

The Family Law Guide for Australia



MATHEWS FAMILY LAW

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This guide covers a range of family law issues in Australia and is for anyone getting married or commencing a *de facto* relationship (including a same sex relationship) or is separating or getting divorced. It covers almost everything you need to know about financial agreements, children, custody, maintenance and property division.

The guide was created by Mathews Family Law, a specialist boutique family law firm.

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FAMILY LAW COURTS

The Family Law Courts in Australia are made up of the Family Court and the Federal Circuit Court. The courts share jurisdiction in all family law matters and you can apply to either court.

Most cases are dealt with in the Federal Circuit Court, which deals with the less complicated cases that can be decided quickly. The Family Court deals with more complicated matters such as trusts and corporations, complex questions of law or more difficult issues of superannuation.

It's best to speak to a lawyer before choosing which court is best for you.

DE FACTO RELATIONSHIPS

Many couples today are in committed relationships that are not legally recognised as marriages in Australia. These include relationships between same-sex couples, couples living together and couples who do not live together full time but still regard their relationship as being akin to a marriage. Family law in Australia recognises many of these as "*de facto*" relationships and grants them virtually all of the same rights and responsibilities as legally married couples.

Laws on division of property, maintenance, child custody and child support, along with most other laws that apply to legally married couples also apply to *de facto* relationships.

De Facto relationships are defined in Section 4AA of the Family Law Act 1975. A relationship is *de facto* if:

1. The partners are not legally married to each other; and
2. They are not related by family; and
3. In all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis (see box).

De facto couples who turn to the courts for orders on division of property, superannuation and maintenance may receive these orders from the court if the court is satisfied that the couple meets one of the following criteria:

- The relationship was at least two years long
- The couple has a child together

What are some of the circumstances the court will look at to decide if yours is a *de facto* relationship?

1. How long you've been together
2. Your home – how long you've been living together and to what extent is it a joint home
3. Is there a sexual relationship?
4. Your financial commitment to one another, ie, does one partner support the other?
5. Whether or not there is joint property. If there is, the court will ask how the property was acquired and used
6. The nature of the commitment and if it is mutual
7. Whether or not your relationship was registered (in those territories where registration is possible)
8. If there are children, the court will want to know who cares for them, makes decisions for them and supports them
9. How other people see your relationship
10. How you and your partner behave in public, ie as a couple or leading separate lives?

- One person made significant contributions to the relationship (financial, non-monetary to the property, as a homemaker or as a parent) and would be disadvantaged if the order was not granted
- The relationship was registered.

Each section throughout this Guide will note whether or not a particular rule applies to *de facto* couples.

WORKING IT OUT ON YOUR OWN

Couples have many different methods for working out family matters after separation and/or divorce. Court is often the last choice, not the first. Below are various options for alternative dispute resolution (ADR) that you may wish to consider. We urge you to read about each of them and consider them in the context of your particular situation.

PRIVATE NEGOTIATIONS

Many couples try to work out their disputes by negotiating on their own. Sitting together, with paper and pen (or more likely, a computer), and working out the dispute on your own can save hours of time and thousands of dollars. It also serves you well for the future, demonstrating that despite the breakdown of your relationship, you can work together for what's best for everyone. In some cases, particularly where the couple has been married a short time, there are no children and there is no joint property, the parties can come to a fairly quick resolution. But for many families with children, property and money, trying to work together, when emotions are so heated, is too difficult. Recognising when you need help – and seeking out that assistance - is also an important step in resolving the dispute.

LAWYER - LED NEGOTIATIONS AND/OR A SETTLEMENT CONFERENCE

Lawyers specialising in family law can help couples who need outside intervention. In these cases, each side to the dispute hires a lawyer to represent them in the negotiations. Each lawyer tries to represent the best interests of his or her client. But it's a negotiation, not a courtroom. No judge makes a final decision, but rather the parties to the dispute, through the intervention of their lawyers, work out a deal that

The Benefits of Working through ADR rather than going to court:

1. ADR lets you take a more active part in the decision-making process.
2. No judge is involved – you make the final decision.
3. ADR can save you months, even years, of time.
4. ADR is much cheaper than going to court. The financial costs of legal fees, court hearings, court fees and work missed are greatly reduced.
5. Working together now sets the stage for working together better in the future.
6. Many of the issues that will come up later can be resolved now.
7. You can meet on your own time, when it's convenient for both of you.

serves the interests of both sides. Lawyers may negotiate via telephone, email and fax. Often, family lawyers work through settlement conferences, where everyone – the couple and both lawyers – meet together. Direct, face-to-face negotiations allow each side to respond in real time, speeding up the process and saving everyone time and money.

MEDIATION AND FAMILY DISPUTE RESOLUTION (FDR)

Mediation also involves intervention by an outside party, but it differs from regular negotiations in several important ways. Mediation is led by a trained, objective mediator. His or her role is to help each side define the issues, manage their discussion and come up with solutions. The mediator is interested in resolving the problem in the best way possible for everyone involved. A good mediator helps each side broaden their understanding of the issues so they can see the picture as a whole, not just the individual claims. The mediator does not judge or make a final decision. Lawyers may attend the mediation if the sides choose. Mediation is completely voluntary and either side may choose to end the mediation at any point. Mediation is, however, a compulsory pre-requisite for couples who want to go to court over a parenting dispute. *Vanessa Mathews is an accredited mediator.*

Family law in Australia provides a unique type of mediation called Family Dispute Resolution. Trained practitioners in the field of family disputes, with professional backgrounds in the fields of law, social work and psychology work with a separating couple to help them through the process. These practitioners will advise the couple on best practices for the good of the children. *Vanessa Mathews is an accredited family dispute resolution practitioner.*

ARBITRATION

Arbitration is similar to a trial, but rather than a judge a qualified professional – often a family law barrister - chosen by both sides, hears the evidence and makes a final, binding decision. Both sides must consent to arbitration. There are numerous benefits to arbitration. It is less formal than court and flexible enough to meet the needs of the parties. The parties and the arbitrator can set their own schedule, including a deadline for a decision, making the process faster and less costly. In arbitration, the case is decided in a closed, private environment and not in an open

courtroom. For families unable to work through mediation or negotiations on their own, arbitration may be a good alternative.

LITIGATION OR "GOING TO COURT"

While most family disputes today are settled out of court – through negotiations, mediation, or arbitration – sometimes the only solution in a particular case is going to court. This process includes filing documents in court, submitting evidence and giving evidence. The process may take a few months or longer. The courts can decide on all of the issues, including financial settlements, child custody and maintenance and division of property. The judge makes the final decision, which is binding on everyone. If you choose to litigate, we recommend you hire a lawyer specialising in family law. *Vanessa Mathews is an accredited family law specialist.*

CONSENT ORDERS AND FINALISING YOUR AGREEMENT

Any agreement reached out of court regarding the children and/or division of property and/or maintenance, can be formalised by the court by applying for a consent order. Once a consent order is made, it has the validity and enforceability of a court order issued by a judge. You can apply for a consent court order for your final parenting and/or property settlement by completing the Application for Consent Orders. You do not need to go to court to apply for consent orders.

TURNING TO THE COURT

WHEN YOU CAN'T AGREE ON YOUR OWN

If you and your spouse can't come to an agreement on your own or using one of the methods of alternative dispute resolution listed above in the section "Working it Out on Your Own", you may apply to the court for orders on your particular issue.

Before applying to the court for a decision on parenting issues, you and your spouse or former partner must make a real effort to resolve the dispute through family dispute resolution. This is a compulsory pre-requisite to issuing parenting proceedings (although in special circumstances exceptions will apply).

De facto couples applying to the court for a decision on property and maintenance issues must file an application with the court within two years of the breakdown of their relationship. They must also prove to the court that:

- They were in a *de facto* relationship AND
- The total period of the relationship was at least two years AND
- They are ordinarily resident in one of the states or territories that recognises *de facto* relationships AND
- The relationship broke down after 1 March 2009 AND
 - There is a child of the relationship OR
 - One of the parties made substantial contributions to the relationship OR
 - The relationship is or was registered.

FAMILY COURT

PRE-ACTION PROCEDURES

If you need to apply to the Family Court in order to settle a financial dispute – division of property, spousal maintenance - you are first required to follow pre-action procedures. The goal of pre-action procedures is to find issues in dispute that can be resolved out of court and where no resolution can be found, narrow the issues that actually require a court decision.

Pre-action procedure is **not required** for applications dealing only with child support or where the case includes bankruptcy jurisdiction. The court may also exempt you from pre-action procedures in certain other special cases (see box).

Cases where pre-action procedures might not be required include:

- urgent cases
- cases with allegations of child abuse or risk of abuse
- cases with allegations of family violence or a risk of family violence
- financial cases involving fraud or where a time limitation is close to expiring
- where the dispute appears unsolvable, for example, because one person refuses to negotiate
- where a person would be prejudiced or negatively affected if the other side became aware of his or her intention to start a case
- if there was a previous application about the same issue or subject in the last 12 months
- certain cases involving *de facto* couples
- where both parties agree to the application

PROPERTY AND MONEY

DIVISION OF PROPERTY AND MONEY

Following the breakdown of a marriage or *de facto* relationship, your assets (house, furniture, car, savings, shares), your liabilities (debts, mortgages, leases, hire purchase), your financial resources (superannuation, pensions, share options, interest in a trust) and your contributions (financial and non-financial, parenting and homemaker) to the marriage must be considered and divided fairly.

Generally, in the case of a short marriage or *de facto* relationship, if you owned something before you were married or commenced your *de facto* relationship those "initial contributions" remain yours when the marriage or *de facto* relationship ends. The longer the marriage or *de facto* relationship the more likely the court will view property as belonging to both partners and the less likely it is that all of the initial contributions will be returned to the person who contributed them.

Anything acquired after the marriage or commencement of the *de facto* relationship is regarded as property both of you contributed to and will be divided between you and your former spouse or *de facto* partner according to the Family Law Act.

Contributions may be direct financial contributions, such as pre-marriage or pre-relationship savings, and non-financial contributions, which include improvements to the home, and working as the homemaker by maintaining the home, garden and children.

A court will also consider the contribution of a stay-at-home parent, who handled most of the child-raising. While not financial, it directly contributed to the ability of the other parent to work and develop professionally.

PROPERTY AND MONEY - FINANCIAL AGREEMENTS

Couples can sign financial agreements at any time: before they are married or commence a *de facto* relationship (sometimes known as a “pre-nuptial agreement or “pre-nup”), during their marriage or *de facto* relationship (before or after separation), or after they have divorced.

All of these arrangements are called "financial agreements" and cover the division of property, finances and debts after a marriage breaks down, superannuation (retirement funds), spousal maintenance and other related issues.

Financial agreements are covered under Part VIIIA of the Family Law Act of 1975. These agreements may refer to:

- (1) Property and financial resources and how they will be dealt with if the marriage breaks down or;
- (2) The maintenance (financial support) of either of the spouses during and/or after the marriage or;
- (3) Any other matter related to (1) or (2) above

De facto couples may also sign financial agreements but the Family Law Act applies to them only if they were residents of New South Wales, Victoria, Queensland, South Australia, Tasmania, the Australian Capital Territory, the Northern Territory or Norfolk Island when the agreement was made.

A financial agreement is binding only if it was signed by both parties AND both parties received independent legal advice (from different lawyers) prior to signing.

The court may invalidate or set aside a financial agreement for various reasons, including fraud and the unenforceability of the agreement.

PROPERTY AND MONEY - PROPERTY DIVISION

The court, lawyer-led negotiations, and mediation, will conduct a four-step process when it considers the property division – both assets and liabilities - for a divorced couple or a *de facto* couple whose relationship has ended:

1. Identify and value the couple's assets and liabilities (the “asset pool”)

2. Evaluate the contributions of each partner to the relationship and asset pool . These include direct financial contributions, such as wages and salary, and indirect financial contributions, such as gifts and property received through inheritance. There are also non-financial contributions, such as taking care of the home and children.
3. Consider the future needs of each partner
Does one partner require more of the marital property because of health, age, financial resources, their role in taking care of the children or their ability to earn a living?
4. Provide a "just and equitable" division. The division does not need to be equal but it must be fair. Any agreement must also include how the division will take place. For example, will the joint home be sold and the money split? How will one spouse receive the other spouse's future pension payments?

CHILDREN

Australian law holds both parents responsible for their children, regardless of whether they are married or not, where they live and how they might feel about their former spouse. Legal responsibility includes the financial, emotional and physical welfare of the children. Family law in Australia encourages parents to work together on issues which involve their children.

Before filing an application for orders regarding children, parents must show that they tried to resolve their differences. Before going to court, compulsory Family Dispute Resolution is required. Parents that have attended these meetings receive a certificate from a registered Family Dispute Resolution Practitioner, which must be submitted to court when filing an application for parenting orders. This certificate is required even if there are pre-existing orders relating to the same children who are the subject of the new application. There are some exceptions to the requirement that parties attend Family Dispute Resolution before filing an application, such as urgency, family violence and mental illness.

CHILDREN – CHILD CUSTODY

A PARENTING PLAN

The aim of a parenting plan is for the parents to work out all arrangements having to do with their children. A good parenting plan includes a day-to-day schedule for the children, who is responsible for pick up and drop off, a break-down of time that each parent is to spend with the child for every day of the year, including all civil, religious and school holidays, payments for all of the various expenses, including medical, dental and after school activities, and how the parents will settle future disagreements. The court cannot grant a divorce order until it is satisfied that proper parenting arrangements are in place.

The best parenting plan is one made by the parents themselves, not by the court. Some parents are able to do this on their own, or using one of the approaches outlined

above in "Working it Out on Your Own". Many families turn to Family Dispute Resolution to resolve the issues.

A parenting plan is an agreement between the parents, however, and not a court order. The court cannot enforce the parenting plan. But if you do not follow the plan and the other parent turns to the courts, the courts may make new orders based on the original parenting plan.

If you're not able to create a parenting plan with your legal or *de facto* spouse, you can apply to the court for a parenting order.

TURNING TO THE COURT FOR ORDERS

Many parents end up turning to the courts to resolve their parenting dispute. The court may make a "parenting order", telling the parents exactly what the parenting arrangement must be. These may be orders which the parents consent or agree to (consent orders) or the order may be imposed on the parents following a trial or court hearing. Finally, there are cases that combine parenting orders by consent along with a parenting plan created by the parents.

A parenting order is in effect until the child turns 18, marries (or enters a *de facto* relationship) or is adopted by someone else.

The most important question the court will ask is what is in the best interests of the children (Section 60CA of The Family Law Act 1975). A court will take many factors into consideration in order to determine the children's best interests, but the two primary considerations are:

- (a) The benefit of having a meaningful relationship with both 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.

The law also explicitly states that the court will give greater weight to the question of harm when weighing these two factors. A parent who was abusive to his or her spouse, thus subjecting the child to psychological harm, is unlikely to obtain custody of the child.

The court will also consider many other factors to determine the best interests of the child including: the child's opinions on the matter; his or her relationship with each parent and other relatives, such as grandparents; the role each parent takes in raising the child and making important decisions for him; each parent's part in supporting the child; how a change in circumstances will affect the child; each parent's ability to care for the child and; the lifestyle of each parent. The law also gives the court room to consider "any other fact or circumstance that the court thinks is relevant".

In some cases, the court may decide that the child needs his or her own lawyer to represent his or her best interests. The court may make this decision on its own or based on an application by the child or a parent. This lawyer is an independent children's lawyer.

A parenting order from the court may include the following:

- Who the child will live with
- How much time the child will live with each parent and maybe other relatives, such as grandparents
- What the child's day to day schedule will look like and which parent is responsible each day
- How the child will be transferred from one home to the other
- How parental responsibility is divided (for example, who makes decisions about education)
- How the child will communicate with the other parent (can he or she call his mother when he or she's with his or her father?)
- How parents will resolve disagreements that arise between them regarding the child

FOLLOWING A PARENTING ORDER

You and your former spouse or *de facto* partner must follow all aspects of the parenting order.

Breaching or disobeying the parenting order is very serious. Your partner may turn to the courts if he or she believes you disobeyed the order. Only the court

can determine if a parent did not follow the parenting order and only the court can penalise that parent.

If the court finds that you did not follow the parenting order it may, among other things:

- Change the original order, perhaps to give the other parent more time with the child
- Order you to attend a parenting program to help you figure out what your child needs and to learn to resolve disagreements with the other parent
- Order you to pay for the other parent's legal fees
- Require you to give community service
- Put up a bond (a financial guarantee) for up to two years
- Order you to pay a fine
- Send you to jail for up to 12 months.

There are, however, cases when the court will accept excuses for breaching an order. Generally, this is when:

- You believed it was necessary to breach the order to protect someone's health or safety (ie you did not return your child to your spouse because you had to rush him to a doctor) or:
- You did not realise that you were breaking the order.

CHANGING OR MODIFYING A PARENTING ORDER

If you want to change a parenting order you can:

- Apply to the courts to change the order. You can do this only after you first tried Family Dispute Resolution
- You both agree on a new parenting plan (if the parenting orders were given after July 2006), unless the court specifically said in the parenting orders that a parenting plan cannot change the orders.

When a child is illegally removed from the custody of his legal guardian, court orders can be obtained to "recover" the child. The law on recovery orders is defined in section 67Q of the Family Law Act 1975. A recovery order given by the court will order that a child be returned to his or her parent OR a person who has a parenting order that states that the child lives with that person, or communicates with that person or spends time with that person OR a person who has parental responsibility for the child. An application for a Recovery order is filed in the Federal Circuit Court where the parenting order was filed (if there was one).

A Recovery Order can do any of the following:

- Authorise or direct a person, such as a police officer, to find, recover or reacquire and deliver a child to one of the people listed above. "Finding" means stopping and searching a vehicle, vessel or aircraft and search the premises in order to find the children.
- Provide directions about the daily care of the child until he or she is returned to one of the people listed above.
- Prohibit the person who took the child from taking the child again.
- Authorise the arrest of the person who took the child or removed him again.

Who can apply for a Recovery Order?

- A person the child lives with, spends time with or communicates with, according to the parenting order.
- A person who has parental responsibility for the child, according to the parenting order.
- A grandparent of the child.
- A person concerned with the care, welfare and development of the child.

Applying for a Recovery Order

Every request is different and depends on the circumstances of the case. You must clearly explain what you are requesting and you must submit a supporting affidavit. It's best to get legal advice from an experienced family lawyer before making an application for a Recovery Order.

Information to include in your affidavit for a recovery order:

1. Your history with the person who took your child
2. A list of previous court hearings and court orders
3. Detail any incidents of violence
4. Your role in caring for the child – what your daily role was in the life of the child as well as the other person's role
5. Any important issues about you – depression, health issues, etc. – and how you have addressed these problems and remedied them
6. Information about the child, including full name, age, a description of the child, where he or she usually lives
7. When and how the child was removed from your possession or not returned to you, including any special circumstances
8. Where you think the child might be and why you think he or she might be there
9. What has been done to date to get the child back
10. Why it's in the best interests of the child that he or she be returned to you
11. What is likely to happen to the child if she or he is not returned to you
12. Recommendations for how the other party will spend time with the child in the future

Once you receive the recovery order, you must submit it to the Australian Federal Police who will carry it out. Often you need to be nearby when the police carry out the order so you can receive your child immediately. Once you have your child, you should notify the courts as soon as possible.

CHILDREN - RELOCATION AND TRAVEL OVERSEAS

In many cases, one parent may want to move to another town, city or even another country. The reasons may vary, and include work opportunities, a new relationship or a return to the person's birth country. While relocation is complicated enough when a couple is married or in a *de facto* relationship, it may be even more difficult when the couple is separated and there are children involved. The main issue to consider – and the one the court will give most weight to – is the best interests of the children.

If you are the parent the children primarily live with, you need to receive permission from the other parent to relocate. It's best if you can come to an agreement on your own, talking it out between yourselves or with the help of a family lawyer or mediator. Any agreement you reach should be written up as a parenting plan or submitted to the court for consent orders. It is sometimes recommended to go the courts to receive a consent order so that future disputes are prevented.

If you can't come to an agreement about relocation, you may apply to the courts for a relocation order. The court, however, may not grant permission to move. You can also prevent the other parent from taking the children away by applying to the court for a stop order.

For more details on passports and travel, see below "International Child Abduction".

You must obtain written consent from the other parent in order to travel overseas with your children.

You also need a passport for your child in order to travel overseas.

If you have written permission from the other parent, you can submit an application for a passport for your child.

If the other parent refuses to sign a written consent, you may submit a written request for a passport for your child due to "special circumstances". This request is submitted to the Department of Foreign Affairs and Trade.

If the Department of Foreign Affairs and Trade denies your request, you can turn to the courts to ask for an order permitting your child to travel abroad.

CHILDREN – INTERNATIONAL CHILD ABDUCTION

International child abduction refers to a case in which one parent takes the child out of his or her home country to reside in another country without the other parent's permission. Every year there are many cases in which one parent wrongfully removes his or her child from Australia. There are, however, measures you can take to prevent your child from being wrongfully removed from Australia, and steps to ensure that your child is returned even if he or she has already been brought to another country.

Australia is a signatory to the Hague Convention on International Child Abduction. Those 89 countries signed on to the Convention guarantee that they will help parents get their children back to their home countries and to ensure that parents have access to their children who live overseas. The Convention is aimed at protecting the child. It works to bring the child back to his or her home country so that issues of residence and access can be decided by the court in the home country.

A list of those countries signed to the Hague Convention may be found at www.ag.gov.au.

International abduction cases have complicated legal issues. You should seek legal advice before submitting any application or request.

HOW TO PREVENT THE OTHER PARENT FROM TAKING YOUR CHILD

If you suspect that your child's other parent may try to take him to another country, you can:

- Prevent a passport being issued to your child in several ways:
 - DO NOT sign a passport application for your child. Generally this application requires both parents' signatures.
 - DO raise a Child Alert Request with the Australian Passport Office. This is to "warn" the office that a passport application may be submitted without your legal consent. If this request is granted, you will be notified by the Department of Foreign Affairs and Trade and the request will be valid for one year.

- DO apply to the court for a Child Alert Order. This order stays in force until your child is 18 years old, unless the court makes a change.

Please note that a Child Alert will not help if your child already has a valid Australian passport or a valid foreign passport.

- If your child already has a passport:
 - Make sure the passport and other official documents are in your possession and not with the other parent.
 - If the other parent has the passport, you can apply to the court for an order that the child's passport and/or the other parent's passport be delivered to the court.
 - Turn to the courts for an order to prevent your child from being taken out of Australia and placed on the Airport Watch List. The Airport Watch List is a system which helps prevent children in families involved in court proceedings from being removed from Australia. The court order should also request that the Australian Federal Police (AFP) help in the implementation of the order. The AFP will need a copy of the order so that they can implement it.

This order stays in force until the court gives a different order. If you wish to travel with your children in the future, you will need to have their names removed from the Airport Watch List, through a court order.

In all cases, always make sure you have recent photos of your child and the other parent in the event that your child is abducted and you need identifying documents to find him or her.

IF YOUR CHILD WAS ALREADY ABDUCTED

If you believe your child was already abducted by the other parent, there are a number of ways of protecting your child and guaranteeing his or her safe return to Australia and you.

1. Contact your local police immediately and report your child missing.
2. Contact the Australian Federal Police to place your child's name on the Airport Watch List. They may be able to tell you if your child was taken out of the country.
3. Get legal advice immediately. An experienced family lawyer who has dealt with child abduction cases can explain what is needed, what your rights are and help you quickly obtain the necessary court orders to bring your child home.
4. If you know that your child was taken to a country that is a member of the Hague International Convention on Child Abduction, you can contact the Australian Central Authority for the Hague Convention (see below).
5. If you know that your child was taken to a country that is NOT a member of the Hague International Convention on Child Abduction, you can turn to the Consular branch of the Department of Foreign Affairs and Trade.

WHAT YOU NEED TO DO TO BRING YOUR CHILD HOME

Before filing an application according to the Hague Convention to request the return of your child, make sure you and your child meet ALL of these requirements:

1. Your child is under 16 years of age.
2. You have custody rights to your child. That is, you are the parent or legal guardian of the child.
3. You were using these custody rights when your child was removed from Australia or when the other parent refused to return your child to Australia.
4. Your child lived in Australia immediately before he was removed from Australia or not returned to Australia.
5. Your child is in a country which is a party to the Hague Convention. This means that the government of the country signed on to the Convention.
6. You did not give your consent or permission and no court gave an order for

If you meet ALL of the above requirements, you can file an application to have your child returned to Australia.

An application includes:

- The standard application, which can be obtained through the Attorney-General's website
- Authorisation for the Australian Central Authority to act for you
- An affidavit of fact, which should include all the facts of the case.
- Other important documents should be attached which will help prove your affidavit: Custody orders, your marriage certificate, the parenting plan, correspondence between you and the other parent regarding the child, travel documents, rental agreements and employment records.
- Your child's certified birth certificate, to prove you are the child's parent.
- Photos of your child and the other parent so they can be located in the other country and the other parent served with court documents.

NOTE: All documents attached to the application should be certified

your child to be taken from Australia.

Australian Central Authority (ACA) which will decide whether or not it meets the criteria of the Hague Convention. If the ACA accepts the application, they will contact the appropriate authority in the country where your child is living or being held. If the ACA denies your application, speak to a lawyer about ways to appeal this decision.

The progress of your case and its outcome depends on the other country. Often, once they have been approached by the ACA, they will contact the other abducting parent and try to have the child voluntarily returned. The authority may also turn to the courts to have the child returned to Australia if the other parent refuses to return the child on his or her own.

Even if the authority in the other country goes to court on your behalf, there are conditions under which the court may not return your child (see box)

International abduction cases have complicated legal issues. You should seek legal advice before submitting any application or request.

When will a foreign court refuse to return a child to Australia?

*The court believes the requirements under the Hague Convention were not met

*The court believes you agreed to the move or later "acquiesced" to the move

*If your child has been living in the other country for over 12 months and is settled there

*If your child is old enough to have his or her opinion considered and does not want to return to Australia

*There is a risk of harm or danger to the child if he or she is returned to Australia

*Returning your child to Australia would be a breach of his or her fundamental freedoms and human rights

ACCESS TO CHILDREN OVERSEAS

Parents who live in a different country from their children also have the right to be in contact with their children. The right to access is also covered by the Hague Convention and applies to those countries signed on the Convention. The right to access means the right to communicate with your child – via phone, mail, email, skype – and the right to travel to see your child or bring your child for visits to Australia. The law ensures that despite the difficulty of living abroad, a method is found to guarantee access to your children.

In order to apply for access to your child according to the Hague Convention, there are four requirements that must be met:

1. Your child is under 16 years old.
2. The country your child lives in is signed on the Hague Convention.
3. You have "rights of access" under Australian law. If you are the parent, you automatically have a right of access. A person other than the parent may have rights of access if there is a court order stating so.
4. Your rights of access were breached or denied. For example, the other parent refuses to let you speak to your child over the phone.

To obtain access to your child, you must:

- Fill out an application.
- Prepare and sign an affidavit stating all of the facts, including as much detail as possible to prove how your rights of access have been breached.
- Attach supporting documents.
- Send the application, affidavit and supporting documents to the Australia Central Authority.

FORMAL RELATIVE, KINSHIP AND GRANDPARENT CARERS

In some cases, a child's best interests require him or her to be removed from their parent's home by the Department of Human Services (or equivalent state or territory department). In such a case, a child may be placed under the care of another relative, such as a grandparent, if that individual is willing to care for the child. These types of arrangements can be formal, where the Children's Court orders the placement, or informal, where the relative and the parents make their own private arrangements. In both cases, the state remains the legal guardian of the child.

If another relative has become the formal carer for your children, through a Child Protection Order granted by the court, he or she is entitled to certain types of help from the Australian government. These may include Family Tax Benefit payments, Parenting Payments and a Foster Child Health Care Card. They can also receive training and support. Each state and territory has its own rules and guidelines so be sure to receive appropriate legal advice.

In informal arrangements, the relative who takes custody of your child can do so with your agreement or through a Family Court Order. An informal carer may be entitled to many of the same benefits that a formal carer receives (see above). Get legal advice for your rights as an informal carer in your state or territory.

CHILD SUPPORT

Taking care of your children includes supporting them financially. Family law in Australia requires both parents, whether biological or adoptive, to participate in this financial responsibility. Generally, one parent will make support payments to the other parent to help pay for the costs of the children. Parents have this responsibility only until the children turn 18 or complete their secondary education.

Most children are covered by law by the Child Support Scheme, which is managed by the Child Support Agency (CSA) (located within the Department of Human Services). The role of the Agency is to help parents transfer their payments. You can apply to the CSA for a child support assessment to determine how much child support each parent must pay. Alternatively parents may enter into a private agreement known as a “Limited Child Support Agreement” or “Binding Child Support Agreement”. (see below on page 30)

PATERNITY

Only the other parent of the child is required to pay child support. The following are proof that the person in question is the parent of the child:

- the couple was married or living together when the child was born;
- the couple was living together between 44 to 20 weeks before the child was born;
- the person is named on the birth certificate as the biological parent;
- the person signs a statutory declaration stating they are a parent of the child;
- the child was adopted by the person;
- the child was conceived through artificial means to both members of the couple;
- the child was born with the assistance of a surrogate;
- a Court Order has been made confirming who is the parent of the child.

DNA testing can also be used to prove or disprove parentage. DNA testing can be voluntarily obtained (ie a man who wants to prove he is NOT the father of a child) or ordered by the court. If the court orders a DNA test and the parent refuses to take it,

the court can make a decision based on the information it has and determine who is the legal father.

For same-sex couples, they are considered the parents of the child for child support purposes if:

- they adopted the child or;
- the child was born through an artificial conception procedure and the parents were in a *de facto* relationship at the time of the procedure, or;
- the child was born as a result of a surrogacy arrangement, and a court has made an order declaring that the couple are the parents of the child.

CHILD SUPPORT THROUGH THE CSA - HOW IS IT CALCULATED?

The takes into consideration the following factors:

(1) How much you earn (income)

The CSA first determines how much it costs to raise the children. Then, looking at your income (and the other parent's), the amount you need to support yourself is deducted. The parent with the higher income will pay a greater, proportional share of child support.

(2) How much money you need to support yourself

(3) The costs of raising children (their ages, how many)

This calculation considers the actual costs based on the ages of the children and how many you have.

(4) How much time you spend with your children (level of care)

The more time you spend with your child, the more you have put into child care and the less it costs you in child support. If your children spend 314 – 365 nights a year with you, you have met 100% of your child support obligations and do not have to pay your former spouse any additional money for child support. If, on the other hand, your children spend only 52 – 127 nights with you, you've met only 24% of your child support obligations and will owe more monetary support to your ex-partner.

(5) Are you supporting other children

If you have other minor children living with you, you may be entitled to pay less support.

AGREEMENTS BETWEEN PARENTS

You can also come to your own child support agreements, without turning to the CSA or the Family Law Courts. A child support agreement should include how much support is to be paid, in what form and how the money will be transferred. There are a number of requirements and the agreement must be submitted to the CSA Registrar and/or the Family Court for approval and registration.

A child support agreement must be between:

- Two parents of a child who are eligible to make an application for administrative assessment of child support to the CSA or;
- One or both parents of a child, and a non-parent carer of the child, who are eligible to make an application for administrative assessment of child support to the CSA.

There are different types of child support agreements

A Binding Child Support Agreement:

- Must be in writing and signed by both parents or the parents and the non-parent carer
- MUST include a statement that each side received independent legal advice about the agreement AND a Certificate of Independent Legal Advice from each lawyer
- MAY NOT be changed but only terminated and replaced with a new binding child support agreement

You can agree on any amount of child support in a Binding Child Support Agreement.

IMPORTANT: If

you agree to receive less child support than the CSA would calculate, you cannot receive the difference from Centrelink (a part of the Department of Human Services that provides payments and services to people during times of major change) and your

A Limited Child Support Agreement:

- There must be a child support administrative assessment in place
- MUST be in writing and signed by both parents or the parents and the non-parent carer
- DOES NOT require legal advice before signing, although this is highly recommended

Family Tax Benefit will be paid as if you are receiving the amount calculated by the CSA.

A parent who refuses to pay child support may be denied the right to be the primary caregiver or the parent the child "lives with". This is because such a refusal shows a lack of concern for the child and failure to take responsibility for the child.

Parties to a binding child support agreement may terminate it ONLY by signing a termination agreement or entering into a new agreement that also terminates the original agreement.

SPOUSAL MAINTENANCE

The Family Law Act, requires a spouse to help support or financially maintain the other. This is required when a couple is married and when they divorce or in the case of *de facto* couples, both during the relationship and after it breaks down. The court considers two issues when determining if maintenance is required and how much that support should be:

- Does one former spouse require financial support, that is, is he to support himself?
- Is the other spouse able to pay this support?

The court will look at a number of factors, for both spouses, to help determine if spousal maintenance is required and the amount to be paid:

- (1) Age. An older person, reaching pension age, may have fewer years in which to earn. A younger person has many more years of work ahead.
- (2) Mental and physical health.
- (3) Ability to earn and if this ability was affected by the marriage or *de facto* relationship. For example, did one spouse stay home to care for the house and the children, and in so doing gave up on a career and professional development, weakening his or her ability to earn a living?
- (4) What is a suitable standard of living?
- (5) Who do the children (under the age of 18) live with?

Restrictions on Spousal Maintenance:

- 1. If you were married, an application for spousal maintenance must be made within 12 months of the divorce becoming final.*
- 2. If you were in a de facto relationship, an application for spousal maintenance must be made within two years of the breakdown of the relationship.*
- 3. If you marry someone else, you are no longer entitled to spousal maintenance.*
- 4. If you begin a new de facto relationship you are not entitled to spousal maintenance.*

FAMILY OR DOMESTIC VIOLENCE

The Family Law Act defines family violence and abuse and provides for the protection of spouses, children, relatives and other individuals living in the house. An application may be made for an order(s) providing for the personal protection of a family member(s).

Each state and territory also provides for some type of Family Violence Order (sometimes referred to as a Protection order, Intervention order, Restraining order or Restraint order) to protect those at risk or in danger.

An experienced family lawyer will be able to advise which approach will provide you with the best protection in the particular circumstances of your matter.

Contact your local police if immediate assistance is required.

CHOOSING A FAMILY LAWYER

Choosing the right lawyer can make the difference between a smooth process with a successful outcome and a painful course of action that fails to meet your expectations. Look around, ask questions, investigate, weigh the options and choose the lawyer who is best for your particular needs. Here are a few ways to choose a lawyer.

1. Look and ask around. Turn to friends and family for names of lawyers. Everybody knows somebody who went through separation or divorce. You can also turn to the Law Society or Institute in your state or territory to get a list of family lawyers if you haven't received enough names from friends and family and have a look on Google.
2. Look up the names on the internet. Every lawyer has a website these days, filled with useful (and less useful) information about their firm. Is this lawyer a sole practitioner or part of a large firm? Does he or she specialise in family law? Sometimes sole practitioners specialise just in family law, but sometimes they end up doing a little bit of everything. If he or she is part of a larger firm, his or her expertise may be family law, but does he or she have the time to commit to your case? There's no right answer, but know what the factors are that you need to consider.
3. Listen to other people's experiences with the lawyer. A lawyer's website most likely says great things about their skills, experience and professionalism. But recommendations from people who used the lawyer can give you better perspective. You might need to ask several people to get a balanced view.
4. Choose a family lawyer. Family law is a very specialised area. While your brother's best friend might be an amazing criminal lawyer, that's not too helpful when you need help dealing with issues of parenting with your former spouse. A good family lawyer knows the law, has experience in the courtroom, presents you with successful cases and has satisfied clients. Also check if he or she is involved in family law issues, written papers on the topic or participates in professional forums and organizations.

5. Start with an initial phone call. You can get a lot of information just from that first call. If you leave a message with the secretary, how long does it take for the lawyer to call you back? If you waited more than a day or two, the lawyer might be too busy (or too uncaring) to deal with your case. How does the lawyer treat you on the phone? Use this opportunity to ask about fees. You might discover immediately that their price is too high for you. Also use the time to ask about their expertise in family law. And if you decide you do want to meet them, find out if they charge for an initial meeting and how much.

6. Interview before you hire. Set up appointments with the lawyers who sound right for you so you can interview them. When you meet, does he or she give you the time you need, addressing your issues and questions, or is he or she busy checking emails and answering phone calls? If he or she talks about other clients, is it in an appropriate way? Is his or her style right for you? He or she might be an aggressive, savvy lawyer who knows how to get her way, but this might mean you don't feel comfortable with him or her. Do you feel you can confide in this person and he or she will be discrete with your details? Sometimes a first read is not correct, but sometimes it's good to go with your gut feeling. You know what works for you.

7. Find out the costs. Lawyers work in different ways. Most charge an hourly fee. In this case, see if the lawyer can give you an estimate of how many hours your case will take. Most likely he or she won't know 100% but they might be able to give a general idea based on previous, similar cases. Other lawyers will give you a price for the entire package of services. Find out what is and isn't included. What happens when special circumstances arise not included in the cost? How does the lawyer charge for those services?

8. Access to other areas of law. Many times in family law, other issues will come up that require expertise in other fields such as business, wills, estates, etc. Is the lawyer in a firm that deals with these other issues so he or she has someone to consult with? Or are there other professionals he or she regularly consults with on their cases?

9. Location, location, location. With so much work done today over the internet and via skype and fax, your lawyer's office does not need to be within a ten minute drive from you. But you will probably be required to sign documents periodically so be sure you can get to your lawyer with a car or with public transportation.

QUESTIONS YOU SHOULD ASK WHEN CHOOSING YOUR LAWYER:

- Do you have the time to give to my case?
- Will you be handling my case? If someone else will be involved, can I meet with him or her?
- Can you estimate how long you expect my case to take?
- What is your policy about communicating? Do you communicate by phone, email, fax? How long does it take for you to return my phone call or email?
- If you aren't available, will there be someone else I can talk to about my case?
- How many cases do you handle a year?
- How many cases of yours went to trial last year and how many were settled out of court?
- What is your usual or preferred strategy or "philosophy" for handling a divorce case?
- Do you recommend mediation to your clients? If so, in what circumstances?
- Are you trained in mediation or other alternative dispute resolution practices?
- Do you encourage or discourage direct contact between spouses or *de facto* couples or parents?
- How long do you think my case will take?
- Based on what I've told you, how would you predict a judge would rule on it?
- Are there experts in your firm or outside of your firm with whom you regularly consult?
- What are your fees?

IMPORTANT CONTACTS AND RESOURCES

GENERALLY

Australian Family Law Courts

Phone: Contact the Family Law Courts national enquiry centre on 1-300-352-000.

Website: www.familylawcourts.gov.au

Family Court of Western Australia

Phone: Telephone call centre (08) 9224 8222.

Website: www.familycourt.wa.gov.au

Family Relationship Advice Line

Phone: 1-800-050-321 8 am to 8 pm, Monday to Friday, and 10 am to 4 pm on Saturday (local time), except national public holidays

Website: www.familyrelationships.gov.au

CHILD ABDUCTION

Australian Federal Police

Phone: Contact the AFP Operations Coordination Centre, Family Law – Airport Watch List Alerts - on (02) 6126 7999.

Website: www.afp.gov.au

Australian Passport Information Service

Phone: 131 232 – 8 am to 8 pm Monday to Friday, and 8.30 am to 5pm weekends and most public holidays (Australian Eastern Standard Time)

Website: www.passports.gov.au

Australian Central Authority

Website: <http://www.ag.gov.au/childabduction>

Email: CentralAuthority@ag.gov.au

Phone: 1-800-100-480

International Social Service Australia

Phone: 1300 657 843

Website: www.iss.org.au

Consular Branch of the Department of Foreign Affairs and Trade

Telephone service 24 hours per day: 1-300-555-135

Court Emergency Number: 1-300-352-000

ABOUT THE AUTHOR

Vanessa Mathews is the founder and managing director of Mathews Family Law. Vanessa is accredited as a family law specialist, mediator, and family dispute resolution practitioner with many years of experience in the full range of legal issues that arise following the breakdown of marriage.

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