



# Before you file – pre-action procedure for parenting cases

This brochure provides information for people considering applying to a court for parenting orders. In particular, it provides information about 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 procedures apply to financial cases. For more information, see the brochure 'Before you file - pre-action procedure for financial cases'.

In the Federal Magistrates Court, pre-action procedures apply to an application for parenting orders (from 1 July 2006 to 30 June 2007) with such modifications as are necessary. These pre-action procedures do not apply in the Federal Magistrates Court for financial cases.

## What is required?

The aim of pre-action procedures is to explore areas of resolution and, where a dispute cannot be resolved, to narrow the issues that require a court decision. This should control costs and, if possible, resolve disputes quickly, ideally without the need to apply to a court. The pre-action procedure applies to:

- anyone considering starting a case
- anyone named as a respondent if a case is started, and
- their lawyers (if any).

The Family Law Rules require prospective parties to genuinely try to resolve their dispute before starting a case. Except for those situations listed under the heading 'What applications are exempt?', all prospective parties must:

- 1 participate in dispute resolution services, such as family counselling, negotiation, conciliation or arbitration
- 2 if dispute resolution is unsuccessful, write to the other parties setting out their claim and exploring options for settlement, and
- 3 comply, as far as practicable, with the duty of disclosure (see page 4 of this brochure).

Anyone who does not comply (unless exempt) risks serious consequences, including costs penalties. See 'Compliance' on page 3.

## What applications are exempt?

Pre-action procedure is not required for applications:

- for divorce only
- for child support 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
- involving allegations 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

### PRE-ACTION PROCEDURE OBJECTIVES

- To encourage early and full disclosure through the exchange of information and documents about the prospective case.
- To help people 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.
- Where an agreement cannot be reached out of court, to help parties identify the real issues in dispute. This should help reduce the time involved and the cost of the case.
- To 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 are 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 need to protect and safeguard the interests of the child
- the importance of a continuing relationship between the child 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 recipient, particularly on the other party
- 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
- 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 the consequences should be (if any).

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.

In addition, 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 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 Invite the other parties to participate in dispute resolution

A person who is considering filing an application to start a case must:

- 1 Give a copy of this brochure to the other prospective parties to the case.
- 2 Invite the other parties to participate in dispute resolution. For more information about dispute resolution or to find an agency near you:
  - go to [www.familyrelationships.gov.au](http://www.familyrelationships.gov.au), or
  - call 1800 050 321.

### STEP 2 Agree on a dispute resolution service and attend the service

Each prospective party must:

- agree on an appropriate dispute resolution service, and
- make a genuine effort to resolve the dispute by participating in dispute resolution.

If an agreement is reached, you and the other party may enter into a parenting plan or apply to court for consent orders. For more information or to get a Consent Orders Kit:

- go to [www.familylawcourts.gov.au](http://www.familylawcourts.gov.au)
- call 1300 352 000, or
- visit your nearest family law registry.

### STEP 3 Written notice of issues and future intentions

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If:

- no dispute resolution service is available
- a person refuses or fails to participate, or
- agreement is not reached through dispute resolution, then

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 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.

This brochure must also be attached to the notice of claim.

### STEP 4 Replying to the notice of claim

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If you receive this notice of claim, you must, within the nominated time, reply to it in writing stating whether the offer is accepted.

Where agreement is reached, you and the other party should consider formalising your agreement by entering a parenting plan or filing an application for consent orders.

Where 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 Taking other action

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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

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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.

In summary, parties should promptly exchange copies of documents in their possession or control relevant to an issue in 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 seek 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 seek 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 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 Law Courts and by government, community and other agencies, and
  - ~ the obligations created by a court 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 any of the legislation, forms or publications listed in this brochure:

- go to [www.familylawcourts.gov.au](http://www.familylawcourts.gov.au)
- call 1300 352 000, or
- visit a family law registry near you.

### AUSTRALIAN CAPITAL TERRITORY

**Canberra** ~ Cnr University Ave & Childers St Canberra ACT 2600

### NEW SOUTH WALES

**Albury** ~ 463 Kiewa St Albury NSW 2640

**Dubbo** ~ Cnr Macquarie & Wingewarra Sts Dubbo NSW 2830

**Lismore** ~ L2/29-31 Molesworth St Lismore NSW 2480

**Newcastle** ~ 61 Bolton St Newcastle NSW 2300

**Parramatta** ~ 1-3 George St Parramatta NSW 2150

**Sydney** ~ 97-99 Goulburn St Sydney NSW 2000

**Wollongong** ~ L1/43 Burelli St Wollongong NSW 2500

### NORTHERN TERRITORY

**Alice Springs** ~ Centrepoint Building Hartley St Alice Springs NT 0870

**Darwin** ~ 80 Mitchell St Darwin NT 0800

### QUEENSLAND

**Brisbane** ~ 119 North Quay Brisbane Qld 4000

**Cairns** ~ L4/104 Grafton St Cairns Qld 4870

**Rockhampton** ~ L4/Cnr East & Fitzroy Sts Rockhampton Qld 4700

**Townsville** ~ L2/143 Walker St Townsville Qld 4810

### SOUTH AUSTRALIA

**Adelaide** ~ 3 Angas St Adelaide SA 5000

### TASMANIA

**Hobart** ~ 39-41 Davey St Hobart Tas 7000

**Launceston** ~ Cnr Brisbane & George Sts Launceston Tas 7250

### VICTORIA

**Dandenong** ~ 53-55 Robinson St Dandenong Vic 3175

**Melbourne** ~ 305 William St Melbourne Vic 3000

### WESTERN AUSTRALIA

**Perth** ~ Family Court of Western Australia  
150 Terrace Rd Perth WA 6000  
08 9224 8222

The Family Law Courts respect your right to privacy and the security of your information. You can read more about the Courts' commitments and legal obligations in the fact sheet 'The Family Law Courts and your privacy'. The fact sheet includes details about information protection under the privacy laws and where privacy laws do not apply.