

# 4. Children

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## 4.1 When parents can agree

### 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.

An application for a parenting order can be made by anyone who has a genuine interest in the child and does not have to be a parent (see ► 4.4 of this chapter), however this chapter focuses on how the law applies to parents.

### 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. You can do this yourselves or get the assistance of a **Family Dispute Resolution Practitioner (FDRP)**. If you are eligible for

legal aid, you can attend a type of family dispute resolution called a **Family Law Conference**. For more information about family dispute resolution see ➤ *section 4.2* below.

- ▶ You can have your agreement or parenting plan made into **consent orders** by an *Application for Consent Orders* with the Court. See ➤ *Chapter 2: Do I need a solicitor or barrister?* for more detail about consent orders.

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

### What is a parenting plan?

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.

### 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 (mediation) 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*.

## 4.2 Family Dispute Resolution

### What is Family Dispute Resolution?

**Family Dispute Resolution (FDR)** is a way of sorting out legal problems without going to court. This method of dealing with legal problems is

generally known as mediation but in family law it is called FDR and the mediator is called a **FDR practitioner (FDRP)**.

A FDRP is a trained, neutral person who helps people discuss their legal problems and 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.

### 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 can apply to the Court for parenting orders.

### 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 that assisted you; 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.

### 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.

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 counselling or FDR. Safety measures can be put in place to make sure you can 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 usually difficult to achieve a fair resolution. A woman who feels less powerful or intimidated may make concessions or agree to decisions that are not necessarily in her best interests, that are not what she really wants, or may not be in the best interests of the children.

FDR is not normally recommended when there is domestic violence. However, a woman may still be able to achieve a fair **settlement** if she has good legal advice and feels safe to assert her rights with mediators' present. FDR can be part of a healing and empowering process but should be entered into with caution and good support.

### 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 she or he 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?” on page 36) so that you will be in separate rooms;

- ▶ Make arrangements for separate times to arrive and leave the waiting rooms;
- ▶ If you are eligible for legal aid, it may be possible to organise a Family Law Conference which is a type of FDR where you can have a **lawyer** present. This provides an important safeguard if there is a history of domestic violence;
- ▶ Ask your local Family Relationship Centre if they have Lawyer Assisted FDR available. If your case is suitable and the other party consents to also being legally represented then legal representation may be possible for the FDR process;
- ▶ Get legal advice about your options before and after attending FDR 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.

### 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. 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 will usually go 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. She or he 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. Sometimes you may reach agreement about some but not all issues. The FDRP may want to put your agreement in writing. Before signing any written agreement, get legal advice.

## 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 on the certificate.

### Important Information

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 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 Decisions of the Family Law Courts about children

### What if we cannot agree about what happens to the children?

If you cannot agree about arrangements for the children, it is important to get legal advice quickly to decide whether or not you need court orders.

When parents cannot agree on the arrangements for their children, then either parent may apply to the Court for a decision about what is best for the children. If the Court makes orders about children they are called parenting orders. Generally, the Family Law Act requires parents to try FDR before applying to court. See ▶ *section 4.2*.

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, Skype or email) and any other aspect of each child's care, welfare and development.

### 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 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 agree on major long-term decisions 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. While the Court can make orders for sole parental responsibility, it is usually very reluctant to make this order.

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 may spend with each parent.

### 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

- ▶ 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 either.

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 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 (**status quo**);
- ▶ 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 can consider any family violence orders and reach their own conclusions about whether that family violence order is relevant.

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

If the Court orders equal shared parental responsibility for the child, the Court must consider making an order for the child to live with each parent on an *equal basis* or to provide for the other parent to have **substantial and significant time** arrangements with their child. 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.

### 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 risks of harm to a child, it helps children if you encourage them to spend time with their other parent, so they do not feel torn between the two of you.

### 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. 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 courts usually make orders for a child to spend time and communicate with the parent the child does not live with. If you have serious concerns about your children's safety during parental visits you should contact your local office of **NSW Community Services** immediately and also get some legal advice.

Parents have obligations to help make 'time' and 'communication with' orders happen. Interfering with the time your child spends with or communicates with the other parent can be seen unfavourably by the court. If it is an unacceptable risk situation, get legal advice.

## 4.4 Who can apply for court orders?

### Who can apply for a parenting order?

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.

### I co-parent a child with my same-sex partner. What are my rights if we separate or divorce?

If you were in a **de facto relationship** with the birth mother or you were married to the birth mother and you consented to the assisted/artificial conception procedures 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, 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.

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

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 of a child with others, 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 first attempt FDR and if that does not work you can apply 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 Court rules and the law, 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 Courts** have 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 directions. These are available from the court registries or on the Family Law Courts website: [www.familylawcourts.gov.au](http://www.familylawcourts.gov.au)

While it is possible to represent yourself, it is in your interests to get advice from a lawyer and have your paperwork reviewed by a lawyer before you file paperwork in Court.

For more information see ► *Chapter 2: Getting Help*.

### How long will it take to get a parenting order?

Generally, you can assume it will take a lot longer than you want. Some cases could take up to two years because of limited court resources or because of **interim applications** in your case. Urgent matters can be decided very quickly if necessary. Your **Local Court** may decide matters much more quickly, depending on how busy it is and if it is prepared to hear family law cases.

### What is a less adversarial trial?

The less adversarial trial (**LAT**) process means that the same judge is involved early in the case and takes an active role. Parties talk directly to

the judge, rather than through their lawyers, and everything said in court is treated as evidence in the case. At the beginning of a case, you will be asked to complete a LAT questionnaire. You should complete this very carefully since it will become part of the evidence in the case. Note that a LAT only takes place in the Family Court.

### What is the Magellan Program?

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. The Magellan Program is only available in the Family Court.

### 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 is so much hostility that the best interests of the child may not be presented to the Court by either parent, or where there are serious allegations of abuse or neglect of the child or where there is some other complicating feature like differences of religion or culture between the parents, or 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 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.

### What if the children are in danger?

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

You should get legal advice as quickly as possible if your children are in danger. You can apply to the Court for an urgent order for your children to live with you. 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**. Generally, they are made to last until all the evidence can

be heard at a final hearing. If there is any risk to the child's safety then an interim order should be made to protect the child from this risk.

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)**. The Family Law Courts 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.

### Notice of Risk in the Federal Circuit Court

All Initiating Applications or Responses seeking parenting orders in the Federal Circuit Court must be accompanied by a Notice of Risk. The *Notice of Risk* must be filled out in accordance with the prescribed form and can be filed electronically through the Commonwealth Courts Portal ([www.comcourts.gov.au](http://www.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 posed to the child. The information provided in response must relate to how they pose a risk to the child.

### Notice of Child Abuse, Family Violence or Risk of Family Violence in the Family Court

If filing in the Family Court, a *Notice of Child Abuse, Family Violence or Risk of Family Violence* will be required where there are allegations to be made. The Notice of Child Abuse requires a concise summary of the allegations and details of each of them including dates they occurred, and any other particulars, which reflect the contents of the **affidavit evidence**. The *Notice of Child Abuse* does not specifically seek additional information about the risk to a child from mental ill-health, drug and alcohol abuse or parental incapacity. In other respects, the substance of the information to be provided is the same as required for a *Notice of Risk*.

### What if the other parent has sexually or physically abused our child?

If your child has been sexually or physically abused, you can be exempted from having to participate in FDR and can go straight to Court. Depending

on the Court in which your matter is being heard, you must lodge either a *Notice of Risk* or *Notice of Child Abuse, Family Violence or Risk of Family Violence* when you file your Application or Response in Court (see above). After the Notice is filed, the Court will assess whether your case should be put in the **Magellan program** (see ➤ page 45).

## 4.6 Contravention of parenting orders

### What happens if the children do not spend time with the other parent as required by a family law orders?

Family law 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.

Depending on the circumstances, the Court may refer you to a parenting program, order make-up time with the other parent, or in serious or persistent cases issue a fine or even gaol you. If the parenting orders are no longer workable, the Court may consider changing the orders.

If you are taken to court for breaching a parenting order, you may avoid being punished if you show that you had a reasonable excuse. A reasonable excuse may be that you needed to protect someone's health or safety, or you believed that you had not contravened the order at the time.

The Court can order costs against an unsuccessful **applicant** if they lodged the contravention application to harass the other parent.

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 need to immediately apply to the Court to change the parenting orders. See ➤ "What if the children are in danger?" on page 45.

The Court might order you to attend a post separation parenting program. The aim of these programs is to help families who are having difficulty making court orders about children work, particularly where there have been breaches of the orders.

### 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 have not been 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 acknowledge parental responsibility.

## 4.7 Taking children without consent of a parent

### What if the other parent takes the children?

You should first try to contact the other parent and see if you can get an agreement about returning the child. If you do not have a parenting order and the children are taken and/or not returned, you can apply to the court for a *parenting order* for the child to live with you and a **recovery order** for the child to be returned. 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 child and empowers the state, territory and federal police to find and return your child to you.

You will need to prove that the Court should deal with your case urgently. If your case is not urgent you will have to try FDR before you can file an application to the Court (unless one of the other exceptions to attending FDR applies to you).

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 present in court).

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

You can get 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.

### Can I stop the children being taken overseas?

Your children could be taken overseas without your knowledge if they have current passports and your partner can access these passports. If you are afraid your 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 their passport and the children's passports and get a restraining order so that the children cannot be taken out of the country without the Court's permission.
- ▶ If the children do not have 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 must 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 then need to provide a sealed/stamped copy of the court 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 FLA 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.

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 FLA 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.

If the children are taken out of Australia without your consent or kept overseas longer than you allowed, get legal advice straight away.

Australia has signed an agreement (the Hague Convention on the Civil Aspects of International Child Abduction) with more than 70 other countries to prevent child abduction. If the country the children have been taken to has signed this agreement you can ask that country to assist in returning your children to Australia. To do this, you will need to contact the Commonwealth Attorney-General's Department and NSW Community Services.

To have your children returned to Australia, you must show that your children are aged 16 or under; the children usually live in Australia and that you have a legal right under Australian law to decide where they live.

If the country is not part of the Hague Convention it is more difficult to get the children back. You can either try to enforce an Australian parenting order in the other country or you can try to get a parenting order in the country where the children are located.

If you are concerned that your children may be taken illegally out of Australia, contact the Australian branch of **International Social Service** that provides telephone referral and social work support. If there is a risk that your children may be taken out of the country before the next working day, the Family Law Courts have an out-of-hours service for emergencies. See ▶ *Chapter 9: 'Referrals and Resources'*.

### 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, the other parent will need to agree to you moving house. If they won't agree you will 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 the relocation and how the other parent will be able to maintain a meaningful relationship with the child.

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

## 4.8 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 can ask for a 'review' by a judge. You need to lodge an Application for Review. You need to check with the court staff about the time limits.

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 for a waiver or exemption of the fee.

You must apply for a **stay of execution** from the Court that made the orders you do not like. The stay will stop those orders from having effect while you wait for the 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 Courts. The matter will be heard by a judge of the Family Law Courts 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.

## 4.9 Other common questions

### How can I change my child's name?

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

You first need to try FDR and attempt to reach agreement with the other parent. For further information about FDR, including exemptions from the requirement to attend FDR, see ► *section 4.2*.

If you cannot reach agreement through FDR, or if you cannot find the other parent, you can apply to the Court to change the child's name. You will need to persuade the Court that the name change is in the best interests of the child.

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.

### What happens to the children if I die?

If there is an order that your children live with you, the other parent does not automatically have the right to have the children live with them if you die.

You can decide who you would like your children to live with and name them as a 'testamentary guardian' in your will. This may help that person to get a parenting order that the children live with them. Naming a guardian in your will does not guarantee that the Court will order what you want. The Court will still decide the case based on the best interests of the child. However, your wishes are important and will be considered by the Court.