

FAMILY LAW

MAKING YOUR WAY THROUGH THE LEGAL FRAMEWORK

Presented by: Mary Buchanan
& Linda Adcock
Legal Aid Qld

RECOVERY ORDERS

Legislation: Meaning of recovery order

FAMILY LAW ACT 1975 - SECT 67Q

Meaning of recovery order

*A **recovery order** is an order made by a court doing all or any of the following:*

(a) requiring the return of a child to:

(i) a parent of the child; or

(ii) a person with whom the child is to live under a parenting order; or

(iii) a person with whom the child is to spend time under a parenting order; or

(iv) a person with whom the child is to communicate under a parenting order; or

(v) a person who has parental responsibility for the child;

(b) authorising or directing a person or persons, with such assistance as he or she requires or they require, and if necessary by force, to stop and search any vehicle, vessel or aircraft, and to enter and search any premises or place, for the purpose of finding a child;

(c) authorising or directing a person or persons, with such assistance as he or she requires or they require, and if necessary by force, to recover a child;

Legislation (cont)

(d) authorising or directing a person to whom a child is returned, or who recovers a child, to deliver the child to:

(i) a parent of the child; or

(ii) a person described in subparagraph (a)(ii), (iii), (iv) or (v); or

(iii) some other person on behalf of a person described in subparagraph (i) or (ii);

(e) giving directions about the day-to-day care of a child until the child is returned or delivered to another person;

(f) prohibiting a person from again removing or taking possession of a child;

(g) authorising or directing a person to arrest, without warrant, a person who again removes or takes possession of a child.

Who can apply for a recovery order

- A person who the child lives with, spends time with or communicates with as stated in a parenting order
- Person who has parental responsibility for the child in a parenting order
- A person concerned with the care, welfare and development of the child – a person who the child lives with or spends time with but there is no order
- Grandparent of the child
- The Police will not usually retrieve children until they are authorised to do so by a Recovery Order
- Recovery Order only has effect if child is in Australia
- If child has left the country, Commonwealth Attorney General's department can assist with recovery under Hague Convention (if applicable)

How to apply

- Applications are usually filed in the Federal Circuit Court
- Consider filing in local Magistrates Court especially if the matter is urgent – can usually get an earlier hearing date
- Hearing date may be listed weeks or months – if urgent make sure the Court is aware at time of filing and they will consider listing it earlier
- Documents
 - Initiating Application (if no current court proceedings)
 - Affidavit of non-filing of FDRC
 - Application in a Case (if current court proceedings)
 - Affidavit
 - Notice of Risk

How to apply (cont)

Example of a Recovery Order

1. *That a Recovery Order issue pursuant to section 67Q of the Family Law Act.*
2. *That the Marshall, officers of the Australian Federal Police and all officers of the Police Forces of all the States and Territories of the Commonwealth of Australia be authorised and directed with such assistance as they require and if necessary by force to:*
 - *Stop and search any vehicle, vessel or aircraft and search premises or place for the purpose of finding the children*
 - *Recover the children*
 - *Deliver the children to the Applicant (or some other named person)*
 - *Arrest, without warrant, the Respondent if they again removes to take possession of the children*

Other Orders:

- Abridge time for service if urgent
- If no current parenting order apply for one at the same time – eg lives with

How to apply (cont)

- Affidavit (including but not limited to)
 - A history of the relationship between the parties, including care arrangements for the child
 - A history of any legal proceedings
 - Any risks to the child/special needs of the child
 - The harm that will occur if an order is not made
 - Why it is believe the child is where the child is said to be,
 - What attempts have been made to have child returned
 - Attach a copy of any current parenting orders
 - Details of any family violence issues
 - Involvement by any government departments (i.e. Child Safety)
 - Proposal for interim arrangements

 - Duty of disclosure – even if it hurts your case

When to apply

- Don't delay – this could affect the prospects of a recovery order being made
- Don't rely on the other party to do what they say they will do
- Get legal advice as soon as possible

What happens when an order is made

- If a recovery order is made by the Court the applicant must provide the order to the person given authority to find, recover and deliver the child – usually the Australian Federal Police.
- The children are not taken to the Court once they are retrieved.
- The Police will not recover the child, unless the parent or other person named in the order is available and in close proximity to have the child placed in their care.
- Once the child is retrieved the Court should be notified by the party
- Time limit can be placed on the order and if there is no time then the Order will expire after 12 months - must apply to extend

Grant of Legal Aid

- Grants of Legal Aid issued to file an application for a recovery order when matter is urgent – risk issues identified, young children etc
- Otherwise a grant for a Legal Aid Conference (mediation) is given
- If unsuccessful at obtaining a grant of aid to apply for a recovery order, parties can consider filing their own application in Court and represent themselves
 - Some parties do this even if they are provided with a grant of aid to attend a Legal Aid Conference

Urgent Family Law Matters

- What makes a Family Law matter urgent?
 - The child has just been taken away from their primary carer, the other person will not return the child, and there is a reasonable risk of harm to the primary carer or the child or; a person has breached parenting orders and there is a reasonable risk of harm to the client or child.
 - Factors indicating urgency could be:
 - The child usually spends no time, supervised or very limited day time with the person who has the child
 - The person with the child is not known to them (eg estranged parent)
 - The party is concerned for the child's safety while with the other person due to:
 - Illegal drug use, regular excessive alcohol consumption
 - Untreated or severe mental health issues
 - Family violence, including previous harm to the child
 - Disability (impacting ability to care for the child)
 - Previous or current child safety involvement
 - Previous history of violent or sexual offences against children

Urgent Family Law matters (cont)

- A very young child, a child with a disability or a child with special medical needs has just been taken from their primary carer, factors indicating urgency:
 - Child is being exclusively breastfed
 - The child is under 2
 - The child has special medical needs and the person with the child doesn't have the proper medications or skills to be able to treat the child
 - The child has a disability needing special care that cannot be provided by the person with the child.
- The child is about to be taken out of the country without parental consent, factors indicating urgency could be:
 - The child's passport is being held by the person with the child
 - The time the person is leaving the country is unknown, or is believed to be imminent
 - The person taking the child has connections to overseas countries
 - The person taking the child intends to permanently relocate them
 - They are travelling to non "Hague convention" countries.

Recovery, Relocation, Location

- **Relocation**

- a party unilaterally relocates with the child to another location
- Court has the power to order what location the child are to live; generally courts will make orders for the child to be returned (on an interim basis) – get legal advice
- in circumstances where a party has unilaterally relocated with the child the other party may apply for a recovery order
- if a parent wants to relocate with the child they should get the other parent's consent or apply to the court

- **Location**

- is aimed at discovering the location of a child
- requiring a person to provide information on child's whereabouts
- requiring a commonwealth authority or department to provide the court with the information that will assist in location of the child (C'wealth Location Order)
- the information is not disclosed to the applicant but to the registry manager of the court
- information can then be disclosed to the legal advisor of the applicant. Offence to disclose location without Order.

Some case studies

- **Mary's Case**

- Consent orders
- Mother relocated with child to unknown address
- Recovery Order issued
- Federal Police located 16 months later
- Mother arrested and put in jail overnight before court appearance the following day and released on bail

- **Italian girls case**

- International relocation
- Hague Convention
- Father essentially applied for the recovery of the children back to Italy

Respondent to an application for a recovery order

- Don't unilaterally change orders
- Get legal advice prior:
 - to retaining children or
 - making a decision not to comply with orders or
 - changing long standing arrangements without the other parties agreement – whether or not there is a parenting order and/ or parenting plan
- Consequences on being granted Legal Aid

Questions?

