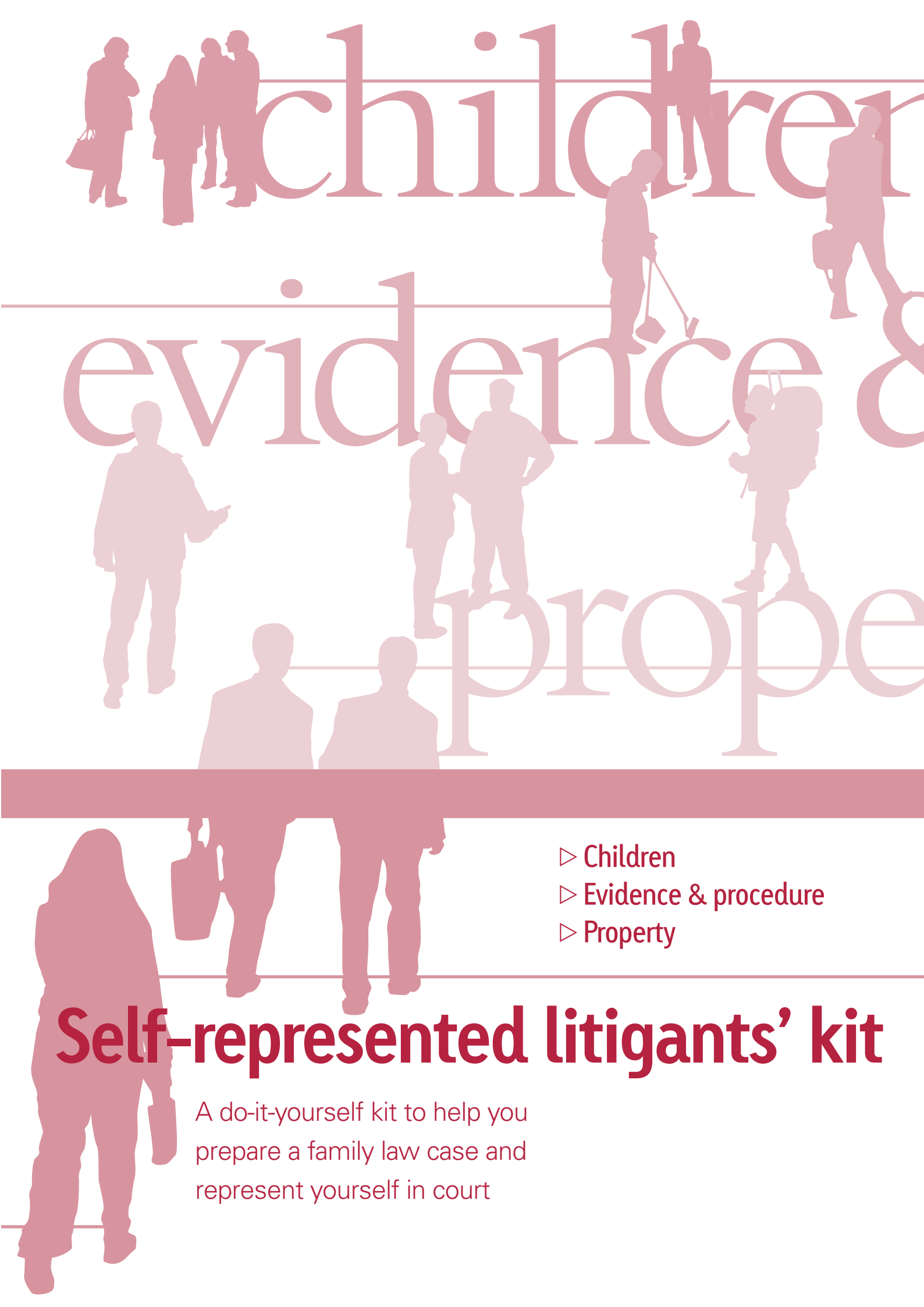
- Children
- Evidence & procedure
- Property

Self-represented litigants' kit

A do-it-yourself kit to help you prepare a family law case and represent yourself in court

Victoria Legal Aid
Lawyers And Legal Services



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Victoria Legal Aid

Our vision

Victoria Legal Aid is a leading and responsible force for community access to the legal system and for social justice.

Our values

Victoria Legal Aid is committed to: serving our clients and community professionally and ethically; acting with integrity, fairness and transparency at all times; respecting and valuing diversity, and pursuing continuous improvement across the organisation.

Victoria Legal Aid provides a broad range of legal services including:

- legal representation in courts and tribunals by qualified Victoria Legal Aid lawyers or private law firms
- legal advice, information and referral either face-to-face or via a call centre, which provides a service in 14 languages
- a family dispute mediation service
- an extensive range of booklets and other materials, plus a range of seminars and workshops on various legal topics
- Victoria's only free public law library.

Some of our services are subject to guidelines and means tests. However, most of our services are provided free of charge. Application forms for legal assistance are available from Victoria Legal Aid or private lawyers.

For more information about our services and service charter go to www.legalaid.vic.gov.au or phone us on 9269 0234 or 1800 677 402.

▷ About this kit

This kit is for people involved in disputes under the *Family Law Act* 1975 ('the Act') about children and property. You may also wish to refer to our other family law publications.

WARNING: The information about children applies in all cases, but the information about property applies only to people who are or were married. People who are or were in domestic partnerships (de facto or same sex couples) cannot use the Act to resolve property disputes. For these matters get legal advice.

References are made to the *Family Law Act* 1975 and to the *Federal Magistrates Act* 1999 and the rules made under these acts. These Acts are regularly updated so it is extremely important that you obtain a copy of the most recent edition. Both acts can be viewed at a law library or on the internet.

This kit provides information only and is not a substitute for legal advice. If you are involved or are likely to be involved in court proceedings, you should get legal advice.

▫ Legal words

- A reference to 'child' includes children.
- A reference to 'the court' includes the Family Court of Australia ('Family Court') and the Federal Magistrates Court unless otherwise stated.
- References to 'the law' or 'the ' means the *Family Law Act* 1975 (Commonwealth).
- References to 'the rules' means the *Family Law Rules* 2004 issued by the Family Court of Australia.
- 'PDR' means primary dispute resolution.
- 'Deponent' means the person giving evidence under oath, in the form of an affidavit.
- 'Child representative' means a lawyer appointed by the court to represent the best interests of the child.

▷ Alternatives to going to court

Primary dispute resolution

The Act aims to 'to encourage people to use primary dispute resolution (PDR) mechanisms (such as counselling, mediation, arbitration or other means of conciliation or reconciliation) to resolve matters in which a court order might otherwise be made'.

The courts therefore encourage parties to try PDR at every step of the court process. Also, the Family Court has introduced pre-action procedures, which make PDR compulsory in all but a few cases – *See:* Pre-Action Procedures and Appendix 2.

PDR has several benefits compared with the court system, for example, it is more likely to lead to a mutually satisfactory outcome and it is cheaper.

A number of organisations offer PDR services. They may charge a fee. *See:* Where to get help.

Consent orders

You do not have to go to court if you and your former partner can reach an agreement about the issues in dispute. To make your agreement legally enforceable you need to file consent orders with the Family Court.

You can do this by completing an Application for Consent Order – *See:* Appendix 1. You need to provide detailed information about all parts of your application. This will require careful preparation.

Examples of orders about children are given in Chapter 2, and examples of property orders are given in Chapter 3.

A kit for the Consent Order form is available directly from the Family Court or can be downloaded from its website. It is strongly recommended that you use this kit as a checklist to ensure you complete it correctly.

Once approved by the Family Court, the consent orders have the same legal effect as any other court order.

You cannot apply for consent orders in the Federal Magistrates Court, but if a matter settles after it has been started consent orders can be made reflecting what has been agreed.

Binding financial agreements

You can also formalise an agreement about financial matters by using a binding financial agreement. You can make binding financial agreements before, during or at the end of marriage. You must meet strict requirements before a financial agreement can be considered binding, for example, both you and your former partner must consult a lawyer.

Pre-action procedures (Family Court only)

The Family Court has introduced mandatory pre-action procedures that parties must follow. These procedures are found in the *Family Court Rules* 2004, Schedule 1 ('the rules'). *See:* Appendix 2.

Primary Dispute Resolution

The procedures require every prospective party to Family Court proceedings to make a genuine effort to resolve the dispute before starting a case. With some exceptions, this means that you must participate in PDR. This can include negotiation, conciliation, mediation, arbitration and counselling, or a combination of these.

For a list of organisations providing PDR services *see:* Where to get help.

If PDR is not successful, you must give notice in writing of your intention to start court proceedings, and must identify the issues in dispute and state the orders you will seek. Options for settlement must be explored with the other party, and you must make a genuine offer to resolve the issues in dispute. You must also specify a date by which the other person must reply to your letter (at least 14 days).

Duty of disclosure

In addition to compulsory PDR, each party to a case has an ongoing obligation to make full, frank and prompt disclosure of all information relevant to the case, in a timely manner. (Rule 13.) This obligation starts at the pre-application stage, and continues until final orders are made. Note that 'information' includes, but is not limited to, documents, and it includes information that may support the other party's case. If you do not comply with this obligation the consequences are severe – they can include costs penalties, delays to your case and proceedings against you for contempt of court. You may also be prohibited from using information in your case if you have not disclosed it.

The information you are required to disclose relates to the issues in dispute, so it is important that these are clearly identified. The type of information you must provide will depend on the nature of your case. In financial cases, the list of information liable to be disclosed is very detailed, and you must refer to Rule 13.04.

The pre-action procedures vary according to the type of dispute. You must consult the rules to find out what you must do for your own case.

▷ Chapter one – Applying to a court

Sometimes disputes cannot be resolved through PDR, and court proceedings may be an option.

Choosing the right court

You will need to decide which court is appropriate for the kind of matter you are involved in. The decision about where to apply can depend on:

– Where you live

If you live in a metropolitan area you would probably apply directly to the Family Court or to the Federal Magistrates Court, depending on some of the other factors listed below.

If you live in regional Victoria you can apply through the Magistrates' Court to begin with. (Interstate readers should check whether this is possible in their state or territory.)

The Magistrates' Court has the power to make orders by agreement. It does not have the power to hear disputed cases, unless both parties consent to the court hearing the matter. If your matter cannot be resolved in a Magistrates' Court, it can be referred to the Family Court or Federal Magistrates Court in the city or outer city area or a regional location during circuit.

The Family Court and Federal Magistrates Court conduct court sittings in country areas. The courts usually sit for one week in each area. To obtain a list of circuit dates, contact the court or visit the web sites. *See:* Where to get help.

If you want your matter to be heard during a circuit sitting, you can lodge your application with the court along with a written request (in the form of a letter) to allocate the matter to a particular circuit. If you have already started court proceedings and want your matter to be transferred to circuit, you will have to request an order from the court to allow you to do this. (If the other party agrees, you an request an order by consent.)

– The complexity of the case

Some complex children's matters can only be heard in the Family Court, for example, matters likely to run beyond two days in a final hearing. If the dispute is about property, and the value of the property is more than $700,000, you will need to apply to the Family Court. The Family Court is the only court able to consider issues like the validity of a marriage or annulment of the marriage.

– Costs

Application costs vary between the Family Court and Federal Magistrates Court. Where more than one court can hear the matter, you might choose the cheaper option.

– Procedural issues

If you apply to the Family Court (for some matters you will have no choice) you will have to follow the pre-action procedures described earlier.

If appropriate, the Family Court and Federal Magistrates Court can transfer cases from one court to the other.

Making an application

The person who files an application with the court first is referred to as the applicant. The person who files a response to an application with the court is referred to as the respondent. It does not affect your case if you are the applicant or respondent.

Both courts divide their forms into interim and final orders. If you are seeking different interim and final orders, you need to outline this in your application and response.

Interim orders are temporary orders that apply until the court makes a final decision, or the matter is resolved by agreement.

Responding to an application

If you are served with an application from your former partner, you may choose to do any of the following:

- disagree with some or all of the orders the other person has asked for and apply for different orders by filing a response
- agree to the orders the other person has asked for, sign a consent order and file a Notice of Address for Service: Form 18
- do nothing and allow the court to decide whether it will grant orders by default in favour of the applicant. It is strongly recommended that you do not ignore any application.

Court documents

Forms

The forms used in each court are generally similar, but there are differences. You should use the correct form for the court you are applying to. The Federal Magistrates Court will sometimes accept Family Court forms if their contents 'substantially comply' with the court's rules. *See:* Appendix 1 for a list of commonly used forms.

Documents to file with an application

The first time you file an application with the court, you must show that the court has authority to deal with your case. You can do this by providing an original or certified copy of the original or a photocopy (you must allow the registrar to sight the original if necessary), of the:

- Marriage Certificate
- Divorce Certificate (if applicable)
- Birth Certificate of the child (if you have not been married)

If you were married in Australia or your child was born in Australia, you can apply to the Registry of Births, Deaths and Marriages in the state in which you were married or in which your child was born for a certified copy of the relevant certificate. If you are unable to obtain a certified copy of your marriage certificate or child's birth certificate, you will need to prepare an affidavit. An affidavit will need to set out the details of your marriage and the reasons why you are unable to obtain a copy of the relevant certificate.

In the Family Court, the rules differ depending on whether you are asking for interim orders, to be dealt with ahead of your application for final orders. In that case, you must prepare two applications (one each for the interim orders and the final orders) and an affidavit in an approved form. If you do not need interim orders, you complete an application for final orders and can prepare an affidavit at a later stage of court proceedings.

In the Federal Magistrates Court, you will need to file an affidavit at the same time as filing your application or response.

The documents required for each court can be obtained from the relevant court or downloaded from their web site. *See:* Where to get help.

Where to file (lodge) your application

Once you have completed your application or response along with any supporting documents you must then file them at the court. You can file your documents either by post or by personally attending the court.

Before filing the original documents, you will need to make enough copies of each original document for each other party to the proceedings and for your own records. Original documents are kept in a file at the court (your file will have an individual court number).

After you have given the documents to the court, they will be stamped with the court's official seal. It is then your responsibility to serve (deliver) a sealed copy of all documents on the other party/ies.

Fees payable

You may be eligible to apply for an exemption or for the fee to be waived (removed) if you meet certain criteria. Ask the court registry staff for more information. Always check with the court registry for changes in fees.

Court fees*

Family Court

$181 Application for final orders (Form 1)

$181 Response to an application for final orders (Form 1A)

Federal Magistrates' Court

$115 Application

$115 Response

* These fees are subject to change without notification

Arranging delivery (service) of court documents

You will need to arrange to serve a sealed copy of your application or response and any other documents on the other party or parties (including the child representative, if applicable). The application must be personally served as soon practicable after filing. The response does not have to be served personally but must be served at least seven days before the court date.

A party to the proceedings cannot personally serve court documents. You will need to arrange for a third person over the age of 18 to serve the documents. This person can be a family member or friend or you can hire a process server. Note, the person serving the documents cannot be someone with an 'interest' in the proceedings. Refer to the Yellow Pages for listings of process servers.

For further information on service of documents refer to a brochure produced by the Family Court called 'Service (of documents)'.

The person serving the documents should attempt to obtain an Acknowledgment of Service signed by the respondent. After the documents have been served, the person serving the documents needs to complete an Affidavit of Service.

Both the Acknowledgment of Service and Affidavit of Service need to be filed with the court.

If you are unable to serve the other party or parties, you will need to apply to the court for substituted service (service of documents on another person) or dispensation of service (court permission not to serve the documents). You do this by making an interim application to the court and supporting your application with an affidavit. KEEP COPIES.

In addition to keeping copies of all court documents, you also need to keep copies of all correspondence that you send to the other party or parties. If a child representative is appointed, you should send them a copy of any letter you send to your former partner or his/her legal representative. You should also serve the child representative with copies of all court documents on which you intend to rely either now or at a later stage, thus giving the child representative the opportunity to participate fully. You should indicate that you have done this by inserting the following at the end of your letter:

Yours faithfully

Jenny Brown

cc Child Representative

▷ Chapter two - Children

The principles of children's rights and parenting obligations are set out in Part VII (seven) of the Act. They apply to all children, whether or not their parents are or have been married.

The court has to apply the Act to the facts of each case before making a decision about a child. The court's main consideration is the best interests of the child. (Section 65E). To determine this, the court looks at the factors in section 68F (see box).

The following outlines some of the important aspects of the Act.

Section 60B

Object of part and principles underlying it

(1) The object of this Part [Part VII] is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

(2) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:

(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

(b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and

(c) parents share duties and responsibilities concerning the care, welfare and development of their children; and

(d) parents should agree about the future parenting of their children.

Section 65C Who may apply for a parenting order

A parenting order in relation to a child may be applied for by:

(a) either or both of the child's parents; or

(b) the child; or

(ba) a grandparent of the child; or

(c) any other person concerned with the care, welfare or development of the child.

Section 65E Child's best interests paramount consideration in making a parenting order

In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

Section 68F

How a court determines what is in a child's best interests

(1) Subject to subsection (3), in determining what is in the child's best interests, the court must consider the matters set out in subsection (2).

(2) The court must consider:

(a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;

(b) the nature of the relationship of the child with each of the child's parents and with other persons;

Continued next page

(c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:

(i) either of his or her parents; or

(iii) any other child, or other person, with whom he or she has been living;

(d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

(e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;

(f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;

(g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:

(i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or

(ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;

(h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

(i) any family violence involving the child or a member of the child's family;

(j) any family violence order that applies to the child or a member of the child's family;

(k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

(l) any other fact or circumstance that the court thinks is relevant.

(3) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2).

Go through the relevant factors in Section 68F of the Act and select those that relate to your case. To present your case in the best possible light, you need to bring these factors to the attention of the court. You can do this by preparing an affidavit. *See:* Chapter 5 – Affidavits.

When the court applies the Act to the relevant facts of each case, it must also consider other decisions made by judges and/or federal magistrates. These decisions are used in conjunction with the Act and applied to family law cases.

Child representatives

A child representative may be appointed in your case. A child representative is an independent lawyer appointed by the court who helps the court decide what arrangements are in the child's best interests. You may be required to contribute to their costs. *See:* Victoria Legal Aid's information sheet on child representatives.

Family and expert reports

In many cases involving children the court asks a counsellor or other expert to prepare a family report. This report gives the court an independent view of the dispute and family relationships and may include the child's wishes if appropriate. You may be required to contribute to the cost of the report if this is ordered privately.

You can obtain case law from most law libraries or search the Family Court, Federal Magistrates Court or Austlii websites. *See:* Where to get help.

It may be a good idea to do some research and try and locate case law that has similar facts to your case.

Applying for parenting orders

There are four types of orders that the court can make in relation to children. These include orders about:

1. Residence – who the child will live with: section 64B (2) (a) of the Act
2. Contact – who the child will spend time with: section 64B (2) (b) of the Act
3. Maintenance – who will contribute to the child's financial support: section 62B (2) (c) of the Act (for children born before 1989)
4. Specific Issues – any other aspects of parental responsibility such as education, holidays, sport, religious or medical matters: section 62B (2) (d) of the Act

Interim orders

An interim hearing is a short hearing where the court makes temporary orders about a case while you are waiting for a final decision. The court will rely upon the documentation you have filed and only in exceptional circumstances will hear evidence directly from you and your witnesses.

Some common applications for interim orders include:

- applications relating to children's residence, contact and specific issues that cannot wait until a final hearing
- urgent matters involving children, for example, stopping a party from taking a child out of the country (injunction) or recovering a child who has been taken without authority (recovery order).

If you believe your matter is urgent, you can request that the court list your matter for an urgent hearing. The request is usually made to the deputy registrar at the time of filing. To obtain an urgent hearing, you will need to state this in your application. The first order on your application should read: *'That this matter be deemed urgent and that all times be abridged'.* You will need to provide reasons in an affidavit to justify why your case should be heard on an urgent basis. In the Family Court, the affidavit should be in the form approved by the Principal Registrar. *See:* Chapter 5 – Affidavits.

For more information about the different types of orders see our publication 'Untying the knots'.

Examples of children's orders

General orders

The following are some examples of orders you might request as interim or final orders. There are no standard orders. Theses examples can be modified to meet your particular circumstances.

(1) That the *husband/wife/mother/father/other party and the _____ have the joint responsibility for the long term care welfare and development of the *child/children of the marriage: (give full names and dates of birth of each child)

(2) That commencing _____day of _____ the child/ren reside with the _____ from _____ am/pm Monday until _____ am/pm the following Monday and each alternate week, and reside with the _____ from _____ am/pm Monday commencing _____day of _____ until _____ am/pm Monday every other alternate week.

(3) That the said *child/children reside with the _____ and that the _____ have the sole responsibility for the day to day care, welfare and development of the said *child/children.

Continued next page

(4) That the _____ have contact with the said *child/children as follows:

(a) each alternate week from _____ am/pm on _____day to _____ am/pm on _____day, the first of such contact to commence on the _____day of _____ 20___ at _____ am/pm

(b) on two evenings during the week on the telephone by agreement between the parties and failing agreement on Tuesday and Thursday evenings between _____ am/pm and _____ am/pm

(c) for one week in each of the term school holidays school holidays, with the _____ to have the first half in 20___ and the _____ to have the first half in 20___ and alternating each year thereafter

(d) for two consecutive weeks in the summer school holiday to commence on the _____day of _____ 20___ at _____ am/pm

(e) on Christmas Day (or other days of religious observance) by agreement between the parties and failing agreement from _____ am/pm to _____ am/pm

(f) on Easter Sunday (or other days of religious observance) by agreement between the parties and failing agreement from _____ am/pm to _____ am/pm

(g) at times agreed between the parties on Mother's and Father's Day and failing agreement from _____ am/pm to _____ am/pm on Mother's/Father's Day

(h) at times agreed between the parties on the child's birthday and failing agreement from _____ am/pm to _____ am/pm

(i) as may be otherwise agreed between the parties from time to time

(5) That transportation to and from any contact shall be shared between the parties, with the _____ collecting the child/children at the commencement of contact and the _____ returning the child/children at the conclusion of contact.

Specific issue orders

(6) That each party keep the other informed in the event that child/children require medical attention whilst in their respective care such notification to be provided within 24 hours of the said medical attention being obtained.

(7) That the parties keep each other informed of any change of address or telephone number within seven (7) days of any such change.

(8) That the _____ authorise the child/children's school to provide the _____ with copies of the child/children's school reports.

Interim orders

(9) That this matter be deemed urgent and that all times be abridged.

(10) That the husband/wife/mother/father/other party be restrained from removing the child/children from the State/Commonwealth of Australia.

(11) That the court issue a recovery order for the return of the child/children to husband/wife/mother/father/other party a person who has a residence order for the said child/children.

(12) That the child/children be permitted to travel outside the Commonwealth of Australia notwithstanding that the consent of the husband/wife/mother/father has not been obtained AND IT IS requested that the Department of Foreign Affairs issue a passport for the said child/children.

These examples are only a guide and can be changed to suit the issues that relate to your case

▷ Chapter three - Property

Decisions in relation to property and spousal maintenance are guided by the principles of Part VIII (eight) of the Act. These principles apply only to parties who are or have been married.

If your case is listed in the Federal Magistrates Court you may also have to get a copy of the *Federal Magistrates Act* 1999. Both acts can be viewed at a law library or on the internet.

The principles of property law and spousal maintenance are set out in Part VIII and VIIIB of the *Family Law Act* 1975 ('the Act'). The court has to apply the Act to the facts of each case before making an order about property or spousal maintenance.

Time limits

If you are married you can apply for a property settlement and/or spousal maintenance at any time before your divorce. Once your final divorce has been granted, you must file your property and/or spousal maintenance application within 12 months.

The court is able to extend the 12 month time limit, but will only do this if there is good reason. If 12 months has expired, you cannot proceed without the permission of the court to file your property and/or spousal maintenance application.

Interim orders

The courts can also make interim property orders. (For general discussion on interim orders *see:* Chapter 2 – Children.)

Some common applications for interim property orders include:

- sole occupancy order - where one party wishes to stay in the former family home at the exclusion of the other party
- urgent injunction - stopping one party from selling or disposing of assets or freezing money in a bank account or money about to be received from a pay out of an insurance policy or superannuation
- periodic spousal maintenance - where one party needs the financial support of the other until a final property settlement can be reached.

Caveats

It may be possible to lodge a caveat on a piece of land. This is a warning to a third party dealing with the land that you must have an interest that must be taken into account. This procedure will not always be possible: you must satisfy the Registrar of Titles that you have an interest in the land that should be protected. If you lodge incorrectly you may have to pay costs, so seek legal advice first.

Recent changes

There have been recent changes to family law that will soon give the courts power, under the Act, to make orders and injunctions that affect third parties (those who are not part of a marriage, including organisations like banks). For example, a court could make an order preventing a bank from selling a house, or an order transferring responsibility for a debt from one former partner to the other. Further changes to these laws and bankruptcy laws are also proposed. These will affect family law cases. This is a complex area of law and you should seek legal advice.

Steps in a property case

There is no automatic 50/50 division of property in the event of marriage breakdown. In considering what orders to make in property law cases, the court generally applies a three-step process.

The three steps are:

1. Identify and value the property of the parties.
2. Take into account the contributions made by the parties to the property – [refer to section 79 (4) (a) to (c) of the Act].
3. Consider the list of factors outlined in sections 75 (2) and 79 (d) to (g) of the Act.

Step 1 – Identify and value the property

You will need to provide the court with a detailed list of all property, usually in a financial statement (Form13) which may include:

- real estate (including the family home and/or rental property)
- cars, boats, caravans etc
- cash/bank accounts
- investments
- superannuation
- insurance policies
- shares
- jewellery
- furniture
- any other assets

Property includes assets owned individually, jointly, or by a family trust or family company. It may also include property that was in your possession or that of your former partner, but has recently been sold, given away to a friend or destroyed.

Collect all the documents you can to prove the financial history of your marriage and your current circumstances. These can include group certificates and taxation returns, bank statements, certificates of title, superannuation and insurance policies as well as any other financial document that relates to your case.

Once you have a list of property, you will need to estimate its value. In order to do this, it may be useful to obtain property valuations. You can get some idea of the value of items like furniture and cars by looking at advertised prices for second hand goods. If property values remain in dispute and the matter proceeds to final trial, you will need to obtain sworn valuations by an independent assessor.

It is important to note that the court will take into account the market value of the property at the time when the matter comes before the court, rather than at the time of separation. When setting out your financial details ensure that they are accurate, as you will be required to swear or affirm that they are correct.

Superannuation

As of 28 December 2002, superannuation interests are treated as property for the purposes of property settlement in the event of marriage breakdown. The new superannuation laws allow you and your former partner to reach an agreement independently. If this is not possible, the court will decide how superannuation interests will be split (divided).

You will need to gather accurate information about the value of your superannuation fund(s) and those of your former partner. To do this, you need to complete a number of forms.

More information about superannuation laws is available on the Commonwealth Attorney-General's Department web site as well as the Family Court and Federal Magistrates Court web sites.
See: Where to get help.

Step 2 – Contributions towards the property

Once the property is identified and its value is established, the court is then able to consider the contributions made by each party: section 79 (4) (a) – (c) of the Act.

The court takes into consideration direct and indirect financial contributions to the property. It also considers any contributions made to the welfare of the family, including any contributions made as home maker or parent.

For example, the contribution a parent makes by staying home caring for children is considered to be just as valuable as if he or she contributed income to the marriage.

Section 79 (4)
Matters to be taken into account

In considering what order (if any) should be made under this section in proceedings with respect to any property of the parties to a marriage or either of them, the court shall take into account:

(a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage, or either of them;

(b) the contribution (other than financial contribution) made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of the last-mentioned property, whether or not that last-mentioned property has, since the making of the property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and

(c) the contribution made by a party to the marriage to the welfare of the family, constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of home maker or parent.

Step 3 – Apply the law to your case

After taking into account the contributions made by the parties, the court will apply section 79 (4) (d) to (g) of the Act. You will note that section 79 (4) (e) directs the court to consider the factors found under section 75 (2) of the Act.

Section 79 (4) continued
Matters to be taken into account

(d) the effect of any proposed order upon the earning capacity of either party to the marriage;

(e) the matters referred to in sub-section 75(2) so far as they are relevant;

(f) any other order made under this Act affecting a party to the marriage or a child of the marriage; and

(g) any child support under the *Child Support (Assessment) Act* 1989 that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage.

The factors found under section 75 (2) of the Act relate to property and spousal maintenance cases.

Section 75 (2)

Matters to be taken into consideration in relation to spousal maintenance

(2) The matters to be so taken into account are:

(a) the age and state of health of each of the parties;

(b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;

(c) whether either party has the care or control of a child of the marriage who has not attained the age of 18 years;

(d) commitments of each of the parties that are necessary to enable the party to support:

(i) himself or herself; and

(ii) a child or another person that the party has a duty to maintain;

(e) the responsibilities of either party to support any other person;

(f) subject to subsection (3) the eligibility of either party for a pension, allowance or benefit under:

(i) any law of the Commonwealth, of a State or Territory or of another country; or

(ii) any superannuation fund or scheme, whether the fund or scheme was established, or operates, within or outside Australia, and the rate of any such pension, allowance or benefit being paid to either party;

(g) where the parties have separated or the marriage has been dissolved, a standard of living that in all the circumstances is reasonable;

(h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;

(j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;

(k) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;

(l) the need to protect a party who wishes to continue that party's role as a parent;

(m) if either party is cohabiting with another person – the financial circumstances relating to the cohabitation;

(n) the terms of any order made or proposed to be made under section 79 in relation to the property of the parties;

(na) any child support under the Child Support (Assessment) Act 1989 that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage; and

(o) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account; and

(p) the terms of any financial agreement that is binding on the parties.

It is a good idea to go through the relevant factors in sections 79(4) and 75(2) of the Act and select the factors that relate to your case. To present your case in the best possible light, you need to bring these factors to the attention of the court. You can do this by preparing an affidavit.

For further information about how to prepare an affidavit, *see:* Chapter 5 – Affidavits.

In addition to the three-step process, section 79 (2) of the Act states that the court must ensure that it is 'just and equitable' (fair) to make the orders.

Spousal maintenance

Spousal maintenance is financial support paid by a person to their former partner when they cannot support themselves. This is found under section 72 of the Act.

Spousal maintenance is not an automatic right. In deciding a spousal maintenance application, the court takes into account the need of the applicant and the respondent's capacity to pay.

Powers and limitations of the courts

Section 80 of the Act outlines the power of the court when making property and spousal maintenance orders. It is only possible for the court to make such orders within the limitations of the Act.

Section 72

Right of spouse to maintenance

72 A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately whether:

(a) by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;

(b) by reason of age or physical or mental incapacity for appropriate gainful employment; or

(c) for any other adequate reason, having regard to any relevant matter referred to in sub-section 75(2).

Section 80

General powers of court

(1) [Orders which court may make] The court, in exercising its powers under this Part, may do any or all of the following:

(a) order payment of a lump sum, whether in one amount or by instalments;

(b) order payment of a weekly, monthly, yearly or other periodic sum;

(ba) order that a specified transfer or settlement of property by made by way of maintenance for a party to a marriage;

(c) order that payment of any sum ordered to be paid wholly or partly secured in such manner as the court directs;

(d) order that any necessary deed or instrument be executed and that such documents of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;

(e) appoint or remove trustees;

(f) order that payments be made direct to a party to the marriage, to a trustee to be appointed or into court or to a public authority for the benefit of a party to the marriage;

(g) omitted;

(h) make a permanent order, an order pending the disposal of proceedings or an order for a fixed term or for a life or during joint lives or until further order;

(i) impose terms and conditions;

(j) make an order by consent;

(k) make any other order which it thinks it is necessary to make to do justice; and

(l) subject to this Act and the applicable Rules of Court, make an order under this Part at any time before or after the making of a decree under another Part.

There are a number of other sections under Part VIII and VIIIB of the Act that may be relevant to your case. Most law libraries will have a copy of the Act or you can view the Act on the Family Court or Federal Magistrates Court web sites. *See:* Where to get help.

Examples of general property orders (interim and final)

(1) That the husband/wife pay to the wife/husband the sum of $ _____ ('the payment') on or before the _____day of _____ 20___('the date').

(2) That contemporaneously with the payment:

(a) the husband/wife do all such acts and things and sign all such documents as may be required to transfer to the husband/wife at the expense of the husband/wife all of his/her right title and interest in the real property situate at and known as (insert full address) and being the whole of the land more particularly described in Certificate of Title Volume _____ Folio _____ ('the real property');

(b) the husband/wife indemnify the husband/wife against all payments and liability pursuant to the mortgage registered No. _____ to (specify lender) ('the mortgage') and all apportionable rates, taxes, and outgoings of or with respect to the real property of whatsoever nature and kind.

OR

(3) That the husband/and or wife do all acts and things necessary to forthwith sell out of Court the real property situate at and known as (insert full address) and being the whole of the land more particularly described in Certificate of Title Volume _____ Folio _____ ('the real property') the proceeds of sale paid in the following manner and priority:

(a) in payment of the amount requires to discharge the mortgage registered No. _____ to (specify lender) ("the mortgage")

(b) in payment of agent's commission and auction expenses if any due on the sale;

(c) in payment of legal costs;

(d) the balance to be divided equally between the husband and wife

OR

(e) the balance to be divided between the husband and the wife as to _____% to the husband and _____% to the wife.

(4) That pending the payment or completion of the sale: -

(a) the husband/wife have the sole right to occupy the real property and that during such right of occupation the husband/wife pay all instalments pursuant to the mortgage and all rates and taxes and like apportionable outgoings of the real property as they fall due;

(b) the parties hold their respective interests in the real property upon trust;

(c) neither party encumber the real property without the consent in writing of the other party.

(5) That the husband/wife forthwith do all necessary acts and things and sign all necessary documents to transfer to the husband/wife at the expense of the husband/wife all of his/her right title and interest in _____ (for example,. car, boat, shares).

(6) That the husband/wife be liable for and indemnify the husband/wife against all payments in respect to _____ (for example,. loan, debt).

OR

If you are uncertain of your entitlements, you may ask the court to determine the property division.

In this case, you may seek an order as follows:

(7) That the husband/wife pay to the husband/wife such amount as the court deems appropriate in the circumstances.

(8) That the husband/wife transfer his/her right title and interest in the real property situate at and known as (insert full address) and being the whole of the land more particularly described in Certificate of Title Volume _____ Folio _____ ('the real property') to the husband/wife in return for such payment as the court deems appropriate in the circumstances.

Examples of general spousal maintenance orders

(9) That the husband/wife pay to the husband/wife for his/her maintenance the sum of $ _____ per week.

(10) That the husband/wife pay to the husband/wife for his/her maintenance the sum of $ _____ by way of a lump sum maintenance payment.

Examples of interim orders

(11) That until the final determination of these proceedings, the husband/wife be entitled to the sole use and occupation of the former matrimonial home and the husband/wife is hereby restrained from entering upon the property without the consent of the husband/wife.

(12) That until the final determination of these proceedings, the husband/wife be restrained from selling, gifting and dealing with, alienating or disposing of howsoever any of the following assets. (for example, house, money, redundancy payouts)

These examples are only a guide and can be changed to suit the issues that relate to your case. You should get legal advice on what terms like 'indemnify' mean.

▷ Chapter four – Preparing for a hearing

The court process is geared to resolving disputes, wherever possible, by agreement. If you and your former partner are unable to reach an agreement, the court will be forced to make a decision. This decision may be one neither party is satisfied with.

Work out the issues in dispute

The planning and management of your case should focus on the legal issue(s) in dispute. Not only must you be clear about the outcomes you want to achieve, you should also understand what the other party wants to achieve, and be able to identify the extent of your differences.

In working out the differences, it may be helpful to make a chart or list of the strengths and weaknesses of each case. You should be able to address any weak points in the other side's case and be able to visualise what the response to any weakness in your case may be. Whatever your strategy is, make sure that you have prepared thoroughly before your case is listed in court.

Be well prepared to support your arguments. When your matter goes to court every detail of what you say will be open to scrutiny and challenge from the other side. Do not assume that something will go unchallenged just because it may seem obvious and correct to you. Where possible, have your evidence ready to support your case.

Gather evidence in support of your case

The court can only consider evidence that is relevant to the case and admissible. Evidence is relevant if it helps to support a party's argument, and/or helps to counter any opposing side of the argument.

Be objective about the evidence required, and try to avoid introducing unnecessary material which may be distracting. At the same time, you must keep in mind your duty to disclose material relevant to the issues in dispute.

Sometimes evidence that might seem relevant cannot be used in court. *See:* Some important rules about evidence.

Sources of relevant evidence

Some of the sources you may be able to draw upon for evidence to support your arguments include:

- witnesses who can verify your version of events
- written documents which back up what you say
- reports from professionals
- financial records (such as bank statements, copies of invoices, bills, receipts)
- letters or other correspondence
- affidavits
- photos or videos that can verify claims or allegations you are making.

What if there is no independent evidence available?

Often there will be no independent evidence or witnesses available to support your case (particularly in situations such as family violence). If you do not have any independent evidence, you can still proceed with your case. In this situation, the evidence presented to the court will be your own account of events in the form of an affidavit.

If this is the case, it is important that the court believes you are giving truthful and accurate evidence. Be careful not to exaggerate details in an attempt to make your case seem more impressive. Try and stick to the facts, and where possible, back up the things you say.

What if someone else holds the evidence I need?

If another person such as family member, friend or work colleague, witnessed an incident first hand, you can ask them to give their evidence to the court in the form of an affidavit. If that evidence is challenged, the witness may be required to come to court. If the witness does not wish to come to court to give their evidence, you may issue a subpoena, which will compel them to attend. For other methods of obtaining evidence held by someone else, *see:* Chapter 6 – Disclosure and subpoenas.

Some important rules about evidence

Not all evidence that is relevant can be presented to the court. Evidence that cannot be used in court is called 'inadmissible evidence'. The most common categories of inadmissible evidence are:

Hearsay evidence

The general rule is that hearsay evidence is not admissible to prove that a fact exists. According to the Australian Concise Oxford Dictionary (2nd ed. 1992) hearsay evidence is 'evidence given by a witness [for example, you] based on information received from others, rather than personal knowledge'.

So, for example, in your evidence you cannot make reference to a conversation between your sister and former partner, which occurred when you were not present.

There are exceptions to the general rule, where the statement is admitted for a purpose other than establishing the truth of the statement. For example, it might be used to establish motivation or a person's state of mind, or the time and location of an event.

If you attempt to use hearsay evidence, the other party may challenge its use. It is probably safer to avoid the possibility of a challenge to the evidence on the grounds that it is hearsay, by calling the person who made the statement as a witness.

Opinion evidence

The general rule is that witnesses can only give evidence about facts directly known to them. So, a witness can give evidence of his or her observations, but not of the conclusions reached as a result of those observations. The exception to this rule is the opinion evidence of an expert, who has qualifications or experience that enables him or her to draw conclusions based on their expertise.

Character evidence

The general rule is that evidence produced for the sole purpose of discrediting a witness is not admissible. If a party uses evidence for the purpose of establishing that party's good character, you may be permitted to call evidence contradicting that evidence.

Conduct on other occasions

The general rule is that the conduct of a witness on a previous occasion, not connected with the present proceedings, is not admissible. However, you may introduce evidence that shows a pattern of behaviour leading to, or directly connected with, the present proceedings.

Legally privileged information

Information that represents a disclosure of confidential communications between lawyers and their clients for the dominant purpose of providing or obtaining legal advice, or which represents the contents of confidential negotiations for the purpose of settling a matter, is not admissible.

The privilege does not apply:

- when the parties consent to the evidence being produced
- where the substance of the evidence has previously been disclosed, entirely or partly
- when the document/communication was not meant to be treated as confidential
- where the evidence contradicts other evidence given about attempts to settle the dispute
- where the proceeding is to enforce an agreement made between the parties to settle the dispute.

Keep records

It is very important to keep accurate, detailed, and well-organised records of anything that is relevant and important to your case. It may be difficult to decide what will be relevant at a particular time, so keep more rather than less information. If and when your matter goes to court, many of your records will need to be referred to or even produced as evidence.

What information to keep

- marriage certificate* and children's birth certificates*
- court documents (noting the date you received them)
- a list or diary of important dates, including:
  - date of cohabitation (living together) or marriage
  - dates of birth of children
  - dates of purchase or sales of goods or real estate
  - date of separation
  - court dates – hearings, documents due etc
  - dates of significant events, such as contact taking place or failing to take place
  - dates and details of violence or threats
  - dates and details of conversations that may affect your case
- names, addresses and contact details of important witnesses you may need to call
- copies of bank statements, invoices, receipts, policies and other documents relating to property
- copies of correspondence
- photos, videos, e-mails etc.

Add important items and events to this list or diary as they occur.

The use of some of this information will be governed by the rules of evidence. Check the court rules.

* If these were issued overseas, and a certificate is in a language other than English, you will need to have the certificate translated.

Further research

Preparing your own family law matter is a time consuming and challenging task. It is important to be organised, prepared and well informed at all times. Conducting your own research can help you gain a greater understanding of the law and how it may affect your case.

▷ Chapter five - Affidavits

In most family law cases, the main method of giving evidence to the court is by a document called an affidavit. An affidavit is a sworn [or affirmed] statement setting out the facts of a matter as they are known to the person completing the affidavit. This person is called the deponent, *see:* Legal Words.

Generally, when you file an application or a response with the court, you will need to attach one or more supporting affidavits. This is done to help each party to prepare their case. It also helps to reduce any elements of surprise in the other side's case.

The law dealing with the preparation and use of affidavits in the Family Court is found in the *Family Law Act* 1975 and the rules made under the Act. For matters in the Federal Magistrates Court refer to the *Federal Magistrates Act* 1999 and the rules made under this Act.

It may be necessary to refer to practice directions issued by each court. Practice directions are instructions and guidelines released by the court to ensure that cases move through the court system efficiently. Because practice directions change, you should check them from time to time.

In the Family Court the rules state that evidence must be given by affidavit unless the court orders otherwise. In the Federal Magistrates Court evidence can be given in person or in writing (affidavit). The decision as to what form is required is decided by the individual magistrate hearing the case. In practice, both courts require the use of affidavits wherever possible.

How to prepare an affidavit

Your affidavit should cover all the evidence you will use at the hearing. There are slight differences between preparing for an interim hearing and a final hearing. In an interim hearing, the court is most likely to consider the affidavit material and submissions from each party about the key features of their case.

The process of cross-examination is rare at an interim hearing.

At the final hearing, each party's evidence is tested in detail. You or your witnesses may be cross-examined on the contents of affidavits made, and you can cross-examine the other party and witnesses on the contents of their affidavits.

It is unlikely that you will be permitted to give oral evidence at a final hearing about something you could have included in an affidavit. The reason for this is that if one party introduces new material on the day, the other party may be at a disadvantage in not having prepared material to cover the issues raised by the new evidence.

Important points about affidavits

The contents must be factual and within the direct knowledge of the deponent

The body of an affidavit is prepared in short, numbered statements. Each statement should follow on logically from the previous one. Each statement should set out a fact relevant to the proceedings. It is important to distinguish between a fact and an opinion, and between a fact known to you personally, and information told to you by someone else (called 'hearsay evidence' – see earlier 'Important Points about Evidence').

If you need to introduce another person's evidence, then they should complete an affidavit and be prepared to come to court.

The contents must be truthful

If you make a statement in an affidavit that you know is untruthful you commit perjury. Perjury is a criminal offence. If you make an untruthful statement, either knowing it is untruthful, or without properly checking its accuracy, you are likely to damage your credibility before the court and to damage your case.

The contents must be relevant to the issues in dispute

Keep your affidavit concise and to the point. The contents should be strictly relevant – irrelevance is likely to annoy the judge or federal magistrate reading it and may affect your credibility overall. You can be ordered to pay costs if the other party has to challenge irrelevant or offensive statements in your affidavit.

On the other hand, do not omit relevant information – as indicated earlier, you may not get the opportunity to add it in later, and it may be important to your case. Also, leaving something out may damage your credibility if it affects the accuracy of your affidavit.

Structure of an affidavit

An affidavit will generally consist of a cover sheet, the body of the affidavit and the jurat clause.

The cover sheet is set out in a prescribed format, and includes:

- a header that indicates which court is dealing with the matter, a file number unique to your case, the court registry and date proceedings were issued, the hearing date and the hearing time
- parties' details – the names and addresses of the relevant parties, the nature of proceedings
- a statement saying on whose behalf the document is filed.

The body of the affidavit identifies the deponent by name, address and occupation, and states whether the person affirms or swears the content. The body of the affidavit contains the numbered statements setting out all the relevant facts. It can vary in length and content, depending on the nature of the information it contains.

The jurat clause comes at the end of the numbered paragraphs. In this section the deponent swears on oath or affirms the contents of the affidavit in the presence of a qualified witness. *See:* People who can receive affidavits. An affirmation is used if the witness' religious beliefs prevent them swearing an affidavit, or where it is not possible to comply with the requirements of the witness' religious beliefs.

The usual jurat clause looks like this:

> 'SWORN by the deponent at [place] the ___ day of _____ 200 __ before me: [the qualified witness signs and inserts his or her details]'

If the deponent is affirming rather than swearing the affidavit, the word 'AFFIRMED' is used instead. If you affirm the first affidavit you should affirm all subsequent affidavits.

Sometimes a special jurat clause is needed, for example where the witness is sight impaired, cannot read or write, or cannot speak English.

The Victorian Department of Justice has devised special clauses for use in these circumstances. You can locate them on the Department's website or call the Legal Policy and Courts Services branch of the Department of Justice. *See:* Where to get help.

An example of a jurat clause for a sight-impaired person could be:

> 'SWORN (AFFIRMED) by the deponent at [place] the day ___ of 200 __ before me, [insert witness' name]. Before the deponent signed this affidavit, I read over the contents to him/her truly distinctly and audibly, he/she being sight impaired, and he/she appeared to understand its contents. [the qualified witness signs and inserts his or her details].'

If there are annexures (sometimes called exhibits) these must also be read to the person, and a suitable amendment must be made to the jurat clause.

If you wish to attach supporting documents to your affidavit, you may do so by attaching them as annexures. Examples of supporting documents could include reports, letters or photos.

There must be a note on each annexure, signed by the person who witnesses the affidavit, identifying the annexure in the same way it is referred to in the affidavit. For example:

> 'This is the annexure marked with 'JB1' produced and shown to Joe Bloggs at the time of swearing his affidavit this 15th day of May 200 __ '

Tip: Once the documents are complete you will need to sign and date every page. It is a good idea to sign the originals in a blue pen so you are able to easily identify the original from the copies.

Contents of an affidavit

The contents of an affidavit will depend on the nature of the proceedings.

Children's issues

The Family Court has developed an approved form of affidavit that must be used in interim applications. The format may also be useful to follow for applications for final orders, and for applications in the Federal Magistrates Court.

Parts A – C are used to set out who the parties are, what the relationship to the other party is and to give details of the children. Part D is used to set out past and present facts and arrangements and future proposals under the headings Housing, Supervision, Contact, Financial Support, Health and Education. Part E is used to set out the individual needs of each child. Part F deals with health and other issues affecting those who will have the care of the children. Part G deals with other relevant issues not include elsewhere. Part H is used to set out the proposals for contact. Part I contains the jurat clause described earlier.

The information you include in each section of the affidavit must be relevant to the orders you are seeking. Parts D – F and Part H are quite specific, and the heading and notes suggests the sort of information to include. However, there may be other important issues, such as family violence, that you need to include in Part G. In completing each section and your application, especially Part G, you need to keep the court's powers and duties in mind. Refer particularly to Section 68 F of the Act.

The following is included to give you an idea of the level of detail and the kind of information required in an application for orders about children. As illustrated, it may be useful to insert headings on your affidavit.

Your affidavit would start:

> 'I, [your full name] of [your full address] in the State of [name the state you live in], [insert your occupation], make oath and say/affirm:'

It might then include:

General background information

Under this heading, include who you are, parties' dates of birth and state of health, the dates that the parties started living together, the date of marriage (if applicable), the full names and dates of birth of children and their state of health, the date of separation (if applicable), whether the parties have remarried or re-partnered and details of any other children of other relationships.

Following this format, develop the rest of your affidavit under headings similar to the following, only including the issues relevant to your case.

This is how this part might look:

1. I am the wife/husband in these proceedings.
2. I was born in Melbourne on 1st April 19___ , and am now ____ years old. I am in good health.
3. The wife/husband was born in Ballarat on 10th June 19___ and s/he is in good health.
4. The wife/husband and I commenced living together in approximately June 19___.
5. We were married at St Albans on 20th December 199__ (OR: We have never been married).
6. There are two children of the marriage (relationship): Samuel Ben Johnson, aged 12, born at St Albans on 29th November 19___ , and Susan Mary Johnson aged 10 years, born at St Albans on 11th November 19___ .
7. I also have a son, Richard Gore, aged 15, born in Hobart, Tasmania in 19___ Richard is in good health and currently lives during term time with his mother/father in Hobart where he attends the Private Boys School. He lives with me during school holidays.
8. The wife/husband and I separated on 1st January 2000, at which time the wife/husband moved to_____ her/his present address. I believe she/he currently resides in a de facto relationship, but I have no details of that relationship.
9. The wife/husband is employed full time as an [occupation] by Company Pty Ltd. I am employed full time as an [occupation] by Partnership and Associates.

Pre-separation history

- provide general information such as who was working, who was not working, who has been responsible for the care and supervision of the children over the relationship, what the general arrangements have been for the children over the course of the relationship including schooling, kindergarten, leisure and sporting activities
- outline any difficulties that have occurred. For example, if there has been domestic violence during the marriage, outline the history of violence, providing examples. Indicate whether there have been any intervention orders made, and whether or not police have been involved
- indicate any other specific requirements the children have such as medical treatment and other special needs
- mention any other issues that have arisen during the course of the marriage including drug use, alcohol use, any issues of mental health and any other issues relating to the children's well being.

Separation and current arrangements

- provide details regarding separation – who moved out and what arrangements were made for the children at that time
- outline the current arrangements about contact and residence – who the children live with, who else lives in the home with them and what role other people play in their care and supervision
- describe the current arrangements for contact with the other parent
- describe the arrangements for the children's schooling, kindergarten and any other activities.
- address other issues in relation to the children including health, whether or not child support is being paid and the relationship of the children with third parties
- detail any Court proceedings that have occurred including Family Court, Federal Magistrates Court and state Magistrates' Court proceedings
- give specific examples of issues that have arisen over the course of the separation – any domestic violence, any continued drug use, alcohol use, mental health or other issues that have occurred since separation.

Facts relied on pursuant to the relevant law

In this part of the affidavit you should attempt to link the facts of your case to the relevant sections the court is bound to take into consideration.

An application about children, for example, should set out what is in the best interests of the children. You should make a checklist of the factors listed in Section 68F of the *Family Law Act* and set out the facts that illustrate your ability to care for and provide for the children. Do not exaggerate or make claims you cannot back up.

Proposed arrangements

This is where you set out the proposals that you want the court to adopt. You should cover the following:

Housing – where the children would live, what type of home, who else lives in the property.

Supervision – the kindergarten or school the children would attend, and any third parties who would be involved in supervision.

Health – this should incorporate any issues as to the health of the parties or the children.

Financial support – what financial resources you can draw on to support the children (job, benefit received, child support received, other income available).

Other issues – if any other issues need to be raised, these could be incorporated here.

Property issues

An affidavit in a property application might include some of the same information required for an affidavit about children if it is relevant, but would concentrate on the following issues:

- the length of the relationship
- what you owned when you started the relationship
- direct and indirect financial contributions each party made to the marriage (indirect contributions could include things like any work done to improve a home or business, or work done in the home and caring for children or made by a third party)
- savings gifts and inheritances, and how these were used
- your future earning capacity
- any child support payments being made
- the list of factors under Section 75(2) of the *Family Law Act*
- any negative contribution (such as gambling or domestic violence that may have had an effect on earning capacity)
- any other relevant issues.

People who may receive affidavits*

Evidence Act 1958 (Vic) – Section 123C

(1) Affidavits for use in any court or for any purpose or in any way whatsoever authorised by law whether by or under any Act of Parliament or by custom or otherwise may be sworn and taken within Victoria before:

(a) any judge or the associate to any judge;

(b) a master of the Supreme Court or of the County Court or the secretary of such a master;

(c) a justice of the peace or a bail justice;

(d) the prothonotary or a deputy prothonotary of the Supreme Court, the registrar or a deputy registrar of the County Court, the principal registrar of the Magistrates' Court or a registrar or deputy registrar of the Magistrates' Court;

(da) the registrar of probates or an assistant registrar of probates;

(db) the registrar or deputy registrar of the Legal Profession Tribunal;

(e) a member or former member of either House of the Parliament of Victoria;

(ea) a member or former member of either House of the Parliament of the Commonwealth;

(f) a public notary;

(g) a natural person who is a current practitioner or interstate practitioner within the meaning of the *Legal Practice Act* 1996 (a solicitor);

(ga) a member of the police force of or above the rank of sergeant or for the time being in charge of a police station;

(gb) a person employed under Part 3 of the Public Sector Management and *Employment Act* 1998 with a classification that is prescribed as a classification to which this section applies;

(gc) a senior officer of a Council as defined in the *Local Government Act* 1989;

(gd) a person registered as a patent attorney under Part XV of the *Patents Act* 1952 of the Commonwealth;

(ge) a fellow of the Institute of Legal Executives (Victoria);

(h) any officer or person empowered authorised or permitted by or under any Act of Parliament to take affidavits in relation to the matter in question or in the particular part of Victoria in which the affidavit is sworn and taken.

* The list of people able to receive affidavits may vary in other states. Make sure you choose a person qualified under your state's law.

▷ Chapter six - Disclosure and subpoenas

As part of the preparation for your case, you may need to call on evidence that is not in your possession – either to back up your case or to challenge the opposing case. You cannot embark on a 'fishing expedition', but there are some steps you can take to obtain documents and other evidence that might be relevant.

Family Court

Duty of disclosure

One of the most significant areas of development in family law relates to the obligation to disclose information. The new *Family Law Rules* make it very clear that parties have an ongoing duty to disclose information relevant to the matters in dispute. (See rules 4.15,12.05 and 13.04.) As part of that process, the parties in property matters for instance, must, as part of the pre-action procedures, provide a schedule of assets, income and liabilities and a list of relevant documents in the party's possession or control. The kind of documents you might need to disclose will depend on the nature of your case. Refer to Schedule 1 of the *Family Law Rules* 2004 to find out what sort of things you will have to disclose. *See:* Appendix 2

If your case has not settled and you are preparing for trial, you will need to review your disclosure statements to make sure they are still current and complete. You will also need to provide an undertaking to the court that you have disclosed all relevant documents. Where appropriate you will need to make documents available to the other party to inspect and make copies.

Note that disclosure of the existence of a document does not necessarily mean that you must supply copies of the document. For example, if you have consulted a lawyer about your case and have received a letter setting out the lawyer's advice, you may need to disclose the existence of the letter but you may be able to claim privilege on the document and avoid disclosing its contents.

Requesting production of a document

You can request another party to produce a disclosed document by letter. The other party must produce it for inspection within 21 days.

If someone who is not a party to proceedings holds a document, you must first serve a formal notice on the party/ies to the proceedings, and seven days later, on the person who holds the document. *See:* Appendix 1 for a list of forms. The person who has the document must then produce it for inspection within a further seven days, unless there is an objection. A party to proceedings must make their objection within seven days of being served. The person required to make the document available also has seven days to object to producing the document.

If a party or third party objects to producing a document, you can apply to the court for an order that the document be produced.

If a document is produced, you may take a copy after you pay the reasonable costs of copying.

Important note: you are only permitted to use the document for the purposes of your case.

Federal Magistrates Court

Orders about producing documents (discovery) cannot be obtained unless the court declares that it would be appropriate in the administration of justice. You and the other party can agree informally to an exchange of documents. If you cannot reach agreement you can apply to the court for a declaration allowing you discovery. You will need to satisfy the court that this step is necessary. If the court agrees, it is likely that both parties will be required to provide an affidavit about the documents they have or have had in their possession or control.

Subpoenas

A subpoena is a written order from the court that tells a person (or a representative of an organisation) to appear before the court.

There are three kinds of subpoena, depending on whether the witness is to give evidence, to produce documents, records or things, or to produce documents and give evidence.

To obtain a subpoena, you need to apply to the court for one to be issued. *See:* Appendix 1. You will need to convince the court that the subpoena is required, and be specific about the kind of subpoena you need.

You should also attach to the form a letter to the court explaining why you want the subpoena issued. If you are representing yourself in the Family Court, you must obtain permission from a Deputy Registrar before applying to the court for a subpoena to be issued.

The maximum number of subpoenas that you can issue in the Family Court is three, and in the Federal Magistrates Court, five.

Documents and records

If you are seeking the production of documents, you need to state in the subpoena the actual documents you require.

You can only ask for things that already exist, and you cannot ask for 'everything you have about X' or even 'every relevant thing you have about X'– you must identify what is relevant to the issue(s) in dispute.

In most cases you must allow at least seven days for the production of documents. If you want to get documents more quickly you will need to show the court that the person required to produce the documents has agreed to provide them with less notice.

Tips

1. To avoid unnecessary costs, talk to the person and find out what documents they have and what it will cost to produce them (for example, the costs of photocopying). Tailor your subpoena request to what is essential to the issues in dispute.
2. Specify a date for delivery of documents that is earlier than the date of the actual hearing, so that you can arrange to inspect the documents and prepare the part of your case that relates to those documents.

There may be a small number of documents that do not need to be disclosed due to privilege (see 'Legally Privileged Information'). Even if privilege applies to a document, you must still list it in the affidavit of documents as a document that is in your possession.

Serving a subpoena

A subpoena must be personally served on an individual and can not be served on an organisation. For example, if you wish to subpoena police records, you can not issue a subpoena on the Victorian Police. In this situation, you must issue your subpoena to a member of the police force, for example, the name of the officer in charge of police records.

The person issuing the subpoena is liable to pay all reasonable costs associated with

- finding, gathering, copying and delivering the documents to court
- getting the witness to court to give evidence, for example, their transport or petrol costs, this is called 'conduct money'. You must provide a money order or bank cheque for the conduct money
- if the witness is a professional, for example, doctor, counsellor or school teacher, the person issuing the subpoena may be responsible to pay their professional costs on an hourly basis.

Once you have issued a subpoena, you must notify the other party or parties in writing that you have issued a subpoena and provide them with a copy of the subpoena. Once the subpoena is served an affidavit of service needs to be completed and filed.

Witnesses

If you have filed affidavits with the court by witnesses who support your case, then the other party or parties may wish to cross-examine those witnesses. To be able to do this, they must give you written notice that the witness(es) must attend the court. They can do this by letter.

If you receive notice that a witness supporting your case is required to attend for cross-examination, it is your responsibility to make sure that person attends court. It is also your responsibility to inform the other party or parties by letter about the witnesses you require for the purposes of cross-examination.

If the witness is unable or unwilling to attend court unless ordered to, then you need to request the court to issue a subpoena. Expert witnesses or witnesses appearing on behalf of an organisation will almost always require a subpoena so they can recover their costs from you for attending, and so that they are protected from allegations of unlawful disclosure of information.

You should serve the subpoena in plenty of time to enable the witness to schedule their time.

▷ Chapter seven – Preparing for final trial

Prior to date of trial

Prior to the trial it is a good idea to observe a trial to get a 'feel' for the process. Make enquiries at the counter and seek the consent of the Clerk of Courts.

Opening address

At the start of the case, the applicant and respondent (and child representative, if applicable) may have an opportunity to:

- state what orders they wish the court to make and
- summarise the evidence that will support their application or response.

This process helps clarify to the court the matters in dispute between the parties and the evidence each party seeks to rely upon.

Evidence in chief

The evidence you wish the court to consider is set out in your affidavit. This is known as 'evidence in chief'. The court will only allow evidence to be given in person during examination in chief in limited circumstances. If there have been new developments since you first prepared your affidavit, it may be necessary to prepare an updated one incorporating the new developments at least fourteen days before the final trial. This will need to be served on all other parties. The Family Court will generally allow only one affidavit per witness. If there are further developments after the revised affidavit is served, you may be permitted to give this evidence orally.

Cross-examination

If you wish to challenge the evidence in an affidavit at final trial, you need to give the other party notice that the witness is required to attend for cross-examination. You can do this by letter, once the date for final hearing has been set. Make the request early.

Preparing your cross-examination

The purpose of cross-examination is to test the credibility of the witness' evidence, to demonstrate to the court any inconsistencies and inaccuracies in that evidence, and to offer the court any alternative explanation of events. To do this you need to be well prepared.

Read all the available affidavit material – for your own case and for the other party's case. List the areas of weakness, differences and inconsistencies in each affidavit and cover these issues during cross-examination.

You may have evidence that contradicts some of the statements in the other party's material. If a witness has made a statement, and you have evidence that shows the statement, or an element of it, is not true, you must 'put' that evidence to the witness.

Write down the main points you want to make. Refer to the Act and the rules for further rules and procedures relating to cross-examination.

Prepare a full list of questions you want to ask a witness so you do not forget anything and which will help you stay on track. It is permissible to ask leading questions (questions in which the answer is suggested) but not in a way that is intended to be offensive or abusive.

Illustration of cross-examination

In the following brief example, Ms Jones is being challenged on her failure to permit Mr Jones to have contact with their son Peter in accordance with orders by consent made in the Family Court. Ms Jones has said in her affidavit that Mr Jones made no contact with Peter, and has implied he does not care about him. Mr Jones' argument is that Ms Jones prevents the contact taking place. He has copies of his telephone records showing calls to Ms Jones' number.

He might cross examine Ms Jones on the following basis:

Q. Now on 6 January 2003, you attended the Family Court at Melbourne, didn't you?

Q. You were legally represented that day, weren't you?

Q. It is correct that we signed consent orders written by your lawyer isn't it?

Q. Before signing the consent orders, you read them carefully didn't you?

Q. It is also true that you were provided with a copy of the consent orders?

Q. You would agree that the orders clearly state that Peter is allowed to receive a call from me each Wednesday between the hours of 6.30pm and 7.00pm?

Q. It is correct that your home number is 9123 4567?

Q. Since the orders were made, it is true that I have telephoned your home and requested to speak to Peter each Wednesday at 6.30pm, isn't it?

Q. It is also true that on each and every occasion that I have called to speak to Peter, you have answered the telephone, isn't it?

Q. It is true isn't it, that as soon as you hear my voice you hang up the telephone?

If Ms Jones disputes the phone calls took place, Mr Jones can tender the phone records showing the connection on the relevant dates, and the duration of the call. However, the phone records only show the connection – they do not prove that it was Ms Jones who received the call or that she disconnected them. It may be her contention that Peter took the calls and hung up. If that is the case, the information should have been in her affidavit, and the omission of this information may affect her credibility.

Re-examination

After a witness has been cross-examined, they have an opportunity to clarify any matters arising out of cross-examination. It is not open for the witness to provide the court with new information or revisit previous evidence during re-examination. In limited circumstances, a witness may introduce new evidence however they must seek permission of the court first.

Closing address

At the conclusion of the case the applicant and respondent (and child representative, if applicable) will have the opportunity to summarise their case.

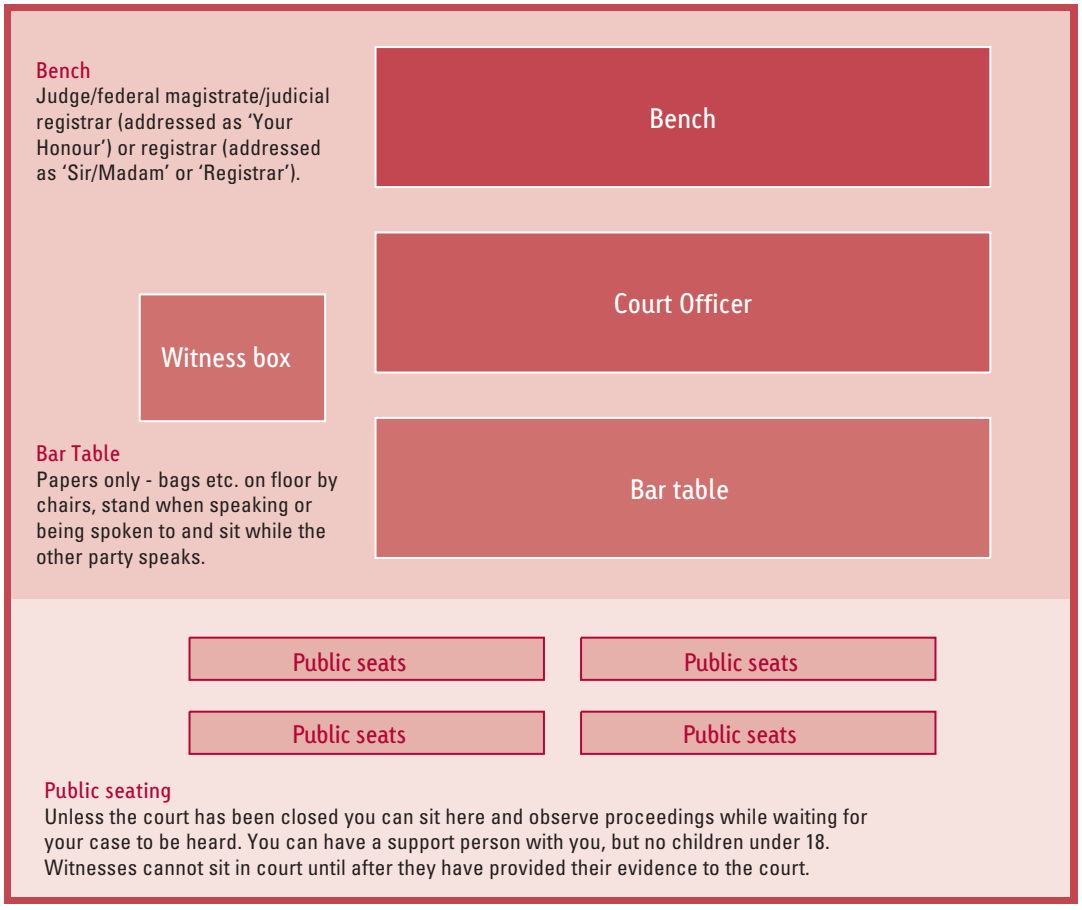
In the closing address, each party should highlight the positive aspect(s) of their case and put forward a final submission as to why the court should accept the orders proposed. Each party should also use this time to bring to the attention of the court any cases that have already been decided on similar facts (case law) and relevant sections of the Act.

▷ Chapter eight – On the day

Before you go into court

- Arrive at least 15 minutes early to find your way to the right court.
- Notify the court officer you have arrived. (The court officer will usually be inside the court before it commences.)
- Notify the court (preferably well before the day of your hearing) if you have any concerns about your safety.
- Switch off your mobile phone and/or pager.

Court layout and procedure



Going into court

- Acknowledge the judge/magistrate/judicial registrar/registrar by respectfully nodding to them from the doorway of the court.
- When your case is called, go to the bar table. Tell the judge/magistrate/judicial registrar/registrar your name and say whether you are the applicant or the respondent. (The applicant starts the proceedings. During this time the respondent remains seated unless speaking to, or responding to, the judge/federal magistrate/judicial registrar/registrar.)

On your way out of court

When your case has finished, the court will either make orders on the spot, or defer making a decision.

If a decision is made on the spot you should write down what has been decided, and what you have to do or not do. Ask the court to repeat anything you have not been able to take down. A copy of the court orders will be sent to you.

On the way out, acknowledge the judge/magistrate/judicial registrar/registrar as you did when you entered the court.

▷ Chapter nine – Once an order is made

Changing or varying court orders

In some circumstances you may be able to make changes to orders the court has made. If you and the other party agree on changes, you can file consent orders to vary orders previously made.

If you cannot reach agreement with the other party, you will need to decide whether or not you can apply to the court for a variation. To make a change to existing orders, the court must be satisfied that the change is justified, based on either party's changed circumstances, a change in the cost of living or the discovery that material evidence was withheld or was false. In the case of financial orders made by consent, the court can also consider whether amounts for spousal maintenance were adequate.

If the court decides there is a good reason to change the orders, it can vary, discharge or suspend part or all of an order. It can also revive an order that has previously been suspended, but it cannot revive an order that has been discharged.

Before you ask the court to make changes, consider what changes you need, and for how long. No matter which court made the original order, applications to vary spousal maintenance are dealt with in the Federal Magistrates Court.

Challenging a decision

If you disagree with a decision you may need to consider whether it is possible to appeal it or have it reviewed. The way you do this depends on who made the decision, and what power that person used to make the decision. Different time limits apply to different kinds of decision.

Decisions that can be reviewed

If a judicial registrar, registrar or deputy registrar made the decision, you can apply for a review of the decision. In some cases you have 28 days, but in other matters you have only 7 days from the date the order is made. The decision is reviewed by a judge of the Family Court.

How do I find out the time limits for review?

You must read the rules and the order made, very carefully. You need to know which power has been used to make the decision.

– 7 day time limits: An application to review any decision a deputy registrar is able to make must be made within 7 days. The kinds of decision a deputy registrar can make are set out in Rule 18.06, Tables 18.4 and 18.5. Note that although these powers are given to deputy registrars, registrars and judicial registrars can also exercise them. The time limit is the same, no matter who exercises the power.

– 28 day time limits: Any power used by a judicial registrar under rule 18.02 and 18.03 and subrule 18.05 (1) and any power used by a registrar under subrule 18.05 (1) is subject to a time limit of 28 days.

Decisions that can be appealed

You can challenge most decisions by magistrates, federal magistrates and judges by appeal if the grounds for appeal can be shown. This is not always possible to do. Rule 22 starts by saying:

> 'The purpose of an appeal is to correct an error, unfairness or wrongful exercise of judicial discretion. Appeals ensure public confidence in the administration of justice and, in appropriate cases, clarify and develop the law and help maintain a high standard of court orders'

Appeals from decisions of magistrates and federal magistrates are generally heard by a single judge, unless the Chief Justice or a delegate of the Chief Justice decides it should be heard by the Full Court of the Family Court. These appeals run as a review of the case to see whether the original decision was justified.

The result of an appeal may be that the decision is affirmed, reversed or referred back to the original court for a new hearing. This last process is much more time consuming and expensive.

Some times there may be cross-appeals, where another party wishes to challenge a different aspect of the original decision.

Each party must set out in their application what they are appealing about (the 'grounds of appeal'). In all cases, there will be a procedural hearing to try to settle the parties' differences and to identify the areas of appeal. Permission from the court is required to change the grounds of appeal after this hearing, at which orders will be made about how the case is to proceed.

In some cases, permission of the court is needed to start an appeal.

Time limits

An appeal must be made within 28 days of the date of the original decision.

Can the order be enforced while the appeal is pending?

In most cases, the order can be enforced even though you may be appealing the decision. To avoid having this happen, you need to specifically apply for a stay (suspension) of the order. This application is decided by the person who made the original decision or by another judicial officer having the power to decide.

Enforcing court orders

You can go to any court authorised to deal with enforcement of family law matters to enforce a court order, but you must register a sealed copy of the order with that court. A sealed copy of an order is one that has been endorsed by the court where it was originally made.

Generally, a party to the order, and in some circumstances, a third party, can enforce a court order. For example, orders about maintenance of a child can be enforced by or on behalf of the child. If a party has died, the order can be enforced by or against that person's estate.

In some circumstances, a court may decide not to enforce an order. For example, if it has been a long time since the order was made, the court might consider what has happened in the mean time and it might decide that the original order is now not appropriate.

How do I enforce an order?

Chapters 20 and 21 in the rules set out two processes for enforcing orders – one dealing with the enforcement of financial orders (Chapter 20) and another (Chapter 21) dealing with enforcing parenting orders, punishment for contravening an order or for contempt of court; or the location or recovery of children.

It is important to read the rules if you are considering enforcement options.

Enforcing financial orders

You apply on the correct form to the court. You will need to prepare an affidavit setting out:

- what the order is that you are trying to enforce
- whether there is an appeal of the order in progress
- what steps you have taken to enforce the order yourself (and attaching any relevant correspondence)
- what you want the court to do
- anything else which might be relevant for the court to consider.

A copy of your application must be served on the other party.

Who will hear my application to enforce a financial order?

Registrars can make certain kinds of orders you might need to make to enforce the original orders, such as garnishing wages and making orders about selling assets.

Applications to enforce spousal maintenance orders must be filed in the Federal Magistrates Court.

However, if you are asking the court to impose some form of punishment where the other party has broken an order without reasonable excuse, the application will go before a judicial registrar in the Family Court or a federal magistrate in the Federal Magistrates Court. The judicial registrar or federal magistrate can place a person on a bond, fine them, order them to perform community service, fine them or jail them. The latter is unlikely unless the person disobeying the order has done so deliberately and persistently or has been fraudulent.

All other enforcement matters are heard by a judge of the Family Court.

Enforcing orders about children

The formal application starts the same way as for financial matters. If a person does not make a reasonable attempt to comply with, or deliberately disobeys, an order about children, they (he or she) will risk further court intervention unless there is a reasonable excuse for their conduct.

The court treats these matters differently to financial matters. The first strategy usually will be to require the 'offending' parent to attend an approved parenting program designed to educate them about parental responsibilities. If their actions have denied the other party's rights to contact and residence, a compensatory order might be made.

If the parent disobeys court orders again, or if the first contravention is serious enough to warrant different action, the court can impose a range of criminal penalties from bonds and community service orders through to fines and jail.

Contempt proceedings

Contempt of court refers to action that challenges the authority of the court in some way, including generally interfering with the administration of justice by the court. If the court has made an order, and a party does something that amounts to an open and deliberate challenge of the court's authority, this will be treated as contempt of court. An example of contempt of court would arise if a person who is ordered to produce property for inspection, hides the property and refuses to tell the court where it is. A serious breach of a parenting order (such as denying a party access by removing the child from the jurisdiction) may be dealt with as a contempt.

The penalties for contempt of court range from fines to prison. As well, the court may change the nature of the orders previously given.

Although information relating to contempt of court is grouped in the rules with matters relating to children, the provisions also apply to financial matters. The introduction to Chapter 21 in the rules makes it clear that contempt proceedings should only be used where there is a very serious and deliberate contravention of an order.

Because contempt of court is a criminal offence, other parties, such as court officials, can also start proceedings against a person. This might occur, for example, in response to violent or offensive behaviour at or near the court and intended to disrupt proceedings.

▷ Where to get help

Legal and government resources

Victoria Legal Aid

See back cover for office locations and website address. Offices open Monday to Friday between 8:45am and 5:15pm.

Victoria Legal Aid Telephone Information Service

The service gives free legal information about legal problems in English and 14 other languages. For languages not listed, call the English line for a telephone interpreter.

Phone Monday to Friday between 8.45am and 5.15pm Country callers: 1800 677 402

English	9269 0120	Mon – Fri	Polish	9269 0228	Mon – Fri
Arabic	9269 0127	Mon – Fri	Russian	9269 0315	Wed
Cantonese	9269 0161	Wed, Thur, Fri	Serbian	9269 0332	Mon – Fri
Croatian	9269 0164	Mon – Fri	Spanish	9269 0384	Thurs, Fri
Greek	9269 0167	Wed, Fri	Turkish	9269 0386	Mon, Tues
Italian	9269 0202	Mon, Tues	Ukrainian	9269 0390	Mon – Fri
Macedonian	9269 0477	Wed	Vietnamese	9269 0391	Mon, Tues, Thurs
Mandarin	9269 0212	Wed, Thurs, Fri			

Federation of Community Legal Centres: 9654 2204. Telephone to find out your nearest Community Legal Centre.

Victorian Aboriginal Legal Service: 9419 3888 or 1800 064 865 (country callers)

Family Law and Regional Law Hotlines: 1800 050 321 (Family law hotline) / 1800 050 400 (Regional law hotline). (Free national telephone services providing information on family law and local services)

Law Institute of Victoria: 9607 9550 (Legal referrals)

Legal Ombudsman: 9642 0655 or 1800 357 772 (For complaints against lawyers)

Australian Federal Police: 9607 7777 (Missing children)

Centrelink: 136 150 (Family Assistance Office) / 131 202 (Multilingual Service)

Child Support Agency: 131 272

Court Network: 9603 7433 (Information, support and referral service) or 1800 681 614 (country callers)

Registry of Births, Deaths and Marriages: 1300 369 367

Courts

Family Court of Australia

Melbourne (and regional visiting services): 8600 3777 (Registry) / 8600 3800 (Enquiries) / Commonwealth Law Courts, 305 William St, Melbourne VIC 3000

Albury: 02 6021 8944 / 463-467 Kiewa St, Albury NSW 2640

Dandenong: 9767 6200 / 53-55 Robinson St, Dandenong VIC 3175

Federal Magistrates Court

Melbourne (and regional circuit information): 1300 367 110
Commonwealth Law Courts, 305 William St, Melbourne VIC 3000

Magistrates' Court of Victoria: see the white pages under Justice Department of Victoria for your nearest court.

Contact centres

Anglicare Gippsland: Morwell: 5133 9998

Bethany Family Support: Geelong: 5278 8122 / Frankston: 9783 5172

Berry Street Contact Centre: Watsonia: 9434 1488

Boyd House (Children's Contact Centre): Morwell: 5133 6855

Community West (Children's Contact Service): Deer Park: 9363 1811

Child and Family Services Ballarat: Ballarat: 5337 3333

Gordon Care Contact Service: Mentone: 9584 6777

Mallee Family Care Inc: Mildura: 5023 5966

Salvation Army Bendigo: Bendigo: 5442 7699

Upper Mallee Family Care: Wodonga: 02 6022 8220

Windermere Child and Family Services: Narre Warren: 9705 2144

Dispute resolution and other education services

Contact the Family Court or Federal Magistrates Court for a full list of approved post parenting service providers.

Centacare Catholic Family Services

Ballarat: 5337 8999

Bendigo: 5443 9577

Dandenong: 9793 2200

Footscray: 9689 3888

Geelong: 5221 7055

Gippsland: 5622 1188

Malvern: 9576 2377

Mitcham: 9873 4344

Family Court Mediation Services [if proceedings issued]

Melbourne: 8600 3888

Family Mediation Centres

Moorabbin: 9555 9300 (head office)

Narre Warren: 9705 6277

Ringwood: 9876 0677

Family Services Australia: 1300 365 859. Telephone to find your nearest service.

Lifeworks: 9654 7360 (head office). Telephone to find your nearest office location.

Relationships Australia: 1300 364 277. Telephone to find your nearest office location.

Family violence and support services

Domestic Violence and Incest Resource Centre: 9486 9866 / TTY: 9417 1255

Immigrant Women's Domestic Violence Service: 9898 3145

Men's Referral Service: 9428 2899 or 1800 065 973

Mensline: 1300 789 978

Salvation Army Crisis Centre: 9536 7777 or 1800 627 727 (country callers)

WIRE (Women's Information and Referral Exchange): 1300 134 130

Women's Domestic Violence Crisis Service: 9373 0123 or 1800 015 188 (24 hours)

Interpreter services

Translating and Interpreting Service: 131 450
A government service that may provide an interpreter for you (and may charge a fee).

Web sites

Australian Federal Police	www.afp.gov.au
Austlii (legal research)	www.austlii.edu.au
Centacare Catholic Family Services	www.centacare.com.au
Centrelink	www.centrelink.gov.au
Child Support Agency	www.csa.gov.au
Commonwealth Attorney General's Department – Family Law Online	www.ag.gov.au www.familylaw.gov.au
Department of Justice Victoria	www.justice.vic.gov.au
Family Court of Australia	www.familycourt.gov.au
Family Mediation Centres	www.mediation.com.au
Federal Magistrates Court – Divorce	www.fmc.gov.au www.divorce.gov.au
Federation of Community Legal Centres	www.communitylaw.org.au
Law Institute of Victoria	www.liv.asn.au
Lifeworks	www.lifeworks.com.au
Magistrates' Court of Victoria	www.magistratescourt.vic.gov.au
Registry of Births, Deaths and Marriages	www.dvc.vic.gov.au
Relationships Australia	www.relationships.com.au
Victorian Aboriginal Legal Service	www.vals.org.au
Victoria Legal Aid	www.legalaid.vic.gov.au

▷ Appendix 1

Commonly used forms

For a full list of the forms available for each court, visit the court's registry or web site.

Topic	Family Court of Australia	Federal Magistrates Court (FMC)
Divorce	N/A – file in FMC	Application for Divorce (Form 4)
Application for orders by consent	Application for consent orders (A kit is available from the court) (Form 11)	N/A. If you have reached agreement without starting court proceedings, use Family Court for consent orders
Other application (non-urgent)*	Application for Final Orders (Form 1): • Children or property matters • Declaration of validity of marriage • Decree of nullity • Maintenance • Child support (application or appeal)	Application and Information Sheet • Children or property matters • Maintenance
Urgent or interim application*	Application in a case (Form 2)** • Interim orders • Child recovery • Review of Registrar's decision • Summons • Leave to appeal • Appeal	FMC Application • Interim orders • Child recovery Review Registrar's decision: • Application for review Summons: Form 45B or 46
Affidavit	Kit available from court	Pro-forma available from court
Financial statement	Financial Statement (Form 13)	Form 13 or Affidavit of financial circumstances
Service of documents	Affidavit of service (Form 7) Acknowledgement of service (Form 6) Notice of address for service (Form 8)	Form 21 (Divorce) Form 20 (Service by post) No prescribed form for other affidavits of service Acknowledgement: Form 19 FMC Notice of address for service
Subpoena	Subpoena (Form 14) NB Consider whether you need to serve a Form 12 – notice of non-party production of documents before your subpoena	FMC Subpoena
Contravention	Application – Contravention (Form 18)	Application
Contempt	Application – Contempt (Form 19)	As for Family Court
Appeal	Notice of Appeal (Form 20)	As for Family Court

* For most applications, there is a corresponding RESPONSE form.

** If you have not previously filed a form 1, you must also prepare one of these.

▷ Appendix 2

Family Court Rules 2004

Schedule 1 – Pre-action procedures

The following is an amalgamation of the sets of rules dealing with financial and parenting matters. For the most part, they are identical. Where there is a provision specific to financial matters it is preceded by the word [Financial]. Where the provision is specific to parenting, it is preceded by the word [Parenting]

1. General

(1) Each prospective party to a case in the Family Court of Australia is required to make a genuine effort to resolve the dispute before starting a case by:

- (a) participating in primary dispute resolution, such as negotiation, conciliation, mediation, arbitration and counselling;
- (b) exchanging a notice of intention to claim and exploring options for settlement by correspondence; and
- (c) complying, as far as practicable, with the duty of disclosure.

(2) Unless there are good reasons for not doing so, all parties are expected to have followed these pre-action procedures before filing an application to start a case.

(3) There may be serious consequences, including costs penalties, for non-compliance with these requirements.

(4) The circumstances in which the court may accept that it was not possible or appropriate for a party to follow the pre-action procedures include cases:

- (a) involving urgency;
- (b) involving allegations of family violence;
- (c) involving allegations of fraud;
- (d) in which there is a genuinely intractable dispute;
- (e) in which a person would be unduly prejudiced or adversely affected if notice is given to another person (in the dispute) of an intention to start a case; and
- (f) [Financial] in which a time limitation is close to expiring.

(5) The objects of these pre-action procedures are:

- (a) to encourage early and full disclosure in appropriate cases by the exchange of information and documents about the prospective case;
- (b) to provide parties with a process to help them avoid legal action by reaching a settlement of the dispute before starting a case;
- (c) to provide parties with a procedure to resolve the case quickly and limit costs;
- (d) to help the efficient management of the case, if a case becomes necessary (that is, parties who have followed the pre-action procedure should be able to clearly identify the real issues which should help to reduce the duration and cost of the case); and
- (e) to encourage parties, if a case becomes necessary, to seek only those orders that are reasonably achievable on the evidence.

(6) At all stages during the pre-action negotiations and, if a case is started, during the conduct of the case itself, the parties must have regard to:

(a) [Financial] the need to protect and safeguard the interests of any child;

[Parenting] the best interests of any child

(b) the continuing relationship between a parent and a child and the benefits that cooperation between parents brings a child (that is, helping to maintain as good a continuing relationship between the parties and the child as is possible in the circumstances);

(c) the potential damage to a child involved in a dispute between the parents, particularly if the child is encouraged to take sides or take part in the dispute;

(d) the best way of exploring options for settlement, identifying the issues as soon as possible, and seeking resolution of them;

(e) the need to avoid protracted, unnecessary, hostile and inflammatory exchanges;

(f) the impact of correspondence on the intended reader (in particular, on the parties);

(g) the need to seek only those orders that are reasonably achievable on the evidence and that are consistent with the current law;

(h) [Financial] the principle of proportionality and the need to control costs because it is unacceptable for the costs of any case to be disproportionate to the financial value of the subject matter of the dispute;

[Parenting] the need to seek only those orders that are reasonably achievable on the evidence and that are consistent with the current law; and

(i) the duty to make full and frank disclosure of all material facts, documents and other information relevant to the dispute.

Note: The duty of disclosure extends to the requirement to disclose any significant changes (see clause 4 of this Part).

(7) Parties must not:

(a) use the pre-action procedures for an improper purpose (for example, to harass the other party or to cause unnecessary cost or delay); or

(b) in correspondence, raise irrelevant issues or issues that may cause the other party to adopt an entrenched, polarised or hostile position.

(8) The court expects parties to take a sensible and responsible approach to the pre-action procedures.

(9) The parties are not expected to continue to follow the pre-action procedures to their detriment if reasonable attempts to follow the pre-action procedures have not achieved a satisfactory solution.

2. Compliance

(1) The court regards the requirements set out in these pre-action procedures as the standard and appropriate approach for a person to take before filing an application in a court.

(2) If a case is subsequently started, the court may consider whether these requirements have been met and, if not, what the consequences should be (if any).

(3) The court may take into account compliance and non-compliance with the pre-action procedures when it is making orders about case management and considering orders for costs (see paragraphs 1.10 (2) (d), 11.03 (2) (b) and 19.10 (1) (b)).

(4) Unreasonable non-compliance may result in the court ordering the non-complying party to pay all or part of the costs of the other party or parties in the case.

(5) In situations of non-compliance, the court may ensure that the complying party is in no worse a position than he or she would have been if the pre-action procedures had been complied with.

Examples of non-compliance with pre-action procedures:
Not sending a written notice of proposed application; not providing sufficient information or documents to the other party; not following a procedure required by the pre-action procedures; not responding appropriately within the nominated time to the written notice of proposed application; not responding appropriately within a reasonable time to any reasonable request for information, documents or other requirement of this procedure.

3. Pre-action procedures

(1) A person who is considering filing an application to start a case must, before filing the application:
   (a) give a copy of these pre-action procedures to the other prospective parties to the case;
   (b) make inquiries about the primary dispute resolution services available; and
   (c) invite the other parties to participate in primary dispute resolution with an identified person or organisation or other person or organisation to be agreed.

(2) Each prospective party must:
   (a) co-operate for the purpose of agreeing on an appropriate primary dispute resolution service; and
   (b) make a genuine effort to resolve the dispute by participating in primary dispute resolution.

(3) If the prospective parties reach agreement, they may arrange to have the agreement made binding by filing an Application for Consent Orders (Form 11).

(4) Before filing an application, the proposed applicant must give to the other party (the proposed respondent) written notice* of his or her intention to start a case if:
   (a) there is no appropriate primary dispute resolution service available to the parties;
   (b) a party fails or refuses to participate in primary dispute resolution; or
   (c) the parties are unable to reach agreement by primary dispute resolution.

   * There is no prescribed form of notice

(5) The notice under subclause (4) must set out:
   (a) the issues in dispute;
   (b) the orders to be sought if a case is started;
   (c) a genuine offer to resolve the issues;
   (d) a time (the nominated time) (that is at least 14 days after the date of the letter) within which the proposed respondent is required to reply to the notice.

(6) The proposed respondent must, within the nominated time, reply in writing to the notice under subclause (4), stating whether the offer is accepted and, if not, setting out:
   (a) the issues in dispute;
   (b) the orders to be sought if a case is started;
   (c) a genuine counter-offer to resolve the issues; and
   (d) the nominated time (that is at least 14 days after the date of the letter) within which the claimant must reply.

(7) It is expected that a party will not start a case by filing an application in a court unless:
   (a) the proposed respondent does not respond to a notice of intention to start a case; or
   (b) agreement is unable to be reached after a reasonable attempt to settle by correspondence under this clause.

4. [Financial] Disclosure and exchange of correspondence

(1) Parties to a case have a duty to make full and frank disclosure of all information relevant to the issues in dispute in a timely manner (see rule 13.01).

(2) In attempting to resolve their dispute, parties should, as soon as practicable on learning of the dispute and, if appropriate, as a part of the exchange of correspondence under clause 3 of these pre-action procedures, exchange:

- (a) a schedule of assets, income and liabilities;
- (b) a list of documents in the party's possession or control that are relevant to the dispute; and
- (c) a copy of any document required by the other party, identified by reference to the list of documents.

(3) Parties are encouraged to refer to the Financial Statement and rules 4.15, 12.05 and 13.04 as a guide for what information to provide and documents to exchange.

(4) Parties are not required to exchange documents that are not subject to the duty of disclosure under rule 13.12 and that would not be ordered to be disclosed by a court (see rule 13.12).

(5) The documents that the court would consider appropriate to include in the list of documents and exchange include:

- (a) in a maintenance case:
  - (i) a copy of the party's taxation return for the most recent financial year;
  - (ii) the party's bank records for the 12 months ending on the date when the maintenance application was filed;
  - (iii) if the party receives wage or salary payments – the party's three most recent pay slips;
  - (iv) if the party owns or controls a business – the business activity statements for the business for the previous 12 months; and
  - (v) any other document relevant to determining the income, expenses, assets, liabilities and financial resources of the party; and
- (b) in a property settlement case:
  - (i) a copy of the party's three most recent taxation returns and assessments;
  - (ii) documents about any superannuation interest of the party, including:
    - (a) a completed superannuation information form for the superannuation interest;
    - (b) if the party is a member of a self-managed superannuation fund – a copy of the trust deed and the three most recent financial statements for the fund; and
    - (c) the value of the superannuation interest, including the basis on which the value has been worked out and any documents working out the value;
  - (iii) for a corporation in relation to which a party has a duty of disclosure under rule 13.04:
    - (a) a copy of the financial statements for the three most recent financial years, including balance sheets, profit and loss accounts, depreciation schedules and taxation returns;
    - (b) a copy of the corporation's most recent annual return that lists the directors and shareholders; and
    - (c) a copy of the corporation's constitution and any amendments;
  - (iv) for a trust in relation to which a party has a duty of disclosure under rule 13.04:
    - (a) a copy of the financial statements for the 3 most recent financial years, including balance sheets, profit and loss accounts, depreciation schedules and taxation returns; and
    - (b) a copy of the trust deed, including any amendments;

(v) for a partnership in relation to which a party has a duty of disclosure under rule 13.04:

(a) a copy of the financial statements for the 3 most recent financial years, including balance sheets, profit and loss accounts, depreciation schedules and taxation returns; and

(b) a copy of the partnership agreement, including any amendments;

(vi) for a person or entity mentioned in subparagraph (i), (iii), (iv) or (v) – any business activity statements for the previous 12 months; and

(vii) unless the value is agreed, a market appraisal of the value of any item of property in which a party has an interest.

(6) It is reasonable to require a party who is unable to produce a document for inspection to provide a written authority addressed to a third party authorising the third party to provide a copy of the document in question to the other party, if this is practicable.

(7) Parties should agree to a reasonable place and time for the documents to be inspected and copied at the cost of the person requesting the copies.

Note: The court will refer to Chapter 13 as a guide for what is regarded as reasonable conduct by the parties in making these arrangements.

(8) Parties must not use a document disclosed by another party for a purpose other than the resolution or determination of the dispute to which the disclosure of the document relates.

(9) Documents produced by a person to another person in compliance with the pre-action procedures are taken to have been produced on the basis of an undertaking from the party receiving the documents that the documents will be used for the purpose of the case only.

(10) Parties must bear in mind that an object of the pre-action procedures is to control costs and, if possible, resolve the dispute quickly.

(11) Disagreements about disclosure may be better managed by the court within the context of a case.

4. [Parenting] Disclosure and exchange of correspondence

(1) Parties to a case have a duty to make full and frank disclosure of all information relevant to the issues in dispute in a timely manner (see rule 13.01).

(2) In attempting to resolve their dispute, parties should, as soon as practicable on learning of the dispute and, if appropriate, as a part of the exchange of correspondence under clause 3 of these pre-action procedures, exchange copies of documents in their possession or control relevant to an issue in the dispute (for example, medical reports, school reports, letters, drawings, photographs).

(3) Parties must not use a document disclosed by another party for a purpose other than the resolution or determination of the dispute to which the disclosure of the document relates.

(4) Documents produced by a person to another person in compliance with the pre-action procedures are taken to have been produced on the basis of an undertaking from the party receiving the documents that the documents will be used for the purpose of the case only.

5. Expert witnesses

(1) There are strict rules about instructing and obtaining reports from an expert witness (see Part 15.5).

(2) In summary:

- (a) an expert witness must be instructed in writing and must be fully informed of his or her obligations;
- (b) if possible, parties should seek to retain an expert witness only on an issue in which the expert witness's evidence is necessary to resolve the dispute;
- (c) if practicable, parties should agree to obtain a report from a single expert witness instructed by both parties; and
- (d) if separate experts' reports are to be relied on at a hearing, the court requires the reports to be disclosed.

6. Lawyers' obligations

(1) Lawyers must, as early as practicable:

- (a) advise clients of ways of resolving the dispute without starting legal action;
- (b) advise clients of their duty to make full and frank disclosure, and of the possible consequences of breaching that duty;
- (c) subject to it being in the best interests of the client and any child, endeavour to reach a solution by settlement rather than start or continue legal action;
- (d) notify the client if, in the lawyer's opinion, it is in the client's best interests to accept a compromise or settlement if, in the lawyer's opinion, the compromise or settlement is a reasonable one;
- (e) in cases of unexpected delay, explain the delay and whether or not the client may assist to resolve the delay;
- (f) advise clients of the estimated costs of legal action (see rule 19.03);
- (g) advise clients about the factors that may affect the court in considering costs orders;
- (h) give clients documents prepared by the court (if applicable) about:
  - (i) the legal aid services and primary dispute resolution services available to them; and
  - (ii) the legal and social effects and the possible consequences for children of proposed litigation; and
- (i) actively discourage clients from making ambit claims or seeking orders that the evidence and established principle, including recent case law, indicates is not reasonably achievable.

(2) The court recognises that the pre-action procedures cannot override a lawyer's duty to his or her client.

(3) It is accepted that it is sometimes impossible to comply with a procedure because a client may refuse to take advice, however, a lawyer has a duty as an officer of the court and must not mislead the court.

(4) If a client wishes not to disclose a fact or document that is relevant to the case, a lawyer has an obligation to take the appropriate action, that is, to cease to act for the client.

Self–represented litigants' kit

- ▷ Children
- ▷ Evidence & procedure
- ▷ Property

Victoria Legal Aid offices

MELBOURNE
350 Queen St
Melbourne VIC 3000
Tel: 9269 0234 / 1800 677 402

BAIRNSDALE
101A Main St
Bairnsdale VIC 3875
Tel: 5153 1975

CENTRAL HIGHLANDS
Area A, Level 1,
75 Victoria St
Ballarat VIC 3350
Tel: 5329 6222

LODDON-CAMPASPE
424 Hargreaves St
Bendigo VIC 3550
Tel: 5441 1155 / 1800 254 500

NORTH WESTERN SUBURBS
Level 1, Building 2
Broadmeadows Station Centre
1100 Pascoe Vale Rd
Broadmeadows VIC 3047
Tel: 9302 2388

WESTERNPORT
1st floor, 9-11 Pultney St
Dandenong VIC 3175
Tel: 9791 5522

PENINSULA
Cnr O'Grady Ave & Dandenong Rd
Frankston VIC 3199
Tel: 9784 5222

BARWON
1st floor, Busport
48 Brougham St
Geelong VIC 3220
Tel: 5229 2211 / 1800 196 200

WIMMERA
29 Darlot St
Horsham VIC 3400
Tel: 5381 6000 / 1800 177 638

GIPPSLAND
Cnr Chapel & George St
Morwell VIC 3840
Tel: 5134 8055

NORTH EASTERN SUBURBS
42 Mary St
Preston VIC 3072
Tel: 9479 8844

OUTER EASTERN SUBURBS
23 Ringwood St
Ringwood VIC 3134
Tel: 9879 5500

GOULBURN
36-42 High St
Shepparton VIC 3630
Tel: 5823 6200

WESTERN SUBURBS
1/474 Ballarat Rd
Sunshine VIC 3020
Tel: 9311 8611

Roundtable Dispute Management

MELBOURNE
338 La Trobe St
Melbourne VIC 3000
Tel: 9269 0500 / 1800 136 832

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