



# Legal Aid and Family Law

This fact sheet summarises the Ask LOIS webinar on this topic, presented by Cecilia Lee, Solicitor at Women's Legal Services NSW on 14 March 2013. This webinar can be downloaded for free at [www.asklois.org.au/webinars/past-webinars](http://www.asklois.org.au/webinars/past-webinars).

## This fact sheet covers:

- When is Legal Aid available in family law?
- What tests must your client meet to be eligible for Legal Aid?
- What services can Legal Aid provide to assist your client in family law matters?

## Legal Aid Tests

Your client needs to satisfy **ALL** 4 tests to receive Legal Aid:

1. Your client meets the **Jurisdiction Test**, which looks at whether legal aid is available in that jurisdiction and area of law. This includes the requirement that the case falls within the **Legal Aid NSW policies** (see the 'Types of family law cases' listed below)
2. Your client meets the relevant **Means Test**
  - This is an assessment of an applicant's income and assets
  - To find out if your client satisfies the Means Test, they can use Legal Aid's 'Means Test Indicator' at <http://laxextra.legalaid.nsw.gov.au/meanstestindicator/>
3. Your client's case meets the relevant **Merits Test**. Merits Test A applies in civil and criminal matters and in State family law matters, while Merits Test B applies in Commonwealth family law matters
  - This is an assessment of whether an applicant's case has a reasonable prospect of success
  - To find out if your client's case would have reasonable prospect of success, refer them to a family lawyer. Advice is available at Legal Aid (drop-in or by appointment) and Community Legal Centres (including Women's Legal Services NSW)
4. Your client meets the relevant **Availability of Funds Test**
  - Legal Aid NSW must consider whether it has sufficient funds to take on the matter taking competing priorities into account

## Types of family law cases available for Legal Aid

- |  |   |
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| - <b>Parenting matters</b>                           | - International child abduction                               |
| - <b>Varying or discharging parenting orders</b>     | - Recovery, location and Commonwealth Information orders      |
| - <b>Property Settlement matters</b>                 | - Contravention of parenting orders and enforcement of orders |
| - <b>Spousal and de facto maintenance matters</b>    | - Matters after final court orders                            |
| - <b>Child support and child maintenance matters</b> | - Contempt of court and breach of court orders                |
| - <b>Divorce and nullity of Marriage</b>             | - Special medical procedures                                  |
| - <b>Care and Protection matters</b>                 | - Adoption matters  |
|  | - Domestic Violence   |

This webinar only focused on the matters bolded above on the left.

## Parenting Matters

- Parenting matters are **disputes relating to who a child will live with, spend time with and communicate with**. Legal Aid can assist parents, people who are not parents and children with parenting matters.
- If your client is a **non-parent**, for Legal Aid to be granted, there is an additional requirement that your client is a person who is significant to the care, wellbeing and development of the child AND it is in the child's best interests.



### Family Dispute Resolution (FDR)

- The first step in a family law dispute is Family Dispute Resolution (FDR). This is a mandatory step, unless your client is exempt because FDR is not appropriate (for example, if there is a history of domestic violence).
- Legal Aid provides FDR through its FDR Section. FDR by Legal Aid is legally assisted FDR and is called a Legal Aid Conference.

### Court proceedings Relating to Parenting Matters

- If FDR is unsuccessful, Legal Aid may be able to assist your client with court proceedings. Your client will require a 60I certificate to show they have attempted FDR OR FDR is not appropriate
- Legal Aid will only assist your client in court proceedings where there is a dispute about a **'substantial issue'**
- What is a substantial issue? The Legal Aid Guide does not define what is a substantial issue; however, it does explain what is NOT substantial. This includes:
  - o A dispute only about the amount of time a child spends with a parent UNLESS your client or your client's child is at **'significant disadvantage'**
    - In deciding if your client or their child are at a 'significant disadvantage', the Legal Aid Officer will take into account any one or more of the following criteria:
      - Allegations of abuse or family violence
      - If the applicant has an intellectual, psychiatric, physical disability or a serious medical problem. The applicant may be asked to provide a letter from their GP confirming the disability or serious medical problem
      - If the applicant has been denied any relationship with their child/children for a period of at least 3 months but not exceeding 3 years
      - Allegations that the child/children are at risk of harm
      - If the applicant has a language or literacy problem which impacts upon his/her capacity to self represent, or
      - If the child/children are Aboriginal or Torres Strait Islander as defined under [s4 of the Family Law Act 1975](#)

### Independent Children's Lawyer (ICL)

- Legal Aid is available for an ICL to be appointed where:
  - o A court makes an order for the appointment of an ICL and asks Legal Aid to arrange for an ICL to provide separate representation for the child/children AND
  - o Legal Aid decides that it is reasonable to provide a grant of aid for the ICL

### Varying or Discharging Parenting Orders

- Available for parents and people who are not parents
- Tests to be satisfied are as for FDR and/or court proceedings :
  - o Means Test, Merits Test B, Availability of Funds Test
- In addition to the above tests, your client also needs to show the following:
  - o For **FDR**
    - FDR is appropriate AND
    - There has been a **'material change in circumstances'** since the parenting orders were made OR the court application is **imperative**
  - o **Court Proceedings**
    - Your client has a 60I Certificate in relation to the dispute OR FDR is not appropriate for your client AND
    - There has been a **'material change in circumstances'** since the parenting orders were made OR the court application is **imperative**
  - o **'Material change in circumstances'** is explained in the Legal Aid Family Guideline 2.5 and include changes where:



- There is a likelihood of the applicant or a child being subjected to violence or physical/mental harm
- A child has been removed from an applicant when the child was living with them before the removal or where there is a risk that a child may be removed
- A child has been removed from the jurisdiction of the Court or there is a risk that a child may be removed
- There is a need for an applicant who the child lives with to move permanently overseas, interstate or elsewhere with a child, if consent is unreasonably refused by another person
- A court application is **imperative** when a change in circumstances makes it impossible for the Legal Aid applicant to comply with the original court order

### Property Settlement

Legal Aid does not take on many property settlement matters. To be eligible:

- Your client must satisfy the Means Test, Merit Test B and Availability of Funds Test, AND
- The dispute must relate to property AND/OR funds from which your client may receive only a deferred benefit such as superannuation, AND
- It is appropriate to attend FDR (Application for FDR only), AND
- Your client has a 60I certificate OR FDR is not appropriate in the circumstances (Application for court proceedings only), AND
- Estimated equity in the disputed property is more than \$20,000
- If the dispute is over the matrimonial home or de facto home, it is most likely that your client will be able to retain the home or there are exceptional circumstances
- The separation of the parties is final
- Where the dispute is about the matrimonial or de facto home, your client is also seeking resolution of another related family law matter (such as parenting) in which case your client is more likely to receive Legal Aid OR it is appropriate to grant legal aid due to your client's personal circumstances.

Applications for Legal Aid in court proceedings relating to property settlement will only be granted if Legal Aid is satisfied that there are '**exceptional circumstances**', such as when the client is a particularly disadvantaged member of the community or has a particular difficulty in obtaining representation. Legal Aid may be available to cover the cost of conveyancing if Legal Aid has been granted for property proceedings.

Clearly it is a more complicated procedure to prove eligibility for Legal Aid in property settlement matters. If you are helping a client to complete a Legal Aid application for such a matter, it is a good idea to go through each criterion with them.

### Child Support and Child Maintenance Matters

Legal Aid has a special service to give advice and representation in Child Support matters. Legal Aid is available in the following areas:

- Child maintenance in stage 1 matters – for parents
- Child support in stage 2 matters – for parents
- Child maintenance and child support matters – for children
- Appeals to the Social Security Appeals Tribunal
- Appeals to the Administrative Tribunal
- Appeals to the court
- Arrears of maintenance or child support
- United Nations Convention on Recovery Abroad of Maintenance
- Delegation
- Parentage testing matters
- Paternity matters



## Divorce and Nullity of Marriage

Legal Aid does not generally represent clients in divorce matters. For your client to have their case taken on:

- They must meet the Means Test, Merit Test B and Availability of Funds Test, AND
- **Special circumstances** exist
- The court application is **imperative**
- Your client suffers particular hardship (**'significant disadvantage'**)
- The court application has a complexity warranting legal aid and due to this complexity it would not be reasonable to expect your client to conduct the proceedings

Legal Aid usually won't grant legal aid for representation or to complete forms unless the case satisfies all the criteria listed here. Instead, Legal Aid offers **Divorce Classes** that are designed to help people to manage their own divorce application.

Legal Aid NSW provide free divorce classes at Legal Aid offices in Haymarket (Sydney), Bankstown, Blacktown, Campbelltown, Dubbo, Fairfield, Gosford, Newcastle, Parramatta, Penrith and Tamworth. The classes help people who cannot afford a private solicitor or who wish to manage their own application for divorce.

The two-hour classes cover:

- How to complete and lodge divorce application forms
- Step-by-step explanations of the divorce process
- Information about service of documents and the hearing

Please refer to the website for the class dates:

<http://www.legalaid.nsw.gov.au/what-we-do/workshops/manage-your-own-divorce>

## Contravention of Parenting Orders & Enforcement of Court Orders

- Legal aid is available for court proceedings for contravention of parenting orders
- Your client must meet the Means Test, Merit Test B and availability of funds test. In addition, the dispute must be about a **substantial issue**
  - o Eg, the matter must concern more than just a change in time arrangements
  - o For smaller matters such as these, the parents can try mediation, and if they reach an agreement they can draw up a parenting plan. This is not legally enforceable unless they elect to formalise it through a court order
- From 9 February 2009, Legal Aid is **NOT** available for enforcement of a final or interim court order in relation to a family law or child support matter

## Care and Protection

It is a good idea to refer your client to talk to a lawyer (either Legal Aid or CLC) to obtain advice on merits before making an application to Legal Aid.

Legal Aid is available in the following areas:

- Alternative Dispute Resolution
- External Care and Protection Mediation
- Care Circle Conferences for parties
- Care proceedings in the Children's Court
- Care proceedings in the District, Supreme and High Court
- Supreme Court proceedings pursuant to the Court's inherent jurisdiction
- Proceedings in the Community Services Division of the Administrative Decisions Tribunal
- Compulsory Schooling order matters

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This factsheet is not intended to take the place of legal advice given by a qualified legal practitioner familiar with the individual case or subject matter. No responsibility is taken for any loss suffered as a result of the information presented



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## Resources

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Legal Aid NSW - Policy Online:

<http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies>

Legal Aid NSW - Applying for Legal Aid:

<http://www.legalaid.nsw.gov.au/get-legal-help/applying-for-legal-aid>

Legal Aid NSW – Find Legal Aid Service office near you:

<http://www.legalaid.nsw.gov.au/contact-us/find-a-service>

Legal Aid NSW – Child Support Services:

<http://www.legalaid.nsw.gov.au/what-we-do/family-law/child-support-advice>

Legal Aid NSW – Care and Protection Services:

<http://www.legalaid.nsw.gov.au/what-we-do/family-law/care-and-protection-services>

**For more information visit:**

- Means test: <http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/7.-means-test>
- Merits test: <http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/8.-merit-test>
- Availability of funds test: <http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/9.-availability-of-funds-test>