

A resource kit for lawyers

Seeking urgent recovery orders in the Family Court



This kit has been developed to assist solicitors in providing advice and assistance to clients who allege that their children have been retained or removed by the other party. Urgent applications for the return of children are difficult to manage, and the purpose of this kit is to provide templates for the preparation of documents to assist the Court in making its decision.

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Meeting your client's needs

Clients are usually distressed and angry when they approach a solicitor in these matters. Often they have been through a number of different agencies including the Police, LawAccess NSW, the Family Court Information Line, the Department of Community Services (DoCS) and the counter staff at the Court. Clients are looking for reassurance and more importantly a quick resolution. The following steps can be useful when assisting a distressed client:

Speak to your client alone and assess the urgency and risk of the situation

It can be difficult when a client attends with other family members or support workers but the information must come from your client as it is their application and their affidavit.

Explain clearly the steps you will be taking and also the time frame that you will be working within

It is important to manage your client's expectations of what will occur in court and the process which will be followed. This would include explaining that the following will occur:

- you will prepare an urgent application and an affidavit;
- you will apply to the Court for the matter to be listed urgently;
- you will be appearing in court on your client's behalf.

Often this type of application is the first time a client has seen a solicitor or been involved in a family dispute. It is important that as their solicitor, you remain calm and be very clear about the process and their prospects of success.

Ask your client to fill in an information sheet

It can be difficult to have a client concentrate on providing relevant information that you will need to complete a successful application. It can sometimes be much simpler to ask your client to fill out an information sheet as it provides a starting point for your questions. Attached to this kit is an information sheet which you may find useful.

After court

If you have been successful in obtaining a Recovery Order you will need to liaise with the Australian Federal Police. The website for the Australian Federal Police is www.afp.gov.au and you will need to speak with the Family Law Team. It is often useful for your client to provide a photo of the children and the other party and to also provide as much detail as possible in relation to the whereabouts of the other party and children. There are forms that the Australian Federal Police request that you fill out and immediately forward to them. These forms can be found on the Australian Federal Police website.

If the children are found interstate it is not the responsibility of the Australian Federal Police to return the children to your client. Your client will need to make their own travel arrangements to collect the children and their own travel arrangements to return to NSW with the children. Sometimes the Salvation Army or other charities can be contacted to provide some assistance in this regard.

Urgent applications

Things to consider

Before filing an application for the urgent recovery of children you should consider whether the application is in fact urgent and also whether you have evidence to support such an application. Some of the things you could consider include:

- Are there any current orders and if so what do they provide for?
- Is it possible that the orders have been misunderstood (this is particularly important when dealing with orders relating to school holiday times)?
- Is there a history of a party retaining the children beyond the agreement but ultimately returning the children – i.e. does the mother always say she will return the children on Sunday but in fact brings them home on Tuesday? If this is the case it may be better to refer your client to family dispute resolution to obtain either a parenting plan or consent orders outlining the varied arrangements for the children;
- What were the care arrangements for the children before the children were removed or retained?
- Are there any risk factors associated with the other parent or your client; this would include issues of domestic violence, drugs, alcohol, involvement of DoCS or mental illness?

Filing urgent applications

Each application will need to include:

- An Application for Interim and Final Orders;
- A supporting affidavit by your client;
- Exemption Form: Payment of court fees.

If possible include a copy of the marriage certificate and birth certificates of the child/ren. It is helpful to call the Family Court and speak to a Registrar and advise that you are bringing to the Court an urgent application and make enquiries about possible listings. In most Registries of the Family Court and Federal Magistrates Court, you will then need to see the Duty Registrar to obtain an urgent listing date. You will need to be able to explain the grounds on which you are seeking urgent orders.

What to include

These applications often require you to decide what sort of application you need to make. An application can include:

Airport Watch List Orders – Important if your client raises the risk of child/ren being removed from Australia.

Substituted Service Order – If your client instructs that while they do not know where the other party is, there is someone else who does (usually a grandparent or a current partner).

Recovery Order – An order for the Australian Federal Police (AFP) to recover the child/ren and return them to your client.

Parenting Order – If there are no Parenting Orders in place you will need to include orders for who the child/ren live with and the time they spend with the other parent. You should also consider requesting the Court to allocate parental responsibility.

Location Order - If you do not know the whereabouts of the child/ren Location Orders usually are made against Government Departments like Centrelink or schools for those organisations to provide information to the Court in relation to the whereabouts of the children. These orders are usually sought in circumstances where your client has no idea of the possible whereabouts of the children. These orders are often needed by the AFP to assist them in locating the general whereabouts of the children.

It is important before seeking this order to read the rules which outline the notice which must be given to the organisation you are seeking information from. There are occasions when Centrelink will object to providing the information sought. Information provided under a Location Order is provided to the Court and not to the parties. In most cases the Court will be very strict about how that information is used and will usually confine the release of the information to the solicitor acting for the party looking for the children.

Short Service Application – A request that the Court list the matter on the earliest possible date. This application is made at the time of the filing of the application.

Publication Order - Publication Orders generally allow the media to report details and publish photographs that may help locate a missing child. Publication Orders usually cease when a child is recovered. You can apply for a Publication Order if you are applying for, or have applied for, a Recovery Order. The Court will usually have an agreed wording of the information which can be released about the child and will usually include a physical

description, description of the person the child was last seen with and details of where they were last seen.

Ex parte Applications and Applications to Dispense with Service – Ex parte Applications request that the Court deal with the matter immediately and with no notice to the other party. This would usually only be granted in matters where you can substantiate urgency, an immediate risk to the child, you cannot find the other party, or there is a reason why you do not want the other party to be aware of the application, or where you have grounds to proceed immediately.

If you are seeking orders on an ex parte basis you would need to ensure that you have complied with the Rules in relation to Dispensing with Service, and that you have addressed these in any affidavit filed with the Court. This affidavit should also address the issues of risk, urgency, why the other party cannot be found – or the grounds to proceed immediately.

An Application to Dispense with Service will need to demonstrate that you have exhausted all avenues to try to serve the other party.

Ex parte Orders can include orders:

- Substituting service on another person who may know where the other parent or children are, such as a grandparent or sibling, or a government agency such as the Child Support Agency;
- For the immediate return of the children, in cases where there is abuse or risk of harm;
- For the disclosure of information of the whereabouts of the other parent and children;
- Requesting that the Australian Federal Police assist in finding the children and returning the children.

Exemption from requiring a section 60I certificate

If your client does not have a certificate that they attended family dispute resolution, it is necessary to seek an order that the application be filed and dealt with, without that requirement being met. Your affidavit would need to address the exceptions under section 60I.

Exemptions to attending family dispute resolution

The following are the exemptions listed under the *Family Law Act* at Section 60I(9).

Exception

60I(9) Subsection (7) does not apply to an application for a Part VII order in relation to a child if:

- (a) the applicant is applying for the order:
 - (i) to be made with the consent of all the parties to the proceedings; or
 - (ii) in response to an application that another party to the proceedings has made for a Part VII order; or
- (b) the court is satisfied that there are reasonable grounds to believe that:
 - (i) there has been abuse of the child by one of the parties to the proceedings; or
 - (ii) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or
 - (iii) there has been family violence by one of the parties to the proceedings; or
 - (iv) there is a risk of family violence by one of the parties to the proceedings; or
- (c) all the following conditions are satisfied:
 - (i) the application is made in relation to a particular issue;
 - (ii) a Part VII order has been made in relation to that issue within the period of 12 months before the application is made;
 - (iii) the application is made in relation to a contravention of the order by a person;
 - (iv) the court is satisfied that there are reasonable grounds to believe that the person has behaved in a way that shows a serious disregard for his or her obligations under the order; or
- (d) the application is made in circumstances of urgency; or
- (e) one or more of the parties to the proceedings is unable to participate effectively in family dispute resolution (whether because of an incapacity of some kind, physical remoteness from dispute resolution services or for some other reason); or
- (f) other circumstances specified in the regulations are satisfied.

Precedent Orders

Ex parte Order

That the applicant be granted leave to proceed ex parte for the purpose of a Location and Recovery Order.

Interim “live with” Order

That pending further order the child/ren [names] shall live with the [].

Interim “spend time with” Order

That pending further order the child/ren [names] shall spend time with the respondent as follows.

General Recovery Order

That the respondent shall forthwith return the child/ren to the applicant.

Australian Federal Police (AFP) Recovery Order

1. That a Recovery Order issue for the child/ren [child/ren(s) names] pursuant to section 67Q of the *Family Law Act 1975*.
2. That the Marshall, the Deputy Marshall, all officers of the Australian Federal Police and all officers of the State and Territory Police be authorised and directed with such assistance as they require and if necessary by force to:
 - a. stop and search any vehicle, vessel or aircraft and search premises or place for the purpose of finding the child/ren;
 - b. recover the child/ren;
 - c. deliver the child/ren to the applicant;
 - d. arrest, without warrant, the respondent in the event that the respondent again removes or takes possession of the child/ren.

Injunction from removing the child

That the respondent be prohibited from again removing or taking possession of the child/ren.

Location Order

That pursuant to s67N(2) of the *Family Law Act* that the Chief Executive Officer of Centrelink furnish forthwith to the Family Court of Australia at [location] information about the location of the child/ren [names] or the mother/father [names] that is contained or comes into the records of Centrelink.

That pursuant to section 67P(1)(d) of the *Family Law Act* leave be granted to disclose the information provided to the Registrar of the Family Court of Australia at [] and that the Court arrange for a process server to effect service of the documents on the respondent and that the applicant pay the costs associated with such service.

Restraint from removal from Australia

That each party be and hereby are restrained from removing and/or causing or allowing the child/ren, [names], born on [dates of birth], to be removed from the Commonwealth of Australia.

Airport Watch List

That until further Order each party, (First Name, Second name SURNAME and Date of Birth of each party) their servants and/or agents be and are hereby restrained from removing or attempting to remove or causing or permitting the removal of the said child/children (First Name, Second Name, SURNAME and Date of Birth of each part) from the Commonwealth of Australia, AND IT IS REQUESTED that the Australian Federal Police give effect to this order by placing the name/names of the said child/children on the Airport Watch List in force at all points of arrival and departure in the Commonwealth of Australia and maintain the child's/children's name/names on the Watch List until the Court orders its removal.

Dispense with section 60I certificate

That the requirement for a section 60I certificate be dispensed with.

Publication Order

That pursuant to section 121 of the *Family Law Act* the applicant is permitted to publish and broadcast the names of the children [names] and [date of birth].

What should be included in your client's affidavit

This affidavit is a guide only to the sort of information which could be included in an application. It is important that any information you include in your affidavit reflects the clear instructions given to you by your client. If you were filing an affidavit in matters where there are urgent or clear risks to the child/ren you would need to act quickly and ensure that your affidavit concentrated on the urgent issues.

Personal history

It is important to provide the court with a clear chronology in relation to the relationship. You would normally include the parties, dates of birth, when the relationship commenced, dates of marriage and dates of separation.

Details of the children

Provide the Court with:

- Names and dates of birth of the children;
- Parenting and family violence orders.

If there is an Apprehended Violence Order (AVO) provide details of where and when it was made, and include a clear statement about who is the protected person. It is important to attach a copy of the AVO to the affidavit.

Specify any current Parenting Orders or any parenting plans that are in place and detail the particulars of the orders. Attach a copy of the orders to the affidavit.

Arrangements for child/ren before separation

Provide information as to who did what with the child/ren during the relationship. If your client asserts they are the primary caregiver then it is important to provide details of what your client did to support the assertion. Include details of how your client cared for the children, whether they were responsible for ensuring homework was done or for taking the children to a doctor.

If the other party was responsible for assisting in the care of the children it is useful to include a statement about how this occurred.

Family violence during the relationship

If your client alleges specific incidents of violence by the other party, detail those allegations, preferably in chronological order. Ensure that each allegation is specified as well as possible with dates, detailed description of behavior and action that was taken afterwards (for example seeing the doctor).

Involvement by DoCS

Include any details of involvement by the Department of Community Services with the family. Include details of when, why and how it occurred.

Risk issues

Ensure that any risk issues such as drug use, alcohol use, Airport Watch List are covered in specific detail. Provide a detailed description of what occurred and whether there was any report made of; for example, any violence or any treatment sought in relation to violence.

If your client is asserting that the risk arises from drug or alcohol use by the other party it is important that your client provide details about what has led them to form the view that there is a risk.

Issues about your client

If there are issues about your client, for example mental health issues, health issues, drug or alcohol issues, you need to disclose these to the court and show how your client has addressed the issues.

For example if your client has suffered from post natal depression:

"I suffered from post natal depression from the birth of John in 2007 through to January 2008. I was under the care of my GP, Dr Jones who provided me with counselling and support. I say I no longer suffer from post natal depression."

Arrangements for the child/ren following separation

If separation has already occurred and your client is now the sole caregiver, detail the current routine for the client and the child/ren—paint a picture for the Court of your client as primary parent.

Time spent between the child/ren and applicant/respondent following separation

If child/ren live with your client, detail the arrangements between the parties for contact including routines, how it was agreed, and how it worked.

Events surrounding the child/ren being taken by the respondent

Specifically outline the events surrounding the child/ren being taken by the respondent. Outline the concern that your client has for the child/ren in the care of the respondent including any risks.

Current arrangements for the care of the child/ren

Provide a good summary of all issues relating to your client's life if the child/ren live with your client. This should include:

- Accommodation arrangements – what kind of home, how many bedrooms, who shares with whom, who else lives there;
- Schooling – where do the children go to school, how are they going, are there specific concerns or problems. Annex a recent school report if the children are doing well;
- Financial – where does the money come from and does the other party pay child support;
- Practical issues – how far apart do the parties live, how far is that from school.

Proposal for spending time

Set out your client's proposal for how the other party will spend time with the children.

If your client seeks that the other party's time be supervised provide details of how the supervision is to occur: for example at a Centre or by a nominated supervisor. If it is at a Centre, include what waiting times there are before the parties can commence attending and if by a nominated supervisor, provide details of why that person is appropriate and give an indication that they have been asked, and have agreed to supervise the children.

If any other restrictions on contact are sought, explain why.

Refuting allegations

If you already know the allegations that will be made, or you have the other party's affidavit that details those allegations, resist the temptation to respond directly to each allegation. There is nothing worse than an affidavit that reads:

"In relation to paragraph 6(a) of the respondent's affidavit, I deny the allegation" and then doesn't give any further detail to specify the issue. It just encourages the judicial officer to read the other side's affidavit again!

Anticipate the allegations and respond as part of the body of the affidavit in your client's own words. For example:

"I deny that I have ever used any prohibitive substances, including speed, heroin or marijuana. I admit that during the relationship I consumed alcohol and generally drank 2-3 middies of beer each night."

"I deny that I have ever struck the respondent during any argument and say that during our relationship, during arguments I only ever pushed her on one occasion on x/x/x. On that occasion, the following occurred.... "

Ex parte Applications

It is important that you read the rules in relation to what the Court must consider when making Ex parte Orders. If your client has tried to contact the other party or any member of their family or friends, your client should provide details of the attempts they have made. For example:

"I have tried to speak to the respondent by telephoning the mobile number I have. I have not been able to speak to the respondent and I have been diverted to a message bank. I have left 12 messages for the respondent to telephone me on my mobile telephone number 123 444 234. They have not done so." or

"I have spoken to the respondent's mother Eileen at 9.00am on the XX February 2008 and said to her: "I need to know where John is. He has Amy." She has replied: "I am not telling you. Get off my property before I call the police."

Dispense with section 60I certificate

It is important to specify the reasons why your client is seeking to dispense with the requirement for a section 60I certificate. For example:

"I request that I be permitted to file this application before attending family dispute resolution on the grounds that this matter is (stipulate the grounds for seeking the exemption; that is urgency, violence, risk to the child).

I refer to the matters sworn in this affidavit to support my application to file the proceedings before attending family dispute resolution."

Information sheet

To be completed by client

1. Name: _____
2. Address: _____

3. Current mobile telephone number: _____
4. Home telephone number: _____
5. I was born on: _____
I am currently _____ years of age.
6. The respondent was born on _____
and is currently _____ years of age.
7. I started a relationship with the respondent in _____
8. The respondent and I married on: _____
9. The respondent and I separated on a final basis on: _____
10. Names and dates of birth of the child/ren:
 - Child One**
Names _____
Date of birth _____
 - Child Two**
Names _____
Date of birth _____
 - Child Three**
Names _____
Date of birth _____
 - Child Four**
Names _____
Date of birth _____
11. Is there a Family Violence Order? Yes No
12. When was it made? _____
13. Are there any orders from the Family/Local Court about the child/ren? Yes No
14. What responsibilities did you have in relation to the child/ren before separation including taking them to school, doctors, cooking and cleaning?

15. What duties did the respondent carry out during the relationship?

16. What housing do you currently live in?

17. Who else lives there?

18. What housing does the respondent live in?

19. Who else lives there?

- Since separation:**
20. Who has supervised the child/ren in your household?

21. Who has supervised the child/ren in the respondent's household?

22. How often have the child/ren spent time with the respondent?

23. Has anything changed to the time that the child/ren have spent with the respondent recently?

24. Does the respondent pay Child Support? Yes No
25. If so how much? _____
26. Do you financially support the child/ren? Yes No

27. Do you work? Yes No

28. If so where do you work and what are your hours of work?

29. Who looks after the child/ren when you are at work?

30. Are the child/ren in good health? Yes No

31. Do the child/ren have any medical problems? Yes No

32. If so what are they?

33. Are they undergoing any counselling? Yes No

34. Who has taken the child/ren to medical appointments and immunisations etc in the past?

35. Are the child/ren fully immunised? Yes No

36. Do the child/ren attend daycares/school? Yes No

37. If yes, please state where:

38. Has their school/daycare/preschool changed recently? Yes No

39. Do any of the child/ren have any special needs? Yes No
If yes, please state here:

Details of respondent

40. What is the respondent's full name?

41. What is their date of birth?

42. Where do they usually live?

43. Who lives with them?

44. If the respondent is not at their home, at what other address would we be able to find them?

45. What is the respondent's telephone number?

Risks to the child/ren

46. What were the circumstances surrounding the child/ren being retained/removed by the respondent?

47. Has there ever been any involvement by DoCS with your family, if so when and in what circumstances?

48. Do you allege that the respondent has abused the child/ren? If so, when and what is the nature of the allegation?

49. Do you allege that the respondent drinks excessively or is a drug user? If so, what specifically do you allege?

50. Has the respondent been violent towards you? If so, when and what happened?

51. Has the respondent been violent towards the child/ren? If so, when and in what circumstances?

52. Did you report the violence to anyone including to doctors, teacher, psychologists, police, the Department of Community Services (DoCS) or friends?

53. If the child/ren have a passport who currently holds that passport?

54. Are you alleging that there is any risk that the other party will remove the child/ren from Australia?

Contacts

Helpful websites:

www.familylawcourts.gov.au - Family Court and Federal Magistrates Court joint website has all the forms and fact sheets which can be provided to your client.

www.afp.gov.au - the Australian Federal Police website, includes a kit on family law.

Legal Aid NSW

Legal Aid NSW is an independent government funded agency which provides legal representation to people who cannot afford a lawyer and who qualify for legal aid. Legal Aid NSW provides free advice to the public, a duty solicitor at Family Courts and Federal Magistrates Courts, and an accredited lawyer-assisted family dispute conferencing service.

The Legal Aid NSW website - www.legalaid.nsw.gov.au; has copies of this kit which can be downloaded from the Tab; "For Legal Practitioners/Important Documents and Tools". The Publications Tab on this website has information about Recovery Orders which may be downloaded for your clients.

This publication

This kit has been prepared by the Family Law Division of Legal Aid NSW (Legal Aid). It can be downloaded from the Legal Aid NSW website www.legalaid.nsw.gov.au. Go to the tab "for Legal Practitioners", under the heading "Important Documents and Tools". The kit is not available in hard copy form.

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