



Before you file – pre action procedure for parenting cases

FAMILY COURT OF WESTERN AUSTRALIA

This brochure will tell you

This brochure provides information for people considering applying to a court for parenting orders. It provides information about the pre-action procedures required before starting a case. For more information, see Rule 1.05 and Schedule 1 of the *Family Law Rules 2004*.

In the Family Court, similar pre-action requirements apply to financial cases. For more information, see the brochure 'Before you file - pre-action procedure for financial cases'.

What is required?

Since 2004, the Family Court has required parties to use services such as mediation and conciliation to attempt to resolve a dispute, as opposed to going to court. From 1 July 2007, the *Family Law Act 1975* and *Family Court Act 1997* requires a person to make an attempt to resolve disputes about parenting matters using family dispute resolution services before applying to a court for a parenting order. There are some exceptions to this and these are summarised in the brochure 'Compulsory Family Dispute Resolution' published by the Australian Government. Further information about these requirements, which apply to all courts, can be found at www.familyrelationships.gov.au or by telephoning the Family Relationships Advice Line on 1800 050 321.

This brochure outlines the further steps you will need to take before filing an application in the Family Court. The information is designed to assist you, the other parties to your dispute and the Court to resolve your dispute as quickly and as amicably as possible while taking into account the best interests of the child/ren.

Before you file an application

Except for those situations listed under 'What applications are exempt?' (see page 2 of this brochure), all prospective parties to an application in the Family Court must do the following things before filing an application in the Family Court:

1. Participate in dispute resolution services, such as family counselling, negotiation, conciliation or arbitration. The Family Court's requirements in this regard are satisfied by participation in the family dispute resolution process outlined in the Australian Government brochure 'Compulsory Family Dispute Resolution'. However, parties are encouraged to actively consider whether some form of process other than court action, may assist them to resolve the dispute.
2. If the attempts at family dispute resolution are unsuccessful, you will need to exchange some written correspondence with the other prospective parties to clearly identify exactly what issues remain in dispute. This is explained in more detail in the Step-by-Step section of this brochure.
3. Comply, as far as possible, with the duty of disclosure (see page 4 of this brochure).

What applications are exempt?

Pre-action procedure is not required for applications:

- for divorce only, or
- for child support, child maintenance, parentage testing only, or
- where the case includes the Court's bankruptcy jurisdiction.

Also, a court may accept that it is not possible or appropriate for the pre-action procedures to be followed in cases:

- involving urgency
- involving allegations of child abuse or risk of abuse
- involving allegations of family violence or risk of family violence
- where there is a genuinely intractable dispute (for example, where one person refuses to negotiate)
- where a person would be unduly prejudiced or adversely affected if another person became aware of the intention to start a case (for example, where there is a genuine concern that the other person will attempt to defeat the claim if they have this prior knowledge), or
- where there has been a previous application about the same issue or subject in the last 12 months.

General information and parties' responsibilities

The objectives of the pre-action procedure are to:

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

Your obligations as a prospective party to a case

The best interests of the child is the Court's primary consideration when resolving or determining family disputes. At all stages during the pre-action negotiations and during the case itself should you ultimately apply to court, you must keep in mind the following:

- the need to protect and safeguard the interests of your children
- the importance of a continuing relationship between your children and both parents, and the benefits the child gains from the parents cooperating with one another
- the potential damage to a child involved in a dispute, particularly if the child is encouraged to take sides or take part in any dispute between the parents
- the importance of identifying issues early and exploring options for settlement
- the need to avoid protracted, unnecessary, hostile and inflammatory exchanges
- the impact of correspondence on the reader, particularly on the other party in the case
- the need to seek only those orders that are realistic and reasonable on the evidence and that are consistent with current law
- the principle of proportionality and the need to control costs and
- the duty to make full and frank disclosure of all material facts, documents and other information relevant to the dispute - see page 4 for more on disclosure.

Parties must not:

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

The Court expects parties to take a sensible and responsible approach to pre-action procedures. However, you are not expected to follow the pre-action procedures to your detriment if reasonable attempts to follow them have not achieved a satisfactory result.

Compliance

If a case is subsequently started, the Court may consider whether the requirements have been met, and if not, what should be the consequences (if any) of non-compliance.

The Court may:

- where there is unreasonable non-compliance, order the non-complying party to pay all or part of the costs of the other party or parties in the case, and/or
- take compliance or non-compliance into account when making orders about how your case will progress through the court.

The Court may also ensure that the complying party is in no worse a position than he or she would have been if the pre-action procedure had been complied with.

Examples of non-compliance with a pre-action procedure include:

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

The pre-action procedure ~ step by step

STEP 1 Comply with the requirements of Compulsory Family Dispute Resolution

This process is set out in the 'Compulsory Family Dispute Resolution' brochure published by the Australian Government. For more information, including information about the exceptions to participate in Compulsory Family Dispute Resolution, go to www.familyrelationships.gov.au or telephone 1800 050 321.

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

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

For more information or to get a Consent Order Kit:

- go to www.familycourt.wa.gov.au
- call **08 9224 8222** or **1800 199 228**, or
- visit the Family Court of Western Australia registry.

STEP 3 Give written notice of issues and future intentions

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

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

STEP 4 Reply to the notice of intention to claim

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

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

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

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

STEP 5 If no agreement is reached: taking Court action

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

Disclosure and exchange of correspondence

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

Parties should promptly exchange copies of documents in their possession or control relevant to an issue in the dispute before, as well as after, starting a case. Examples of documents may include: medical reports, school reports, letters, drawings, photographs.

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

Expert Witnesses

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

In summary:

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

Legal Advice

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

You can get legal advice from a:

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

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

Lawyers' obligations

Lawyers must, as early as practicable:

- advise clients of ways of resolving the dispute without starting legal action
- advise clients of their obligations and requirements imposed by Sections 60I and 60J of the *Family Law Act 1975* or Sections 66H and 66I of the *Family Court Act 1997*
- advise clients of their duty to make full and frank disclosure, and of the possible consequences of breaching that duty
- subject to it being in the best interests of the client and any child, endeavour to reach an agreement rather than start or continue legal action
- notify the client if, in the lawyer's opinion, it is in the client's best interests to accept a compromise or settlement where, in the lawyer's opinion, the compromise or settlement is a reasonable one
- in cases of unexpected delay, explain the delay to their client and whether or not the client may assist to resolve the delay
- advise clients of the estimated costs of legal action
- advise clients about the factors which may affect the Court in considering costs orders
- actively discourage clients from making ambit claims or seeking orders which the evidence and established principles, including recent case law indicates, is not reasonably achievable, and
- provide clients with documents prepared by the Court about:
 - ~ the social and legal effects of separation
 - ~ the services provided to families by the Family Court and by government, community and other agencies, and
 - ~ the obligations created by an order and the consequences for failing to comply with an order.

The Court recognises that the pre-action procedure cannot override a lawyer's duty to his or her client. 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. If a client wishes not to disclose a fact or document which is relevant to the case a lawyer has an obligation to take the appropriate action, that is, cease to act.

More information

For more information, including access to the legislation, forms or publications listed in this brochure:

- go to www.familycourt.wa.gov.au
- call **08 9224 8222** or **1800 199 228**; or
- visit the Family Court of Western Australia registry.

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APPROVED BY THE PRINCIPAL REGISTRAR IN ACCORDANCE WITH THE *FAMILY LAW RULES 2004*

The Family Court respects your right to privacy and the security of your information.

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