

kids in care

Going to the Children's Court



kids in care

2 Going to the Children's Court

There are six booklets in the **kids in care** series available from Legal Aid NSW.

- 1 Communities and Justice want to talk about my kids: what will happen?
- 2 **Going to the Children's Court**
- 3 Things have changed and I want my kids back: what can I do?
- 4 The Children's Court made a decision I am unhappy about: what can I do?
- 5 What happens when my kids are in care?
- 6 Aboriginal and Torres Strait Islander children and care



My kids are in care: what happens next?

When Communities and Justice remove your children from your care, they have to apply to the Children's Court for Court Orders. The 'care application' has to be lodged with the Court within three working days of your children being removed.

Communities and Justice must give you a copy of the application. You should read it carefully. It will state the time and date of your first court appearance, and the address of the Court.

It is very important that you attend Court. If you cannot attend for a good reason (eg. illness) you must telephone the Court and let them know, and make sure you get a certificate to prove why you could not attend.

What will happen on the first day of court?

You will be assisted by a duty lawyer on the first day of court (see 'Can I get a lawyer?' below).

The main decision to be made on the first day in Court is who should have temporary powers to make decisions about your children, including where your children will

live, until your case finishes. This is called 'interim (short term) parental responsibility'.

Sometimes parents agree that during the proceedings, their children should be placed somewhere else while they work on the care and protection issues that brought the case to Court. Interim parental responsibility can be given to the Minister for Communities and Justice, who can place your children in foster care or with any other person suitable to care for your children, like a family member.

Even if the Court Orders that interim parental responsibility is given to the Minister for Communities and Justice, this does not stop the Court from making a different order about who has parental responsibility at the end of the proceedings. This can include ordering that your children should be returned to your care, or that parental responsibility is given to another person such as a family member.

What is 'parental responsibility'?

'Parental responsibility' in relation to a child or young person means all the duties, powers, responsibilities and authority, which by law parents have in relation to their children.

Parental responsibility for your children can

Why does my child have a lawyer?

Every child in every case gets a lawyer to represent them. This lawyer is independent from the parents and Communities and Justice. The lawyer will be arranged by Legal Aid NSW. There are two types of children's lawyers:

- ▲ if your child is under the age of 12, they will have an 'Independent Legal Representative' who will tell the Court what they think is best for your child;
- ▲ if your child is aged 12 or over, they will have a 'Direct Legal Representative' who will tell the Court what your child wants.

be given to someone else either for a short time (interim) or long term. It gives that person the right to make decisions about your children, including different issues such as:

- ▲ where your children live,
- ▲ who your children have contact with,
- ▲ what religion and/or culture your children are raised in,
- ▲ where your children go to school, and
- ▲ what medical treatment your children have.

Parental responsibility can be given to:

- ▲ a parent;
- ▲ another suitable person, such as a family member; or
- ▲ the Minister for the Department of Communities and Justice (which in reality means that Communities and Justice caseworkers will make decisions about your children).

Every case is different because all families are unique. Sometimes the Court may decide that aspects of parental responsibility should be divided between parties so, for example, you or your children's other parent might be given parental responsibility for some aspects of your children's life while Communities and Justice has parental responsibility for other aspects.

I don't want my kids to go into foster care – who else can look after them?

When children have to be removed from their parents, it is important to consider whether they can be placed with family members or friends even if it is only in the short term. If you want someone else to care for your children, it is important

that they contact your lawyer and Communities and Justice as soon as possible. Communities and Justice will do a 'placement assessment' of the person, which will include background checks on their police and child protection history, will interview the person, and may do a home visit.

If Communities and Justice refuse to assess your relative you can speak to your lawyer about your relative making an application to the Court to be joined as a party to the proceedings. This is called a 'joinder application' and if successful, it means that your relative can be represented in Court with their own lawyer.

It also means that your relative can ask to be assessed by the Children's Court Clinic (see section below on 'What is an Assessment by the Children's Court Clinic?') and they can also file evidence about why your children should be placed with them.

When do I get to have my say?

If Communities and Justice bring your matter to the Children's Court, they must explain to the Court why this is necessary. To do this, Communities and Justice will provide the Court with an initial Report setting out their side of the story and in which there may be allegations made against you. You will be provided with a copy of the initial Report.

The Court will give you time to respond to the things which have been said about you and your family, and to put together any evidence you want to use. You will be given time to meet with a lawyer and decide if you wish to prepare a written response which is called an 'affidavit'. The Court will make a timetable for all parties to do various things, including filing affidavits, before the matter comes back to Court again.

After the first day in Court, you should meet with your lawyer as soon as possible to talk about the allegations in the Court documents, and to decide if you are going to file an affidavit setting out your side of the story. Your lawyer will advise you whether or not this is the right time to do this, depending on your individual circumstances.

What happens when we go back to Court?

The next time your case is in Court, the magistrate is likely to ask whether you agree to a finding that your children were in need of care and protection at the time that Communities and Justice got involved. This is called 'establishing' the matter and

you should have legal advice before the Court considers this stage of your matter. If you have not had legal advice you can ask the Court for an adjournment.

If you agree to the matter being 'established', then the proceedings will move on to the 'placement phase' which involves making decisions about the future care of your children.

A matter can be established 'without admissions' – this means agreeing that the child was in need of care and protection without accepting that all of Communities and Justice' evidence is true.

If you do not agree to the matter being 'established', then the magistrate will give you a hearing date.

What is 'establishment'?

To 'establish' the case, the Court needs to be satisfied that your children were 'in need of care and protection' at the time Communities and Justice got involved.

Children can be in need of care and protection for many reasons, including that:

- ▲ you and the children's other parent were not available to care for the children at the time (eg. due to imprisonment or ill health),
- ▲ the children's needs were not being met (such as not having enough to eat, warm clothes, bedding, and a clean and safe home);
- ▲ the children were not attending school;
- ▲ the children were living with domestic violence, or were being exposed to adults using illegal drugs or drinking excessive amounts of alcohol;
- ▲ the children have been sexually or physically abused, or there was reason to fear that this might happen in the future.

Who has to prove it?

It is usually up to Communities and Justice to prove that the case should be established. However it will be your job to convince the Court that the matter should not be established if:

- ▲ a court has previously made final orders removing one or more of your other children from your care and they have not been returned to you, or
- ▲ you have breached a Parental Responsibility Contract.

What happens after the case is established?

The application made by Communities and Justice will state what orders it is asking the Court to make. Often, this will be an order giving parental responsibility for your children to another person or to the Minister for Communities and Justice. Usually, these orders are sought until the children turn 18 years, although this is not always the case.

It is up to the magistrate to decide whether or not to make the orders which Communities and Justice are seeking.

Before the magistrate can make a decision, the Court will need evidence about whether your children will be safe in your care. The Court will decide who can file evidence, and how long they can take to do so. Once all the evidence is gathered, the Court will be ready to hold a 'hearing'.

What evidence will the Court have?

In the Children's Court, evidence is filed with the Court in a written document called an 'affidavit'. You are entitled to make an affidavit, and you should speak with your lawyer who will help you to prepare and write it.

Evidence might also be filed with the Court from other sources, such as:

- ▲ records held about you or your family by the police, hospitals, doctors, schools, or other agencies. These documents will be produced to Court if the agency has been issued with a document called a 'subpoena'. Any party in the case can arrange for a subpoena to be issued. If you have any concerns about sensitive information in your records, you should speak to your

lawyer. You should also speak to your lawyer about whether it would help to issue a subpoena to any agency who may have evidence to help your case.

- ▲ affidavits from other relevant people, including your treating doctors or professionals. You should speak with your lawyer about whether this might be a good idea for your case.
- ▲ a report from an independent expert (such as a Clinician from the Children's Court Clinic) who might be appointed to assess your family and give an expert opinion on whether your children should be returned to your care.

You will be given copies of the evidence filed by all the parties in the proceedings.

What is an Assessment by the Children's Court Clinic?

Any of the parties, including you, can ask the Court to make an order for a 'Clinic Assessment'. If the Court makes the order, the Children's Court Clinic will appoint a 'clinician', who will be a social worker, psychologist or psychiatrist, to prepare the assessment.

The Children's Court Clinic is independent from Communities and Justice. The clinician will interview anyone whom the Court has decided should be assessed. The Clinician can also speak informally to other people who may be able to help give relevant information.

The Clinician will look at the evidence provided to the Clinic by the parties.

Once the assessment is written, it is sent to the Court and provided to all the parties.

Can I see my kids during the proceedings?

If Communities and Justice have 'interim parental responsibility' for your children, they will decide how much contact you will have with your children until the Court proceedings finish.

If you are not happy with the amount of contact you are having, you should speak with your caseworker. If agreement cannot be reached, you should speak with your lawyer.

Contact is often supervised, usually by Communities and Justice or sometimes by a relative.

The Court cannot tell Communities and Justice how much contact they have to supervise. If you do have someone else who can supervise your contact, the Court must still agree that person is suitable and that more contact with you is in your children's best interests.

The contact supervisor will write a report after each of your visits, with details about how the visit went and what happened. It is important to make sure that you turn up to all your contact visits, behave appropriately, and spend the contact time with your children instead of talking with the other adults. Turn your mobile phone off and do not bring other people to the contact unless Communities and Justice say this is acceptable. Remember that the reports can be used as evidence in Court.

You should speak to your lawyer about whether it would be helpful for your case to make an application for a Clinic Assessment.

What is a Care Plan?

Communities and Justice will file a 'Care Plan,' which sets out Communities and Justice' final recommendations about the future care arrangements for your children. The Care Plan will contain:

- ▲ the reasons Communities and Justice brought the matter to Court,
- ▲ what Communities and Justice say has happened since the matter has been at Court,
- ▲ an assessment of whether there is a possibility of the children being returned to your care,
- ▲ the proposals for how your children's long term needs will be met, including where your children will live, and how much contact your children will have with you and other important people in your children's life (eg. relatives and close friends),
- ▲ the reasons that Communities and Justice are making these recommendations.

Before the Plan is filed with the Court, Communities and Justice must talk to you about their proposals. You will receive a copy of the Care Plan after it has been filed at the Court and will have a chance to respond to it. If you do not agree with the Care Plan, you can say in your affidavit what you think should happen instead and why.

Although Communities and Justice propose a Care Plan, only the magistrate can make a decision about the final orders which should be made about your children. It is up to the magistrate to decide whether or not to approve the Care Plan. If, after a hearing, the magistrate does not agree with the Care Plan, Communities and Justice will be ordered to write a new Care Plan based on the magistrate's decision.

Who's who in the Children's Court



Judge or
magistrate

Court
Reporter

Court
Officer

Communities
and Justice
Solicitor

Communities and
Justice
Caseworker

Independent legal
representative for
children under 12



Does there have to be a hearing?

No, there does not have to be a hearing. Before the Court decides to have a hearing, it will first give you the opportunity to sort things out by agreement with Communities and Justice and the other parties. One way to do this is by attending a 'dispute resolution conference' or 'alternative dispute resolution mediation', which is a confidential meeting run by an independent person. The purpose of the meeting is to give everyone a chance to talk about the case, and to help everyone try to reach an agreement about the best possible future care arrangements for your children. Your lawyer will attend the conference or mediation with you.

If the parties do not reach an agreement, then the Court will hold a 'hearing'. You will need to attend, and you may have to give evidence. If you provide an affidavit from another person (such as a treating doctor, friend or support worker) they may also have to give evidence. The lawyer for each party will make submissions about the final orders which should be made.

The magistrate will listen to everyone and then make a decision which the magistrate thinks is in your children's best interests.

What if I don't have a lawyer?

If you do not have a lawyer, you will sit at the 'bar table' and speak directly to the magistrate for yourself. You will be treated by the Court in the same way as the legal representatives. It is best to speak to the Court and the other legal representatives politely at all times, even if you do not agree with what they are saying. You will also need to write your own 'affidavit' and give copies to the Court and to all the other parties.

At a final hearing, you will be able to 'cross-examine' the other witnesses. This means that you will be allowed to ask the witness questions. The questions you ask should be ones which either help your case, or cast doubt on another party's case. Often, you will do this by putting to the witness a version of events which you want the witness to agree with. You should not argue with witnesses or ask them improper

I have a Care Plan for restoration: what do I have to do now?

Returning your children to your care is called 'restoration'. This can happen over a short or long period of time. In some cases the Court will give parental responsibility to Communities and Justice for up to two years (or in special circumstances for longer) and then the children to return to your care.

If this happens, the Care Plan will clearly state the 'minimum goals' you have to meet before your children can come home. Sometimes you will be asked to give 'undertakings' to meet these goals. These are promises you make to the Court.

It is really important that you comply with all your undertakings.

Keep written records of all the appointments you attend, and ask for notes of any meetings you go to.

If you do not meet the 'minimum goals', Communities and Justice can bring the case back to the Children's Court to change or cancel the orders.

This might mean that your children are not restored to your care.

questions. You should not make arguments at this stage – you will have a chance to do that at the end of the case in ‘submissions’.

After everyone has given their evidence, each party makes ‘submissions’ before the magistrate makes a decision. This is the time when you can tell the Court what orders you want the Court to make, and what your reasons are.

What final orders might the Court make about my children?

At the end of the case, the Court might make some of the following final orders:

- ▲ an order giving parental responsibility to the Minister for Communities and Justice, or to someone else (such as a relative), or to only one parent;
- ▲ a Guardianship Order which gives parental responsibility to a suitable person until they are 18. When this type of Order is made Communities and Justice aren’t involved, don’t supervise the Guardian or ask them to give promises to the Court. Communities and Justice also don’t have to give a Guardian financial support but they may decide to do so;
- ▲ an order sharing parental responsibility between you, another person and/ or the Minister for Communities and Justice;
- ▲ an order that says how much contact your children should have with you, other family members and other important people;
- ▲ an order that returns the children to your care but places the children under the ‘supervision’ of Communities and Justice which allows them to monitor your children’s safety, welfare and wellbeing;
- ▲ an order that you, or anyone else who is caring for your children, give promises (called ‘undertakings’) to the Court about what you will do or not do in the future.

The Court will state how long the orders are going to last: sometimes they last until your children turn 18, and sometimes they expire earlier;

For more information about what happens if final orders are made giving parental responsibility to Communities and Justice, see **BOOKLET 5: What happens when my kids are in care?**

Can I get a lawyer?

Legal Aid will provide you with a ‘duty lawyer’ to help you on your first day at court.

After your first appearance, you will need to arrange a lawyer to represent you for the rest of the case. You can do this by:

- ▲ applying for legal aid. The duty lawyer on your first day at court will help you do this; or
- ▲ if you are not eligible for legal aid, you can choose to pay a lawyer privately, or represent yourself.

More information and help

- ▲ Legal Aid NSW Family Law Intervention Unit:
1800 551 589
www.legalaid.nsw.gov.au
- ▲ Aboriginal Legal Service:
1800 733 233
www.alsnswact.org.au
- ▲ LawAccess NSW:
1300 888 529
www.lawaccess.nsw.gov.au

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**.



© Legal Aid Commission of NSW 2020

Order brochures online at **www.legalaid.nsw.gov.au/publications** or email: **publications@legalaid.nsw.gov.au**

For more information about Legal Aid NSW Services:



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.



If you find it hard to hear or speak, call the National Relay Service (NRS) on **133 677** and ask for LawAccess NSW or visit **www.relayservice.gov.au**

Legal Aid NSW acknowledges the prior publication *The Children's Court, Care, My Child and Me* from the Shoalcoast Community Legal Centre.

Legal Aid
NEW SOUTH WALES
www.legalaid.nsw.gov.au