

# Preparing for a final hearing in a protection and care matter in the Children's Court of WA



This information may help you if you are a respondent in an application by the Department of Communities - Child Protection and Family Support (“the Department”) for a protection order and you are preparing to represent yourself in a final hearing (sometimes called a “trial”).

You should get legal advice to help you prepare for and represent yourself at a final hearing.

## How does a case get to a final hearing?

Your case can get to a final hearing from:

- a mention date, or
- a pre-hearing conference

when one or more parties or the child representative opposes the Department's application.

**Before the case goes to a hearing you should be clear about exactly what you are opposing.**

For example is it:

- whether your child was, or is, in need of protection
- if you agree your child was in need of protection, whether he/she is still in need of protection
- if you agree your child is still in need of protection, which protection order, if any is in your child's best interests
- the long term arrangements being proposed, or
- if you agree that your child is still in need of protection, do you disagree with the contents of the Department's Section 143 Written Proposal in relation to the care arrangements for your child, for example, where your child is to live, or your contact arrangements?

If you have a problem with, or do not agree with, what is in the Section 143 Written Proposal try to negotiate changes with the Department before the case goes to a final hearing. Following a final order hearing the court may make a protection order (time limited) or protection order (until 18)

but it does not have the power to specify where the child will live or contact arrangements. The Department will make those decisions.

Before the final hearing date is set the parties (you, the Department, the child representative, and other parties) need to work out approximately how long the hearing will take. This will depend on several factors including: the number of witnesses (including experts); the evidence each witness will be giving, eg whether what they say will be short or long, simple or complicated; whether interpreters will be needed; how many parties are involved; and what issue/s are in dispute.

## Pre-hearing conference

The purpose of a pre-hearing conference is to give the parties a chance to talk about and reach agreement in relation to any matter in the protection application. It may be possible to reach agreement on some or all matters.

There may be more than one pre-hearing conference.

At the pre-hearing conference before a final hearing (sometimes called a “pre-trial conference”) if agreement is not reached, on all issues and the final hearing is to go ahead, the magistrate may ask the parties for information about their witnesses. This will help everyone work out how long the case will take and how much court time is needed for the hearing.

The magistrate may make directions about when things have to be done to prepare for the hearing, for example:

- When the Department has to file and serve (“serve” means give to) any new/updated

affidavits or other documents, for example, a parenting capacity assessment or psychiatric reports.

- When respondents have to file and serve any affidavits.
- When the child representative has to file and serve any affidavits and/or reports.

This is done to make sure parties have enough time to read and think about what is written in the affidavits and other court documents and prepare any response to them **before** the final hearing.

Sometimes a direction may be made setting a date by which a party has to let the court and other parties know if they do not have legal aid for the final hearing.

You should make sure you understand what these directions mean for you and the other parties before the pre-hearing conference ends. If you are not sure ask the magistrate.

You should follow the directions that are made about what you have to do.

### *What if the directions are not followed?*

If the directions are not followed, for example, the Department has not served documents on you by the due date, you will need to:

- write to the court as soon as possible to ask to have your case early listed to tell the court what has happened.
- send a copy of that letter to the Department and all the other parties so that they will know that you are asking to early list the case and the date you are proposing for that listing.
- confirm the date and time with them when the court sets the date for the early listing.

If the final hearing date is several weeks away you could first write to the party who has not followed the direction and ask them to do so within a limited time (perhaps seven days). Keep a copy of this letter to show the court if they do not follow the direction within this time.

If you are not able to follow a direction that applies to you it is important that you tell the other parties as soon as you work out that you have this problem and try to estimate when you will be able to do what has been directed.

## Protection Review Hearings

The President of the Children's Court now requires the Department and other parties to protection proceedings to go to a Review Hearing for cases which have a future trial listing at Perth Children's Court.

This hearing gives the parties a chance to resolve the issues to avoid a trial.

If all of the issues can't be resolved, the aim is to reduce the issues in dispute and the number of hearing days for the trial.

**If you get a letter from the court telling you about a Protection Review Hearing you should get legal advice.**

You have to go to this hearing even if you have a lawyer unless you have been excused in advance by the President of the Children's Court.

You, or your lawyer (if you have one), must:

- complete a Review Certificate (Form PCREV)
- lodge it with the Registry three working days prior to the Review Hearing, and
- serve (give) a copy of the Review Certificate to the Department and all the other parties, including the Child Representative, if one has been appointed.

If the trial is going to go ahead and you have not filed any documents prior to the Review Hearing, orders may be made for the filing of responding documents and affidavit evidence in support of your case. Other parties may also be ordered to file documents.

## What happens at the final hearing?

The Department has to prove to the court on the balance of probabilities, that is, that it is more likely than not, that your child is in need of protection. This means the Department has to have evidence to support its application that your child is in need of protection. It also has to show it is in your child's best interests to be placed on the protection order it seeks.

The magistrate will listen to the Department's witnesses, your witnesses, the witnesses of any other party and the child representative before

deciding whether your child is or was in need of protection and what to do next.

The court in deciding what is best for the child may:

- make the protection order requested by the Department
- make another protection order, or
- decide that no protection order is needed.

You will need to question the Department's witnesses and other witnesses about the things they say that you do not agree with to help the court work out whether your child is in need of protection and to help the court understand what you think is in your child's best interests.

You and your witnesses will need to give the court evidence that shows:

- the child is not in need of protection, or
- if they are in need of protection that the order the Department wants is not in the child's best interests, for example, that
  - no order is needed, or
  - a protection order (supervision) is all that is needed rather than a protection order (time limited), or
  - a protection order (time limited) is in the child's best interests rather than a protection order (until 18).

*What does "a child is in need of protection" mean?*

The *Children and Community Services Act 2004* (WA) ("the Act") sets out the law for protection and care matters.

The Department application to the court sets out the grounds under the Act for the application.

Read the top of page two of the application and see which of the grounds listed apply to your child's application.

Under section 28(2) of the Act a child is in need of protection if:

- (a) the child has been abandoned by their parents and, after reasonable inquiries
  - i. the parents cannot be found; and

- ii. no other suitable adult relative or other suitable adult can be found who is willing and able to care for the child

or

- (b) the child's parents are dead or incapacitated, and after reasonable inquiries, no suitable adult relative or other suitable adult can be found who is willing or able to care for the child

or

- (c) the child has suffered, or is likely to suffer, harm as a result of any one or more of the following –
  - i. physical abuse
  - ii. sexual abuse
  - iii. emotional abuse (this is defined in section 28 (1) of the Act to include psychological abuse, and being exposed to an act of family violence)
  - iv. neglect

and the child's parents have not protected, or are unlikely or unable to protect the child from harm, or further harm, of that kind;

or

- (d) the child has suffered, or is likely to suffer, harm as a result of –
  - i. the child's parents being unable to provide, or arrange for the provision of adequate care for the child; or
  - ii. the child's parents being unable to provide or arrange the provision of, effective medical, therapeutic or other remedial treatment for the child.

*What does the court take into account in working out the best interests of the child?*

What is in the best interests of the child is the paramount, or most important, consideration when the court is making decisions about your child.

Under section 8(1) of the Act, to find out what is in the best interests of the child the court must take into account:

- (a) the need to protect the child from harm;
- (b) the capacity of the child's parents to protect the child from harm;

- (c) the capacity of the child's parents, or of any other person, to provide for the child's needs;
- (d) the nature of the child's relationship with the child's parents, siblings and other relatives and with any other people who are significant in the child's life;
- (e) the attitude to the child, and to parental responsibility, demonstrated by the child's parents;
- (f) any wishes or views expressed by the child, having regard to the child's age and level of understanding in working out the weight to be given to those wishes or views;
- (g) the importance of continuity and stability in the child's living arrangements and the likely effect on the child of disruption of those living arrangements, including separation from –
  - i. the child's parents; or
  - ii. a sibling or other relative of the child; or
  - iii. a carer or any other person (including a child) with whom the child is, or has recently been, living; or
  - iv. any other person who is significant in the child's life;
- (h) the need for the child to maintain contact with the child's parents, siblings and other relatives and with any other people who are significant in the child's life;
- (i) the child's age, maturity, sex, sexuality, background and language;
- (j) the child's cultural, ethnic or religious identity (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal people or Torres Strait Islanders);
- (k) the child's physical, emotional, intellectual, spiritual and developmental needs;
- (la) the child's educational needs;
- (l) any other relevant characteristics of the child;
- (m) the likely effect on the child of any change in the child's circumstances.

Other factors may also be taken into account in working out what is in the best interests of the child.

The court must also consider the guiding principles of the Act as set out in Section 9. There are several principles including:

- (a) the principle that the parents, family and community of a child have the primary role in safeguarding and promoting the child's wellbeing; and
- (b) the principle that the preferred way of safeguarding and promoting a child's wellbeing is to support the child's parents, family and community in the care of the child.

You should think about all of the principles to see which are relevant to your case.

There are also specific principles relating to Aboriginal and Torres Strait Islander children.

#### *How do I link all this to my case?*

You need to write down the points you want to make to show the magistrate it is in your child's best interests to do what you want, for example:

- make a different protection order to the one the Department want or make no order at all
- if a protection order (until 18) is requested by the Department, that long term arrangements are not needed for the wellbeing of your child.

You need to be able to show, for example:

- your child will be safe in your care now if you are seeking a protection order (supervision) or no order, or
- how things are changing and that it will soon be in the child's best interests to make a protection order (time limited), or extend that order rather than make a protection order (until 18).

For example, if the Department seek a protection order (until 18) and you want a protection order (time limited), you will need to show "proof" or "evidence" that you have changed or are changing your life since the Department started its case and that you have plans to make your child safe at home. Evidence could include, for example:

- separation from a violent partner
- no police call outs for "x" months

- satisfactory completion of counselling (for example, drug and alcohol, or personal or family violence)
- good support networks to increase safety at home for your child.

**You need proof of what you are saying**, for example, through a witness such as a counsellor, or urinalysis results.

### How can I prepare before the court date?

#### Be clear on what you are in dispute about.

You will need to:

- **Prepare your response** (on a form PCRESP) to any affidavit filed at court by the Department (or anyone else). Your response is an affidavit that sets out your evidence in writing for the hearing. It must be true. If you have already filed a Response, you should file another one to cover anything you did not respond to the Department's first affidavit and any others filed since you put in your response.
  - If you do not have a lawyer, use the [Response Kit - Protection and Care of Children](#) to help fill in the response form. The kit also includes examples. Visit the **Children's Court of WA** website at [www.childrenscourt.wa.gov.au](http://www.childrenscourt.wa.gov.au) or any Children's Court registry to get a copy of the kit or a blank response form.
- Gather any paperwork you need for your evidence ("proof") in the one place. Keep it in a folder or folders with tabs or different parts so you can easily find documents at the hearing, eg it could be divided into Department documents, your court documents, and so on.
- Write down some questions you might like to ask each Department witness or other witnesses to cover:
  - the things you do not agree with, and
  - what you think is best for your child.
- Arrange for your witnesses to come to court (see below under this heading).
- Arrange to look at the Department documents and/or other documents before the final hearing (see below under this heading).

### Arranging for your witnesses to come to court:

#### **You should get legal advice about the benefit to your case of summoning witnesses and the possible financial cost to you.**

- Your witness must come to court and say what happened.
- A letter or statement from a witness is not enough.
- In special circumstances the court might accept an affidavit from a witness. This is only if the other parties agree to it being used. This is because the other parties have to have the chance to ask your witnesses questions, for example, about what they saw or heard; why they recommend something.
- If you want to show the court a document, the person who wrote the document must be in court. This is so that other parties can ask them whether the document is correct. For example, your doctor must be there to hand to the court their medical report.
- If there are reports and letters (eg, from counsellors) that you want to use as evidence at the trial you should ask the Department **before** the hearing date if it will agree to you using them as evidence without the author being required to be at court to be questioned about the contents. If the Department doesn't agree you will have to make sure the witness comes to court to give evidence.
- If you have witnesses you should speak to them and ask them to come. If they are happy to come tell them the court date and time and details of where the hearing is being held.
- If witnesses don't want to come or can't get out of work you can summons them. This will force them to come to court. Employers must allow workers to go to court when summonsed. You will need an "Application for a Witness Summons" form (Form 46) and the "Witness Summons – to give oral evidence" form (Form 47).
- Witnesses are entitled to be paid their cost of getting to court. This is usually just the amount of a bus/train fare. If your witness is from somewhere far away or is a professional, for example, a doctor, then **you should get legal advice about the costs that you may have to pay the witness.**

- There are special rules about calling a child as a witness and they will not usually be allowed to give evidence. You need the permission of the court to call a child witness. You should ask for this permission **before** the final hearing date. **If you have not raised this at a mention, pre-hearing conference, or Review Hearing you will need to early list your case to ask for permission.**

*Arrange to look at the Department's file or other documents before the final hearing*

If you think there are documents on the Department's file or from somewhere else that you do not have and that may help your case you will need to **apply for a summons** for the documents you want to look at.

- For Department documents a summons served by mail or process server should be addressed to "The Proper Officer", Department of Communities Child Protection and Family Support, Level 6, 8 Bennett Street, East Perth WA 6004" (telephone 9218 5566/email: [information@dcp.wa.gov.au](mailto:information@dcp.wa.gov.au)).
- You will get a letter from the court telling you when documents you have asked for by a summons have arrived at court.
- A lawyer normally looks at the documents that have been summonsed for a party. If you do not have a lawyer there are restrictions on you looking at the documents. You need to make arrangements with the court to look at the documents **well in advance** of the hearing date. Contact the court about this as soon as the documents are at court. You may need to make an application to early list your case if you have not been able to look at the documents before the hearing.
- You must not remove, destroy or write on any of the summonsed documents. You will not be allowed to copy documents without prior approval from the Children's Court.

*What if I need an interpreter?*

If you or one of your witnesses needs an interpreter you should mention this at the pre-hearing conference. Otherwise contact the court **as early as possible before your court**

**appearance** to ask the court to arrange an interpreter. This interpreter will then be available on the morning of your court case.

The court will need to know your court date and the specific language you or your witness speak.

*What if I need child care on the day of the hearing?*

It will be very difficult to represent yourself properly in court if you need to look after young children. If you have children, try to arrange childcare. If you can't, take someone with you who can mind the children outside the court during your case. Some courts can help organise and pay for childcare. Ask at the court registry **well before your final hearing date**. Child care is not available at the court.

*What if I want the final hearing to be adjourned?*

If you want the final hearing to be adjourned (put off) you will need to apply to the court. You should firstly ask if the other parties will agree to your request. Your request should be made in writing so that you have proof that it was made.

Your application to the court should be made **before** the final hearing date. You will need to write to the court to ask for your case to be early listed and let the other parties know. A sample letter to the court to ask for your case to be early listed is included at the end of this information sheet.

You will need a good reason for an adjournment even if the other parties consent as it is thought to be in the child's best interests to have the case finalised as soon as possible.

If you ask for the adjournment on the day of the hearing your request is less likely to be granted unless you have a very good reason, for example you have just been unexpectedly hospitalised.

*Applying for legal aid*

If you want to apply for legal aid to have a lawyer for the final hearing you must do this as soon as the final hearing date is set. Legal aid is not

available in all cases and you will need to be seen to have a good chance of success to get aid.

If aid for representation is refused you have the right to seek reconsideration of the decision to refuse aid. If aid is still refused you can apply for review of that decision.

**The reconsideration and review process takes time so applications need to be made well before the final hearing date.**

### Where can I find the forms I need?

You can get the forms from any Children's Court of WA registry or you can download the forms from the Children's Court website ([www.childrenscourt.wa.gov.au](http://www.childrenscourt.wa.gov.au)).

### Where can I get more information?

- Contact the **Legal Aid WA Infoline** on **1300 650 579** or go to any Legal Aid WA office to get copies of the information sheets **Representing yourself in a final hearing in a protection and care matter at the Children's Court of WA** and **Protection orders in the Children's Court of WA** which explains the differences between protection orders.
- Visit the Children's Court of WA website at [www.childrenscourt.wa.gov.au](http://www.childrenscourt.wa.gov.au) for more information including a **Response Kit-Protection and Care of Children**. You can also get a copy of this kit from any Children's Court registry.
- You can read an online copy of the Children and *Community Services Act 2004* (WA) at the Parliamentary Counsel's Office website: [https://www.legislation.wa.gov.au/legislation/statutes.nsf/law\\_a9243.html](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a9243.html)

## Sample letter to early list a case

Listings Co-ordinator

[put in the name of the court your case is at, eg Bunbury] Children's Court

Address of the Children's Court

Date [remember to put in the date of your letter]

Dear Sir/Madam

**Name of children and court file number** (it is on the Department application in the top right hand corner)

**Next court date**

I am a respondent in this case [Note: if you applying to revoke (cancel) an order you are the applicant].

I am writing to ask for this case to be early listed.

The case needs to be early listed because [put in the reason why it needs to be early listed, eg the Department has not filed an affidavit by the date set at the pre-hearing conference held on....].

If it is convenient to the court I would like the case to be listed on [put in the date that suits you or that other parties have indicated suits them].

[If you have told the other parties you are doing this you can put this in your letter].

Please let me know if this request has been granted. You can contact me on [put in contact details eg, mobile number, email address].

Yours faithfully

Sign the letter

[print your name below your signature]

[Copies to: Show on the letter that a copy is being sent to the other parties]



## Legal Aid WA Offices

**TELEPHONE INFOLINE: 1300 650 579 (General Enquiries)**  
Infoline open Monday to Friday 9.00 am to 4.00 pm  
(Australian Western Standard Time) except public holidays

**Translating and Interpreting Service 131 450**  
**National Relay Service (for hearing and speech impaired) 133 677**

[www.legalaid.wa.gov.au](http://www.legalaid.wa.gov.au)

### **Perth Office**

32 St Georges Terrace, Perth, WA 6000  
1300 650 579  
(08) 9261 6222

### **Southwest Regional Office**

7<sup>th</sup> Floor, Bunbury Tower, 61 Victoria Street, Bunbury, WA 6230  
(08) 9721 2277

### **Great Southern Regional Office**

Unit 3, 43-47 Duke Street, Albany, WA 6330  
(08) 9892 9700

### **Goldfields Regional Office**

Suite 3, 120 Egan Street, Kalgoorlie, WA 6430  
(08) 9025 1300

### **Midwest & Gascoyne Regional Office**

Unit 8, The Boardwalk, 273 Foreshore Drive, Geraldton, WA 6530  
(08) 9921 0200

### **Pilbara Regional Office**

28 Throssell Road, South Hedland, WA 6722  
(08) 9172 3733

### **West Kimberley Regional Office**

Upper Level, Woody's Arcade, 15-17 Dampier Terrace, Broome, WA 6725  
(08) 9195 5888

### **East Kimberley Regional Office**

98 Konkerberry Drive, Kununurra, WA 6743  
(08) 9166 5800

### **Indian Ocean Office**

Administration Building, 20 Jalan Pantai  
Christmas Island, Indian Ocean, WA 6798  
(08) 9164 7529

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