your case is not urgent you will have to follow the pre-action procedures and try FDR before you can file an application to the court (unless one of the other exemptions to complying with pre-action procedures or attending FDR applies to you). (See ➤ *section 4.2*).

Normally you need to serve (formally notify by giving a copy of the court documents) the other parent when you make a court application, but if you cannot find the other parent or if the situation is very urgent, you may be able to get the court to hear your application ex parte (without the other parent having been served).

If your child has been taken and you think you need a recovery order, it is very important you get legal advice right away.

What if I do not know where my children have been taken?

You can ask the court for a location order or a commonwealth information order to get information from individuals or government departments like the Australian Taxation Office, Centrelink or Housing NSW about where the other parent is and where the children may be.

I am worried about the children being taken overseas. Can I stop the children being taken overseas?

If your children have current passports and your partner has access to the passports or can get a passport for the children, your children could be taken overseas without your knowledge. If you are afraid your ex-partner will take the children out of Australia, get legal advice straight away.

Important Information

There are some steps you can take to prevent your children from being taken overseas without your consent.

If the children already have passports, keep the passports in a safe place.

If the other parent already has the children's passports, ask the court to order the other parent to give the court the children's passports and get an order which prohibits the children from being taken out of the country without the court's permission.

If the children do not have Australian passports, ask the Australian Passport Office to stop passports being issued for your children. You can also make a Child Alert Request so that if an application for a passport is lodged, the Passport Office is warned that there may be circumstances to consider and is more likely to notify you about this application. This Alert Request will remain valid for 12 months. If you have a court order for a Child Alert Request, it will remain valid until the child is 18 years of age.

If it is possible that your children could get foreign passports or be added to the other parent's foreign passport, you should contact the embassy or consulate about that country's policy to protect children from being abducted overseas.

If you have real concerns about your children being taken out of Australia without your consent, you can ask for a specific court order to place the children on the Airport Watchlist (also known as the Family Law Watchlist). You will need to provide a sealed/stamped copy of the application for an Airport Watchlist order to the Australian Federal Police (**AFP**), which directs them to place the children on the Watchlist. Any child on the Watchlist will be stopped before boarding a plane

or ship that is leaving Australia. The child's name will remain on the Watchlist until they are 18 years of age or until a future court order directs the AFP to remove the child's name from the Watchlist.

What if the children are taken out of Australia?

Unless there is clear written consent for a child to travel or the court has made an order for overseas travel, section 65Y of the *Family Law Act 1975* makes it an offence to take or send a child overseas from Australia if that child is subject to a parenting order dealing with:

- where a child lives;
- when a child spends time with a person;
- with whom a child communicates with; or
- when a person has parental responsibility for a child.

It may also be an offence to assist someone to take a child overseas in these circumstances.

Similarly, unless there is clear written consent for a child to travel or the court has made an order for overseas travel, section 65Z of the *Family Law Act 1975* makes it an offence to take or send a child overseas from Australia if there is an application filed in court seeking orders of the type set out above. It may also be an offence to assist someone to do this.

If there is a risk that your children may be taken out of the country before the next working day, the Family Law Court has an out-of-hours service for emergencies. See ➤ *Chapter 9: Referrals and Resources*.

4.8 How can I change my child's name?

Generally, a child's name cannot be changed without the consent of both parents or a court order.

Application to the Federal Circuit and Family of Australia

In most circumstances, you first need to attempt to reach agreement with the other parent if you want to change your child's name.

If you cannot reach agreement, or if you cannot find the other parent, you can apply to the court to change the child's name. However, before you can apply to the court you must comply with the pre-action procedures. This

usually includes attending FDR. For further information about FDR and pre-action procedures, including exemptions, see ➤ *section 4.2*.

You will need to persuade the court that the name change is in the best interests of the child.

Application to the District Court

Alternatively, you can apply to the District Court to change the child's name. The District Court will not consider other parenting issues and there are no FDR requirements.

If you have concerns for your safety or the safety of your child, you can ask the court to make an ex parte and non-publication application. This means the other parent will not be notified of your application. Instead, a decision will be made in chambers (outside of the open courtroom) and the application will be given a pseudonym rather than using names.