Family Law EARLY Intervention UNIT
Resolving legal issues before they get serious

Legal Aid NEW SOUTH WALES

Factsheet 9

What you need to know about final hearings

This is a fact sheet about some of the important things you need to know about being involved in a final hearing and generally what to expect.

If your matter has been listed for final hearing in one of the Family Law Courts, then the judge has decided that it is time for them to hear all of the evidence in your matter. You may not get the same judge that you have had for other mentions of your matter.

Preparing for your final hearing

Step 1 – Make sure you understand the timeline for your court case

Before a final hearing, the judge will make orders setting out a very clear timetable about when your evidence needs to be filed and then served (given to the other parties). Lawyers often call these "trial directions" and they are made at least several months before the final hearing on a separate court date.

Each case is different and you need to make sure you have a copy of the orders that set out the trial directions. You can access a copy of your court orders online by registering for the Commonwealth Court Portal at comcourts.gov.au or you can inspect your court file in person at the Court Registry where your case is being heard.

If you need further help accessing your orders you should contact the National Enquiry Centre on 1300 352 000 or via the LiveChat at www.familycourt.gov.au and www.federalcircuitcourt.gov.au.

Step 2 – Preparing the documents you need for final hearing

There are different types of documents that a Court may require you to prepare, and this will vary from case to case.

If your case involves a dispute concerning a child, the types of documents you may need to prepare include:

1. Affidavits from yourself and each of your witnesses;
2. A Minute of Order, which is a document setting out the final orders you are seeking;
3. A Case Outline containing a chronology and your written final submissions; and
4. A list of documents that are not part of an affidavit, but that you want to rely on at the trial. This is called a "list of exhibits".

If your case involves a dispute that concerns property as well, you might also need to prepare other documents including:

1. An updated Financial Statement; and
2. A Balance Sheet, which is a schedule setting out the current values of all assets, liabilities, superannuation and financial resources.

Remember that any document you give to the Court also needs to be given to every other party in your case. For example, in a parenting case there will often also be an Independent Children's Lawyer, and you will need to make sure any document you file is also given to them.

Whether you have a lawyer or not, it is your personal responsibility to make sure you have done everything you have been asked to do by the Court to prepare for the final hearing.

Step 3 – Preparing your evidence

Think about what the judge needs to decide. In other words, what information does the judge need to know for them to make the orders you are proposing? You may need to return to your Initiating Application or Response and try to work out what orders you are seeking.

At final hearing, you must be clear what orders you are asking the Court to make. You must make sure the information you provide will help the judge to make those orders. Be concise. Stick to the issue(s) that you are asking the Judge to decide. Your evidence will generally consist of:

1. Your Affidavit;
2. Any witness Affidavits;
3. Any reports; and
4. Any other documents you hand up to the judge, including documents marked in subpoena bundles.

Affidavits and witnesses

Remember if an affidavit is not filed in time the judge may decide not to read that affidavit. Check the trial directions and see whether the orders restrict what witness affidavits can be filed. A Court can also refuse to read evidence if it is not relevant to what they need to decide or it is not filed in compliance with the trial directions.

When asking witnesses to provide supporting affidavits, make sure they use their own words and that you are not "coaching" them on what they should say. The witness should also be aware that they may be cross-examined to test the truthfulness of what they have put into their statement. They should be available to attend the final hearing, so check this with them well before the dates of your final hearing. If they are unable to attend, this will impact on how much weight the judge can give to their evidence.

Tips for writing an affidavit

- Divide the affidavit into paragraphs.
- Number each paragraph.
- Keep each paragraph short and deal with one issue only.
- Be specific rather than general. Think about who, what, when, where, and how. Provide exact dates wherever possible. If you can't be exact, make your best estimate.
- Focus on the issues that are relevant (related) to your application.
- When you are writing about a conversation, quote it exactly, or write: 'On or around [DATE and TIME], [NAME] said to me words to the effect of *"I'm going to my Mum's. Don't call."*
- To attach a document, you should refer to it in your affidavit and then write **"Annexed to this affidavit and marked with the letter "A" is a copy of [DOCUMENT NAME]".** Write the letter "A" at the top of the front page of the document you are attaching to your affidavit. If you have more than one annexure, the second document should be marked "B" and the third document marked "C", etc.
- Sign the bottom of each page of the affidavit in front of a Justice of the Peace (JP) or lawyer and complete and sign the "jurat" at the end of the

Do not assume you will be able to rely on earlier affidavits. Generally you can only do this if the judge gives you permission.

affidavit. This is the statement at the end of your affidavit which sets out when, where and before whom you have signed the affidavit.

- If you have attached a document (annexure) to your affidavit, make sure the JP or lawyer who is witnessing the affidavit signs each document.
- If you need to correct any errors, cross out the error and put your initials next to the change. The JP or lawyer who is witnessing the affidavit must also put their initials next to the change. These changes can only be made prior to completing the jurat.

Subpoenas

Often parties choose to issue a request to organisations (e.g. schools, doctors), to provide relevant documents to the Court. This is called a "subpoena". The subpoena needs to be filed with and approved by the Court and then served on the organisation so that the documents may be produced by a certain date. Each party or their lawyer, if they are represented, will have the opportunity throughout the course of a matter to inspect these documents after they are produced to the court. The Family Court has a useful factsheet available that discusses how to issue subpoena and what needs to be done before subpoena documents can be inspected, available here:www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/subpoenas/subpoena-information-for-a-person-requesting-the-issue-of-subpoena.

During the final hearing all of the subpoenaed documents will be brought into the courtroom. If there is subpoenaed material and you don't have a lawyer, you will have to direct the judge to important sections of the subpoenaed material – the judge will not read any subpoenaed material unless it is properly flagged and tendered. You will have very little time to read through this material during the final hearing, so you should make sure you check this well in advance of the final hearing.

It is helpful to use sticky flags or post-it notes to locate important sections of subpoenaed documents as you cannot mark the material. Photocopy access may be granted which will allow you to mark you own copy however this is rare. The subpoenaed material is available in the Exhibits Room at the Court Registry where your matter is being heard.

Before you try to go and inspect any subpoena in your case, make sure you check opening times as these vary at each Court Registry. You should also check if you need to make an appointment to inspect material.

If there are particular documents you want to see, you should also check if you have permission to look at these documents. If you go on the Commonwealth Courts Portal, you can access a list of documents produced to the Court under subpoena and importantly which documents there is permission to look at. If you are already at Court you may also be able to make a general enquiry to check what is available.

If you have trouble accessing the Commonwealth Courts Portal, you can contact the Family Law National Enquiry Centre on 1300 352 000 or use their LiveChat service at www.familycourt.gov.au and www.federalcircuitcourt.gov.au.

Non-standard form documents

It is common that the Court will ask for the preparation of a document that there is no standard form for prior to a final hearing. For example, there are no standard forms for a "Case Outline", "Chronology" or "Outline of Submissions". If you are required to file one of these documents, you should seek legal advice about what is required. You can get free legal advice from a Legal Aid office or a Community Legal Centre but be aware that

it is unlikely they will have the capacity to draft the documents for you. You can also refer to *Factsheet 12 'How do I write a Case Outline'* for further information.

Step 3 – Attend the compliance check/call-over (if applicable)

In some cases there may be an additional step before your case is listed for final hearing. This is normally called a "compliance check" or "call-over". A compliance check/call-over can be ordered in a number of circumstances, including:

- Where a date or dates for final hearing have already been allocated;
- Where a final hearing date is not already allocated; or
- Sometimes where there has been non-compliance a judge will decide to bring a matter back to Court to check/ensure compliance. This court date is an opportunity for the Court to make sure everyone is ready for the final hearing or trial. What happens on this date will depend on whether everyone in the case has done what they are required to do under the "trial directions".

If there is compliance the hearing dates will normally be confirmed or allocated.

Failure to comply with trial directions

If there is non-compliance with trial directions, there can be some consequences:

- The final hearing dates may be cancelled or adjourned, substantially delaying your case;
- If there is a repeated failure to comply by all parties, the case can be dismissed;
- Where one person has not complied, a judge can order the party who has not complied to pay the other person's legal costs; or
- A judge might also decide to proceed to hear a matter without reading any affidavits from the non-compliant party. This is called an "undefended hearing".

Step 4 – Considering whether further Alternative Dispute Resolution is appropriate

The purpose of a Court asking for the documents well in advance of a final hearing is so that everyone in the case has the opportunity to know and understand what the case will be about. After everyone has prepared and served their documents, it may be worth considering again whether to try and resolve your dispute in a different way, for example through negotiation or family dispute resolution.

It is important to remember that you always have the option of trying to reach resolution of your matter at any time, including on the date of the final hearing.

What happens at final hearing?

What if I am not prepared for my final hearing, can I ask for an adjournment?

Do not expect the Court to grant an adjournment of a final hearing on the day of the hearing. You must come prepared that the hearing may run even if you have not complied with the timeline. The Court has limited resources, so assume that any adjournment of a final hearing will only be made in extraordinary circumstances.

If you have applied for legal aid and this has been refused, you can appeal that decision. If you have appealed or intend to appeal a refusal of legal aid, you are able to ask for an adjournment, and the Court is required to grant that adjournment unless the appeal would improperly delay the case or there are special circumstances.

You should be aware that what may constitute “special circumstances” is very wide and the fact an adjournment may lead to a long delay may be enough to constitute “special circumstances”.

To get an adjournment of a final hearing, you will put yourself in the best position possible if:

- You try to request an adjournment in advance of a final hearing, this could be by filing an **Application in a Case**;
- You are able tell the Court exactly how much time you need to prepare yourself and the steps you have already taken to get yourself prepared or to comply with directions;
- You are appealing a decision about a refusal of legal aid, you must explain when you lodged the application, when you appealed and when the appeal might be determined; and
- You have at least attempted to explain your situation to the other parties, given them notice of the application for adjournment, and made every attempt to prepare for the case.

If you are considering trying to adjourn a final hearing, it is strongly recommended you get legal advice as soon as can. You can get free legal advice from a Legal Aid office or a Community Legal Centre.

The final hearing

A final hearing may be listed for one day or a number of days, depending upon the number of witnesses each party has. The Court lists more than one matter each day in case parties settle their matters.

Both the Applicant and the Respondent will be required to be present in Court each day that the matter is listed (unless in exceptional circumstances and with the permission of the Court). If you do not come to Court and participate, orders could be made in your absence without the Court taking into account your position. It is your responsibility to make sure you are at Court and know your court date.

You are allowed to bring support people (over the age of 18 years) with you to Court. If your support person has also prepared an affidavit in the matter, then that person is not permitted to enter the courtroom until after they have given their evidence. Your support person cannot speak for you unless the Court gives special permission. This is rarely given.

Children are not allowed to enter the courtroom. The Court does not have child care facilities and it is not a good idea to bring them to sit in the waiting room, especially children who are the subject of the Court proceedings, unless ordered by the Court. Appropriate child care arrangements should be made for children for each day that the matter is listed in Court. The Court can sit from 9:00 am until after 5:00 pm.

Heading the evidence

As it is the Applicant who commenced the proceedings, their evidence is heard first unless the judge determines otherwise. The Applicant's witnesses (if any) are heard after the Applicant's evidence is given. Those witnesses are not allowed in the courtroom prior to giving their evidence. It is then the Respondent's turn, and their witnesses (if any). Finally, any joint expert witnesses or court appointed witnesses give their evidence to the Court. Sometimes the expert witnesses will give their evidence earlier, depending on their availability to attend Court.

Expert witnesses: On occasions, either party to the proceedings or the Court may think it is appropriate for an expert to be appointed in the matter, to prepare a report. This might be a child psychologist or paediatrician in children's matters; an accountant or a valuer in property matters.

You can only put forward evidence that has been written in your affidavit material, unless you seek the Court's permission (leave of the Court) to do so.

Swearing in

Once you (or any witness) has entered the witness box, you will be asked by the Court officer whether you wish to swear to tell the truth by an affirmation (non-religious) or by a religious oath. You will be asked to repeat what the Court officer says and to speak directly to the judge.

For a witness appearing in Court, the form of oath taken is as follows: "I swear (or the person taking the oath may promise) by Almighty God (or the person may name a god recognised by his or her religion) that the evidence I shall give will be the truth, the whole truth and nothing but the truth".

For a witness appearing in Court, the form of affirmation taken is as follows: "I solemnly and sincerely declare and affirm that the evidence I shall give will be the truth, the whole truth and nothing but the truth."

Once a person is sworn in, they will not be able to speak to their lawyer or any other person about their evidence until they are excused from the witness box, even if Court is temporarily adjourned for lunch, or adjourned overnight. The judge will normally remind them of this obligation when Court adjourns.

Examination-in-chief

If you are representing yourself, the judge or Independent Children's Lawyer may ask you to confirm your name and address, what affidavit you are relying on, and the date that material was filed with the Court. If you are represented, your lawyer or barrister will do this for you.

If you have information that you think is relevant for the Court to know, that was not included in your affidavit material you can now seek leave to give that evidence verbally. The judge will decide whether to permit this or not. If you have a lawyer they may then ask you questions in relation to the new evidence.

The examination-in-chief should be brief, as all the detailed evidence should already be in the affidavit material.

Cross-examination

The other party will now choose whether to ask you or your witness any questions. The Independent Children's Lawyer, if there is one appointed, may also choose to ask you questions. The judge may interrupt and ask you questions directly. You are required to answer their questions. Cross-examination can take a long time, sometimes days.

Re-examination

There may be an opportunity for your lawyer to ask you some questions if any issues need clarifying after cross-examination, providing the judge permits this.

Other court processes

Objections: You cannot interrupt the other party with an objection unless it is about a matter of law. If you do have a legal objection, stand and tell the judge of your objection. The judge will then determine whether the objection is valid or not. Common objections are made on the basis of relevance and confusing or misleading questions.

Tendering documents: At the final hearing each party can draw the judge's attention to the subpoenaed material and question the witnesses in relation to this material. Providing no one objects, a party can seek the document to be tendered to the Court and it is then handed to the judge for them to read and consider when they are making their judgment. The judge will not have read the subpoenaed material unless it is tendered through this process.

Judgment and when orders are made

Depending on the type of matter and the amount of evidence before the judge, the judge may choose to either give their judgment or decision at the end of all the evidence, or he/she may choose to reserve (or hold over) their judgment.

If judgment is reserved, it is up to the judge and the Court as to when this date may be and it could be months after the final hearing was concluded. Any interim orders would normally continue until final judgment and orders are delivered by the judge. You or your lawyer will be notified by the Court when the judgment is to take place, and you and/or your lawyer will attend Court on this date to hear the judge read out their decision.

It is important to listen carefully to the judge's decision, and to write down the orders that are made. Always bring a notepad and pen to Court. You can ask the Court to repeat the orders if you have missed any. If you do not understand the orders (and do not have lawyer) you can request the judge to explain them to you once he/she has finished speaking. Once the judge has signed off on the orders, a sealed copy (stamped by the Court) will be forwarded to all the parties (and also made available on the Com Courts portal).

Your matter is finalised once the orders are made.

Important things to consider:

- You have 28 days from the date final orders are made to appeal a decision. You can do this by filing a Notice of Appeal. It is very important to seek specific legal advice if you are considering filing an appeal. An unsuccessful appeal may result in you having to pay another person’s legal costs.
- If one party breaches the final parenting orders, the other party can file a Contravention Application with the Court for the matter to be dealt with. Be aware that if your final orders were made more than 12 months ago, you may need to try family dispute resolution before being able to file a Contravention Application. Contravention Applications can be technical and so you should seek specific legal advice before deciding to make this type of application.
- It is not easy to change final parenting orders. There must be a ‘significant change in circumstances’ for orders to be amended, especially soon after they are made. Financial orders are even harder to change.

Getting legal advice

You should seek legal advice before deciding what to do. A lawyer can help you understand your legal rights and responsibilities, and explain how the law applies to your case.

You can seek legal advice from a Legal Aid office, Community Legal Centre or a private law firm.

- LawAccess NSW: contact 1300 888 529 or see www.lawaccess.nsw.gov.au
- Legal Aid Early Intervention Unit: contact 1800 551 589 or see www.legalaid.nsw.gov.au
- Legal Aid Domestic Violence Unit: contact (02) 9219 6300 or see www.legalaid.nsw.gov.au
- Aboriginal Legal Service: contact 1800 733 233 or see www.alsnswact.org.au
- Salvos Legal Humanitarian: find an Advice Bureau at www.salvoslegal.com.au/expertise/humanitarian-free-legal-service/
- Women's Legal Service NSW: (02) 8745 6900 or 1800 810 784 DV Legal Advice Line
- NSW Law Society Solicitor Referral Service: (02) 9926 0300 or see www.lawsociety.com.au/for-the-public/going-court-and-working-with-lawyers/solicitor-referral-service

Court staff can help you with questions about court forms and the court process, but cannot give you legal advice. You can contact the National Enquiry Centre on 1300 352 000 or go to www.familycourt.gov.au, www.federalcircuitcourt.gov.au.

This fact sheet uses the term "judge" to refer to either a judge of the Family Court of Australia or a judge of the Federal Circuit Court. This fact sheet is intended as a general guide to the law. It should not be relied on as legal advice and it is recommended that you talk to a lawyer about your particular situation. At the time of writing, the information shown is correct but may be subject to change. If you need more help, contact LawAccess NSW on 1300 888 529.

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