

# Are you a grandparent?

## Your legal questions answered

You may be a grandparent who is caring for or raising your grandchildren.

You may be a grandparent who is concerned about your grandchild's safety or well-being.

Or you may have been stopped from seeing your grandchildren and would like to know what you can do about it.



This brochure looks at the different laws that can affect children and their grandparents – family law and child care and protection law. It tells you what legal options you have, what financial assistance is available to you and where you can get legal help.

Although the brochure uses the term ‘grandparents’, the information in this brochure also applies to other relative carers, such as aunts or uncles or other family members who are caring for or raising children.

## WHAT IS FAMILY LAW?

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The *Family Law Act 1975* is the law that applies across Australia to separation and divorce, division of property and who children live and spend time with when their parents separate, whether or not their parents were married.

Grandparents can use the *Family Law Act* to apply to court for orders that their grandchildren live with or spend time with them. You can do this whether the parents of the children are together or separated.

The *Family Law Act* acknowledges the importance of children having a relationship with their grandparents. Grandparents are specifically mentioned in the *Family Law Act* as being able to apply to a court for orders to do with their grandchildren. However it is important to be aware that this does not mean that grandparents (or indeed parents) have an automatic right to have contact with the children.

The *Family Law Act* makes it clear that the ‘best interests of the child’ are the main considerations when it comes to decisions about parenting.

The focus of the *Family Law Act* is on the rights of children to know and be cared for by both parents and other people significant to their care, welfare and development, such as grandparents and other relatives.

This is explained in more detail in this brochure.

## WHAT IS CARE AND PROTECTION LAW?

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The *Children and Young Persons (Care and Protection) Act NSW* is the law that applies in New South Wales when the Department of Community Services (DoCS) thinks it is necessary to intervene to protect a child or young person from neglect or abuse. Care and protection law is completely separate from and has nothing to do with family law.

DoCS is the NSW Government child protection agency. DoCS can support families to look after their children, or can remove children from their parents if it thinks it is necessary for their safety, welfare and well-being or if they are at risk of harm.

Grandparents can sometimes get involved when DoCS makes decisions about the children and in some cases may be able to have the children placed in their care. You can apply to be joined as a party to Children’s Court proceedings started by DoCS or the Court can join you as a party.

This is explained in more detail in this brochure.

## HOW ARE ARRANGEMENTS FOR CHILDREN MADE WHEN THEIR PARENTS SEPARATE?

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Most separating parents can agree about who the children will live with, spend time with and communicate with and about other aspects of the children’s lives (such as where they will go to school, holidays, medical treatment and so on). This can be done informally, without any documents and without going to court.

These decisions can also be put into a written agreement called a Parenting Plan that sets out the arrangements for the children. Or the parents can make the agreed arrangements for the children more formal by writing up what are called Consent Orders and registering them with the Court.

You may feel confident that you will continue to have the same level of contact with your grandchildren if their parents separate. If you are not confident that this will happen you can talk with the children's parents about including you in a Parenting Plan or Consent Orders if they are going to have these documents drawn up. However the best interests of the children must always be taken into account and the practicalities of implementing the arrangements need to be considered.

If the parents can't agree on the arrangements for the children between themselves, or with the help of a family dispute resolution service, they can apply to the Court (currently the Family Court, Federal Magistrates Court or Local Court) for Parenting Orders. If you and the parents cannot agree on what contact you will have with the children you can also apply to the Court for Parenting Orders about your grandchildren.

**The Court will decide what orders to make based on what is in the best interests of the children. Parenting Orders can deal with:**

- where the child lives
- who they spend time with
- who has parental responsibility
- what communication the child is to have with other people, including by telephone or email
- any other aspect of the child's care, welfare and development.

Although you have a right to apply to the Court for Parenting Orders this does not mean that the Court will make an order in your favour. You should get legal advice before you do this.

## HOW A COURT DECIDES WHAT IS IN THE CHILD'S BEST INTERESTS

**The Court will primarily look at:**

- the benefit to the child of having a meaningful relationship with both parents
- the need to protect the child from harm

**The Court will also look at:**

- the views of the child (the importance given to the child's views will depend on their age, maturity and level of understanding)
- the child's relationship with parents and others, including grandparents and other relatives
- each parent's willingness and ability to facilitate and encourage a close and continuing relationship between the child and the other parent
- the effect of any change to the current situation on the child
- the practical difficulties and expense involved in 'spending time with' and 'communicating with' a parent
- the capacity of each parent and others to provide for the child's needs (as a grandparent this may include your health, age and financial circumstances)
- the maturity, sex, lifestyle and background (including culture and traditions) of the child and parents
- if the child is Aboriginal or Torres Strait Islander, the child's right to enjoy Aboriginal or Torres Strait Islander culture
- each parent's attitude to the child and to parenting
- any family violence involving the child or a member of the child's family
- any family violence order that might exist
- the desirability of making the order that is least likely to lead to further court proceedings
- any other circumstance the Court thinks relevant.

## ARE YOU BEING STOPPED FROM SEEING YOUR GRANDCHILDREN?

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Sometimes grandparents are stopped from having a relationship with their grandchildren. This can happen where the relationship with your own child has broken down (but the parents' relationship remains intact), or where the parents have separated and one parent refuses to let you have anything to do with your grandchildren. It can also happen if you have been the primary carer for your grandchildren and the children's parent returns to take the children back into their care.

Grandparents do not have an automatic right to have a relationship with a grandchild. However, anyone who has an ongoing relationship with the child, or any other person who can show that they are concerned with the care, welfare or development of a child (including grandparents) may apply to the Court for Parenting Orders. A Parenting Order can be an order that you can spend time with or communicate with the child. It will be up to the Court to decide what will happen, based on what is in the child's best interests.

If your child and/or their partner is refusing to let you see or speak to your grandchild you can take steps to try to change the situation:

### STEP 1 – GET LEGAL ADVICE

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The information in this brochure is general information only. You should get legal advice about your particular situation and what you can do.

You can get free legal advice from your closest Legal Aid NSW office. To find your nearest Legal Aid office visit [www.legalaid.nsw.gov.au](http://www.legalaid.nsw.gov.au) or call LawAccess NSW on 1300 888 529.

LawAccess NSW also provides free telephone legal information, advice and referrals to other legal services that can help you, including Community Legal Centres and private lawyers.

### STEP 2 – DISPUTE RESOLUTION

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Going to court should always be the last option as it can be stressful and expensive. Before you do anything you should talk to the parents and try come to an agreement about how and when your grandchildren see or have contact with you.

Not only is it in everyone's interest to resolve disputes without taking legal action, but the *Family Law Act* requires people to try family dispute resolution first. Family dispute resolution is where an independent person who is trained to help families discuss their differences tries to help you explore possible solutions with each other. This is also called mediation or conciliation.

If the mediation is successful the agreement about the time you are to spend with your grandchild can be written up in a Parenting Plan or Consent Orders, which can then be lodged with the Court.

Family Relationship Centres (FRCs) can provide up to three hours of joint dispute resolution sessions free of charge. They can also refer you to other dispute resolution services. You can find out more about FRCs at [www.familyrelationships.gov.au](http://www.familyrelationships.gov.au) or call 1800 050 321.

You can also find more information about dispute resolution and providers of dispute resolution at [www.ag.gov.au/fdrproviders](http://www.ag.gov.au/fdrproviders).

Legal Aid NSW has accredited dispute resolution practitioners. If you are eligible for legal aid (see '[How can Legal Aid NSW help me?](#)' below) you can get assistance from either a lawyer employed by Legal Aid NSW or from a private lawyer. The lawyer will give you advice and assistance in the dispute resolution process and help you explore options for settlement.

## STEP 3 – GOING TO COURT

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If you are not able to resolve the dispute about contact with your grandchild through mediation you will have to apply to court for an order that you can spend time with or communicate with your grandchild.

You can only lodge an application with the Court if you have a certificate from an accredited family dispute resolution practitioner to show that dispute resolution was attempted. There can be monetary penalties for a person who applies to the Court without first trying family dispute resolution.

You will not need a certificate in some circumstances. For example, you won't need one if the Court is satisfied that there are reasonable grounds to believe there has been or is a risk of abuse or family violence; if the matter is urgent or if a party is unable to participate – for example, because of a disability.

You should get legal advice before taking legal action, including advice about how strong your case is; what forms and documents to support your case (affidavits) you will need to lodge with the Court; what orders you should ask for; which Court you should start the case in and the costs of taking legal action. Currently you can start your case in the Family Court, the Federal Magistrates Court or the Local Court.

If the case goes to Court there will be a hearing and the Court will decide what is in the best interests of the child, taking into account the factors listed in the box above. The Court can also require the parties to continue to try to resolve the dispute themselves.

In some cases the Court can order that an independent children's lawyer be appointed to represent the child's interests. That lawyer's role is to form an independent view of what is in the child's best interests and make the Court aware of those interests. The Court can also order a Family Consultant (normally a counsellor, social worker or psychologist) to interview and observe the parties and the child and prepare a Family Report for the Court.

It can take more than 12 months from the date you apply to the Court for final orders to be made, depending on the complexity of the case. However interim (temporary) orders can be made in the meantime.

You can represent yourself in court. However Court proceedings can be complex and confusing and it is still a good idea to get legal advice about what you should do and how you should prepare your case.

## HOW CAN LEGAL AID NSW HELP ME?

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Legal Aid NSW is a government-funded agency that provides a range of legal services to disadvantaged people, and representation in some cases to those who cannot afford a private lawyer.

Free legal advice is available at Legal Aid offices across NSW. To find your closest Legal Aid NSW office or for information about the Legal Aid NSW policies in Family Law matters call LawAccess NSW on 1300 888 529 or visit [www.legalaid.nsw.gov.au](http://www.legalaid.nsw.gov.au).

If you need urgent telephone advice LawAccess NSW provides information, advice or referrals to other legal services.

Legal Aid NSW can provide an inhouse lawyer or legal aid can be granted to cover the costs of a private lawyer. To be eligible for legal aid, you must satisfy Legal Aid NSW's policies and guidelines; meet a means test (income and assets) and a merit test (you must have reasonable prospects of success). You will also need to satisfy Legal Aid NSW that you have exhausted all other ways of resolving the dispute. There is usually a small contribution required with all grants of legal aid.

Legal Aid also provides a duty lawyer at Parramatta, Sydney and Newcastle Family and Federal Magistrates Courts. Call your nearest Legal Aid NSW office to find out about the duty lawyer service provided at other Courts. You may be able to see a duty lawyer who can give you some assistance.

## The Family Law Act

acknowledges the importance of children having a relationship with their grandparents.

Grandparents are specifically mentioned in the Family Law Act as being able to apply to a court for orders to do with their grandchildren. However it is important to be aware that this does not mean that grandparents (or indeed parents) have an automatic right to have contact with the children.

## HAVE YOU BEEN CARING FOR YOUR GRANDCHILDREN AND THE PARENTS WANT THEM BACK IN THEIR CARE?

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If you are caring for your grandchildren with the informal agreement of the family you may want to think about formalising the arrangement. You can do this by putting it in writing with both parents (getting Consent Orders) and registering that with the Court. This will clarify the arrangement and help if there are any disputes down the track about the care of the children. You should get legal advice about this.

If you have been caring for your grandchildren informally and you don't think it would be in the best interests of the children to resume living with their parents, you will need to think about starting court action to get orders that the children are to stay with you.

Before you can apply to the Court you will need to follow the same Steps 1 to 3 set out above under '[Are you being stopped from seeing your grandchildren?](#)' If there needs to be a hearing the Court will decide what would be in the best interests of the child.

If there are already court orders in place that state that the children are to live with you and the parents wish to have the children back with them, they will need to go back to Court to apply to have the orders varied. The parents will need to show the Court that their circumstances have changed since the orders were originally made, and that it is in the children's best interests for them to be returned to them.

## ARE YOU CONCERNED ABOUT YOUR GRANDCHILD'S SAFETY?

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If you have concerns for your grandchild's welfare or safety in their current living situation you can:

### **Talk to the Police**

If you hold fears for your grandchild's safety you can talk to the police who may investigate your concerns.

### **Consider taking legal action under the *Family Law Act***

You (or any other person concerned with the care, welfare or development of the child) may be able apply to the Court for orders that the child lives with you. You should get legal advice before you do this.

### **Report your concerns to the Department of Community Services (DoCS)**

If you report your concerns to DoCS you will be taking action under care and protection law, not family law. Care and protection law is completely separate from and has nothing to do with family law.

DoCS is the NSW Government child protection agency. DoCS can support families to look after their children, or can remove children from their parents if they think it is necessary for their safety, welfare and well-being or if they are risk or harm.

You can report your concerns to DoCS by calling the **DoCS Helpline** on **132 111**. The report you make will be treated confidentially. DoCS will investigate your concerns and decide what to do.

### **If DoCS thinks that the child is in need of care and protection, it can:**

- arrange for support services to be provided to the family
- come to an agreement with the parents that the child be placed in temporary alternative care
- develop a care plan with the family to meet the needs of the child

- develop a parental responsibility contract with the primary caregivers of the child or young person
- remove the child or young person from their family

To remove a child from their family DoCs has to apply to the Children's Court for an order for an alternative placement for the child, unless the parents agree to a temporary care arrangement. This is called 'making a care application' to the Court.

DoCs will first ask the Children's Court to make short term orders. This can be either a 14-day order called an Emergency Care and Protection Order (ECPO), or an Interim Order that will usually remain in place until Final Orders are made by the Court. This may take up to 12 months.

The Children's Court will also decide who should have 'parental responsibility' for the child. Parental responsibility means that any decisions about the child's wellbeing which normally would have been made by the parents are now made by another person. That person has the legal authority to make decisions about the child. The Court may allocate parental responsibility to the Minister of Community Services (DoCS) or to another suitable person, including a grandparent or other relative.

If short term orders are made, you can ask that the child be placed in your care. This is a separate issue from parental responsibility. For example, the Court may give parental responsibility for the child to the Minister of Community Services (DoCS), and then DoCS may decide that the child should be placed with you or another appropriate carer. If the Court gives you parental responsibility you can decide that the child will also live with you.

If DoCS has parental responsibility for the child and you wish to have the child placed with you, DoCS will need to assess you and your household to make sure that you will provide a safe and satisfactory placement for the child. This is the case even if you have been the person who has cared for your grandchild informally in the past. If you wish to have the child placed with you then you should tell DoCS as soon as possible.

You can apply to be joined as a party to the Children's Court proceedings. If you are successful your views will be considered by the Court. To be joined as a party you must be able to demonstrate a genuine concern for the safety, welfare and wellbeing of the child. However, no one, including grandparents with a genuine concern about the welfare of their grandchild, is automatically entitled to be joined as a party.

If you are joined as a party you should have a lawyer with expertise in care and protection law to represent you. You can see a private lawyer, or you may be eligible for legal aid. For a referral to a private lawyer, or for information about whether you are eligible for legal aid, call LawAccess NSW on 1300 888 529 or visit [www.legalaid.nsw.gov.au](http://www.legalaid.nsw.gov.au) for information about the Legal Aid NSW Policies in care and protection matters.

If you need urgent telephone advice LawAccess NSW provides information, advice or referrals to other legal services.

If you are not sure what would be the best option for you to take if you have concerns for your grandchild you should get legal advice.



# WILL I RECEIVE ANY FINANCIAL SUPPORT IF I CARE FOR MY GRANDCHILD?

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You may have an informal arrangement for the care of your grandchildren. For example, the parents may have agreed that you will care for the children, or they may have come to live with you because their parents were not in a position to care for them.

You may have a more formal arrangement. For example, your grandchild may have been placed in your care by a Parenting Order made by the Family Court, through the Children's Court or through the involvement of DoCS.

There are several Commonwealth payments available to assist grandparents raising and caring for children. As long as you have the legal responsibility and day-to-day care for your grandchildren, you may be eligible for financial assistance. You must have at least 35% actual care of the child to be eligible for family assistance. You generally will not be eligible for family assistance if the parent of the child also lives in the same household.

You may be eligible for the following types of financial assistance:

**Family Tax Benefit Part A** – helps with the cost of raising the children.

**Family Tax Benefit Part B** – extra assistance to single parent families and to families with one main income where one parent chooses to stay at home or balance some paid work with caring for their children.

**Child Care Benefit** – a payment to help families who use approved and registered child care. You may also be entitled to extra assistance with the costs of child care through a Grandparent Child Care Benefit.

**Child Care Tax Rebate** – additional help for working families with the cost of child care.

**Baby Bonus** – to help with the extra costs of a new or adopted baby.

**Maternity Immunisation Allowance** – a payment paid in two separate instalments for children who are fully immunised or have an approved exemption from immunisation. The first instalment becomes payable when the child is 18-24 months old and the second becomes payable when the child is 4-5 years old.

**Double Orphan Pension** – is available if both parents have died or one parent has died and the other is in an institution such as a prison, psychiatric hospital or is missing and unable to be contacted.

**Carer Allowance** – may be available if you are caring for a child with a disability.

Other payments you may want to find out about are the **Youth Allowance** before your grandchild turns 16.

**Health Care Cards** –

If you receive a payment from Centrelink, such as the Age Pension, and if you are eligible for Family Tax Benefit, the grandchildren in your care can be added to your Pensioner Concession Card and receive the same benefits, such as prescription medicines, at the concessional rate.

If you do not receive a Centrelink payment but are eligible for the maximum rate of Family Tax



Benefit A you will automatically be given a Health Care Card for you and the children in your care. If you are not automatically entitled to a Health care Card you may be entitled to a low income Health Care Card. The Family Assistance Office can give you information about this.

You can also claim a separate foster child Health Care Card from the Family Assistance Office for your grandchild if you are caring for a child through an informal or formal foster care arrangement. The foster child Health Care Card is issued in the child's name and is not means tested.

### **Medicare benefits –**

You can claim Medicare benefits for medical expenses for your grandchild. You don't need to have the child registered on your Medicare card or a card issued for the child. A receipt in your name will enable you to claim the benefit. For more information about Medicare and your grandchildren contact Medicare on **13 2011**.

You can find out more about and apply for all these payments through the **Family Assistance Office**. You should make an appointment to see a worker at the Family Assistance Office to discuss your personal circumstances and to find out what you may be entitled to as a grandparent. The Family Assistance Office is located in all Medicare Australia offices, Centrelink Customer Service Centres and Australian Taxation Office shopfronts.

You can also get much more information about these payments online at [www.familyassist.gov.au](http://www.familyassist.gov.au) or by calling **13 6150**.

### **Payments through the NSW Department of Community Services (DoCS) –**

If you have the full time care of your grandchildren through the Children's Court as a result of DoCS involvement (that is, where DoCS has parental responsibility but you are the Authorised Relative Carer) you will receive a Statutory Care Allowance to help with the cost of caring for the child, including food, clothing, educational costs, travel, pocket money and so on.

If you have the care of grandchildren through either an informal family arrangement or a Family Court Order you may be able to receive a Supported Care Allowance as a contribution towards the cost of caring for them if you can show a need for financial assistance. You will need to be assessed by DoCS and they will take into account any other payments you receive.

For more information about these payments and your specific circumstances contact a **DoCS Community Services Centre**.

You can find your closest Community Services Centre by calling **(02) 9716 2222** or online at [www.community.nsw.gov.au](http://www.community.nsw.gov.au).

### **Child Support –**

If you provide care for your grandchild for at least 35% of the time you may be able to receive child support from the child's parents. You would have to apply for a child support assessment through the Child Support Agency.

If you receive an income-tested benefit from Centrelink for the child in your care that is greater than the minimum Family Tax Benefit Part A you will not be required by Centrelink to apply for child support. However you can apply for child support if you wish to do so.

If you apply for child support both parents will be assessed. You cannot ask for an assessment against one parent only unless there are special circumstances – such as if one parent has died or you fear violence from that person if you ask for child support from them.

For more information contact the Child Support Agency on **131 272**.

You can also find out more about Child Support online at [www.csa.gov.au](http://www.csa.gov.au).

# Where to get more information

## THE OLDER PERSONS' LEGAL SERVICE (A SERVICE OF THE AGED-CARE RIGHTS SERVICE)

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Provides free legal advice and assistance for older people in a range of areas of law.

Tel: **(02) 9281 3600** or **1800 424 079** (toll-free)

**[www.tars.com.au](http://www.tars.com.au)**

## LAWACCESS NSW

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Provides free telephone legal information, advice and referrals to other services, including to your nearest Legal Aid NSW office, Community Legal Centres, private lawyers and other organisations that can help.

Tel: **1300 888 529** (cost of a local call)

TTY: **1300 889 529**

**[www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au)**

If you need an interpreter call the Translating and Interpreting Service (TIS) on **131 450** and ask them to call LawAccess NSW.

## LEGAL AID NSW CHILD SUPPORT SERVICE

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A specialist service of Legal Aid NSW. It is not part of the Child Support Agency or Centrelink. It can help you if you need to prove parentage in order to obtain a child support assessment or if you have other questions about child support.

Tel: **(02) 9633 9916** or **1800 451 784**



## COUNCIL ON THE AGEING NSW (COTA NSW)

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COTA NSW has a grandparenting web site - a resource point for grandparents raising their grandchildren in NSW to find information and support groups.

Tel: **(02) 9286 3860** or **1800 449 102**

**[www.raisinggrandchildren.com.au](http://www.raisinggrandchildren.com.au)**

## COURT WEBSITES

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You can get further information about Court processes, forms, publications and Do-It-Yourself kits on the Family Court website and the joint website of the Family Court and Federal Magistrates Court.

**[www.familycourt.gov.au](http://www.familycourt.gov.au)**

**[www.familylawcourts.gov.au](http://www.familylawcourts.gov.au)**

## NATIONAL ENQUIRY CENTRE (NEC)

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The NEC is the entry point for all enquiries about Family Court and Federal Magistrates Court matters.

Tel: **1300 352 000**

This brochure was produced by Legal Aid NSW's Older Persons Legal & Education Program. This Program provides legal advice, assistance and information to older people in NSW. To find out more about the Program or to request an information session on this topic call (02) 9219 5000.

Copies of this brochure can be obtained online at [www.legalaid.nsw.gov.au/publications](http://www.legalaid.nsw.gov.au/publications) or email [publications@legalaid.nsw.gov.au](mailto:publications@legalaid.nsw.gov.au) or call (02) 9219 5028.



**Other brochures available:**

- **Moving in with the family?**  
Make sure you protect your interests
- **Changing your accommodation arrangements?**  
Will it affect your pension?
- **Are you experiencing violence or abuse?**  
You can make it stop
- **Who will decide for you if you can't decide for yourself?**  
Think about planning ahead
- **Helping your family financially?**  
Understand the risks

This brochure provides basic information only and is not a substitute for legal advice. You should see a lawyer to get advice about your particular situation.

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