

Legal Aid Queensland:

Family Law Applications –
How to help self represented clients.

The Problem

As lawyers when we conduct ourselves in the various courts everything we do must be done according to a law.

Family Law Act

Family Law Rules

Federal Circuit Court Rules

Evidence Act

Child Protection Act

We are obliged to work within that framework.

We are constrained and restricted as to how we act and what we do in that framework.

Self represented litigants are expected to conduct their proceedings according to the law as well.

Self represented litigants are at an obvious disadvantage because they are conducting their matter in a framework they are neither familiar with or trained in.

It's not all doom and gloom

There are some great, easily accessible resources available to assist you to assist your client. Here are my 4 top picks:-

<https://www.legalaid.vic.gov.au/find-legal-answers/how-to-run-family-law-case>

We recommend this fact sheet regularly. It's a great resource. It's quite long and detailed but deals with Children and Property Applications, legal terminology, legislation, forms and tips for Affidavits.

<https://www.ag.gov.au/Publications/Pages/Parenting-orders-what-you-need-to-know.aspx>

Another great resource. Gives advice on, and examples of Parenting Orders. Explains the law and concepts like 'Parental Responsibility.'

<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/publications/corporate-publications/fs-first-court-event>

Explains what to expect and what to do when the self represented litigant gets to court for the first time. Gives handy hints on procedure and how to conduct yourself in court.

<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-resource-how-to-prove-your-family-law-case.docx>

Explains the rules of evidence and what is and isn't admissible evidence in an accessible format.

Which Court and Where?

Applications are made to the Federal Circuit Court in Brisbane, Cairns, Rockhampton or Townsville. Whichever is most convenient.

In Queensland the Federal Circuit Court 'circuits' to Bundaberg, Hervey Bay, Toowoomba, Ipswich, Mackay, Maroochydore and Southport. The Court sits for up to a week at a time up to 8 times a year in the larger regional cities.

In the regions we send correspondence when we file an Application and ask for the matter to be transferred to the circuit court closest to us, or most convenient.

Although Bundaberg and Hervey Bay are listed separately they are the same circuit. The court just sits in both locations usually on an alternative basis.

If an Application contains allegations of child physical or sexual abuse, or is particularly complex it may be transferred to the Family Court of Australia. This is usually done on the first return date but can be done by the Registry when they consider the material.

The Family Court sits in Brisbane and Cairns and circuits to Townsville, Rockhampton and Mackay.

Evidence – do's and don'ts

The evidence in a case are the facts relevant to the dispute.

Evidence, in the Family Law jurisdictions is provided by way of Affidavit.

The Affidavit supports the Application.

The Application informs the court as to what Orders you want it to make.

It's not allowed, or appropriate for anyone, lawyers or self represented parties to give evidence from the bar table. If a parent or party to the proceedings wants the Judge to know something – It must be in an Affidavit.

When you seek an Order in your Application – You must include material in your Affidavit that explains to the Judge why they should make the Orders you seek.

Judges routinely decline to make Orders if they have no evidence before them as to why they should.

Affidavits tell the story

Affidavits should include the following:-

The history of the matter (relevant history) – If these points below are included it is a good start:-

- When the relationship started
- Children's dates of birth
- When separation occurred
- What have been the arrangements for the children since separation
- Any incidents of domestic violence
- The risk to the children in not making the Orders sought

Try and make each paragraph of your Affidavit 'self contained,' that is, every paragraph tells a little story.

Draft it in a way that makes it easy for the Judge to pick up what's happened, what are the issues, what's happening now and what are the risks, if any, to the children.

I recommend preparing Affidavits in a chronological fashion.

60CC How a court determines what is in a child's best interests

Determining child's best interests

- (1) Subject to subsection (5), in determining what is in the child's best interests, the court must consider the matters set out in subsections (2) and (3).

Note: Section 68P also limits the effect of this section on a court making decisions under that section about limiting, or not providing, an explanation to a child of an order or injunction that is inconsistent with a family violence order.

Primary considerations

- (2) The primary considerations are:
 - (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
 - (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).

- (2A) In applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(b).

Additional considerations

- (3) Additional considerations are:
- (a) any views 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 views;
 - (b) the nature of the relationship of the child with:
 - (i) each of the child's parents; and
 - (ii) other persons (including any grandparent or other relative of the child);
 - (c) the extent to which each of the child's parents has taken, or failed to take, the opportunity:
 - (i) to participate in making decisions about major long-term issues in relation to the child; and
 - (ii) to spend time with the child; and
 - (iii) to communicate with the child;
 - (ca) the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child;
 - (d) 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
 - (ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;

- (e) the practical difficulty and expense of a child spending time with and communicating 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;
- (f) the capacity of:
 - (i) each of the child's parents; and
 - (ii) any other person (including any grandparent or other relative of the child);to provide for the needs of the child, including emotional and intellectual needs;
- (g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;
- (h) if the child is an Aboriginal child or a Torres Strait Islander child:
 - (i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and
 - (ii) the likely impact any proposed parenting order under this Part will have on that right;
- (i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
- (j) any family violence involving the child or a member of the child's family;

- (k) if a family violence order applies, or has applied, to the child or a member of the child's family—any relevant inferences that can be drawn from the order, taking into account the following:
- (i) the nature of the order;
 - (ii) the circumstances in which the order was made;
 - (iii) any evidence admitted in proceedings for the order;
 - (iv) any findings made by the court in, or in proceedings for, the order;
 - (v) any other relevant matter;
- (l) 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;
- (m) any other fact or circumstance that the court thinks is relevant.

Consent orders

- (5) 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) or (3).

Right to enjoy Aboriginal or Torres Strait Islander culture

- (6) For the purposes of paragraph (3)(h), an Aboriginal child's or a Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:
- (a) to maintain a connection with that culture; and
 - (b) to have the support, opportunity and encouragement necessary:
 - (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
 - (ii) to develop a positive appreciation of that culture.

Applications

Interim Applications - Seek Orders that last until another Order is made. They result in the first Order made in proceedings generally.

Applications for Final Orders – are self explanatory.

Applications in a Case – Can be made while the proceedings are ongoing and result in Interim Orders.

Interim Orders dictate what happens until a Final Hearing and Final Orders are made.

This can be between 6 months and 2 years (or longer).

At Court

Make use of the Duty Lawyer Service

Regional Circuit Courts have one Duty Lawyer.

Often the Judge will 'stand the matter down' and send a self represented person out to see the Duty Lawyer.

They are very good at negotiating with the other parent/party or their lawyer. It puts at least an arms length between the parties.

They will ensure the self represented person gets accurate information about what to expect from their first day in Court and most importantly (in my view) if the Orders they are seeking are reasonable and likely to be made.

In Brisbane there are 2 duty lawyer services. This is ideal if both parties are self represented.

Suggestions for your client

- Ask for a Family Report
- If there are concerns about the other parent/party and substance abuse – ask the Court to Order that they undergo drug tests
- If they are concerned about the child or children’s safety with the other parent/party – ask the Court to Order that the time they spend with the child/children be supervised
- If the other party has had very little to do with the child/children –ask the Court to Order their attendance and completion of a parenting program
- If further evidence gathering is required (and some other factors are present) - ask for an Independent Children’s Lawyer to be Appointed

These Orders should be sought in the Application and supported (in the Affidavit) by evidence of why they’re required.

The court may order (of its own motion, or when a child or any other person or organisation concerned with the child's welfare applies) that the child's interests be independently represented [Family Law Act 1975 (Cth) s 68L] and ask the local Legal Aid Commission to arrange the representation.

Re K (1994) FLC 92-461

In the case of **Re K (1994) FLC 92-461** the Full Court of the Family Court laid down an extensive list of guidelines for cases in which an independent children's lawyer should be appointed. These stipulate that a lawyer may be appointed where:

1. there are allegations of abuse of the child
2. there is intractable conflict between the parties
3. the child is alienated from one or both parties
4. there are cultural and religious differences between the parents
5. there are concerns about the mental or physical illness or personality disorder of either parent
6. neither party seems to be a suitable residential parent for the child
7. a child of mature years indicates that they do not wish to have contact with one parent
8. there is a threat of removal of the child from the jurisdiction
9. the *determination* of the case may involve separation of siblings, or
10. neither party is represented

What does the independent children's lawyer do?

The independent children's lawyer must:

- (a) decide what they think about a child's welfare and best interests, based on evidence in the case
- (b) act in a way that they believe is in the child's best interests
- (c) ask the court to take action, if the lawyer believes it is right to do so
- (d) be completely independent (this is called acting 'impartially')
- (e) make sure that the court knows about any thoughts or feelings that the child has spoken about, to do with the case
- (f) make sure the court is aware of important issues, to do with the child's best interests, in any reports or documents, including any reports to the Department of Child Safety, Youth and Women that involve other children in the household
- (g) do their best to lessen any trauma to the child caused by the family law case
- (h) do their best to help everyone involved in the case (the 'parties') make a final agreement, where the lawyer believes this is best for the child.

What does the independent children's lawyer do?

How they do it.

The lawyer usually does these things by:

- collecting information about the case and the child. This can include meeting the child and talking with people like teachers, doctors, psychologists or counsellors
- I find the most reliable and impartial way of gathering information is to issue subpoenas. Police, Child Safety, Hospitals and School records are regularly sought by the ICL.
- encouraging the parties to put the child first, and to make an agreement that will meet the child's needs, where possible
- asking the court to order a family report, where needed
- giving information to the court, including asking witnesses to give evidence
- asking witnesses questions, including parents, at the final hearing
- advising the court on how the law applies to the disagreement in the family
- recommending how court orders could be written to make sure the child's interests are protected.

What is a family report?

A family report is a written report about the family for use in court. Family report writers generally have qualifications in social work or psychology. They speak to family members and other significant people.

A family report usually includes recommendations about arrangements for the children. It gives the judge an expert's opinion about the issues affecting the child.

Any party involved in a case can ask for a court order for a family report to be prepared. Either the court, or the independent children's lawyer and the parties can arrange the report.

If the court organises the family report it will ask a court family consultant or other professional to talk to the family. Families do not have to pay for these reports.

If the parties (including the independent children's lawyer) organise the family report, the family will talk to a qualified private psychologist, social worker or other expert. Legal Aid pays for the family report if it's arranged by the independent children's lawyer.

Does the independent children's lawyer have to meet the child?

If the child is mature enough and old enough, the lawyer will usually meet them, unless there are special circumstances. The lawyer will explain what they do and how court works. They will ask if the child wishes to let the court know what the child thinks. A child does not have to do this. Also, the lawyer does not have to tell the court any information that the child may give them, unless they believe this is in the child's best interests.

Children do not normally give evidence or go to court.

Does the independent children's lawyer have to do what the child asks?

No, but the lawyer will do this where the lawyer thinks it is in the child's best interests.

I always tell the child that this might happen. I will listen to what they want, and I will tell the Judge that is what they want but if I don't think it's in their best interests I will tell the Judge that too.

Does the judge do what the independent children's lawyer asks?

The independent children's lawyer tells the court what they think based on all the evidence. They are listened to by the judge. However, many people give information to the court. The judge considers all the facts and views given by all the parties and the child or children.

Who pays the independent children's lawyer?

Legal Aid pays the costs of the independent children's lawyer. However, Legal Aid generally asks each party to pay a part of this lawyer's legal costs. This is up to and usually \$3300 per party.

A party's capacity to pay is taken into account. For instance, a party whose case is funded by Legal Aid does not have to pay anything. Parties are sent out a financial questionnaire to ascertain whether they have the means to pay those costs.

The independent children's lawyer can ask the court for their costs to be paid by the parties at the end of the case.

What can I do to help a self represented client if there is an independent children's lawyer appointed?

Tell them the following:-

- Court cases can be very stressful for children. Support the child in any way you can and get information on how best to help them through the experience.
- Do not talk about details of the court case in front of the child.
- If the independent children's lawyer asks to see the child, parents should make sure this happens. Do not coach a child before any meetings with the independent children's lawyer or ask them questions about the meeting before or afterwards.

The Separate Representative

- Section 110, Child Protection Act 1999: if, in a child protection proceeding, the Children's Court considers it is necessary in the child's best interests for the child to be separately represented by a lawyer, the court:
 - May order the appointment if the court considers separate representation *necessary in the child's best interests*
 - Must consider ordering the appointment if the application is *contested by the parents or opposed by the child*

The Separate Representative

- Rule 68(2), *Childrens Court Rules*: prescribes matters that the court must consider when deciding whether to make an order appointing a separate representative –
 - The circumstances of the child;
 - The circumstances of the child’s family;
 - The factual or evidentiary complexity of the proceedings;
 - Whether a separate representative is necessary for the child protection proceedings to be conducted in a way that is consistent with the best interests of the child, or the court to decide the child protection proceeding in the best interests of the child.

The Separate Representative

- Section 110, Child Protection Act: if a separate representative is appointed, he or she must:
 - To the extent that it is appropriate, taking into account the child's age and ability to understand –
 - Meet with the child; and
 - Explain the separate representative's role; and
 - Help the child take part in the proceedings; and
 - As far as possible, present the child's views and wishes to the court.
 - The separate representative must act in the child's best interests regardless of any instructions from the child.
 - The separate representative's role ends when the application is decided or withdrawn, or if there is an appeal in relation to the application, when the appeal is decided or withdrawn.

The Separate Representative

- In addition to meeting the child, the separate representative may gather information about the case by:
 - Reviewing the filed material and conducting an inspection of Child Safety's files
 - Seeking information from teachers, guidance officers, or other people who have spent a significant amount of time with the child;
 - Issue subpoenas to Police, Schools, Hospitals etc
 - Requesting a social assessment report;
 - Requesting reports from other professionals (e.g. psychologist or psychiatrist).