

Are you a grandparent?

Your legal questions answered



LEGAL ISSUES FOR OLDER PEOPLE

You may be a grandparent who is caring for or raising your grandchildren.

You may be a grandparent who is concerned about your grandchild's safety or well-being.

Or you may have been stopped from seeing your grandchildren and would like to know what you can do about it.

This brochure tells you about the different laws that can affect children and their grandparents – family law and care and protection law. It tells you what legal options you have, what financial assistance is available to you and where you can get legal help.

Although the brochure uses the term 'grandparents', the information in this brochure also applies to other relative carers, such as aunts or uncles or other family members who are caring for or raising children under the age of 18 years.

What is family law?

The Family Law Act 1975 is the law that applies across Australia to separation and divorce, division of property and who children live and spend time with when their parents separate, whether or not their parents were married.

Grandparents can use the *Family Law Act* to apply to court for orders that their grandchildren live with or spend time with them. You can do this whether the parents of the children are together or separated.

The *Family Law Act* acknowledges the importance of children having a relationship with their grandparents. Grandparents are specifically mentioned in the *Family Law Act* as being able to apply to a court for orders to do with their grandchildren. However it is important to be aware that this does not mean that grandparents (or indeed parents) have an automatic right to spend time with the children.

The *Family Law Act* makes it clear that the 'best interests of the child' is the main consideration when it comes to decisions about parenting.

The focus of the *Family Law Act* is on the rights of children to know and be cared for by both parents and other people significant to their care, welfare and development, such as grandparents and other relatives.

How are arrangements for children made when their parents separate?

Most separating parents can agree about who the children will live with, spend time with, communicate with and about other aspects of the children's lives (such as where they will go to school, holidays, medical treatment and so on). This can be done informally, without any documents and without going to court.

These decisions can also be put into a written agreement called a parenting plan that sets out the arrangements for the children. Or parents can make the agreed arrangements

for the children more formal by writing up consent orders and then having the Federal Circuit and Family Court of Australia (FCFCOA) make these binding court orders.

You may feel confident that you will continue to have the same level of time with your grandchildren if their parents separate. If you are not confident that this will happen you can talk with the children's parents about including you in a parenting plan or consent orders if they are going to have these documents drawn up. However the best interests of the children must always be taken into account and the practicalities of implementing the arrangements need to be considered.

If parents cannot agree on arrangements for children between themselves, or with the help of a family dispute resolution service, they can apply to the FCFCOA for parenting orders. If you and the parents cannot agree on what contact you will have with the children you can also apply to the court for parenting orders about your grandchildren.

The court will decide what orders to make based on what is in the best interests of the children.

Parenting orders can deal with:

- where a child lives
- who they spend time with
- who has parental responsibility for a child
- what communication a child is to have with other people, including by telephone or email, and
- any other aspect of a child's care, welfare and development.

Although you have a right to apply to the court for parenting orders this does not mean that the court will make an order in your favour. You should get legal advice before you do this.

How the FCFCOA decides what is in the child's best interests

The court will primarily look at:

- the benefit to the child of having a meaningful relationship with both parents, and
- the need to protect the child from harm.

Protecting children from harm is more important than children having a meaningful relationship with both parents.

The court will also look at:

- the views of the child (the importance given to the child's views will depend on their age, maturity and level of understanding)
- the child's relationship with parents and others, including grandparents and other relatives
- the effect of any change to the current situation on the child
- the practical difficulties and expense involved in 'spending time with' and 'communicating with' a parent
- the capacity of each parent and others to provide for the child's needs (as a grandparent this may include your health, age and financial circumstances)
- the maturity, sex, lifestyle and background (including culture and traditions) of the child and parents
- if the child is Aboriginal or Torres Strait Islander, the child's right to enjoy Aboriginal or Torres Strait Islander culture
- each parent's attitude to the child and to parenting
- any family violence involving the child or a member of the child's family
- any family violence order that might exist

- the desirability of making the order that is least likely to lead to further court proceedings, and
- any other circumstance the court thinks relevant.

Are you being stopped from seeing your grandchildren?

Sometimes grandparents are stopped from having a relationship with their grandchildren. This can happen where the relationship with your own child has broken down (but the parents' relationship remains intact), or where the parents have separated and one parent refuses to let you have anything to do with your grandchildren. It can also happen if you have been the primary carer for your grandchildren and the children's parent returns to take the children back into their care.

Grandparents do not have an automatic right to have a relationship with a grandchild. However, anyone who has an ongoing relationship with a child, or any other person who can show that they are concerned with the care, welfare or development of a child (including grandparents) may apply to the court for parenting orders. A parenting order can be an order that you can spend time with or communicate with the child. It will be up to the court to decide what will happen, based on what is in a child's best interests.

If your child and/or their partner is refusing to let you see or speak to your grandchild you can take steps to try to change the situation:

Step 1: Get legal advice

If you need help from a lawyer, the first step is to contact our team at LawAccess NSW. They can tell you if you are eligible and book an appointment for you to speak with a lawyer if you are.

LawAccess NSW information officers can give you legal information, help you plan your next step and connect you with services that can help you.

Start a chat using our website's web chat function at www.legalaid.nsw.gov.au or call **1300 888 529** from 9am to 5pm, Monday to Friday (excluding public holidays).

Step 2: Dispute resolution

Going to court should always be the last option as it can be stressful and expensive. Before you do anything you should talk to the parents and try come to an agreement about how and when your grandchildren see or have contact with you.

Not only is it in everyone's interest to resolve disputes without taking legal action, but the *Family Law Act* requires people to try family dispute resolution first. Family dispute resolution is where an independent person who is trained to help families discuss their differences tries to help you explore possible solutions with each other. This is also called mediation or conciliation.

If the mediation is successful the agreement about the time you are to spend with your grandchild can be written up in a parenting plan or consent orders, which can then be lodged with the court.

Family relationship centres (FRCs) can provide joint dispute resolution sessions. They can also refer you to other dispute resolution services.

You can find out more about FRCs at www.familyrelationships.gov.au or call **1800 050 321**.

You can also find more information about dispute resolution and providers of dispute resolution services at www.fcfcoa.gov.au/fl/family-dispute-resolution.

Legal Aid NSW has accredited dispute resolution practitioners. If you are eligible for legal aid (see '*How can Legal Aid NSW help me?*' below) you can get assistance from either a lawyer employed by Legal Aid NSW or from a private lawyer. The lawyer will give you advice and assistance in the dispute resolution process and help you explore options for settlement.

Step 3: Going to court

If you are not able to resolve the dispute about spending time with your grandchild through mediation you will have to apply to court for an order that you can spend time with or communicate with your grandchild.

You can only lodge an application with the court if you have a certificate from an accredited family dispute resolution practitioner to show that dispute resolution was attempted. There can be monetary penalties for a person who applies to the court without first trying family dispute resolution.

You will not need a certificate in some circumstances. For example, you won't need one if the court is satisfied that there are reasonable grounds to believe there has been or is a risk of abuse or family violence. If the matter is urgent or if a party is unable to participate – for example, because of a disability.

You should get legal advice before taking legal action, including advice about how strong your case is, what forms and documents to support your case (affidavits) you will need to lodge with the court; what orders you should ask for, which court you should start the case in and the costs of taking legal action. Currently you can start your case in the FCFCOA or the Local Court.

If the case goes to court there will be a hearing and the court will decide what is in the best interests of the child, taking into account the factors listed in the box above. The court can also require the parties to continue to try to resolve the dispute themselves.

In some cases the court can order that an independent children's lawyer ("ICL"), be appointed to represent the child's interests. That lawyer's role is to form an independent view of what is in the child's best interests and also make the court aware of the child's wishes. The court can also order a family consultant (normally a counsellor, social worker or psychologist) to interview and

observe the parties and the child and prepare a family report for the court.

It can take a long time for court proceedings to finish from the date you apply to the court for final orders to be made, depending on the complexity of the case. However interim (temporary) orders can be made in the meantime.

You can represent yourself in court. However court proceedings can be complex and confusing and it is still a good idea to get legal advice about what you should do and how you should prepare your case.

What is care and protection law?

The *Children and Young Persons (Care and Protection) Act 1998* is the law that applies in New South Wales when the Department of Communities and Justice (DCJ), thinks it is necessary to intervene to protect a child or young person from neglect or abuse.

Care and protection law is state law and in NSW matters are heard in the Children's Court. Care and protection law is quite different from family law, which is federal law or Commonwealth law and heard in the FCFCOA.

However, if the Children's Court has made orders about your grandchildren and the matter has to go back to court either to enforce the orders or to change the orders, it is best to get legal advice. This is because the intersection between care and protection law and family law is complex.

DCJ is the main government agency in NSW that protects children. They used to be called 'FACS' and 'DOCS' but are now the Department of Communities and Justice.

Grandparents can get involved when DCJ makes decisions about children and in some cases may be able to have the children placed in their care. You can apply to be joined as a party to Children's Court proceedings or you can ask the court to be heard in relation to decisions about your grandchildren without becoming a party.

The *Family Law Act* acknowledges the importance of children having a relationship with their grandparents. Grandparents are specifically mentioned in the *Family Law Act* as being able to apply to a court for orders to do with their grandchildren. However it is important to be aware that this does not mean that grandparents (or indeed parents) have an automatic right to spend time with the children.

How can Legal Aid NSW help me?

Everyone can get legal help from Legal Aid NSW. We offer different levels of support depending on who you are and what your problem is about.

If you want to find out about a legal topic or take steps to resolve your problem yourself, the 'My problem is about' section of our website covers most areas of the law.

If you have a legal question, start with our team at LawAccess NSW.

LawAccess NSW information officers can give you legal information, help you plan your next step and connect you with services that can help you.

Start a chat using our website's web chat function at www.legalaid.nsw.gov.au or call **1300 888 529** from 9am to 5pm, Monday to Friday (excluding public holidays).



If you need personalised advice or representation from a lawyer, our team at LawAccess NSW can make an appointment for you with a Legal Aid NSW lawyer if your circumstances and legal issue meet our criteria. If a Legal Aid NSW lawyer isn't able to help, we might refer you to another legal service, like a community legal centre or the Aboriginal Legal Service.

Have you been caring for your grandchildren and the parents want them back in their care?

If you are caring for your grandchildren with the informal agreement of the family you may want to think about formalising the arrangement. You can do this by putting it in writing with both parents (getting consent orders) and registering that with the family court. This will clarify the arrangement and help if there are any disputes down the track about the care of the children. You should get legal advice about this.

If you have been caring for your grandchildren informally and you don't think it would be in the best interests of the children to resume living with their parents, you will need to think about starting court action in the FCFCOA to get orders that the children are to stay with you. Before doing so you should get advice about what orders are needed for you to be eligible to receive a carers payment (see below for more details).

Before you can apply to the court you will need to follow the same steps 1 to 3 set out above under '*Are you being stopped from seeing your grandchildren?*' If there needs to be a hearing the court will decide what would be in the best interests of the child.

If there are already court orders in place that state that the children are to live with you and the parents wish to have the children back with them, they will need to go back to court to apply to have the orders varied. The parents will need to show the court that their circumstances have changed since the

orders were originally made, and that it is in the children's best interests for them to be returned to them.

Are you concerned about your grandchild's safety?

If you have concerns for your grandchild's welfare or safety in their current living situation you can:

Talk to the police

If you hold fears for your grandchild's safety you can talk to the police who may investigate your concerns.

Consider taking legal action under the *Family Law Act*

You (or any other person concerned with the care, welfare or development of the child) may be able to apply to the court for orders that the child lives with you. You should get legal advice before you do this.

Report your concerns to the Department of Communities and Justice (DCJ)

You can report your concerns to DCJ by calling the Child Protection Helpline on **132 111**. The report you make will be treated confidentially. DCJ will investigate your concerns and decide what to do.

If DCJ thinks that the child is in need of care and protection, it can:

- arrange for support services to be provided to the family
- come to an agreement with the parents that the child be placed in temporary alternative care
- develop a care plan with the family to meet the needs of the child
- develop a parental responsibility contract with the primary caregivers of the child or young person, and
- remove the child or young person from their family.

DCJ may ask you to attend a Family Group Conference (FGC) to work out how the family can be supported so that a child or children can remain in the care of their parents. Before you attend a FGC find out what DCJ is concerned about and realistically assess how you can help. You can get legal advice before attending a FGC and you can ask for the opportunity to get advice before you sign any agreement reached in the FGC.

If DCJ removes a child from their family they have to apply to the Children's Court for a care order. This is an order seeking that parental responsibility for the child be given to the Minister in the short term and while care arrangements are made for the child.

If you want to care for your grandchild you should speak with DCJ as soon as possible and be at court when the matter is first listed.

DCJ will first ask the Children's Court to make short term orders. This can be either a 14-day order called an Emergency Care and Protection Order (ECPO), or an interim order that will usually remain in place until final orders are made by the court. This may take up to 12 months.

The Children's Court will also decide who should have 'parental responsibility' for the child. Parental responsibility means that any decisions about the child's wellbeing which normally would have been made by the parents are now made by another person. That person has the legal authority to make decisions about the child. The court may allocate parental responsibility to the Minister for Communities and Justice or to another suitable person, including a grandparent or other relative.

If short term orders are made, you can ask that the child be placed in your care. This is a separate issue from parental responsibility. For example, the court may give parental responsibility for the child to the Minister for Communities and Justice, and then DCJ may decide that the child should be placed with you or another appropriate carer. If the court gives you parental responsibility you can decide that the child will live with you.

If DCJ has parental responsibility for the child and you wish to have the child placed with you, DCJ will need to assess you and your household to make sure that you will provide a safe and satisfactory placement for the child. This is the case even if you have been the person who has cared for your grandchild informally in the past. If you wish to have the child placed with you then you should tell DCJ as soon as possible.

If you are not approved as a carer, or you want a chance to put your position before the court, you can apply to be joined as a party to the Children's Court proceedings. If you are successful your views will be considered by the court.

To be joined as a party you must be able to demonstrate a genuine concern for the safety, welfare and wellbeing of the child. However, no one, including a grandparent with a genuine concern about the welfare of their grandchild, is automatically entitled to be joined as a party.

If you are joined as a party you should have a lawyer with expertise in care and protection law to represent you. You can see a private lawyer, or you may be eligible for legal aid. For a referral to a private lawyer, or for information about whether you are eligible for legal aid, call LawAccess NSW on **1300 888 529** or visit www.legalaid.nsw.gov.au for information about the Legal Aid NSW policies in care and protection matters.

If you are not sure what would be the best option for you to take if you have concerns for your grandchild you should get legal advice.

Will I receive any financial support if I care for my grandchild?

You may have an informal arrangement for the care of your grandchildren. For example, the parents may have agreed that you will care for the children, or they may have come to live with you because their parents were not in a position to care for them.

You may have a more formal arrangement. For example, your grandchild may have been placed in your care by a parenting order made by the FCFCOA, through the Children's Court or through the involvement of DCJ.

There are several Commonwealth payments available to assist grandparents raising and caring for children. As long as you have the legal responsibility and day-to-day care for your grandchildren, you may be eligible for financial assistance. You must have at least 35% actual care of the child to be eligible for family assistance. You generally will not be eligible for family assistance if the parent of the child also lives in the same household.

You may be eligible for the following types of financial assistance:

Family Tax Benefit Part A – helps with the cost of raising the children.

Family Tax Benefit Part B – extra assistance to single parent families and to families with one main income where one parent chooses to stay at home or balance some paid work with caring for their children.

Child Care Benefit – a payment to help families who use approved and registered child care. You may also be entitled to extra assistance with the costs of child care through a grandparent child care benefit.

Child Care Tax Rebate – additional help for working families with the cost of child care.

Newborn Upfront Payment and Newborn Supplement – to help with the extra costs of a new or adopted baby.

Maternity Immunisation Allowance – a payment paid in two separate instalments for children who are fully immunised or have an approved exemption from immunisation. The first instalment becomes payable when the child is 18-24 months old and the second becomes payable when the child is 4-5 years old.

Double Orphan Pension – is available if both parents have died or one parent has died and the other is in an institution such as a prison, psychiatric hospital or is missing and unable to be contacted.

Carer Allowance – may be available if you are caring for a child with a disability.

Other payments you may want to find out about are the **Youth Allowance** before your grandchild turns 16.

Health care cards – If you receive a payment from Centrelink, such as the age pension, and if you are eligible for family tax benefit, the grandchildren in your care can be added to your pensioner concession card and receive the same benefits, such as prescription medicines, at the concessional rate.

If you do not receive a Centrelink payment but are eligible for the maximum rate of Family Tax Benefit Part A you will automatically be given a health care card for you and the children in your care. If you are not automatically entitled to a health care card you may be entitled to a low income health care card. Services Australia can give you information about this.

You can also claim a separate foster child health care card from Services Australia for your grandchild if you are caring for a child through an informal or formal foster care arrangement. The foster child health care card is issued in the child's name and is not means tested.

Medicare benefits – You can claim Medicare benefits for medical expenses for your grandchild. You don't need to have the child registered on your Medicare card or a card issued for the child. A receipt in your name will enable you to claim the benefit. For more information about Medicare and your grandchildren contact Medicare on **13 2011**.

If you're eligible for a payment, the easiest way to apply is online. To do this, you need a Centrelink online account linked to myGov. If you don't have a myGov account or a Centrelink online account you'll need to create them.

You can also get much more information about these payments online at www.servicesaustralia.gov.au/support-for-grandparent-carers or by calling **13 6150**.

Payments through the NSW Department of Communities and Justice (DCJ) – If the Children's Court has given DCJ parental responsibility but you are the full time Authorised Relative Carer, you will receive a Statutory Care Allowance to help with the cost of caring for the child. This includes food, clothing, educational costs, travel, pocket money, etc.

Supported Care Allowance – Supported out-of-home care (OOHC) is care arranged, provided or supported by Department of Communities and Justice Services (DCJ) when DCJ has assessed that a child or young person is in need of care and protection, and the Children's Court has made an order giving the relative or kin carer full parental responsibility for the child.

It also includes situations where an order has been made in the FCFCOA, but only when DCJ has been involved in the court process.

For more information about these payments and your specific circumstances contact a DCJ Community Services Centre.

You can find your closest DCJ Community Services Centre by calling **(02) 9716 2222** or online at www.community.nsw.gov.au.

Child Support – If you provide care for your grandchild for at least 35% of the time you may be able to receive child support from the child's parents. You would have to apply for a child support assessment through the Services Australia.

If you receive an income-tested benefit from Centrelink for the child in your care that is greater than the minimum Family Tax Benefit Part A you will not be required by Centrelink to apply for child support. However you can apply for child support if you wish to do so.

If you apply for child support both parents will be assessed. You cannot ask for an assessment against one parent only unless there are special circumstances – such as if one parent has died or you fear violence from that person if you ask for child support from them.

For more information contact Services Australia on **131 272**.

You can also find out more about child support online at www.servicesaustralia.gov.au/separated-parents.



Where can I get more help?

Seniors Rights Service

Provides free legal advice and assistance for older people in a range of areas of law.

Tel: **1800 424 079**

www.seniorsrightsservice.org.au

LawAccess NSW

LawAccess NSW is a free information service run by Legal Aid NSW. Anyone who has a legal problem in NSW can contact LawAccess NSW for legal help.

Click on the Chat with us icon at www.legalaid.nsw.gov.au or call **1300 888 529** between 9am to 5pm, Monday to Friday (excluding public holidays).

Legal Aid NSW Child Support Service

The Child Support Service is a confidential, independent service for parents or grandparents who need to get child support and parents who need to pay child support.

Tel: **(02) 9633 9916** or **1800 451 784**

Council on the Ageing NSW (COTA NSW)

COTA NSW has information and resources on their website for grandparents raising their grandchildren.

Tel: **(02) 9286 3860** or **1800 449 102**

www.cotansw.com.au

Court websites

You can get further information about court processes, forms, publications and self-help tools on the FCFCOA website

www.fcfcga.gov.au

National Enquiry Centre (NEC)

The National Enquiry Centre (NEC) is the entry point for all enquiries about Federal Circuit and Family Court of Australia matters.

Tel: **1300 352 000**

Other brochures available:



Why make a will?

A guide to making a will



They want me to leave

Staying in your house when your partner dies



Are you experiencing violence or abuse?

You can make it stop



Who will decide for you if you can't decide for yourself?

Think about planning ahead



Adult children living at home

What to do if you want them to leave?



Your home and the age pension

What you need to know



Helping your family financially?

Understand the risks



Moving in with the family

Make sure you protect your interests

This publication is a general guide to the law. You should not rely on it as legal advice, and we recommend that you talk to a lawyer about your situation.

The information is correct at the time of printing, however it may change. For more information contact LawAccess NSW on **1300 888 529**.



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For more information, visit: www.legalaid.nsw.gov.au

Do you need help to contact us?



If you need an interpreter, call the Translating and Interpreting Service (TIS National) on **131 450** (9am–5pm) and ask for LawAccess NSW.

Do you find it hard to hear or speak?



If you are deaf, or have a hearing or speech impairment, contact us through the [National Relay Service NRS](#). Ask for LawAccess NSW on **1300 888 529**.

